

PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

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

Joint Standing Committee on Electoral Matters

January 2023
CANBERRA

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Membership of the Committee

Chair

Ms Kate Thwaites MP Jagajaga, VIC

Deputy Chair

Senator the Hon James McGrath QLD

Members

Senator Ross Cadell NSW

Senator Karen Grogan SA

Senator the Hon Marise Payne NSW

Senator Marielle Smith SA

Senator Larissa Waters QLD

Ms Kate Chaney MP Curtin, WA

Hon Darren Chester MP Gippsland, VIC

Ms Tania Lawrence MP Hasluck, WA

Hon Shayne Neumann MP Blair, QLD

Mr Sam Rae MP Hawke, VIC

Ms Anne Stanley MP Werriwa, NSW

Mr James Stevens MP Sturt, SA

Terms of reference

On 1 December 2022 the House of Representatives referred the Referendum (Machinery Provisions) Amendment Bill 2022 to the Committee for inquiry and report by 10 February 2023.

List of recommendations

Recommendation 1

1.103 The Committee recommends that the Australian Government strengthen the opportunities for enfranchisement and participation in the referendum, including considering possible amendments to the Referendum (Machinery Provisions) Amendment Bill 2022, to allow the Australian Electoral Commission to support increased enrolment and participation, particularly of Aboriginal and Torres Strait Islander people, including in remote communities.

Recommendation 2

1.111 The Committee recommends that the Australian Government ensure appropriate structures and mechanisms are put in place, including considering possible amendments to the Referendum (Machinery Provisions) Amendment Bill 2022, to ensure:

- clear, factual and impartial information is made accessible to all voters as part of the referendum process; and
- clear, factual and impartial information is provided in appropriate formats for Aboriginal and Torres Strait Islander voters, and people from culturally and linguistically diverse backgrounds.

Recommendation 3

1.123 Subject to recommendations 1 and 2, the Committee recommends that the Referendum (Machinery Provisions) Amendment Bill 2022 be passed.

1. Inquiry into the Referendum (Machinery Provisions) Amendment Bill 2022

Referral and conduct of the inquiry

- 1.1 On 30 November 2022, the Special Minister of State, Senator the Hon Don Farrell, wrote to the Joint Standing Committee on Electoral Matters (Committee) to advise of the introduction of the Referendum (Machinery Provisions) Amendment Bill 2022 (bill) and to request that the Committee consider the measures of this bill.
- 1.2 The Minister noted that the bill would ensure alignment between the *Referendum (Machinery Provisions) Act 1984* (Referendum Act) and the *Commonwealth Electoral Act 1918* (Electoral Act) prior to a referendum being held on the matter of enshrining a First Nations Voice to Parliament in the Constitution.¹
- 1.3 The bill was introduced in the House of Representatives on 1 December 2022 by the Hon Patrick Gorman MP, Assistant Minister to the Prime Minister, and referred to the Committee for report by 10 February 2023 under Standing Order 143(b).²
- 1.4 In introducing the bill, the Assistant Minister explained that:

This bill will advance the Prime Minister's commitment to hold a referendum to enshrine a First Nations voice in the Australian Constitution, a voice that

¹ Referral letter, Senator the Hon Don Farrell, Special Minister of State, 30 November 2022.

² *Votes and Proceedings*, No. 30, 1 December 2022, pp. 409, 414.

will speak to the parliament and the executive about matters that affect First Nations people.

The Prime Minister has said the referendum will be held in the next financial year. This bill will modernise the legislation that will govern how this referendum will be conducted.³

- 1.5 The Committee advertised the inquiry on its website; issued a media release on 1 December 2022; and invited submissions from stakeholders. In advertising the inquiry, the Committee noted that it did not intend to examine the specific details of the proposed referendum or the merits of a Voice to Parliament, and that submissions should address the provisions of the bill.
- 1.6 The Committee received 78 submissions from a range of organisations, academics and concerned citizens (see Appendix A). The Committee also heard evidence from the Department of Finance, the Australian Electoral Commission (AEC), and constitutional law experts at public hearings held in Canberra on 19 December 2022 and 9 January 2023 (see Appendix B).
- 1.7 The Committee thanks those individuals and organisations who contributed to the inquiry.

Purpose of the bill

- 1.8 The bill consists of eight schedules amending the Referendum Act:
 - Schedule 1, which modernises postal voting provisions in line with the Electoral Act;
 - Schedule 2, which introduces operational efficiencies in sorting and counting votes in line with the Electoral Act and provides greater legislative clarity on the formality of referendum ballot papers;
 - Schedule 3, which updates authorisation requirements in line with the Electoral Act and restricts foreign campaigners from authorising referendum matter;
 - Schedule 4, which establishes a simplified financial disclosure and foreign donation restriction framework for referendums consistent with Part XX of the Electoral Act, consistent with a recommendation of the House of Representatives Standing Committee on Social Policy and Legal Affairs (SPLA Committee);

³ *House of Representatives Hansard*, 1 December 2022, p. 13.

- Schedule 5, which updates both the Referendum Act and Electoral Act to extend the application of the designated elector framework to referendums;
 - Schedule 6, which allows the Electoral Commissioner to make modifications to aspects of a referendum process during a declared emergency, replicating recent amendments to the Electoral Act; and
 - Schedules 7 and 8, which make various changes to modernise terminology in the Referendum Act.
- 1.9 The bill also includes a clause for the temporary disapplication of Section 11 of the Referendum Act until the commencement of the next general election. Section 11 includes requirements relating to the distribution of the pamphlet containing arguments for and against a referendum proposal to households, sometimes referred to as the Yes/No Pamphlet, and provisions which restrict Commonwealth funding for providing information about a referendum proposal.⁴
- 1.10 Further background on the context, purpose and key provisions of the bill is available in a Bills Digest prepared by the Parliamentary Library.⁵

Overview of referendum machinery provisions

- 1.11 Section 128 of the Australian Constitution sets out how alterations can be made and provides that the electors' vote on any proposed change 'shall be taken in such a manner as the Parliament prescribes'.
- 1.12 The Referendum Act provides the framework for the process of holding a referendum vote in Australia. It closely mirrors the Electoral Act, providing that the experience of voting in a referendum is largely the same as voting at a federal election. The Referendum Act has not been substantially updated to reflect modernisations in Australia's federal electoral framework since the last referendum was held in 1999.⁶

Inquiry into constitutional referendums and reforms

- 1.13 During the 46th Parliament, the SPLA Committee conducted a broad inquiry into constitutional referendums and reforms which, among other matters,

⁴ Referendum (Machinery Provisions) Amendment Bill 2022, cl. 4; Referendum (Machinery Provisions) Amendment Bill 2022, Explanatory Memorandum, p. 12.

⁵ Parliamentary Library, *Bills Digest No. 45, 2022-23, Referendum (Machinery Provisions) Amendment Bill 2022*, 22 December 2022.

⁶ Department of Finance, *Proof Committee Hansard*, 19 December 2022, pp. 1, 6.

considered the effectiveness of the current arrangements for referendums set out in the Referendum Act and the need for additional bodies or mechanisms to oversee the referendum process.⁷

1.14 This inquiry followed an earlier inquiry into the machinery of referendums conducted by the then House of Representatives Standing Committee on Legal and Constitutional Affairs.⁸

1.15 In its report, the SPLA Committee made several specific recommendations for modernisation and reform of the Referendum Act, including that it be amended to:

- enable the Electoral Commissioner to distribute an official pamphlet by any methods considered appropriate;
- enable the Australian Government to fund referendum education and promotion of the arguments for and against the referendum proposal; and
- be made consistent with relevant provisions for political donations in the Electoral Act.⁹

1.16 In addition to these, the SPLA Committee recommended the establishment of a Joint Standing Committee on Constitutional Matters and an Independent Expert Panel with functions to provide advice on specific matters relating to each referendum, including the form of wording of the referendum question and neutral information and education activities.¹⁰

1.17 In its comments, the SPLA Committee further noted that the Referendum Act would benefit from a further comprehensive review to consider other improvements and modernisations, however emphasised that:

... any review of the Referendum Act should not delay the implementation of the recommendations ... and that the Government should seek to modernise the referendum process as soon as practicable and well in advance of any future referendum.¹¹

⁷ House of Representatives Standing Committee on Social Policy and Legal Affairs, [Inquiry into constitutional reform and referendums](#) (SPLA Report), December 2021.

⁸ House of Representatives Standing Committee on Legal and Constitutional Affairs, [A Time for Change: Yes/No?](#), December 2009.

⁹ SPLA Report, Recommendations 6, 7 and 8.

¹⁰ SPLA Report, Recommendations 4 and 9.

¹¹ SPLA Report, p. 82. See also: SPLA Report, Recommendation 10.

