

**Submission to the Joint Standing Committee on Electoral Matters Inquiry into the
Referendum (Machinery Provisions) Amendment Bill 2022**

Dr Morgan Harrington and Dr Francis Markham

Centre for Aboriginal Economic Policy Research

The Australian National University, Canberra

15 December 2022

We thank the committee for the opportunity to make a submission to this inquiry on the *Referendum (Machinery Provisions) Amendment Bill 2022*. We write as two non-Indigenous academics at the Centre for Aboriginal Economic Policy Research (CAEPR) at the Australian National University. Our research focuses on a range of public policy issues. Dr Morgan Harrington is an ethnographer and social researcher who has worked on applied projects across Australia and Indonesia. He has conducted exploratory research regarding First Nations voter participation in the electorate of Lingiari in the 2022 election, and gave a seminar in June 2022 on enrolment and participation in the seat of Lingiari.¹ Dr Francis Markham is a quantitative economic geographer whose research spans a range of Indigenous public policy issues, including electoral participation.² We make this submission as individual researchers, not in the name of the CAEPR.

The Bill sets out changes to the *Referendum (Machinery Provisions) Act 1984* that will, according to the Assistant Minister to the Prime Minister, ‘advance the Prime Minister’s commitment to hold a referendum to enshrine a First Nations voice in the Australian Constitution, a voice that will speak to the parliament and the executive about matters that affect First Nations people.’³ The Voice Referendum is about giving Indigenous peoples a say in the policies and programs that affect their lives. This is an important and historic referendum, and we commend the Government for making it a priority.

However, we are concerned that some Indigenous people may not get the chance to have their say in whether the referendum passes. To put it plainly, many Indigenous people who are currently unenrolled, and who may not have participated in recent elections at the state/territory or federal levels, will try to vote in the referendum but be turned away. Others, particularly in remote areas, may be effectively disenfranchised by the unpredictable, limited availability of mobile polling services. Either eventuality may receive wide media coverage during the referendum, as there is likely to be greater scrutiny of electoral issues at polling places that serve large Indigenous populations.

¹ The seminar recording can be viewed at https://www.youtube.com/watch?v=44Q5_VXwrPQ

² See, for example, Francis Markham and Bhiamie Williamson, *Indigenous Electoral Power in the 2022 Federal Election: A Geographic Snapshot of Latent Potential*, CAEPR Topical Issue (Canberra: Centre for Aboriginal Economic Policy Research (CAEPR), ANU, May 2022), <https://doi.org/10.25911/05QA-0R43>.

³ Hon Patrick Gorman (2022, December 1). *First Reading of Referendum (Machinery Provisions) Amendment Bill 2022*. House of Representatives.

https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansardr/26234/&sid=0042

This would be regrettable for three reasons. First, the disenfranchisement of any Australian citizen is problematic at any time. But for Indigenous citizens, who were excluded from voting for many decades in Australia, and in the context of a referendum specifically about Indigenous political representation, this would be especially problematic.

Second, if the Voice proposed in the Uluru Statement from the Heart is to meet its promise of increasing Indigenous engagement in public life, its legitimacy with both Indigenous peoples and the broader Australian public is of utmost importance. If significant numbers of Indigenous people were unable to vote in the referendum, it could degrade the legitimacy of the Voice before it is even established.

Third, such an event would be deeply embarrassing for the Australian Electoral Commission (AEC). It could potentially reduce public confidence in the AEC's ability to administer Australian elections and referendums fairly.

There are good reasons to fear that this unfortunate scenario may occur during the Voice Referendum. The rate at which Indigenous Australians participate in elections is significantly lower than the national average, and declining. Official estimates by the AEC suggest that the number of Indigenous people on the electoral role has steadily increased over the past two decades, from 74.7% 30 June 2017 to 81.7% on 30 June 2022.⁴ However, such estimates do not account for Indigenous population increase at the 2021 Census and, once this is corrected for, Indigenous enrolment rates appear to be declining. While no official Indigenous turnout statistics exist, it is clear that, in remote Indigenous communities, turnout is low – it indeed fell between 2019 and 2022. For more details on this matter, we refer the committee to our submission to its current inquiry into the conduct of the 2022 election.⁵

In this context of relatively low enrolment, the Voice Referendum — being highly salient to Indigenous citizens — is likely to engage more Indigenous voters. As more Indigenous citizens attempt to have their democratic say — including those who may not be habitual voters in federal and state/territory elections — existing flaws of electoral administration are likely to be exposed. In the referendum context, reforms that were already necessary to increase Indigenous electoral participation in federal elections have become urgent. For example, it is concerning that the allegations that current electoral administration practices constitute a form of indirect racial discrimination⁶ against Indigenous people appear unlikely to be resolved before the Voice Referendum.

