



Australian
Human Rights
Commission

Inquiry into the Referendum (Machinery Provisions) Amendment Bill 2022

Australian Human Rights Commission

Submission to the Joint Standing
Committee on Electoral Matters

15 December 2022

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1 Introduction

1. The Australian Human Rights Commission ('the Commission') welcomes the opportunity to make this submission to the Inquiry into the Referendum (Machinery Provisions) Amendment Bill 2022 ('the Bill').
2. The purpose of this submission is to comment on the Bill, which details the mechanisms by which the proposed referendum to enshrine a First Nations voice in the Australian Constitution will be conducted. This submission does not engage with the substantive question to be put at that referendum, or the merits of the proposed constitutional amendments.
3. The Assistant Minister to the Prime Minister acknowledged during the Second Reading Speech for the Bill that '[r]eferendums are an integral part of our democracy' and that '[a] decision to change our Constitution is a significant national event'.¹ The process by which such a referendum is conducted necessarily engages a number of fundamental human rights, including the right to freedom of expression (which encompasses the freedom to seek, receive and impart information and ideas of all kinds)² and the right to political participation.³

2 Yes/No Pamphlet

4. One significant change proposed by the Bill is to remove the requirement under s 11 of the Referendum (Machinery Provisions) Act 1984 for the distribution to electors of arguments for and against the proposed constitutional amendment ('the Yes/No pamphlet').
5. The basic purpose of the Yes/No pamphlet 'is to provide electors with enough information on the arguments for and against the proposed change to the Constitution to enable them to cast an informed vote'.⁴ The history of the Yes/No pamphlet, and questions surrounding whether the

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mechanism should be reformed, were comprehensively outlined and considered in parliamentary inquiries in both 2009 and 2021.⁵

6. When the Yes/No pamphlet was originally introduced, in 1912, then-Prime Minister Fisher envisaged that ‘the case will be put from both sides impersonally and free from any suggestion of bias or misleading on the one side or the other’.⁶
7. While these ideals of objectivity may not always have been met in practice, this does not justify removing entirely the requirement for the Yes/No pamphlet. For example, in 2009 the House of Representatives Standing Committee on Legal and Constitutional Affairs noted that the arguments put in the Yes/No pamphlet were ‘rarely impersonal or free from bias, as was originally envisioned in 1912 when they were introduced’. However, the Standing Committee went on to conclude that they did ‘not necessarily consider this to be a deficiency of the current arrangements’,⁷ noting that the pamphlets were an important way for parliamentarians to explain to electors why they are supporting or opposing the proposed amendments, and helping to stimulate public discussion and debate. The Committee ultimately recommended that the Yes/No pamphlet should be retained and that ‘dissemination of the Yes/No pamphlet remains an essential component of the referendum process’.⁸
8. Similarly, while the House of Representatives Standing Committee on Social Policy and Legal Affairs recommended in December 2021 that the Government ‘modernise the Referendum Act and the referendum process’,⁹ the Standing Committee continued to support the distribution of the Yes/No pamphlet, considering that it had a ‘central role’ in the referendum process.¹⁰
9. The Commission supports retaining the requirement under s 11 that a Yes/No pamphlet be distributed to Australian electors as part of the referendum process. While it may be appropriate to modernise both the form and distribution of the Yes/No pamphlet, it continues to be ‘a valuable document which provides electors with the views of their elected representatives’.¹¹
10. This is particularly important in an environment where the Australian Electoral Commission has identified misinformation and disinformation as being ‘globally pervasive’ and having a ‘corrosive effect on citizens’ trust in, and views of, their electoral system’.¹² 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

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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.

11. Further, it is appropriate (indeed, preferable) for these summary arguments to be prepared by the Members of Parliament who themselves spoke and voted on the proposed amendments in Parliament. While Members of Parliament now have many alternative methods by which to communicate with electors, the provision of an official 'Yes/No' pamphlet is a way of ensuring that electors are provided with alternative points of view in the one document, to consider and compare, and that all electors are provided with the same basic information about the substantive arguments.
12. To suggest that there should not be an official summary of the arguments for and against a proposed constitutional amendment provided to electors by their parliamentary representatives diminishes the democratic link between the people and the Parliament. It is ultimately the elected Members of Parliament who are responsible for any amendment proposal and it is appropriate for the Members of Parliament to retain responsibility for authorising the arguments contained in the Yes/No pamphlet.