Evidence on provisions of the bill

- 1.18 This section considers advice received to the inquiry on the provisions of the bill. Evidence to the inquiry primarily focussed on the disapplication of Section 11 of the Referendum Act and changes relating to financial disclosure, which are discussed in turn below.

Disapplication of Section 11

- 1.19 Much of the evidence received to the inquiry related to the implications of Clause 4 of the bill, which suspends Section 11 of the Referendum Act until the next general election. As noted above, Section 11 of the Act relates to the distribution of arguments for and against the proposed amendment to the Constitution and expenditure on referendum information more broadly.

The official pamphlet

- 1.20 Under Section 11, the Act currently requires that an official pamphlet containing arguments in favour of and against a referendum proposal, along with the proposed textual alterations and additions to the Constitution, be prepared and distributed to households by the Electoral Commissioner via post no later than 14 days before the voting day.¹²
- 1.21 The Act prescribes that the arguments contained in the official pamphlet, which can be up to 2000 words in length each, are written by the members of Parliament who voted for or against the proposed law for the alteration of the Constitution and must be provided to the Electoral Commissioner within four weeks of the passage of the proposed law.¹³
- 1.22 The official pamphlet is produced and distributed separately to the AEC's educational materials about the actual process of voting a referendum. Mr Tom Rogers, the Electoral Commissioner, informed the Committee that work is already underway to prepare a campaign that informs voters of this process and does not mention the subject matter of the referendum.¹⁴
- 1.23 The Committee heard that the official pamphlet was first introduced in 1912 to promote public education on each side of a referendum question

¹² *Referendum (Machinery Provisions) Act 1984* (Referendum Act), Section 11.

¹³ Referendum Act, Section 11.

¹⁴ Mr Tom Rogers, Electoral Commissioner, Australian Electoral Commission, *Proof Committee Hansard*, 19 December 2022, p. 15.

in response to concerns about misinformation and partisanship during previous referendums.¹⁵

- 1.24 Although some submitters were of the view that the official pamphlet has been an essential feature of referendums since that time,¹⁶ the Committee heard that it was not produced for referendums in 1919, 1926 and 1928, and in other instances only a Yes pamphlet was produced.¹⁷
- 1.25 The Explanatory Memorandum notes that the form of the official pamphlet has changed very little over the century since it was first conceived and that, as communication methods have changed significantly in that time, there may be a 'more effective way to engage and inform the Australian public about the Constitution and proposed constitutional change'.¹⁸
- 1.26 By suspending Section 11 of the Referendum Act, the bill would remove the requirement for an official pamphlet to be produced and distributed for any referendum held before the next general election. Instead, parliamentarians could choose how and when to engage with their constituencies.¹⁹

Views on the official pamphlet

- 1.27 When the official pamphlet was first introduced, it was intended that parliamentarians would put their case in an 'impersonal, reasonable, and judicial way' and that an argument should be 'one which appeals to the reason rather than to the emotions and party sentiments'.²⁰
- 1.28 However, several constitutional experts told the committee that this intention had not been met, and that official pamphlets have focused on persuasive arguments rather than explanation, and often contained emotive, incorrect, or misleading information which did not assist voters in decision-making.²¹

¹⁵ Professor George Williams, *Submission 1*, pp. 1-2; Samuel Griffith Society, *Submission 23*, p. 2.

¹⁶ For example, see: Mr Robert Vose, *Submission 6*, p. 4; Institute of Public Affairs, *Submission 13*, pp. 3-4.

¹⁷ Department of Finance, *Proof Committee Hansard*, 19 December 2022, pp. 9-10.

¹⁸ Referendum (Machinery Provisions) Amendment Bill 2022, Explanatory Memorandum, pp. 12-13.

¹⁹ Referendum (Machinery Provisions) Amendment Bill 2022, Explanatory Memorandum, p. 13.

²⁰ The Hon William Hughes MP, Attorney General, *Parliamentary Debates*, 16 December 1912, p. 7154.

²¹ Professor George Williams, *Submission 1*, pp. 1-2; Professor Anne Twomey, *Submission 5*, p. 2; Dr Paul Kildea, *Submission 15*, p. 2.

- 1.29 Professors George Williams and Anne Twomey both supported eliminating the pamphlet in its current form. However, both also stressed the need for the provision of some form of authoritative information (see below).²²
- 1.30 Other submitters supported retaining the pamphlet as the official source of information in a referendum. For example, the Institute of Public Affairs argued that the official pamphlet plays an important role in setting the tone of a referendum debate by helping ensure ‘an open and fair exchange of ideas in which no side is demonised’.²³
- 1.31 The Australian Human Rights Commission submitted that, while it may be appropriate to modernise the form and distribution of the pamphlet, it remains a valuable document which provides electors with the views of their elected officials:
- Ensuring that all voters are provided with an official source of information that summarises the key arguments for and against a proposed constitutional amendment is an important element towards ensuring that relevant information is readily available and accessible to all electors, and that they have the opportunity to make an informed choice.²⁴
- 1.32 The Central Land Council expressed concern that not providing a physical, posted pamphlet in remote areas would leave some people, particularly older people and Elders, without reliable access to information about the referendum, especially given the barriers to telecommunications access in some communities.²⁵
- 1.33 Although not directly relevant to referendums, the AEC advised that, while the way in which voters engage with information about elections is changing, its research indicated that 40 per cent of people use the guide posted to households as a primary source of information about the electoral

²² Professor George Williams, *Submission 1*, pp. 1-2; Professor George Williams, *Proof Committee Hansard*, 19 December 2022, pp. 25-26; Professor Anne Twomey, *Submission 5*, p. 2; Professor Anne Twomey, *Proof Committee Hansard*, 19 December 2022, pp. 25, 30-31.

²³ Institute of Public Affairs, *Submission 13*, p. 4.

²⁴ Australian Human Rights Commission, *Submission 14*, pp. 2-4.

²⁵ Central Land Council, *Submission 12*, p. 3. See also: Dr Shireen Morris, *Submission 17*, p. 2; Australian Monarchist League, *Submission 77*, pp. 2-5; Professor Anne Twomey, *Proof Committee Hansard*, 19 December 2022, p. 25.

process.²⁶ The AEC also advised it would send out a similar booklet to households about the referendum process.²⁷

- 1.34 The Committee also heard a range of arguments for improving, rather than suspending, the official pamphlet to address concerns about its content and method of distribution.
- 1.35 For example, several submitters proposed that the statements prepared by members of Parliament be supplemented by a clear, factual explanation of the proposed constitutional amendment, or replaced entirely with arguments for and against prepared by an independent body or public servants.²⁸
- 1.36 Dr Paul Kildea among others provided examples of similar pamphlets in Ireland, California and New South Wales that include information of this kind.²⁹
- 1.37 Another suggestion was that the official pamphlet include the number, or a list, of the parliamentarians that supported the yes and no cases in order to inform voters of the balance of opinion in the Parliament.³⁰
- 1.38 Other submitters recommended that the official pamphlet be distributed through broader means, such as through publication on government websites, and that it be translated into Aboriginal languages and made available in audio format.³¹ For example, in addition to posting the pamphlet, the Central Land Council suggested displaying the pamphlet

²⁶ Mr Tom Rogers, Electoral Commissioner, Australian Electoral Commission, *Proof Committee Hansard*, 19 December 2022, p. 21.

²⁷ Mr Tom Rogers, Electoral Commissioner, Australian Electoral Commission, *Proof Committee Hansard*, 19 December 2022, pp. 15-16.

²⁸ Central Land Council, *Submission 12*, p. 4; Dr Paul Kildea, *Submission 15*, p. 2; Dr Shireen Morris, *Submission 17*, p. 2; The Australia Institute, *Submission 25*, p. 5; Professor Gabrielle Appleby, *Submission 74*, p. 3.

²⁹ Dr Paul Kildea, *Submission 15*, p. 2. See also: Dr Paul Kildea, *Proof Committee Hansard*, 19 December 2022, pp. 26-27; Professor Anne Twomey, *Submission 5*, p. 2; Professor Gabrielle Appleby, *Submission 74*, p. 3.

³⁰ For example, see: Dr Shireen Morris, *Submission 17*, p. 2; Uphold & Recognise, *Submission 22*, p. 3; Professor Gabrielle Appleby, *Submission 74*, p. 3.

