

December 2022

AEC Submission to the Joint Standing Committee on Electoral Matters

Referendum (Machinery Provisions) Amendment Bill 2022

This submission highlights the Australian Electoral Commission's (AEC) key remarks on the proposed *Referendum (Machinery Provisions) Amendment Bill 2022* (Amendment Bill) which outlines the proposed changes to the *Referendum (Machinery Provisions) Act 1984* (Referendum Act). The AEC welcomes the opportunity to further strengthen and streamline referendum processes by building on the insights and operational experience gained through delivering the 2022 federal election.

Schedule 4 of the Amendment Bill – Referendum financial disclosure

The AEC has previously contended, in evidence to the Joint Standing Committee on Electoral Matters, that the design of a disclosure scheme is ultimately a matter for Parliament. In that previous evidence to the Committee, the AEC pointed out that four features common to robust financial disclosure schemes are transparency, enforceability, clarity, and timeliness. Those features, buttressed by clear legislation and adequate enforcement, enable citizens to better understand which individuals and entities are involved in Australia's electoral system. Furthermore, and as a general principle, any regulatory scheme should aim to address any contemplated harm in a way that causes the least administrative burden on those being regulated.

The purpose of the financial disclosure scheme in Part XX of the *Commonwealth Electoral Act 1918* (Electoral Act) is to not only disclose who is seeking to influence the outcome of the election, but also who is seeking to influence the candidates and parties who are elected. Because of the ongoing, cyclical, nature of elections, disclosure information also enables electors to form their voting intentions for future electoral events. The purpose of a financial disclosure scheme for a referendum is to see who spent money to influence the outcome of the referendum: a one-off event.

It is highly likely that a referendum will involve individuals and entities who do not regularly participate in federal electoral events. Accordingly, it is important that those novice and possibly one-off participants have a clear understanding of any regulatory and reporting obligations imposed on them (and are able to reasonably comply with those obligations). Item 1, Schedule 4 of the Amendment Bill proposes to insert a new definition of 'referendum expenditure period' in s 3(1) of the Referendum Act:

referendum expenditure period means the period:

- (a) starting on the day that is 6 months before the writ for a referendum is issued; and
- (b) ending on the voting day for the referendum.

Section 128 of the Australian Constitution provides that a referendum must be held 'not less than two nor more than six months' after the passage of the proposed law through both Houses. In this case, it means that under the current Bill the expenditure period will commence prior to the passage of the proposed law. The Committee may care to consider the implications of this matter, and whether such a requirement would impose onerous and retrospective regulatory and administrative obligations on people and entities, and whether that regulatory burden may act as a disincentive for participation in the national debate.

Other relevant considerations:

- **Education:** The committee will be aware that the proposed regulatory changes will need to be supported by an extensive education campaign. That campaign will need to inform an unknown number of stakeholders, many with no previous

interaction of this nature with the AEC, of the disclosure requirements given their activities may be subject to disclosure and/or authorisation requirements at some indeterminate point in time. This is achievable, but will need to be adequately resourced, and undertaken with sufficient time to inform those potentially affected.

- **Regulatory confusion:** The proposed definition of referendum expenditure period may create confusion for stakeholders who are likely to be unaware they will be regulated by the legislation and may therefore have to retrospectively comply with the disclosure obligations. Accordingly, it is likely communication from particular entities and individuals may not have been properly authorised due to them being unaware of their obligation at the time. This creates a regulatory inequity.

Section 51 of the Referendum Act – Remote Area Mobile polling

The Committee may wish to consider expanding the period of time available for the AEC to undertake Remote Area Mobile Polling (RAMP) for the referendum. Section 51(5) of the Referendum Act currently constrains the AEC to a 12-day polling period in which to offer mobile polling services, including within very remote areas. The AEC experienced some significant challenges in delivering RAMP for the 2022 federal election in the 12-day pre-poll period. Expanding this period for mobile polling in remote areas to 19 days (commencing on the Monday three weeks before voting day) would better enable the AEC to undertake RAMP and maximise enfranchisement within remote communities and further enable residents in those communities to meet their compulsory voting obligations under section 45 of the Referendum Act. This would better align the timing of access to voting services in remote areas with the timing of access to postal voting, which is easily accessible by most other Australians who have access to a reliable postal service.

A 12-day period for RAMP limits the successful delivery of services to these areas due to logistical reasons, which (especially when combined with any staffing constraints, weather and cultural events) hamper the number of locations visited, time spent at locations, and the ability to return to locations should polling schedules be interrupted or unforeseen events occur.

