

THE UNIVERSITY OF
NEW SOUTH WALES



FACULTY OF LAW

6 August 2021

Committee Secretary
House of Representatives Standing Committee on Social Policy and Legal Affairs
PO Box 6021
Parliament House
Canberra ACT 2600

Dear Secretary

Inquiry into the constitutional reform and referendums

Thank you for the opportunity to make a submission to the Committee's inquiry into the constitutional reform and referendums. I am making this submission in my capacity as Director of the Referendums Project at the Gilbert + Tobin Centre of Public Law and as a member of the University of New South Wales Faculty of Law & Justice. I am solely responsible for its contents.

My submission is confined to the effectiveness of arrangements for the conduct of referendums. In summary, this submission recommends that the *Referendum (Machinery Provisions) Act 1984* (Cth) ('Referendum Act') be amended to:

- enable referendum questions to be asked in a more simple and balanced way;
- remove restrictions on Commonwealth expenditure to enable government resourcing of public education initiatives and Yes/No campaign committees;
- introduce regulation of private money, including spending caps; and
- improve public education by establishing an independent Referendum Panel and rethinking the official pamphlet.

This inquiry is timely given the ongoing push for a referendum on establishing a First Nations Voice. There is a clear need to update the Referendum Act ahead of any vote on that topic. Some features have not been revisited in over a century; others, for many decades. It is critical that any amendments be made in advance of our next referendum, to ensure that they are careful, considered and made for principled rather than strategic reasons.



1. SETTING THE REFERENDUM QUESTION

The Referendum Act should be amended to permit a more flexible approach to question setting, and to enable more scrutiny of proposed questions.

Under current laws, the question on the ballot paper is determined by Parliament and must take a certain form. The Referendum Act requires that ballot papers present voters with the long title of the Bill that proposed the constitutional amendment, followed by the question: ‘Do you approve this proposed alteration?’.¹ This formula ensures the drafting of precise questions that comply with the overriding requirement in section 128 of the *Commonwealth Constitution* that a ‘proposed law’ be ‘submitted’ to electors. On the other hand, the drafted questions tend to be technical and wordy, and can be confusing to voters. In addition, this approach to question setting elevates the significance of the long title. It encourages members of parliament to draft emotive or misleading Bill titles in the hope of swaying voters. In 1988, for example, voters were asked to approve a proposed law ‘[t]o alter the *Constitution* to provide for fair and democratic parliamentary elections throughout Australia’, notwithstanding the fact that the actual proposal was aimed at achieving the relatively narrow objective of ‘one vote, one value’.²

The Act should be amended to enable referendum questions to be put in a more direct and plain manner. One possible formulation is: ‘Are you in favour of [name of proposed reform], as provided in the [short title of Act]?’ This approach would comply with section 128, while also being more friendly to voters. To further foster an informed vote, the law could permit the inclusion on the ballot paper of a short, factual description (no more than 50 words) of the proposed constitutional amendment. This would remind voters of key details in the final moments before voting. Such a description could be developed by a Referendum Panel (see below) or developed by the Parliament.

The Act should also be altered to permit independent scrutiny of the referendum question and any other text that is to appear on the ballot paper. Parliament could refer the wording of the proposed question to the Referendum Panel which, in turn, could conduct public research and report on the question’s clarity and fairness. In the United Kingdom, for instance, the Electoral Commission has a statutory obligation to consider the wording of a proposed referendum question and publish a statement on its intelligibility.³ Such an approach would help to encourage the setting of clear and balanced questions, while leaving the final say on question wording to the Parliament.

¹ *Referendum (Machinery Provisions) Act 1984* (Cth) s 25, sch 1.

² *Constitutional Alteration (Fair Elections) 1988* (Cth).

³ *Political Parties, Referendums and Elections Act 2000* (UK) c 41, ss 104(1), (2).