³¹ Name withheld, *Submission 9*, p. 1; Central Land Council, *Submission 12*, p. 4. See also: Dr Paul Kildea, *Submission 15*, p. 2; The Samuel Griffith Society, *Submission 23*, p. 3.

in public spaces, while Dr Kildea suggested disseminating its contents via broadcast media and the internet.³²

Commonwealth expenditure on referendum information

- 1.39 Subsection 11(4) of the Referendum Act also provides that the ‘Commonwealth shall not expend money in respect of the presentation of the argument in favour of, or the argument against, a proposed law’ except for the costs of distribution of the official pamphlet.
- 1.40 Disapplication of Subsection 11(4) clarifies that the Government can provide funding for the provision of information in connection with the referendum, such as an education program on the proposed constitutional amendment and its implications, or official Yes and No campaigns.³³ Subsection 11(4) was suspended to provide public funding for the Yes and No campaigns for the 1999 referendum³⁴ and the proposed 2013 referendum.³⁵
- 1.41 While the Government has announced its intention not to provide public funding for the Yes and No campaigns for the proposed referendum on a First Nations Voice, the suspension of Subsection 11(4) is intended to allow the government to provide public information and education about the referendum and to counter misinformation.³⁶
- 1.42 Introducing the bill, the Assistant Minister described that this civics campaign would ‘provide voters with a good understanding of Australia’s constitution, the referendum process, and factual information about the referendum proposal’.³⁷
- 1.43 While not reflected in the text of the bill, the Committee received a range of submissions relating to the Government’s stated intention not to

³² Central Land Council, *Submission 12*, p. 4; Dr Paul Kildea, *Submission 15*, p. 2.

³³ Professor George Williams, *Submission 1*, p. 2; Professor Anne Twomey, *Submission 5*, pp. 2-3.

³⁴ *Referendum Legislation Amendment Act 1999*, Section 4.

³⁵ *Referendum (Machinery Provisions) Amendment Act 2013*, Section 4.

³⁶ “[Next steps towards Voice Referendum](#)”, *Joint Media Release*, 1 December 2022.

³⁷ *House of Representatives Hansard*, 1 December 2022, p. 14; “[Next steps towards Voice Referendum](#)”, *Joint Media Release*, 1 December 2022.

fund official Yes and No campaigns in favour of a civics campaign, and the implications that this may have on the conduct of the referendum.³⁸

- 1.44 For example, the Samuel Griffith Society expressed concern that without public funding, dependence on private funding from vested interests could lead to ‘distortion of the public discourse and compromise the quality of public debate, which could negatively affect voters’ ability to make informed decisions’.³⁹
- 1.45 In relation to the suspension of Subsection 11(4), the Samuel Griffith Society expressed concern that the bill included no safeguards in relation to the ‘fair and impartial’ use of public money.⁴⁰ This concern was shared by others including Professor George Williams, who argued that there will be no ‘capacity to hold the government to its commitment’ not to fund advocacy for either side of the argument in the referendum.⁴¹
- 1.46 Professor Williams elaborated on this point at a public hearing:
- Parliament should have clarity about what the money will be used for and what the constraints are. I say there that it’s not acceptable merely to remove section 11; we need to state with clarity what the government will be doing and what the guardrails would be.⁴²
- 1.47 Similarly, Dr Kildea said the decision to suspend Subsection 11(4) ‘creates a vulnerability’, and that it would be better for the Referendum Act to include some protections against public funding for one side of the argument over the other, while still allowing for public expenditure on genuine public education.⁴³
- 1.48 While there was broad support among submitters for a public education campaign,⁴⁴ the Committee heard concerns about the lack of any

³⁸ For example, see: Mr Lewis Jones, *Submission 7*, pp. 2-3; Name withheld, *Submission 9*, p. 2; Hon L W Powell, *Submission 36*, p. 1; Mr Alan Baker, *Submission 53*, p. 1; Mr David Graham, *Submission 61*, p. 1.

³⁹ The Samuel Griffith Society, *Submission 23*, p. 3.

⁴⁰ The Samuel Griffith Society, *Submission 23*, p. 3.

⁴¹ Professor George Williams, *Submission 1*, p. 2.

⁴² Professor George Williams, *Proof Committee Hansard*, 19 December 2022, p. 28.

⁴³ Dr Paul Kildea, *Submission 15*, p. 3. See also: Dr Shireen Morris, *Submission 17*, pp. 2-3.

⁴⁴ For example, see: Susan McKinnon Foundation, *Submission 24*, p. 4.

specific detail about what such a campaign would entail, and about the challenges involved in providing genuinely objective information.⁴⁵

- 1.49 For example, Professor Williams noted that there is currently no precision around the sorts of factual information that would be provided in a civics campaign and that there is ‘a high risk that what some people regard as factual material others will see as partisan advertising’.⁴⁶ Similarly, Dr Kildea argued that careful design of any campaign would be essential for it to be trusted and effective.⁴⁷
- 1.50 The Institute of Public Affairs expressed a view that the proposed civics campaign could give preferential treatment to the Yes argument, becoming a de facto Yes campaign, and that educational initiatives intended to counter misinformation could have an effect of controlling public debate on the arguments for and against the proposal.⁴⁸

Provisions to modernise the Referendum Act

- 1.51 Submissions to the inquiry were broadly in favour of the alignment of the Referendum Act with the Electoral Act through the bill. However, a small number of submissions raised concerns with specific amendments in the main schedules or recommended additional modernisation measures.

Schedule 4 - Financial disclosure

- 1.52 While most amendments in the bill update existing provisions in the Referendum Act, Schedule 4 is the only part which is entirely new. This schedule would implement a financial disclosure regime for referendum campaigns, including a restriction on foreign donations and referendum expenditure by foreign campaigners. The changes are based largely on Part XX of the Electoral Act, consistent with a recommendation of the SPLA Committee.⁴⁹

⁴⁵ Professor Anne Twomey, *Submission 5*, p. 3; Professor Gabrielle Appleby, *Submission 74*, pp. 3-4; Law Council of Australia, *Submission 76*, p. 2.

⁴⁶ Professor George Williams, *Submission 1*, p. 2.

⁴⁷ Dr Paul Kildea, *Submission 15*, p. 3.

⁴⁸ Institute of Public Affairs, *Submission 13*, pp. 4-5.

⁴⁹ SPLA Report, Recommendation 8. See also: Mr Sebastian Powney, Assistant Secretary, Department of Finance, *Proof Committee Hansard*, 19 December 2022, p. 7.

- 1.53 While some submitters discussed the tax deductibility of political donations or gifts to registered charities engaged in referendum campaigns, the present bill makes no changes to these arrangements.
- 1.54 Submissions broadly supported the establishment of a disclosure and donations regime for referendums.⁵⁰ However, some also recommended stronger measures be included in the bill. For example, The Real Republic Australia argued for a total ban on donations or spending on referendum campaigns by foreign individual or entities.⁵¹
- 1.55 Professor Williams, while describing the changes as a ‘positive feature’ of the bill, argued that the disclosure threshold for donations – which mirrors that in the Electoral Act and is currently set at \$15,200 – is ‘too high and will mean that the origin of large sums of money remains secret’. Professor Williams also called for the real-time disclosure of donations.⁵²
- 1.56 Dr Kildea made similar points, and also suggested the introduction of limits on expenditure to avoid a wealthy donor from ‘undermining the level playing field’.⁵³
- 1.57 Professor Twomey proposed that the referendum could be an opportunity to trial both a lower disclosure threshold and a real-time disclosure regime, which could subsequently be adopted for general elections.⁵⁴
- 1.58 In its submission, the AEC observed that, due to the interaction between the six-month reporting period in the bill and the requirement in Section 128 of the Constitution that a referendum must be held between two and six months from the passage of the proposed law, the reporting period for the referendum will necessarily commence before the referendum bill passes the Parliament. Noting that the referendum would likely involve campaigners who do not regularly participate in elections, the AEC questioned whether:
- ... such a requirement would impose onerous and retrospective regulatory and administrative obligations on people and entities, and whether that

⁵⁰ For example, see: Australian Human Rights Commission, *Submission 14*, p. 4.

⁵¹ The Real Republic Australia, *Submission 3*, p. 6.

⁵² Professor George Williams, *Submission 1*, pp. 3-4. See also: The Australia Institute, *Submission 25*, pp. 3-4.

⁵³ Dr Paul Kildea, *Submission 15*, p. 4; Dr Paul Kildea, *Proof Committee Hansard*, 19 December 2022, p. 34.

⁵⁴ Professor Anne Twomey, *Submission 5*, p. 1; Professor Anne Twomey, *Proof Committee Hansard*, 19 December 2022, p. 34.

regulatory burden may act as a disincentive for participation in the national debate.⁵⁵

- 1.59 The Electoral Commissioner told the Committee that a significant education effort would be important to ensuring that individuals and entities involved in referendum campaigns are aware of their disclosure obligations.⁵⁶
- 1.60 In response to questioning on the retrospective nature of the proposed disclosure obligations, a representative of the Department of Finance advised that the bill ‘makes provision for circumstances where a person or an entity is unable to obtain the particulars required for the return’.⁵⁷

Other proposals

- 1.61 Submitters provided commentary on further measures which could be included in amendments in the bill, such as the framing of a referendum question; proposals for improving enfranchisement; proposals relating to truth in political advertising and misinformation; and a recommendation to establish an independent panel to advise on aspects of the referendum process. These are discussed below.