It would not only be unconscionable — but also poor risk management — to hold the Voice Referendum without efforts to remove the barriers preventing many Indigenous citizens of Australia from exercising their right to vote. Accordingly, this submission does not address the content of the amendment Bill specifically, much of which we agree with. Instead we focus on what is not in the Bill: amendments to the *Referendum (Machinery Provisions) Act 1984* and the *Commonwealth Electoral Act 1918* that would facilitate greater Indigenous participation in

⁴ Australian Electoral Commission, 2022, *Indigenous enrolment rate*, https://aec.gov.au/Enrolling_to_vote/Enrolment_stats/performance/indigenous-enrolment-rate.htm

⁵ Morgan Harrington and Francis Markham (2022, October 20), *Submission to the Joint Standing Committee on Electoral Matters Inquiry into the conduct of the 2022 federal election* (Submission no. 430). <https://www.aph.gov.au/DocumentStore.ashx?id=defd7729-6244-4bc3-bc0e-d5818188faaf&subId=722862>

⁶ See the submission made by Matthew Ryan (Submission 1492) to the JSCEM's Inquiry into the Conduct of the 2022 Federal Election.

the referendum. We believe that these issues have perhaps been overlooked by this Government through haste rather than by intention, and wish to make some constructive suggestions regarding how this could be addressed.

Specifically, we make six recommendations that we believe will assist in the enfranchisement of eligible Indigenous voters. Three of these recommendations require amendments to the *Referendum (Machinery Provisions) Act 1984* and, in the context of the current Bill, should be urgently considered by the Committee.

- 1. That the *Referendum (Machinery Provisions) Act 1984* and *Commonwealth Electoral Act 1918* be amended to add a savings provision allowing eligible unenrolled electors to enrol and cast a vote at a polling place.**
- 2. That the AEC's work to implement Federal Direct Enrolment and Update (FDEU) in previously under-served regions be expanded.**
- 3. That s. 51(5) of the *Referendum (Machinery Provisions) Act 1984* be altered to extend the period during which mobile polling can take place from 12 to 26 days, and that the AEC use this extension to provide greater access to the ballot for remote voters in the Voice Referendum.**
- 4. That the Committee consider ways to extend the provision of interpreters to Indigenous Australians for whom English is not a first language.**
- 5. That s. 51(8)(a) of the *Referendum (Machinery Provisions) Act 1984* be amended to require mobile polling teams to have a supply of "how-to-vote" cards available to provide to voters if requested.**
- 6. That the *Referendum (Machinery Provisions) Act 1984* be amended to allow for the posing of clear referendum questions, rather than the potentially confusing wording currently required by s.25.**

On the day enrolment

Give its salience to First Nations citizens, there is a strong likelihood that many currently unenrolled First Nations citizens will wish to vote in the referendum on the Voice. There are two strategies to address the issue of under-enrolment among First Nations citizens. The first, and potentially most effective, is to allow on-the-day enrolment as a savings provision.

According to the *Referendum (Machinery Provisions) Act 1984* (s.9) no elector can be added to the roll from seventh calendar day after writs are issued for a referendum. This means that no one can vote in the referendum unless they are enrolled 26 – 51 days before the referendum is held.

Following the example of the *Electoral Act 2004 (NT)*, which provides for on-the-day enrolment as a savings provision, a safety net could be provided to ensure that no one is disenfranchised through non-enrolment. Similar enrolment saving provisions exist in New South Wales, Queensland and Victoria. Evidence from the Northern Territory suggests that on-the-day enrolment helps increase the rate of both enrolment and voting among eligible Indigenous citizens.

For example, in Legislative Assembly elections administered by the Northern Territory Electoral Commission (NTEC), unenrolled eligible voters are enabled to complete a declaration vote and have their enrolment details forwarded to the AEC. Once enrolment is confirmed, these declaration votes are added to the count. In the 2020 Territory election, 1,709 declaration votes of this type were counted — 1.6% of all ballot papers.⁷

We believe that a similar on-the-day enrolment and voting mechanism should be considered for elections administered by the AEC. This would enfranchise a significant number of unenrolled Indigenous citizens, and avoid a potentially embarrassing media spectacle that could harm the legitimacy of any eventual Indigenous Voice.

Allowing on-the-day enrolment would require an amendment to the *Commonwealth Electoral Act 1918* and *Referendum (Machinery Provisions) Act 1984*.