2. CAMPAIGN FINANCE

The current rules on funding and spending should be reviewed with an eye to establishing administrative neutrality, integrity and a level campaign playing field.

a. Limits on Commonwealth expenditure

Under section 11(4) of the *Referendum Act*, the Commonwealth may not spend money ‘in respect of the presentation of the argument in favour of, or the argument against, a proposed law’ except in relation to three narrow activities, including the preparation and distribution of the official pamphlet. These spending restrictions were introduced in 1984 to ensure neutrality in public expenditure.⁴ The idea is that the state should not be able to use its resources to promote one side of a referendum proposal over another.

Neutrality is a worthy goal, but the current rules suffer from three main shortcomings.⁵ First, they prevent the Commonwealth from spending money to promote referendum arguments via mass media outlets such as television, radio and newspapers, or through social media, even if it wishes to do so in an even-handed manner. They also preclude the federal government from funding Yes and No committees to undertake their own campaigns.

Second, section 11(4) impedes Commonwealth spending on genuine education campaigns. The line between argument and neutral information is often difficult to identify and, as a result, even well-intentioned information programs are vulnerable to challenge for promoting a point of view.⁶ Third, the existing rule is selective in its application. Equivalent restrictions do not apply to expenditure by State and Territory governments, political parties, interest groups or individuals. These entities remain free to spend as much money as they like promoting or opposing federal government proposals for constitutional change.

Recent practice suggests that governments and parliaments view current spending limits as unduly restrictive. In both 1999 and 2013, legislators voted to lift the restrictions to facilitate Commonwealth funding of public education initiatives and the allocation of money to Yes and No campaign committees. In 2009 the House Standing Committee commented that section 11(4) ‘severely restricts the way in which the Government can engage with electors on issues of constitutional change’.⁷

⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 29 May 1984, 2358 (Raymond Steele Hall).

⁵ For more detail see Paul Kildea, ‘Achieving Fairness in the Allocation of Public Funding at Referendums’ (2016) 37 *Adelaide Law Review* 14.

⁶ *Reith v Morling* (1988) 83 ALR 667.

⁷ House of Representatives Standing Committee on Legal and Constitutional Affairs (hereafter ‘House Standing Committee’), Parliament of Australia, *A Time for Change: Yes/No? — Inquiry into the Machinery of Referendums* (2009) 64. See also George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010) 260-61; Paul Kildea and George Williams, ‘Reworking Australia’s Referendum Machinery’ (2010) 35 *Alternative Law Journal* 22, 24.

The current limits on Commonwealth expenditure should be lifted. This would enable the federal government to deploy resources more freely on funding education campaigns and supporting official campaign groups. However, the Act should be amended to ensure that future governments cannot allocate funds in a one-sided way. The lead-up to the abandoned 2013 referendum on local government recognition demonstrates that this is a real possibility: the Labor government announced that it would allocate 95 per cent of public advocacy funds to the Yes campaign, in line with the votes cast for the referendum bill in the federal Parliament.⁸ The Act should include a provision stating that, should the Commonwealth opt to support the Yes and No campaigns, an equal amount of money must be given to each side.

b. Limits on private expenditure

Under current law, there are no limits on the amount of money that individuals, campaign groups and political parties can spend on referendum campaigns. Although referendums have not historically been a site for significant private spending, we cannot be certain that this will continue. The Australian Marriage Postal Survey (AMPLS) demonstrates that, in hard fought campaigns on salient issues, some individuals and groups are prepared to spend significant amounts on advertising. Such spending is of particular concern where it is one-sided, as this enables one side of the issue to flood the airwaves and drown out opposing arguments.

The Act should be amended to impose spending limits on individuals, campaign groups and political parties. This would help to foster a level campaign playing field. It is important to set the spending cap at an appropriate level: if set too low, it can prevent a group from getting their message across in today's media environment; if set too high, the risk of excessive and one-sided spending remains.

c. Financial disclosure

Under current rules, referendum campaign groups are not required to disclose information about donations they have received. This shields campaigners from scrutiny about their funding sources. To improve transparency, campaign groups should be required to report, in real time, on the source and amount of their donations.

d. Foreign donations

There are no restrictions on foreign donations for referendums, as now exist for elections. There is, accordingly, a risk of foreign influence on Australian referendum campaigns. To address this risk, and to bring referendum and election laws into alignment, foreign donations in relation to referendums should be banned.