Framing of a referendum question

- 1.62 In July 2022, the Prime Minister told attendees at the Garma Festival that a draft referendum question could be a simple form of words such as ‘Do you support an alteration to the Constitution that establishes an Aboriginal and Torres Strait Islander Voice?’. The Prime Minister said this question was a basis for dialogue and would not necessarily be the final form of words.⁵⁸

⁵⁵ Australian Electoral Commission, *Submission 18*, pp. 2-3; Mr Tom Rogers, Electoral Commissioner, Australian Electoral Commission, *Proof Committee Hansard*, 19 December 2022, p. 16. See also: Australian Monarchist League, *Submission 77*, pp. 3-4.

⁵⁶ Mr Tom Rogers, Electoral Commissioner, Australian Electoral Commission, *Proof Committee Hansard*, 19 December 2022, pp. 16-18; Australian Electoral Commission, *Submission 18*, pp. 2-3. See also: Professor Anne Twomey, *Proof Committee Hansard*, 19 December 2022, p. 33.

⁵⁷ Mr Nathan Williamson, Deputy Secretary, Department of Finance, *Proof Committee Hansard*, 9 January 2023, p. 7.

⁵⁸ Lorena Allam, ‘Anthony Albanese reveals ‘simple and clear’ wording of referendum question on Indigenous voice’, *The Guardian*, 30 July 2022.

- 1.63 However, submitters noted that the current requirements for presenting a referendum question in ballot papers would not support using simple form such as that proposed by the Prime Minister.⁵⁹
- 1.64 Section 25 of the Referendum Act requires that a referendum ballot paper be set out in the form prescribed, with the title of the proposed law and a question ‘DO YOU APPROVE THIS PROPOSED ALTERATION?’. For a referendum considering one proposal, such as the proposed referendum on the Voice to Parliament, that form is demonstrated in the figure below.

Figure 1.1 Referendum ballot paper

Commonwealth of Australia

BALLOT-PAPER

[Here insert name of State or Territory]

Referendum on proposed Constitution alteration

DIRECTIONS TO VOTER

WRITE “YES” or “NO” in the space provided opposite the question set out below.

[Here set out the title of the proposed law]

DO YOU APPROVE THIS PROPOSED ALTERATION?

Source: *Referendum Machinery Provisions Act 1984*.

- 1.65 Several submitters recommended that Section 25 of the Referendum Act be modernised to allow for a clear and simple question to be posed in a manner that would be easily understood by voters.⁶⁰

⁵⁹ For example, see: Dr Morgan Harrington and Dr Francis Markham, *Submission 16*, p. 8; Dr Shireen Morris, *Submission 17*, p. 3; Professor George Williams, *Proof Committee Hansard*, 19 December 2022, p. 34.

⁶⁰ Dr Paul Kildea, *Submission 15*, pp. 4-5; Dr Morgan Harrington and Dr Francis Markham, *Submission 16*, p. 8; Dr Shireen Morris, *Submission 17*, pp. 3-4; Professor Gabrielle Appleby, *Submission 74*, pp. 4-5.

- 1.66 Dr Paul Kildea submitted that the ‘awkward formula’ of the current form had been developed to comply with the constitutional requirement that a proposed law for altering the Constitution be submitted to and approved by electors. He proposed that the Referendum Act could be amended to allow for a clear and simple question that still incorporates the title of the proposed law, such as: ‘Do you support the establishment of a First Nations Voice, as provided in the [short title of Act]?’.⁶¹
- 1.67 Professor Gabrielle Appleby proposed a similar approach, noting a further solution posed by the Indigenous Law Centre whereby a short, neutral description of the proposed reform would be developed by an independent panel and incorporated into the question, for example:
- Are you in favour of establishing a body, to be called the First Nations Voice, that will guarantee Aboriginal and Torres Strait Islander peoples an institution to make representations to the Parliament and the Executive Government of the Commonwealth about the development of Commonwealth laws and policies affecting them, as provided in the *Constitution Alteration (First Nations Voice) 2023*?⁶²

Enfranchisement measures

- 1.68 Several submitters proposed that the modernisation of the Referendum Act, particularly for the purpose of a referendum on a Voice to Parliament, provides an opportunity to also include enfranchisement measures, including:
- extension of mobile polling;
 - secure telephone voting;
 - savings provisions allowing on-the-day enrolment; and
 - repealing electoral act provisions preventing prisoners from voting.
- 1.69 Dr Morgan Harrington and Dr Francis Markham argued that disenfranchisement of Indigenous Australians could undermine the legitimacy of the First Nations Voice before it is established and reduce public confidence in the AEC. They also expressed concerns about declining Indigenous enrolment rates and low voter turnout in remote communities.⁶³

⁶¹ Dr Paul Kildea, *Submission 15*, pp. 4-5.

⁶² Professor Gabrielle Appleby, *Submission 74*, p. 5. See also: Professor Gabrielle Appleby, *Proof Committee Hansard*, 19 December 2022, p. 33.

⁶³ Dr Morgan Harrington and Dr Francis Markham, *Submission 16*, pp. 1-2.

- 1.70 Given their concerns, Dr Harrington and Dr Markham made six recommendations, three of which require amendments to the Referendum Act (on-the-day enrolment, extension of mobile polling, and allowing mobile polling teams to providing how-to-vote cards if requested).⁶⁴
- 1.71 Similarly, the Central Land Council said that, as the referendum directly concerns Indigenous Australians, it is vital that participation of these communities is maximised. The Council noted barriers to enrolling in remote communities and also recommended on-the-day enrolment, extension of mobile polling, and extending the vote to prisoners.⁶⁵
- 1.72 The Council explained that on-the-day enrolment had worked to strengthen enfranchisement in the Northern Territory.⁶⁶ Similarly, Dr Kildea suggested that on-the-day enrolment ‘would foster referendum participation generally but be of particular benefit to First Nations people given their disproportionately low enrolment rate’.⁶⁷
- 1.73 The AEC advised the Committee that, while there had been a ‘huge, sustained increase’ in the enrolment rate among Indigenous Australians, the current rate is around 82 per cent nationally.⁶⁸
- 1.74 In its submission to the inquiry, the AEC recommended consideration of extending the period for remote-area mobile polling from 12 days to 19 days, noting that this is more feasible for a referendum than for a federal election due to the longer lead time and smaller number of ballot papers to be printed.⁶⁹
- 1.75 The AEC nominated secure telephone voting and on-the-day enrolment as other opportunities to improve the franchise.⁷⁰ The Electoral

⁶⁴ Dr Morgan Harrington and Dr Francis Markham, *Submission 16*, pp. 3-8. See also: Dr Paul Kildea, *Submission 15*, p. 5.

⁶⁵ Central Land Council, *Submission 12*, pp. 1-3.

⁶⁶ Central Land Council, *Submission 12*, p. 2.

⁶⁷ Dr Paul Kildea, *Submission 15*, p. 5.

⁶⁸ Mr Tom Rogers, Electoral Commissioner, Australian Electoral Commission, *Proof Committee Hansard*, 19 December 2022, pp. 19-20.

⁶⁹ Australian Electoral Commission, *Submission 18*, pp. 3-4; Mr Tom Rogers, Electoral Commissioner, Australian Electoral Commission, *Proof Committee Hansard*, 19 December 2022, p. 13.

⁷⁰ Australian Electoral Commission, *Submission 18*, pp. 4-5; Mr Tom Rogers, Electoral Commissioner, Australian Electoral Commission, *Proof Committee Hansard*, 19 December 2022, pp. 13-14.

Commissioner told the Committee that on-the-day enrolment was already in place in some state jurisdictions and would be a ‘failsafe mechanism’ to ensure that every Australian could have a say in the referendum:

They would go into a polling place and be given a provisional vote, and we would treat that as an enrolment form. As long as we could establish their identity, that vote would be counted.⁷¹

- 1.76 In relation to secure telephone voting, the AEC explained the service was a successful way of enabling voters impacted by COVID-19 to participate in the 2022 federal election. The AEC argued that expansion of the service for the referendum could be a ‘safety net’ for voters at risk of being unable to cast their vote in another manner, including people in aged-care facilities that the AEC is not able to attend (due to a health incident, for example), people in remote areas, and people impacted by declared emergencies and natural disasters.⁷²

Truth in political advertising and countering misinformation

- 1.77 The Department of Finance advised that the bill contains provisions ‘to promote free and informed voting’, including a requirement for campaign material to be authorised and an offence of misleading voters, based on existing provisions in the Electoral Act.⁷³ The Electoral Commissioner told the Committee that the AEC would be ‘very active’ in working with campaign entities to understand their requirements.⁷⁴
- 1.78 However, given concerns about the potential for misinformation to affect the referendum process, some submitters called for stronger measures to be included in the bill for ensuring truth in advertising in the referendum campaign and for countering misinformation and disinformation.
- 1.79 For example, Dr Kildea referred to truth in political advertising regime in South Australia, in which the electoral commissioner in that

⁷¹ Mr Tom Rogers, Electoral Commissioner, Australian Electoral Commission, *Proof Committee Hansard*, 19 December 2022, p. 14.

