

Senate Finance and Public Administration Committees
PO Box 6100
Parliament House
Canberra ACT 2601

24 April 2023

Dear Officer,

RE: Inquiry into the administration of the referendum into an Aboriginal and Torres Strait Islander Voice

The Australian National University Law Reform and Social Justice Research Hub (‘ANU LRSJ Research Hub’) welcomes the opportunity to provide this submission to the Senate Finance and Public Administration References Committee, responding to the terms of reference of the inquiry.

The ANU LRSJ Research Hub falls within the ANU College of Law’s Law Reform and Social Justice program, which supports the integration of law reform and principles of social justice into teaching, research and study across the College. Members of the group are students of the ANU College of Law, who are engaged with a range of projects with the aim of exploring the law’s complex role in society, and the part that lawyers play in using and improving law to promote both social justice and social stability.

Summary of Recommendations:

1. An independent referendum pamphlet panel be established to review and oversee the arguments drafted for the pamphlet with reference to misleading, deceptive or factually incorrect material.
2. Include in the pamphlet a neutral explanation of the amendments, the context behind the amendments, how the amendments fit into the constitutional structure, and the effect of the amendments. This could be drafted by the independent referendum panel.
3. Include a list of the members of Parliament who voted for the “Yes” and “No” cases in the pamphlet to increase transparency.
4. Allow for more than 14 days for the pamphlet to be distributed to the voting public.
5. Distribute the pamphlet digitally on the Internet and on social media platforms in addition to the printed pamphlet.
6. A truth in political advertising law should be introduced into the *Referendum (Machinery Provisions) Act 1984* or the *Commonwealth Electoral Act 1918*.

If further information is required, please contact us at

On behalf of the ANU LRSJ Research Hub,
Authors: Caleb Skea and Hugh McSweeney
Editors: Jae Brieffies, Nabeela Maricar
Under the supervision of: Associate Professor Ron Levy

Introduction

This submission addresses the need to improve the referendum machinery to ensure the detection, mitigation and obstruction of potential dissemination of misinformation and disinformation. This submission identifies that the current machinery provisions concerning the official pamphlet should be reviewed to improve the administration of the referendum.

1. Improving the official pamphlet

Section 11 of the *Referendum (Machinery Provisions) Amendment Act 1984* (“Act”) currently authorises the Electoral Commission to distribute an official printed pamphlet to electors not later than 14 days before the voting day for the referendum. The pamphlet contains arguments for and against the constitutional amendment consisting of not more than 2,000 words, authorised by a majority of those members of Parliament who voted for and against the amendment. We agree that the distribution of the pamphlet is important for informing voters about the referendum, but there are several problems with the current model.

1.1 Lack of regulation of the arguments

Currently, there is no regulation, input or oversight for the arguments drafted by the subject members of Parliament, so misleading or exaggerated claims may be included in the official pamphlet. This leaves open the possibility for the arguments to contain information that is deceptive, misleading or factually incorrect. Meaning that racist or culturally offensive information or statements may be included in the pamphlet. It is imperative the voting public has access to an official pamphlet that is truthful and accurate and which is not misleading. It is important to prevent the spread of misinformation in the pamphlet, especially given the “sensitivity and importance of this referendum to Australia as a nation”¹ specifically because it concerns Aboriginal and Torres Strait Islander peoples.

The pamphlet was first distributed in 1912 with the intention of being an accessible source of official information. Then Prime Minister Fisher wanted the pamphlet to be “free from any suggestion of bias or misleading on the one side or the other”.² In the time since the pamphlet has not lived up to this intention. At multiple referenda, the pamphlet has been characterised by “unrestrained language, exaggeration and misinformation”.³ The lack of regulation of the arguments, absent even a requirement for truth and accuracy, has enabled this. If the Government wants to retain the official pamphlet for this referendum for the voting public, it is necessary to regulate the arguments to ensure that they are truthful and accurate.

This Parliament has previously heard recommendations for an independent panel or public servants to draft and/or review the arguments in the pamphlets to ensure the arguments are factually correct and not

¹ Dr Gabrielle Appleby, Submission 74 p.1 to Inquiry into the Referendum (Machinery Provisions) Amendment Bill 2022

² Professor George Williams, Submission 1 p.1 to Inquiry into the Referendum (Machinery Provisions) Amendment Bill 2022

³ Ibid 2, p.1

misleading or deceptive.⁴ There have been recommendations to establish an independent referendum panel to review the arguments for any misleading or deceptive information, with proposed amendments already drafted.⁵ Although there are arguments to consider a panel of ordinary citizens that have been randomly drafted including the strengthening of trust in politics and improving democracy. There are costs to this idea, such as providing the initial teaching to these citizens to ensure they have the correct information about the referendum. The method of providing information would need to be an unbiased approach that examined arguments for each side, this would allow the panel of citizens to correctly identify misinformation or exaggerated claims in pamphlets submitted for review.