- 1. That the *Referendum (Machinery Provisions) Act 1984* and *Commonwealth Electoral Act 1918* be amended to add a savings provision allowing eligible unenrolled electors to enrol and cast a vote at a polling place.**

Federal Direct Enrolment and Update

Another strategy that may contribute towards increasing Indigenous electoral enrolment would be to expand the application of the Federal Direct Enrolment and Update (FDEU) process. This could increase the enrolment of Indigenous people prior to the close of rolls for the Voice Referendum. FDEU enables the AEC to register eligible Australians to vote based on information available through several government agencies including Centrelink, Services Australia, the Australian Taxation Office, and the National Exchange of Vehicle and Driver Information Service. Until the September 2022 announcement⁸ of a pilot program in remote

⁷ Northern Territory Electoral Commission (2021). *Annual Report 2020-2021*. Darwin.
https://ntec.nt.gov.au/_data/assets/pdf_file/0010/1065466/2020-2021-Annual-Report.pdf

⁸ Australian Electoral Commission, 2022, *Significant Boost to First Nations Enrolment Announced*, September 1, 2022, <https://www.aec.gov.au/media/2022/09-01.htm>

parts of Australia, the FDEU was only applied where mail is delivered to a street address. This had the effect of excluding most discrete Indigenous communities, which rely on PO Boxes or a single community mail bag.

In June 2021, two community leaders from Arnhem Land, including Matthew Ryan, the Mayor of the West Arnhem Regional Council, launched an official complaint to the Australian Human Rights Commissioner over this issue, claiming that failure to apply the FDEU in remote communities represented a breach of the *Racial Discrimination Act 1975*.⁹ This complaint is currently in conciliation.¹⁰

The FDEU has been a great success in significantly increasing rates of enrolment across Australia to the point that the roll is now the most complete it has ever been.¹¹ There is every reason to expect that the extension of this program to remote parts of Australia could do the same – if it is broadly and rapidly applied.

As it stands, for the trial extension of FDEU to remote communities, the AEC will send letters to approximately 800 eligible but unenrolled potential voters in approximately 60 remote locations across the Northern Territory, Queensland, and Western Australia.¹² If letters were sent to an equal number of people in each community, the pilot would reach approximately seven and a half people in each community. These 800 eligible but unenrolled potential voters is a tiny fraction of the many thousand unenrolled. We fear that if the referendum on an Indigenous Voice is held in the 2023-2024 financial year, this trial may not precede rapidly enough to be relied on as the primary mechanism to enfranchise unenrolled Indigenous citizens. We support calls for the AEC to work with Aboriginal organisation to assist with the application of the FDEU program in remote communities, and for the AEC to use options other than ordinary mail – including electronic communication – as part of its effort to increase enrolment among Indigenous people.¹³

2. That the AEC's work to implement Federal Direct Enrolment and Update (FDEU) in previously under-served regions be expanded.

The provision of polling booths to remote Indigenous communities

To service remote communities during federal elections, the AEC relies on its Remote Mobile Polling teams, which travel between these communities to provide ballot boxes and election officials to oversee voting and ballot security. However, limited time, resources and flexibility mean that the Remote Mobile Polling booths provided by the AEC can be present for as little as a single hour during an entire election period. The alleged underservicing of some remote

⁹ Roxanne Fitzgerald, *Indigenous Voters Lodge Discrimination Complaint Against Australian Electoral Commission*, ABC News, June 19, 2021: <https://www.abc.net.au/news/2021-06-19/nt-voters-racial-discrimination-human-rights-commission/100227762>

¹⁰ See the submission made by Matthew Ryan (Submission 1492) to the JSCEM's Inquiry into the *Referendum (Machinery Provisions) Amendment Bill 2022*.

¹¹ Joint Standing Committee on Electoral Matters, *Report on the conduct of the 2019 federal election and matters related thereto*, December 2020, p. 16

¹² Australian Electoral Commission, 2022, *Significant Boost to First Nations Enrolment Announced*, September 1, 2022, <https://www.aec.gov.au/media/2022/09-01.htm>

¹³ See the submission made by Matthew Ryan (Submission 1492) to the JSCEM's Inquiry into the Conduct of the 2022 Federal Election.

communities through the use of Remote Mobile Polling is a further subject of the racial discrimination complaint mentioned above.¹⁴

Analysis of remote mobile polling schedules for the Division of Lingiari during the 2022 federal election shows that, from 205 locations served by remote mobile polling, polling teams were present at 154 locations for four hours or less. This included 95 locations in which polling booths were present for a single hour. The requirement stipulated in s. 51(5) of the *Referendum (Machinery Provisions) Act 1984* that these locations all be serviced during a 12 day period is a major constraint on electoral administration that limits access to the ballot in remote communities.