⁷² Australian Electoral Commission, Submission 18, p. 4; Mr Tom Rogers, Electoral Commissioner, Australian Electoral Commission, *Proof Committee Hansard*, 19 December 2022, p. 14.

⁷³ Mr Sebastian Powney, Assistant Secretary, Department of Finance, *Proof Committee Hansard*, 19 December 2022, pp. 5, 7.

⁷⁴ Mr Tom Rogers, Electoral Commissioner, Australian Electoral Commission, *Proof Committee Hansard*, 19 December 2022, p. 17.

state is responsible for making determinations in relation to electoral advertisements.⁷⁵

- 1.80 When questioned about this issue, the Electoral Commissioner referred to discussion with the Committee in the context of its inquiry into the 2022 federal election, but also said that establishing a truth-in-advertising regime prior to the referendum would be a ‘very, very steep project’.⁷⁶
- 1.81 As an alternative, Professor Williams suggested the establishment of an independent panel or body for the purpose, or an independent unit within the AEC.⁷⁷ Similarly, Professor Appleby suggested one role of an independent referendum panel should be fact-checking information disseminated in the referendum campaign.⁷⁸
- 1.82 Some stakeholders referred to the private members’ bill introduced by Ms Zali Steggall OAM MP, the Commonwealth Electoral Amendment (Stop the Lies) Bill 2022, which seeks to establish a truth-in-advertising regime for both elections and referendums.⁷⁹ In her submission to the present inquiry, Ms Steggall argued that the establishment of measures to prohibit misleading and deceptive advertising was a matter of urgency.⁸⁰
- 1.83 In a media release announcing the introduction of the present bill, the Government stated that educational initiatives would also have a role in countering misinformation.⁸¹ In response to this statement, the Institute for Public Affairs’ submission expressed concern about the absence of any further detail about what could be counted as misinformation, and the potential for the Government to ‘control’ the public debate.⁸²

⁷⁵ Dr Paul Kildea, *Submission 15*, p. 3; Dr Paul Kildea, *Proof Committee Hansard*, 19 December 2022, p. 33. See also: Professor George Williams, *Submission 1*, p. 3.

⁷⁶ Mr Tom Rogers, Electoral Commissioner, Australian Electoral Commission, *Proof Committee Hansard*, 19 December 2022, p. 15.

⁷⁷ Professor George Williams, *Proof Committee Hansard*, 19 December 2022, p. 33.

⁷⁸ Professor Gabrielle Appleby, *Submission 74*, p. 4; Professor Gabrielle Appleby, *Proof Committee Hansard*, 19 December 2022, p. 31.

⁷⁹ The Australia Institute, *Submission 25*, p. 3; Professor Gabrielle Appleby, *Proof Committee Hansard*, 19 December 2022, p. 31. See also: Parliament of Australia, [Commonwealth Electoral Amendment \(Stop the Lies\) Bill 2021](#).

⁸⁰ Ms Zali Steggall OAM MP, *Submission 75*, pp. 1-4.

⁸¹ [“Next steps towards Voice Referendum”](#), *Joint Media Release*, 1 December 2022.

⁸² Institute of Public Affairs, *Submission 13*, p. 5.

- 1.84 Dr Kildea argued that ‘the mere provision of information may do nothing to combat misinformation’.⁸³
- 1.85 A related issue was raised by the Human Rights Law Centre, which noted that the bill does not exclude from the definition of ‘referendum matter’ communications whose dominant purpose is education, awareness raising, or encouraging debate, as per the equivalent definition of ‘electoral matter’ in the Electoral Act.⁸⁴ However, in relation to this issue, the AEC clarified that, if the bill is enacted, ‘matter communicated for a dominant purpose that is educative will not be referendum matter that will need to be authorised’.⁸⁵

Independent referendum panel

- 1.86 In its 2021 report, the SPLA Committee recommended the establishment of a panel to provide advice to a parliamentary committee in the lead up to any referendum on matters including the form of wording of the referendum question, the contents of the official pamphlet, and neutral information and education activities.⁸⁶
- 1.87 In the present inquiry, several submitters made similar recommendations for an independent panel to provide advice on various aspects of the referendum process.
- 1.88 For example, Professor Appleby said an independent referendum panel, appointed by the Prime Minister in consultation with other parliamentary leaders, should oversee the development of the official pamphlet and other educational material, assist in formulating the referendum question, and fact check information disseminated in the campaign.⁸⁷ Professor Appleby noted examples from other jurisdictions which could inform the design of such a panel. For example, in relation to the panel’s role in official information and education, Professor Appleby explained:

... in the UK, there is a process whereby a similar panel undertakes focus groups and checks how different ways in which information is conveyed to

⁸³ Dr Paul Kildea, *Submission 15*, p. 3.

⁸⁴ Human Rights Law Centre, *Submission 26*, p. 1.

⁸⁵ Australian Electoral Commission, *Submission 18.1 (answers to questions on notice)*, p. 6.

⁸⁶ SPLA Report, Recommendation 9.

⁸⁷ Professor Gabrielle Appleby, *Submission 74*, pp. 2-5; Professor Gabrielle Appleby, *Proof Committee Hansard*, 19 December 2022, pp. 27-28, 31, 33.

voters and is understood by voters before it's released as official information. There are lots of international practices that a panel could review and learn from in its processes.⁸⁸

- 1.89 Noting previous recommendations along these lines, Dr Kildea said a 'well-designed, independent body to oversee public education could make a huge difference' in ensuring that reliable information was available in the referendum.⁸⁹

Broader reform of the referendum process

- 1.90 While outside the scope of the present inquiry, which centres on the provisions in the bill, a strong theme in evidence was the need for more comprehensive reform of the referendum process and the process of constitutional change more broadly.
- 1.91 Some submissions also recommended further consideration of recommendations made by the SPLA Committee in its 2021 report, including the expansion of education on constitutional matters, and the establishment of a parliamentary committee advised by independent expert panel to provide advice to the Parliament on aspects of referendums (discussed above).⁹⁰
- 1.92 More broadly, Professor Williams argued the bill was the continuation of a cycle of piecemeal, temporary amendments to the Referendum Act, and said it was widely recognised that the worst time to debate changes to the referendum rules was in the lead up to the poll. He went on to explain that disagreement over the referendum rules contributed to the abandonment of the 2013 referendum.⁹¹ Dr Kildea made a similar point:

... it's kind of like patching your roof while the sun is shining. You don't want to wait till it starts raining. That's kind of what we're doing here.⁹²

⁸⁸ Professor Gabrielle Appleby, *Proof Committee Hansard*, 19 December 2022, p. 31.

⁸⁹ Dr Paul Kildea, *Submission 15*, p. 3; Dr Paul Kildea, *Proof Committee Hansard*, 19 December 2022, p. 27.

⁹⁰ For example, see: Australia Institute, *Submission 25*, pp. 5-6; Law Council of Australia, *Submission 76*, pp. 2-3.

⁹¹ Professor George Williams, *Submission 1*, p. 4; Professor George Williams, *Proof Committee Hansard*, 19 December 2022, pp. 32-33. See also: Dr Paul Kildea, *Submission 15*, p. 5.

⁹² Dr Paul Kildea, *Proof Committee Hansard*, 19 December 2022, p. 32.

- 1.93 Professor Williams recommended that, following the proposed referendum on a First Nations Voice, there be a further inquiry into the Referendum Act with a view to addressing longstanding issues in the Act, consistent with a recommendation of the SPLA Committee.⁹³
- 1.94 The Law Council of Australia noted that the proposal to temporarily suspend Section 11, as was done (in part) in both 1999 and 2013, indicates that a more enduring reform of this aspect of the referendum process may be justified.⁹⁴
- 1.95 The Australian Human Rights Commission argued similarly that it would be preferable for reform of the referendum process to be done outside of the context of an imminent referendum, and recommended consideration of recommendations made by previous inquiries following the proposed referendum on the First Nations Voice.⁹⁵

Committee comment

- 1.96 Consistent with the referral to the Committee, the inquiry was focussed on whether the specific provisions contained within the bill would achieve the objective of modernising the referendum process in advance of a referendum on the question of enshrining a First Nations Voice in the Constitution.
- 1.97 In this regard, the Committee notes that evidence to the inquiry was broadly supportive of the provisions in the bill that seek to align elements of the Referendum Act and the Electoral Act.
- 1.98 The Committee's views on the other main elements of the bill discussed in evidence are outlined below.