It should be noted that an expanded period is currently less feasible for a federal election given the very short periods between legislated dates in the Electoral Act for declaration of nominations (and, therefore, printing of the required 159 different ballot papers) and commencement of polling given the time it takes to transport ballot papers to remote corners of Australia. The AEC would welcome the Committee's consideration of this issue in the context of its inquiry into the 2022 federal election. The AEC notes that evidence has already been provided about some of the limitations of the current remote voting service for federal elections. These legislated timeframes are not an issue for a referendum where there will be only 8 different ballot papers that can be printed as soon as the Constitution Alteration is passed by both Houses and dispatched to locations ready for polling, well in-advance of the permitted polling period.

Currently RAMP does not have its own construct in legislation but is a combination of pre-poll and mobile polling given the high proportion of interstate electors in locations that are visited by RAMP services. Both pre-poll and mobile polling have legislative provisions regarding timing which would need to be adjusted to enable 19 days of RAMP. If an amendment were made to allow the AEC to conduct services 'up to' 19 days prior to a referendum, it is not the AEC's intention to move away from a consistent service offering for general mobile polling and pre-poll voting of two weeks prior to a referendum

(consistent with the current timeframes for a federal election). The requirement for RAMP could alternatively be given a separate legislative basis (for example, as a mobile team that can issue interstate votes) in both the Referendum and Electoral Acts.

Opportunities to improve the franchise

(a) Secure Telephone Voting

The *Electoral Legislation Amendment (COVID Enfranchisement) Act 2022* and supporting *Commonwealth Electoral (COVID Enfranchisement) Regulations 2022* provided contingency arrangements to enable electors in mandatory isolation or quarantine due to COVID-19 and therefore unable to attend a polling place during the final period before polling to participate in the 2022 federal election. The arrangements will be automatically repealed on 31 December 2022 (section 202AFA(6) of the Electoral Act).

While the Secure Telephone Voting service is no longer required given the end of COVID-19 isolation requirements across Australia, the service was a successful way of enfranchising voters who had no other option to cast their vote. As such, the Committee may wish to use the referendum to trial expanded use of the Secure Telephone Voting solution to cohorts at risk of being unable to cast their vote in another manner. This may include:

- Voters in remote areas who are not serviced by a mobile polling team or polling place in close proximity, and for whom the postal service is unreliable or unavailable;
- Voters in aged care facilities impacted by COVID-19 or other health incidents that prevent the attendance of an AEC mobile polling team at the facility;
- Voters overseas who do not have ready access to postal voting or in-person voting at an Embassy or High Commission;
- Voters impacted by declared emergencies and natural disasters such as flood or fire that prevent them from casting a postal vote or voting in person; and
- Voters in hospital unexpectedly who are unable to vote in person.

Secure Telephone Voting could be a useful voting safety net for these voters. Of course, eligibility requirements for this service would need to be strictly defined and enforced to ensure that it does not become a voting channel for citizens who simply do not want to attend a polling place.

(b) Enrolment 'on the day'

Some state and territory jurisdictions have electoral legislation that permits voter enrolment 'on the day' of voting rather than entitlement to vote being dependent on enrolment prior to the close of rolls date. In practice this means that a voter, who cannot be found on the electoral roll at the point of voting, casts a declaration vote. The vote is then processed along with their enrolment. Provided they meet all the legislative requirements to be enrolled, their vote is admitted to the count.

Despite a high rate of enrolment nationally, some cohorts of electors have lower rates of enrolment. The AEC is working hard to rectify this and has made great strides in recent

years to improve, for instance, the estimated rate of Indigenous enrolment. However, the Committee may wish to consider legislation to permit enrolment on the day to maximise enfranchisement for Australians attempting to cast a vote.

Enabling enrolment on the day would require an amendment to the Electoral Act.

Section 16 of the Referendum Act – Newspaper publishing requirement

Section 16 of the Referendum Act requires the AEC to publish a notice setting out the location of all polling places in each Division, if it is practical to do so, in a newspaper circulating in each Division in Australia. The AEC considers that the Referendum Act can be modernised by removing this requirement.

The key benefits of doing so are:

- **Cost saving:** Requiring publication of this information in every Division incurs an unnecessary additional expense to the cost of a referendum.
- **Modernisation of notification requirements:** Providing electors with information about where they can vote on the AEC website is a sufficient notification of polling places. Electors have other means of finding out where polling will be, and in general electors will be familiar with polling places from previous elections. Digitally excluded electors can also contact the AEC to find out the location of polling places.

To reflect more modern and cost-effective ways to communicate with voters this requirement could be replaced with a requirement to publish the location of polling places on the AEC website and in any other manner the Electoral Commissioner considers appropriate. This would require an amendment to section 16 of the Referendum Act which is not currently in the Amendment Bill.