⁸ Paul Kildea, 'Achieving Fairness in the Allocation of Public Funding at Referendums' (2016) 37 *Adelaide Law Review* 14.

3. PUBLIC EDUCATION

The Referendum Act should be amended to better facilitate the dissemination of quality information in the lead up to a referendum. Here the goal should be to equip voters to engage in internal reflection about the issues, deliberate with others, and make a free and informed choice at the ballot box. Five aspects should be considered: establishing a Referendum Panel; rethinking the official pamphlet; allocating funds to Yes and No campaign committees; running a neutral education campaign; and regulating misinformation.

a. Establishing a Referendum Panel

The establishment of an independent Referendum Panel to oversee public education initiatives has been widely recommended.⁹ The creation of such a body would help to improve the quality of referendum information and temper the exaggerated claims that are common to referendum campaigns. Its composition should be carefully considered to ensure that it is trusted by political parties, campaigners and the general public. The Panel could, for instance, be appointed by the Prime Minister in consultation with the Leader of the Opposition and other party leaders. Its membership could also include experts in constitutional law and public communication, a representative from the Australian Electoral Commission, and lay persons.

The roles and responsibilities of the Referendum Panel could include scrutiny of question setting, preparation of a neutral statement on the meaning and implications of the proposed reform, preparation of arguments for and against that reform, and oversight of Yes and No committees. These functions are elaborated upon elsewhere in this submission.

b. Rethinking the official pamphlet

Under the Referendum Act, the primary mechanism for informing voters about the referendum proposal is an official pamphlet. The Commonwealth first authorised expenditure on the production and distribution of the pamphlet in 1912. The document typically contains arguments for and against the proposed constitutional amendment, each being no more than 2000 words in length, and a statement showing the proposed textual changes to the *Constitution*. The arguments are authorised by a majority of the members of Parliament who voted for or against the amendment. Section 11(1) requires the Electoral Commissioner to arrange for the pamphlet to be printed and sent to each household within 14 days of polling day.

In its current form, the official pamphlet is a poor mechanism for educating voters. The arguments presented are often exaggerated and/or misleading. The maximum length of 2000

⁹ Eg, House of Representatives Standing Committee on Legal and Constitutional Affairs (hereafter 'House Standing Committee'), Parliament of Australia, *A Time for Change: Yes/No? — Inquiry into the Machinery of Referendums* (2009) Recommendation 7; George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010); Paul Kildea and George Williams, 'Reworking Australia's Referendum Machinery' (2010) 35 *Alternative Law Journal* 22.

words is unnecessarily long and likely exceeds the attention span of many voters. Further, the law does not provide for the preparation of a statement setting out basic facts about the referendum proposal. Overall, a fair-minded voter motivated to learn more about the referendum will find little of value in the official pamphlet.

Several steps should be taken to improve the pamphlet. First, it should include a clear, 'plain English' explanation of the parts of the *Constitution* affected by the reform proposal, and the effect of the amendment. This could be prepared by the Referendum Panel, or by a senior public servant. In California, the voter pamphlet contains an impartial analysis of proposed ballot measures, which appears alongside arguments prepared by supporters and opponents of change.¹⁰ This analysis is prepared by the Legislative Analyst, a public servant, and must 'generally set forth in an impartial manner the information the average voter needs to adequately understand the measure'.¹¹

For New Zealand's 2020 referendums on cannabis and end of life choices, the Ministry for Justice provided factual and impartial information about the proposals.¹² A Cabinet Paper made clear that the goal was to provide accessible, accurate and impartial content, and 'not to debate the merits or risks of either referendum topic or to provide opinion or commentary'.¹³ The materials to be published were: a one-page information sheet providing a summary of the draft bills; a to four- to five-page summary of its key aspects; and a list of simple questions and answers about the referendum topic.