Enfranchisement

- 1.99 The Committee believes the current rates of Aboriginal and Torres Strait Islander enrolment and participation in elections remain too low. Proposals put to this inquiry to improve this rate are welcome. The Committee was pleased to hear from the AEC that it believes it would be able to enact some of these changes in time for a referendum this year.

⁹³ Professor George Williams, *Submission 1*, pp. 4-5; Professor George Williams, *Proof Committee Hansard*, 19 December 2022, p. 26. See also: SPLA Report, Recommendation 10.

⁹⁴ Law Council of Australia, *Submission 76*, pp. 2-3.

⁹⁵ Australian Human Rights Commission, *Submission 14*, pp. 4-5.

- 1.100 The Committee urges the Government to consider enfranchisement measures to support the highest possible participation the referendum, particularly among Aboriginal and Torres Strait Islander communities.
- 1.101 In particular, the Government should give serious consideration to enabling the AEC to introduce measures recommended in their submission, including:
- conducting Remote Area Mobile Polling for up to 19 days ahead of the referendum date;
 - trialling the provision of Secure Telephone Voting in certain circumstances where a voter risks being unable to cast their vote in another manner; and
 - providing for secure ‘on the day’ enrolment, enabling a potential new voter to cast a declaration vote that is admitted to the count once their enrolment is approved and processed.
- 1.102 The forthcoming referendum is an important opportunity to improve in this area, including when considering the historical trend of a lower enrolment rate amongst Indigenous Australians compared to the general voting public. All Australians who are eligible to vote should be supported to ensure they are enrolled and can participate in electoral events.

Recommendation 1

- 1.103 The Committee recommends that the Australian Government strengthen the opportunities for enfranchisement and participation in the referendum, including considering possible amendments to the Referendum (Machinery Provisions) Amendment Bill 2022, to allow the Australian Electoral Commission to support increased enrolment and participation, particularly of Aboriginal and Torres Strait Islander people, including in remote communities.**

Disapplication of Section 11

- 1.104 The Committee acknowledges concerns raised by some stakeholders about the disapplication of Section 11 of the Referendum Act, particularly as it relates to the removal of the requirement to distribute the official pamphlet and the absence of any alternative mechanism to provide information to voters about the proposed amendment.
- 1.105 The Committee notes that there are differing views on the value of the official pamphlet as a source of information about a proposed constitutional

amendment, particularly in light of changes to how information is distributed in the modern age.

- 1.106 Further to this, a strong theme observed in evidence was the importance of ensuring that voters are provided with clear and objective information about the referendum and the proposed amendment, which has not been a feature of official pamphlets in past referendums.
- 1.107 The Committee supports the principle of ensuring that voters are fully informed about a referendum proposal and, on balance, considers that this is mostly likely to be achieved through a neutral information and education campaign. The Committee also notes that the bill does not prevent the Government from distributing written material to voters.
- 1.108 The Committee notes the view expressed by some submitters that the Referendum Act should contain some boundaries on public expenditure to ensure its neutrality in respect of the referendum question.
- 1.109 The Committee believes that there are a number of ways in which the Government can strengthen an information campaign to ensure that clear, factual and impartial information is accessible to all voters, whether this be through amendments to the bill or measures taken outside of the bill. Either way, the Government needs to ensure that all voters have access to information that they understand to be clear, factual and impartial.
- 1.110 The Committee expects that the Government will consider the suggestions made in evidence to this inquiry to ensure material is accessible to voters in regional and remote communities, culturally and linguistically diverse communities, and Aboriginal and Torres Strait Islander communities.

Recommendation 2

- 1.111 **The Committee recommends that the Australian Government ensure appropriate structures and mechanisms are put in place, including considering possible amendments to the Referendum (Machinery Provisions) Amendment Bill 2022, to ensure:**
 - **clear, factual and impartial information is made accessible to all voters as part of the referendum process; and**
 - **clear, factual and impartial information is provided in appropriate formats for Aboriginal and Torres Strait Islander voters, and people from culturally and linguistically diverse backgrounds.**

Donations and disclosure regime

- 1.112 The Committee notes broad support in evidence for the establishment of a financial disclosure and foreign donation restrictions framework in the Referendum Act, modelled on the relevant provisions in the Electoral Act.
- 1.113 The Committee acknowledges the views of some stakeholders that these measures should go further, including to lower the disclosure threshold below that which is specified in the Electoral Act, and to introduce or trial a real-time disclosure regime. However, the Committee considers that any such changes would require more careful consideration than was possible given the short timeframe for this inquiry.
- 1.114 To this end, the Committee notes that issues including the lowering the disclosure threshold and introducing a real-time disclosure regime are being considered as part of the Committee's inquiry into the 2022 federal election.
- 1.115 The Committee's general view is that procedures for a referendum should in so much as possible be consistent with those for a general election. As such, the Committee's expectation is that any changes to the Electoral Act arising from recommendations made in that inquiry would be mirrored through changes to the Referendum Act.
- 1.116 Some members of the Committee raised concerns regarding the implementation of the donations and disclosure regime, particularly the retrospective nature of both the disclosure requirements and the restriction on foreign donations. The Committee trusts that these issues will be taken into consideration by the Government in the implementation of the bill and in the referendum process, and that the AEC will be adequately resourced to undertake the required education and compliance activity.

Other proposals

- 1.117 The Committee notes a range of other proposals received in evidence, including in relation to the referendum question, other enfranchisement measures, and a truth-in-political-advertising regime.
- 1.118 While the Committee considers that some of these proposals may have merit, the Committee is of the view that many involve complex and sensitive issues, particularly in the context of an imminent referendum. For example, changing the form of the referendum question is a significant reform, which, if not considered carefully, may have unintended consequences and may undermine confidence in the referendum process and electoral processes more generally.

- 1.119 The Committee appreciates the concerns raised around mechanisms to ensure accurate information through the referendum campaign. The Committee notes the complexity of establishing a truth-in-political-advertising regime is highlighted in the extensive evidence to the Committee's review into the 2022 federal election. Considering these complexities, the Committee believes that the forthcoming referendum is not the right time to establish a truth-in-political-advertising regime. The Committee will continue to consider truth-in-political-advertising as part of its election review.
- 1.120 In the absence of further consultation by the Government on these other measures with a broad range of stakeholders, the Committee considers that the present arrangements, which have been used successfully in previous referendums, should remain in place.

Summary

- 1.121 While the Committee considers that there are elements of the referendum process that could be further improved, on balance, the Committee supports the passage of the bill to ensure that the referendum machinery is updated in advance of the proposed referendum on a First Nations Voice.
- 1.122 Beyond the scope of the present bill, the Committee encourages the Government to also give full and proper consideration to the suggestions for a more comprehensive update of the referendum rules, which were made in evidence to both this inquiry and previous inquiries.

Recommendation 3

- 1.123 Subject to recommendations 1 and 2, the Committee recommends that the Referendum (Machinery Provisions) Amendment Bill 2022 be passed.**

Ms Kate Thwaites MP
Chair
31 January 2023

Dissenting Report – Coalition Members and Senators

Recommendation 1

The Coalition supports Recommendation 1 of the Government’s report, in particular changes which seek to increase enrolment and participation, particularly of Aboriginal and Torres Strait Islander people, including in remote communities.

Recommendation 2

That clause 4 of the Bill relating to the suspension of Section 11 of the Act be removed, and the Government to provide an official pamphlet outlining both a ‘Yes’ and ‘No’ case on any proposed constitutional amendment.

Recommendation 3

That the Government create official ‘Yes’ and ‘No’ campaign entities to ensure the referendum is conducted as seamlessly as possible whilst ensuring misinformation is minimised. These official campaign entities would be vital in assisting the regulation of the referendum under the proposed donations and foreign interference laws.

Recommendation 4

That the Government adequately fund and resource official campaign bodies and official communications for both ‘Yes’ and ‘No’ campaigns. These respective ‘Yes’ and ‘No’ campaigns should receive equal funding.

Recommendation 5

That the Bill be opposed in its current form, should the above amendments set out in Recommendations 2, 3, and 4 not be successful.