In addition, a list of the members of Parliament who voted for and against the amendment should be included in the pamphlet to increase transparency and give voters a “sense of [the] balance of opinion among their representatives”.⁶ This process informs voters more of what their local politician’s views and stances are. Voters are then able to make a more informed decision based on politicians’ alignments as opposed to voting for political parties.

We recommend the inquiry consider establishing a referendum pamphlet panel, which can regulate the arguments to ensure the removal of deceptive or misleading content in the pamphlets.

1.2 Lack of independent, neutral and clear explanation of the amendment

As it stands, the pamphlet will contain a “statement showing the textual alterations and additions proposed to be made to the Constitution”.⁷ In addition to this statement, a clear and neutral explanation of the amendments should be included. This statement should also include an explanation of how the amendments fit into the constitutional structure and the effect of the amendments on the Constitution. The inclusion of this additional statement would provide the average voter with a useful explanation of the amendment and help voters make a more informed decision. This explanation may also be an opportunity for the Government to insert a section that officially answers frequently asked questions about this referendum, such as the wording and the powers of the Voice body. We recommend that the referendum pamphlet panel considered under heading 1.1 be responsible for this.

1.3 Improving the accessibility of the official pamphlet

Under section 11, the pamphlet will be distributed to electors not later than 14 days before the voting day for the referendum.⁸ The voting public deserves more time to deliberate on the arguments in the pamphlet,

⁴ Central Land Council, Submission 12, p. 4 to Inquiry into the Referendum (Machinery Provisions) Amendment Bill 2022; Dr Paul Kildea, Submission 15, p. 2 to Inquiry into the Referendum (Machinery Provisions) Amendment Bill 2022; Dr Shireen Morris, Submission 17, p. 2 to Inquiry into the Referendum (Machinery Provisions) Amendment Bill 2022; The Australia Institute, Submission 25, p. 5 to Inquiry into the Referendum (Machinery Provisions) Amendment Bill 2022; Professor Gabrielle Appleby, Submission 74, p. 3. Inquiry into the Referendum (Machinery Provisions) Amendment Bill 2022

⁵ Senator David Pocock, Proposed Amendment to the *Referendum (Machinery Provisions) Act 1984*

⁶ Dr Paul Kildea, Submission 15 p. 7 to Inquiry into constitutional reform and referendums

⁷ *Referendum (Machinery Provisions) Act 1984* s 11 (1), (2)

⁸ *Ibid* 8

especially given it is an official source of information from the Government. We recommend the inquiry consider providing more time for the benefit of the electors.

Just as the posted pamphlet provides those voters who may live in remote areas with access to official information about the referendum, it is necessary to consider expanding the accessibility of the pamphlet beyond the printed version. 43% of voters in the 2022 Federal Election were those under 45 years of age,⁹ and the national youth enrolment rate has steadily increased to 87.6%.¹⁰ Given the increasing involvement of young voters, the pamphlet should be disseminated via the Internet and through social media platforms.

Expanding the reach of the pamphlet would likely ensure that a greater number of young voters have access to official information. Further, it generally increases the availability and accessibility of official information to all voters. A model similar to those of Western Australia and Tasmania could be adopted, which currently authorises the Electoral Commissioner to bring the arguments to “the notice of electors”¹¹ during their referenda. It is likely the Government will use media sources to disseminate its “neutral public civics education and awareness activities”,¹² so it is appropriate for the pamphlet to be disseminated digitally as well. We recommend that the referendum pamphlet panel considered under heading 1.1 be responsible for this.

Recommendation 1: An independent referendum pamphlet panel be established to review and oversee the arguments drafted for the pamphlet with reference to misleading, deceptive or factually incorrect material.

Recommendation 2: Include in the pamphlet a neutral explanation of the amendments, the context behind the amendments, how the amendments fit into the constitutional structure, and the effect of the amendments. This could be drafted by the independent referendum panel.

Recommendation 3: Include a list of the members of Parliament who voted for the “Yes” and “No” cases in the pamphlet to increase transparency.