Second, responsibility for drafting the Yes and No cases should be taken out of the hands of parliamentarians and given to other individuals or bodies. This promises to foster more accuracy and balance. One option is to follow the practice in New South Wales and give the task to public servants, subject to vetting by experts.¹⁴ A second option is to engage university departments or expert bodies to draft the arguments. This is permitted under Western Australian law, and was the practice adopted prior to New South Wales's 1967 referendum on the creation of a new state in north-east New South Wales.¹⁵ The task could also be given to the Referendum Panel.

Third, the pamphlet should include a 'citizens' statement' on the referendum proposal, consistent with practice in Oregon. That state conducts what is known as a Citizen Initiative Review (CIR), a small-scale deliberative process that aims to help voters make informed choices about referendum proposals. The CIR invites a randomly selected, demographically

¹⁰ Cal Elections Code §§ 9086.

¹¹ Cal Elections Code §§ 9087(b).

¹² Archived website available at:

<<https://ndhadeliver.natlib.govt.nz/webarchive/wayback/20191205054841/https://www.referendum.govt.nz>>.

¹³ Ministry of Justice, *Referendums 2020 Public Information Programme* (2020)

<<https://www.justice.govt.nz/justice-sector-policy/referendums-2020-public-information-programme>>.

¹⁴ Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 320.

¹⁵ *Referendums Act 1983* (WA) s 9(5); *New State Referendum Act 1966* (NSW) s 10.

representative group of 20 to 24 citizens to deliberate about a proposal and, based on those deliberations, to write a one-page statement setting out key findings on the measure and the best reasons to vote for and against it. Over the course of 3-5 days, participants hear from advocates on both sides of the issue and from experts, engage in small group discussions, and weigh up different claims about the proposed reform. The citizens' statement is included in the official pamphlet that is distributed to registered voters prior to polling day.¹⁶ Research indicates that many voters find the citizens' statements to be a helpful information source and appreciate that it is prepared by ordinary people.¹⁷

Fourth, the law should be amended to pamphlet contents to be disseminated via print and broadcast media and the internet. One approach would be to follow referendum rules in Western Australia and Tasmania and simply authorise the Electoral Commissioner to bring the arguments to the notice of voters, thus leaving the choice of media to the Commissioner.¹⁸

Finally, a range of additional, minor changes should be made:

- The maximum length of arguments should be reduced to 1000 words, in line with Queensland law.¹⁹
- The pamphlet should include details on the number of members who voted for and against the proposed amendment in parliament, to give electors a sense of the balance of opinion among their representatives.
- The Act should be amended to enable the pamphlet to be posted to households further in advance of the referendum, to give voters more time to consider the information and arguments.
- The Act should be amended to enable a No case to be distributed even where parliament votes unanimously for a proposed amendment.

c. Publicly funded Yes and No campaign committees

As indicated above under 'Campaign finance', the Referendum Act should be amended to enable the Commonwealth to provide equal funding to Yes and No campaign groups. This approach has been adopted once in Australia. In 1999, the Howard government allocated \$7.5 million each to 'Yes' and 'No' campaign committees to make the case for and against the republic. The practice has been more common in the United Kingdom. Referendum law provide for the designation of lead campaign groups that are entitled to up to £600,000 in

¹⁶ John Gastil, Elizabeth Rosenzweig, Katherine R Knoblauch and David Brinker, 'Does the Public Want Mini-Publics? Voter Responses to the Citizens' Initiative Review' (2016) 1 *Communication and the Public* 174, 175.

¹⁷ Ibid 182.

¹⁸ *Referendums Act 1983* (WA) s 9; *Referendum Procedures Act 2004* (Tas) s 12.

¹⁹ *Referendums Act 1997* (Qld) s 11.

public funding, free mailings, campaign broadcast time and a higher spending limit than other campaigners.²⁰

It will not always be appropriate for the Commonwealth to provide funding to campaign groups and, as such, the law should make it discretionary rather than mandatory. It works best for referendums where one side of the argument lacks resources and is struggling to communicate its arguments to voters. In such circumstances, public money can provide a basic level of funds that helps to ensure that voters hear from both sides. Where both Yes and No campaigners are well funded, the argument for public money is weaker. There is a risk that it will simply 'top up' already large coffers.