Overview

- 1.1 The Coalition believes that any consideration of constitutional change should be considered, measured, and balanced. The changes proposed in this Bill will set precedent for future referenda and should not be considered as temporary or to be adopted lightly.
- 1.2 The Government's decision to rush this inquiry over the Christmas and summer holiday-period is disappointing. This has limited the ability of JSCEM members to effectively scrutinise witnesses and the proposed legislation.
- 1.3 While there are a number of sensible and constructive changes included in this Bill, it is clear that the Government has put forward other changes that are not in the interests of informed and robust process for conducting a referendum.
- 1.4 The Coalition believes the publication and communication of an official pamphlet, the designation of official campaign entities, in addition to the adequate and equal funding of 'Yes' and 'No' campaigns negates Recommendation 2 of the Chair's Report and puts at risk a successful referendum process with integrity and appropriate protections against misinformation.
- 1.5 The Coalition recognises the practical benefits the *Referendum (Machinery Provisions) Amendment Bill 2022* would offer by bringing the Referendum Act generally into line with updates to the Commonwealth Electoral Act 1918 that have been legislated in recent years.
- 1.6 Unfortunately, the Government has failed to adequately address serious concerns raised in the vast majority of submissions along with those of Coalition members relating to the implications of Clause 4 of the Bill, which suspends Section 11 of the Act.
- 1.7 Further, the Coalition, along with numerous stakeholders and submitters remain greatly dissatisfied at the Government's decision not to create and fund official 'Yes' and 'No' organisations. This decision by the Government allows for misinformed debate and puts at risk the entire referendum process.

- 1.8 In considering the valid concerns raised by the Coalition along with the majority of submitters, the Government has failed to outline any substantial reasons why the suspension of Section 11, and the absence of properly constituted and funded official 'Yes' and 'No' entities are necessary steps which would improve the overall referendum process.

Abandonment of official 'Yes' & 'No' pamphlet

- 1.9 The majority of evidence presented to the inquiry primarily focused on the suspension of Section 11 of the Referendum Act and changes relating to financial disclosure.
- 1.10 Section 11 of the Act currently requires that an official pamphlet containing arguments for and against the referendum proposal, along with the proposed textual alterations and additions to the Constitution, be prepared and distributed to households by the Electoral Commissioner via post no later than 14 days before the voting day. This requirement was first introduced in 1912.
- 1.11 Clause 4 of the Bill will strip away any formal 'Yes'/'No' pamphlet in any proposed referendum that is brought forward during this parliament, including the proposed referendum on an Indigenous Voice to Parliament.
- 1.12 The absence of this requirement will leave Australians without any official source of information on the question being asked at the referendum. Of particular concern is the fact that this requirement has not been replaced with an alternative model for countering misinformation.
- 1.13 Evidence provided to the Committee characterised this as creating a vacuum for misinformation and 'a free-for-all on the internet'¹ and that it will 'encourage more bizarre views out there being given some kind of level of legitimacy'².
- 1.14 A prima facie analysis of the referendums that have been held since the introduction of the requirement to provide a pamphlet highlights that this suspension is without any comparable precedent. On only three occasions since 1912 have referenda been held where there was no pamphlet issued.
- 1.15 In 1919, there was insufficient time to produce a pamphlet prior to the conduct of the referendum. In 1926, there was no agreement on how to

¹ Professor Anne Twomey, *Proof Committee Hansard*, 19 December 2022, p. 29.

² Professor Anne Twomey, *Proof Committee Hansard*, 19 December 2022, p. 30.

argue or produce the 'Yes' argument. And in 1928 there was overwhelming agreement between parties and Governments of all levels.

- 1.16 Australians have received pamphlets at every referendum since 1928.
- 1.17 The Government has also signalled they have no intention to publish an online version of a pamphlet, and that it could be left to parliamentarians as to how they communicate referendum detail with their constituency.³
- 1.18 On this basis, it is clear the decision to abolish the official pamphlet is neither a cost saving or practical exercise but rather a calculated political decision on the Government's behalf.⁴
- 1.19 A large majority of submitters to the inquiry raised concerns around the Government's decision to abolish the official pamphlet. Examples of such submissions included but are not limited to the following:

Central Land Council: Noted that the failure to provide a physical, posted pamphlet in remote areas would almost certainly leave people (in particular older Australians and Elders) without reliable access to information regarding the referendum question, especially given the barriers to telecommunications in regional communities.⁵

Australian Electoral Commission (AEC): Advised that its research "*shows that 40 per cent of people still rely on and use the guide posted to households as their primary source of information*".⁶

Institute of Public Affairs (IPA): Argued that the official pamphlet plays an integral role in setting the tone of a referendum debate and helps to ensure an "*open and fair exchange of ideas in which no side is demonised*".⁷

- 1.20 As the Coalition believes that any consideration of constitutional change should be considered, measured, and balanced, the official pamphlet is, as

³ Mr Nathan Williamson, *Proof Committee Hansard*, 19 December 2022, p. 14.

⁴ Mr Tom Rogers, Electoral Commissioner, Australian Electoral Commission, *Proof Committee Hansard*, 19 December 2022, p. 21. Mr Rodgers indicated in his evidence that it was more economical to communicate with electors online than through traditional methods such as newspaper advertising and pamphlets.

⁵ Central Land Council, *Submission 12*, p. 3. See also: Dr Shireen Morris, *Submission 17*, p. 2; Australian Monarchist League, *Submission 77*, pp. 2-5; Professor Anne Twomey, *Proof Committee Hansard*, 19 December 2022, p. 25.

⁶ Mr Tom Rogers, Electoral Commissioner, Australian Electoral Commission, *Proof Committee Hansard*, 19 December 2022, p. 21.

⁷ Institute of Public Affairs, *Submission 13*, p. 4.

has been evidenced in referendums past, the best medium to help achieve this outcome and ensure informed choice that counters misinformation.

‘Yes’ & ‘No’ campaigns

- 1.21 An additional matter of concern to the Coalition and the majority of submitters is the Government’s decision not to create official ‘Yes’ and ‘No’ campaign entities as has been standard practice in past referenda.
- 1.22 In 2009 the House of Representatives Legal and Constitutional Affairs Committee, chaired by the Hon Mark Dreyfus KC MP recommended the establishment of a legislated Referendum Panel to determine campaign operations and education initiatives relating to referenda.
- 1.23 At 1.88 of the Chairs report for this inquiry, the Government relies on Professor Appleby’s submission for further examples of functions such a panel would undertake. These included formulating the referendum question itself and fact checking information disseminated in the course of the campaign.⁸
- 1.24 The Coalition would not support the formation of such a panel.
- 1.25 Further, the Coalition disagrees with the Government’s decision not to create official ‘Yes’ and ‘No’ campaigns for the following reasons.
- 1.26 The absence of official campaign entities is of concern when considering the implementation and enforcement of modern electoral regulations on donations and foreign interference.
- 1.27 The regulatory auditing process to administer these regulatory schemes would be assisted by having official campaigns to provide a starting point for enforcement and education by the AEC.
- 1.28 The existence of official ‘Yes’ and ‘No’ campaign entities would reduce the inevitable cluster of faux and or proxy organisations promoting themselves as official campaign bodies. Instances of such conduct is already evident in public coverage of a number of bodies that have already been established.
- 1.29 Further evidence provided to the inquiry highlighted that current or previous activities of organisations and individuals relating to the Voice have the potential to be captured by the proposed regulatory schemes.⁹

⁸ Professor Gabrielle Appleby, *Submission 74*, pp. 2-5; Professor Gabrielle Appleby, *Proof Committee Hansard*, 19 December 2022, pp. 27-28, 31, 33.

⁹ Mr Tom Rogers, *Proof Committee Hansard*, 19 December 2022, p. 22.

- 1.30 An official campaign structure will provide a starting point for the AEC's efforts in coordinating education on the responsibilities of organisations and individuals participating in the referendum campaign.
- 1.31 It is imperative to the integrity of the referendum process that the Government establish official organisations for the conduct of the upcoming referendum in order to provide greater integrity to the regulatory process which governs participants, including donations, authorisations, and foreign interference.

Public funding of official 'Yes' & 'No' campaigns

- 1.32 The Government has also announced its intention not to provide any public funding for 'Yes' and 'No' campaign entities or official communications for either a 'Yes' or 'No' campaign.¹⁰
- 1.33 This risks a dependence on private funding from vested interests dominating debate and in turn distorting public discourse. This would undoubtedly compromise the quality and reliability of referendum information available to Australians, negatively affecting voters' ability to make informed decisions.¹¹
- 1.34 Should the Government provide funding for either case it remains the position of the Coalition that an equal amount be provided to both sides.

Ministerial availability to the inquiry

- 1.35 On the 23rd of December 2022, Senator James McGrath wrote on behalf of JSCoalition members to the JSCoalition Chair requesting that the relevant ministers (Burney and Farrell) make themselves available to assist the committee in its deliberations, noting the significance of the legislation being considered.
- 1.36 In addition, Senator McGrath wrote directly to both the Hon Linda Burney MP and Senator the Hon Don Farrell requesting the same. Copies of the relevant letters are attached at Appendix A.
- 1.37 It is disappointing that the respective ministers chose not to make themselves available to the inquiry. Coalition members are yet to receive an

¹⁰ 'Next steps towards Voice Referendum', *Joint Media Release*, 1 December 2022.