Recommendation 4: Allow for more than 14 days for the pamphlet to be distributed to the voting public.

Recommendation 5: Distribute the pamphlet digitally on the Internet and on social media platforms in addition to the printed pamphlet.

⁹ Intifarah Chowdhury (2023) *Young Australian voters helped swing the election – and could do it again next time*, *The Conversation*. Available at: <https://theconversation.com/young-australian-voters-helped-swing-the-election-and-could-do-it-again-next-time-184159>

¹⁰ Australian Electoral Commission (2023) *National Youth Enrolment Rate*, *Australian Electoral Commission*. Available at: https://www.aec.gov.au/Enrolling_to_vote/Enrolment_stats/performance/national-youth.htm

¹¹ *Referendum Procedures Act 2004* (TAS) s 12; *Referendums Act 1983* (WA) s 9

¹² *Referendum (Machinery Provisions) Act 1984* s 11(6)

2. Countering misinformation

Section 122 (1) of the *Referendum (Machinery Provisions) Amendment Act 1984* (“the Act”) makes it unlawful to mislead or deceive an elector about the manner in which they cast their referendum vote. This does not extend to statements that “*misrepresent the substance of a referendum proposal*”.¹³ As such, there is insufficient legislation to regulate the dissemination and distribution of misinformation during the upcoming referendum campaign.

The issue of regulating misinformation through truth in political advertising laws has been considered by this Government in recent years.¹⁴ We recognise the Government has committed to legislating truth in political advertising laws after the matter has been considered by the Joint Standing Committee on Electoral Matters in their inquiry into the 2022 election.¹⁵ However, we recommend the Government introduce truth in political advertising laws prior to the upcoming referendum. A “wave of disinformation”,¹⁶ particularly racist and vitriolic commentary, is expected in the lead-up to the referendum. The potential for misinformation about the referendum to mislead, deceive and manipulate voters is not insignificant. The Australia Institute found that 73% of Australians were exposed to misleading political advertisements during the 2022 Federal Election campaign.¹⁷

In April 2023, the Australian Electoral Commission (“AEC”) established a “*Referendum Disinformation Register*” with the purpose of listing “*prominent pieces of disinformation*”¹⁸ about the referendum the AEC has discovered, and providing the correct information. However, the AEC has made clear they are not the “*arbiter of truth regarding political communication*”.¹⁹ The AEC alone cannot counter misinformation. To actively counter misinformation, the Government should consider introducing truth in political advertising laws. One approach is to adopt a model similar to section 113 of the *Electoral Act 1985* (SA) or consider the model legislation proposed by Ms Zali Steggall OAM MP, which proposed a model which covers elections and referenda.²⁰

We consider that countering misleading or deceptive political advertising is of great importance to ensure the successful administration of this referendum and recommend the Government consider introducing truth in political advertising laws prior to the referendum.

¹³ Dr Paul Kildea, Submission 15 p. 9 to Inquiry into constitutional reform and referendums

¹⁴ *Advisory report on the Referendum (Machinery Provisions) Amendment Bill 2022*

¹⁵ Karp (2022) Labor aims to legislate spending caps and truth in advertising, says Don Farrell, The Guardian.

Available at:

<https://www.theguardian.com/australia-news/2022/jul/10/labor-aims-to-legislate-spending-caps-and-truth-in-advertising-says-don-farrell>

¹⁶ Buckingham-Jones, S. and Stefano, M.D. (2023) *AEC eyes tie-up with fact-checkers for voice referendum*, *Australian Financial Review*. Available at:

<https://www.afr.com/companies/media-and-marketing/aec-eyes-tie-up-with-fact-checkers-for-voice-referendum-20230317-p5ct0r>

¹⁷ The Australia Institute. (2022) Exit poll – Misinformation in the federal election campaign. The Australia Institute. Available at:

<https://australiainstitute.org.au/report/political-advertising-on-social-media-platforms-during-the-2022-federal-election/>

¹⁸ Australian Electoral Commission (2023) *Disinformation register - referendum process*, *Australian Electoral Commission*, Available at: <https://www.aec.gov.au/media/disinformation-register-ref.htm>

¹⁹ Ibid 19

²⁰ Zali Steggall, MP, Proposed Amendment to the *Referendum (Machinery Provisions) Act 1984*

Recommendation 6: A truth in political advertising law should be introduced into the *Referendum (Machinery Provisions) Act 1984* or the *Commonwealth Electoral Act 1918*.