Recommendation 1: The requirement that a Yes/No pamphlet be distributed to electors before the voting day for the referendum should be retained.

3 Other Amendment Provisions

13. The Commission supports the proposed measures to establish a simplified financial disclosure and foreign donation restrictions framework that will support transparency and accountability for referendums. We agree with the analysis contained within the Statement of Compatibility with Human Rights that these measures represent permissible limitations to the relevant human rights, most notably the right to privacy under Article 17 of the International Covenant on Civil and Political Rights.¹³
14. Finally, we would highlight the importance of separating the amendment of rules around referendum processes from consideration of substantive referendum questions. Australia's referendum processes would benefit from modernisation; however, it would be preferable for this to be done at a time when there is not a substantive referendum proposal being considered. This will help to avoid the necessary conversations about

referendum processes being viewed through the prism of a specific referendum question.¹⁴ We would encourage the Parliament to return to the recommendations made by previous parliamentary inquiries following the proposed referendum to enshrine a First Nations voice in the Australian Constitution, and to consider legislative reforms to modernise Australia's referendum processes.

Recommendation 2: The proposed measures to establish a simplified financial disclosure and foreign donation restrictions framework for referendums should be supported.

Recommendation 3: Reform of the laws informing Australia's referendum processes should be considered and implemented outside of the context of an imminent referendum.

4 Recommendations

Recommendation 1

The requirement that a Yes/No pamphlet be distributed to electors before the voting day for the referendum should be retained.

Recommendation 2

The proposed measures to establish a simplified financial disclosure and foreign donation restrictions framework for referendums should be supported.

Recommendation 3

Reform of the laws informing Australia's referendum processes should be considered and implemented outside of the context of an imminent referendum.

¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 1 December 2022, 13-14 (Patrick Gorman, Assistant Minister to the Prime Minister).

² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), Article 19(2).

³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), Article 25(a).

⁴ House of Representatives Standing Committee on Legal and Constitutional Affairs, *A Time for Change: Yes/No? Inquiry into the Machinery of Referendums* (December 2009), [3.37].

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- ⁵ House of Representatives Standing Committee on Legal and Constitutional Affairs, *A Time for Change: Yes/No? Inquiry into the Machinery of Referendums* (December 2009), 7-8; House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into constitutional reform and referendums* (December 2021), ch. 4.
- ⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 16 December 1912, 7156 (Andrew Fisher, Prime Minister and Treasurer).
- ⁷ House of Representatives Standing Committee on Legal and Constitutional Affairs, *A Time for Change: Yes/No? Inquiry into the Machinery of Referendums* (December 2009), [5.11].
- ⁸ House of Representatives Standing Committee on Legal and Constitutional Affairs, *A Time for Change: Yes/No? Inquiry into the Machinery of Referendums* (December 2009), [5.18].
- ⁹ Parliament of the Commonwealth of Australia, *Referendum (Machinery Provisions) Amendment Bill 2022 Explanatory Memorandum* (2022), 3
- ¹⁰ House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into constitutional reform and referendums* (December 2021), [4.152].
- ¹¹ House of Representatives Standing Committee on Legal and Constitutional Affairs, *A Time for Change: Yes/No? Inquiry into the Machinery of Referendums* (December 2009), vii.
- ¹² Australian Electoral Commission, *AEC Submission to the Joint Standing Committee on Electoral Matters: 2022 federal election* (October 2022), 3.
- ¹³ Parliament of the Commonwealth of Australia, *Referendum (Machinery Provisions) Amendment Bill 2022 Explanatory Memorandum* (2022), 7.
- ¹⁴ House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into constitutional reform and referendums* (December 2021), [4.149].