Another risk is that public funding will be used by campaigners to disseminate claims that are false or misleading. To help counter this, campaign groups could be asked to obtain pre-clearance of advertising and other materials. The receipt of public money could also be conditional on adherence to minimum standards of objectivity, accountability and fairness, overseen by the Referendum Panel.

d. Publicly funded neutral information

Publicly funded, neutral education campaigns are another useful tool for fostering informed voting. They provide factual material that is not connected to either the Yes or No campaigns. As noted above, existing limits on Commonwealth expenditure would need to be lifted to enable public education of this kind.

This approach has been adopted once in Australia. In 1999, the Howard government devoted \$4.5 million to a neutral information campaign. It was managed by a panel of experts chaired by former Governor-General and High Court justice, Sir Ninian Stephen.²¹ The panel was asked to produce information material on the current system of government, on the referendum process, and on the actual referendum questions. Its main outputs were an information pamphlet that was distributed widely, and a supporting campaign of television, radio and newspaper advertising, as well as a website.²² The experience was generally a positive one. Looking ahead, the priority for any neutral educational initiative should be to produce and circulate information that is balanced, accurate and, as much as is possible, coordinated with other official sources of information.

²⁰ See Independent Commission on Referendums, *Report of the Independent Commission on Referendums* (The Constitution Unit, UCL, 2018) 134-137.

²¹ The other members of the panel were constitutional experts Colin Howard and Cheryl Saunders, and historians Geoffrey Blainey and John Hirst.

²² John Warhurst, 'From Constitutional Convention to Republic Referendum: A Guide to the Processes, the Issues and the Participants' (Research Paper No 25, Parliamentary Library, Parliament of Australia, 1999) 17; Department of the Prime Minister and Cabinet, *Annual Report 1999–2000* (2000) 61.

e. Regulating misinformation

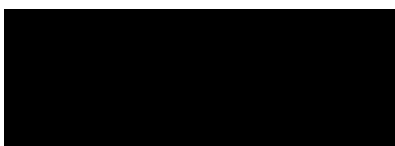
The Parliament should consider the merits of introducing measures to regulate the dissemination of misinformation during referendum campaigns.

The law currently makes it unlawful to mislead voters as to the manner in which they cast their referendum ballot.²³ However, it applies only to statements that might mislead a voter about the process of casting their vote.²⁴ The question is whether some sanction should be introduced to penalise those who disseminate statements that misrepresent the substance of a referendum proposal.

One possible approach would be to introduce a measure like section 113 of the *Electoral Act 1985* (SA). Under that provision, it is an offence to authorise, cause or permit the publication of an election advertisement by any means (including on radio or television) that ‘contains a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent’. The state’s Electoral Commissioner may request that such an advertisement be withdrawn and/or that a retraction be issued, and can seek a court order to support that request. Individuals (including opposition campaigners) can also request a withdrawal and/or retraction, provided that they can demonstrate standing. Where a prosecution is launched against an advertiser, the maximum penalties that apply are \$5,000 for individuals and \$25,000 for corporations. It is a defence for an advertiser to establish that they played no part in determining the content of the advertisement in question and ‘could not reasonably be expected to have known that the statement...was inaccurate and misleading’.

An alternative approach is taken in New Zealand. The law regulates the making of misleading statements during election campaigns, but only for the two days preceding polling day. It is an offence within that period to make ‘a statement of fact that the person knows is false in a material particular’.²⁵

Yours sincerely,



Dr Paul Kildea

Senior Lecturer, Faculty of Law & Justice, University of New South Wales
Director, Referendums Project, Gilbert + Tobin Centre of Public Law

²³ *Referendum (Machinery Provisions) Act 1984* (Cth) s 122(1).

²⁴ *Evans v Crichton-Browne* (1981) 147 CLR 169, 204, 208 (The Court), interpreting the equivalent provision in the *Commonwealth Electoral Act 1918* (Cth).

²⁵ *Electoral Act 1993* (NZ) s 199A.