¹¹ Institute of Public Affairs, *Submission 13*, p. 4.

explanation as to the ministers' non-attendance or any acknowledgement of Senator McGrath's correspondence to the ministers.

- 1.38 The question of how Australians change their constitution is as important as the change they make itself.
- 1.39 It should be of concern to Australians that their Government has chosen to not only remove the requirement of the provision of information on the choice they face, but that the Government has also chosen not to assist this Committee in understanding the change.

Conclusion

- 1.40 The Coalition's position is that the full reinstatement of Section 11 in addition to the creation and adequate funding of official 'Yes' and 'No' campaign entities are fundamental elements to ensuring informed national debate and a successful referendum process.
- 1.41 In considering the concerns set out above, the Coalition cannot in good conscience support Recommendations 2 and 3 of the Government's report.
- 1.42 The Coalition's position remains that the Bill be opposed in its current form if the recommendations contained within this report are not adopted.

Appendix A

Letter to JSCEM Chair – Sent via email (23/12/22)



23 December 2022

Kate Thwaites MP
 Chair of the Joint Standing Committee on Electoral Matters
 Parliament House, Canberra
 Via Email

Dear Chair,

The Opposition would request that The Hon Linda Burney MP as Minister for Indigenous Australians and Senator the Hon Don Farrell as Special Minister of State attend the JSCEM hearing scheduled for 9 January 2023.

The Opposition believes that any proposal to change the Constitution should be carefully considered and that consideration should also extend to the manner in which the forthcoming referendum is conducted.

To assist the examination of the current inquiry before JSCEM, the Opposition believes both Ministers will be able to explain the rationale behind the legislative changes proposed by the Government.

Regards,

JAMES McGRATH
LNP Senator for Queensland
Shadow Assistant Minister to the Leader of the Opposition
Shadow Assistant Minister for Finance

cc – The Hon. Linda Burney MP and Senator the Hon. Don Farrell

Letter to Senator the Hon Don Farrell – Sent via email (23/12/22)



23 December 2022

Senator the Hon Don Farrell
Special Minister of State
Parliament House, Canberra
Via Email

Dear Minister,

Please find attached a letter I have sent to the Chair of JSCEM.

I am certain you would welcome the opportunity to assist JSCEM in our consideration of Labor's proposed legislative changes.

I look forward to seeing you at our public hearing in January.

Regards,

JAMES McGRATH
LNP Senator for Queensland
Shadow Assistant Minister to the Leader of the Opposition
Shadow Assistant Minister for Finance

Letter to the Hon Linda Burney MP – Sent via email (23/12/22)



23 December 2022

The Hon Linda Burney MP
Minister for Indigenous Australians
Parliament House, Canberra
Via Email

Dear Minister,

Please find attached a letter I have sent to the Chair of JSCEM.

I am certain you would welcome the opportunity to assist JSCEM in our consideration of Labor's proposed legislative changes.

I look forward to seeing you at our public hearing in January.

Regards,

JAMES McGRATH
LNP Senator for Queensland
Shadow Assistant Minister to the Leader of the Opposition
Shadow Assistant Minister for Finance

Senator the Hon. James McGrath
Deputy Chair
Liberal National Senator for Queensland

Senator the Hon. Marise Payne
Member
Liberal Senator for New South Wales

The Hon. Darren Chester MP
Member
Nationals MP for Gippsland

Senator Ross Cadel
Member
Nationals Senator for New South Wales

James Stephens MP
Member
Liberal MP for Sturt

Minority Report – Kate Chaney MP

For the record, I agree with the Committee report and recommendations.

However, I would like to have the following comments recorded as additional comments.

1. Independent Panel

I support the establishment of an Independent Panel as the ‘structure or mechanism’ recommended in Recommendation 2.

Many witnesses (e.g. Appleby, Kildea) suggested an Independent Panel be appointed, to determine the wording of the referendum question, to ensure that clear, factual and impartial information is made accessible and to address misinformation during the lead-up to the referendum.

2. Financial disclosure

In relation to the referendum and in line with community expectations, I would support a more transparent financial disclosure recommendation, with more immediate (e.g. within 28 days) disclosure of donations above \$1,000.

The Bill creates financial disclosure requirements in line with Part XX of the Electoral Act, with a threshold of \$15,200 and delayed annual disclosure. Every State and Territory has lower thresholds and more immediate disclosure than the Commonwealth.

While the reduction in disclosure to \$1,000 creates additional obligations on entities that are supporting either campaign, it is appropriate to ensure that voters know who is funding each campaign before they vote.

3. Truth in political advertising

Witnesses shared significant concerns about the potential for misinformation to affect the referendum process. The separate inquiry into the 2022 federal election is considering recommendations to support truth in political advertising. Given proposed timing, establishing a broader truth in political advertising regime before the referendum is unrealistic.

Establishing an Independent Panel to fact-check information disseminated in the referendum would partially address this issue within the timing constraints.

Kate Chaney MP
Federal Member for Curtin

A. List of submissions

- 1 Prof George Williams
- 2 *Name Withheld*
- 3 The Real Republic Ltd
- 4 The newDemocracy Foundation
- 5 Prof Anne Twomey
- 6 Mr Robert Vose
- 7 Mr Lewis Jones
- 8 Hon Peter Lindsay
- 9 *Name Withheld*
- 10 Mr Timothy Tunbridge
- 11 Mr Peter Dunn
- 12 Central Land Council
- 13 Institute of Public Affairs
- 14 Australian Human Rights Commission
- 15 Dr Paul Kildea
- 16 Dr Morgan Harrington and Dr Francis Markham
- 17 Dr Shireen Morris
- 18 Australian Electoral Commission
 - 18.1 Supplementary to submission 18
- 19 Department of Finance

- 19.1 Supplementary to submission 19

- 20 Mr Mark Yore
- 21 Blind Citizens Australia
- 22 Uphold and Recognise
- 23 The Samuel Griffith Society
- 24 Susan McKinnon Foundation
- 25 The Australia Institute
- 26 Human Rights Law Centre
- 27 Mr Ian Watson
- 28 Ms Tarney James Spencer
- 29 Mr Bruce Warhurst
- 30 Ms Enid Saffy
- 31 *Name Withheld*
- 32 Mr Michael Menzies
- 33 Mr Mark Whillas
- 34 Mr Richard Hill
- 35 Mr Tony Atkinson
- 36 Hon L W Powell
- 37 Mr Mark Lorenz Schrader
- 38 Mr John Dempsey
- 39 Mr Gerard McKeering
- 40 Ray and Angela Lane
- 41 Mr Geoff Murray
- 42 Mr Peter Fitz-Gibbon
- 43 Mr Les Hawkes
- 44 Mr Robert Constantine
- 45 Mr John Cantarella
- 46 Mr Tony Philbrick
- 47 Mr Paul Corbiere

-
- 48 Mr Rodney Spencer
- 49 *Name Withheld*
- 50 Ms Margaret Neilson
- 51 Ms Janice Stenton
- 52 Mr Graham Neilson
- 53 Mr Alan Baker
- 54 Ms Michelle Francis
- 55 Ms Clare Hardess
- 56 Mr Steve van Tonder
- 57 Ms Marylin Smith
- 58 Ms Una May Lister
- 59 Mr Colin Gill
- 60 *Name Withheld*
- 61 Mr David Graham
- 62 Mr Terry Harding
- 63 *Name Withheld*
- 64 GetUp!
- 65 Ms Susan Crawford
- 66 Mr Robert Edmonds
- 67 Ms Carol Sullivan
- 68 Jabin Mills
- 69 Mr Robert Reid
- 70 *Name Withheld*
- 71 Mr Jim Evans
- 72 Siew-Tuan Smith
- 73 Peter and Maria Bellas
- 74 Professor Gabrielle Appleby
- 75 Ms Zali Steggall OAM MP
- 76 Law Council of Australia

77 Australian Monarchist League

78 Australians for Constitutional Monarchy (ACM)

B. List of public hearings

Monday, 19 December 2022 – Canberra

Department of Finance

- Mr Nathan Williamson, Deputy Secretary
- Mr Sebastian Powney, Assistant Secretary

Australian Electoral Commission

- Mr Tom Rogers, Electoral Commissioner
- Mr Jeff Pope, Deputy Electoral Commissioner

Expert roundtable

- Dr Gabrielle Appleby
- Dr Paul Kildea
- Professor Anne Twomey
- Professor George Williams

Monday, 9 January 2023 – Canberra

Department of Finance

- Mr Nathan Williamson, Deputy Secretary
- Mr Scott Dilley, First Assistant Secretary, Governance Division