Remote mobile polling causes issues partly because booths are often only available for a short time, but also because their presence is unpredictable and poorly advertised. Under s. 227(4)(b) of the *Commonwealth Electoral Act 1918* (and identical provisions in s. 51(4)(b) of the *Referendum (Machinery Provisions) Act 1984*) schedules are required to be published online and ‘by any other means that the Electoral Commissioner thinks fit’ in the weeks before an election. However, many community members do not know which day the remote polling team will be visiting remote communities. For example, a report commissioned by the Ngaanyatjarra, Pitjantatjara Yankuntjatjara Women’s Council about enrolment and participation in the 2022 federal election, found that “most people told us they did not know voting was happening until they saw AEC staff setting up. Lots of people said they did not know what they were there for.” According to this report, “the period of time the booths are open in the communities gives people a limited opportunity to vote.”¹⁵

This uneven and unpredictable provision of polling booths in Indigenous communities and outstations relative to the rest of Australia may contribute to low remote voter turnout rates. Consider that, at the other end of the spectrum, voters in Australia’s major cities are provided with the opportunity to vote at pre-polling centre for up to 12 days before an election.

As well as providing more notice of schedules and extending the time remote mobile polling is available, more flexibility needs to be built into schedules. At federal and state/territory elections, anecdotes are often reported of communities where turnout rates are exceptionally low due to other events, such as funerals, taking precedence in community life. A more flexible approach to mobile polling might require some slack being built into schedules to facilitate return visits by remote mobile polling teams to communities where turnout is unusually low.

Providing a more flexible and generous remote mobile polling schedule is likely to have resourcing implications for the AEC, but is also likely to require a greater amount of time. Unlike in federal elections, referendum dates are fixed with considerable notice, with the Constitution requiring a minimum period of two months between the passage of the proposed law for the alteration the Constitution through Parliament and referendum day. Put simply, referendum timelines allow a longer period for remote mobile polling than federal election timelines.

¹⁴ Roxanne Fitzgerald, *Indigenous Voters Lodge Discrimination Complaint Against Australian Electoral Commission*, ABC News, June 19, 2021: <https://www.abc.net.au/news/2021-06-19/nt-voters-racial-discrimination-human-rights-commission/100227762>.

¹⁵ Kavanagh, M., 2022, *Report on NPY Women’s Council project with the Australian Electoral Commission Indigenous Electoral Participation Project Getting the Engagement Right*, p.14

However, s. 51(5) of the *Referendum (Machinery Provisions) Act 1984* limits the period in which remote mobile voting may take place to a span of just 12 days. We believe that the legislation should be amended to increase this period substantially, and see little obstacle to doubling this period to 26 days.

- 3. That s. 51(5) of the *Referendum (Machinery Provisions) Act 1984* be altered to extend the period during which mobile polling can take place from 12 to 26 days, and that the AEC use this extension to provide greater access to the ballot for remote voters in the Voice Referendum.**

Language and interpreters

Interpreters are needed not only to translate written and verbal information, but to assuage any potential distrust, disinterest or fear of government. Interpreters need to have good literacy levels, fluency in the relevant language(s), and a working knowledge of Aboriginal sign language. A report on Anangu participation in the 2022 federal election, Kavanagh found that:

apart from having community member's trust and knowing their circumstances, they [community field officers] also know it is important not to rush people or make them feel foolish if they don't know what to do. When people are feeling powerless and staff don't understand or hurry you along, then people will just walk away [from a polling station] to save face.¹⁶

Given the essential service they provide, the provision of interpreters to work with the AEC in Indigenous communities needs to be addressed.¹⁷

This is likely to be especially important during the Voice Referendum in comparison with federal and state/territory elections. In elections, scrutineers from political parties are often available at the polling place to assist voters who struggle with English literacy to complete a formal ballot. It is not at all clear if such scrutineers are going to be present at polling places during the Voice Referendum, especially with remote mobile polling teams.

It is also concerning that, unlike s. 227(8)(a) of the *Commonwealth Electoral Act 1918*, s. 51(8)(a) of the *Referendum (Machinery Provisions) Act 1984* does not require remote mobile polling teams to provide voters with "how-to-vote" cards. If political parties do not provide volunteers at remote mobile polling booths to hand out how-to-vote cards, there may be an absence of material assisting voters to complete a valid ballot at polling places. Replicating the relevant provisions of the *Commonwealth Electoral Act 1918* may ameliorate this problem.

- 4. That the Committee consider ways to extend the provision of interpreters to Indigenous Australians for whom English is not a first language.**
- 5. That s. 51(8)(a) of the *Referendum (Machinery Provisions) Act 1984* be amended to require mobile polling teams to have a supply of "how-to-vote" cards available to provide to voters if requested.**

¹⁶ Kavanagh, M, 2022, 'Report on NPY Women's Council project with the Australian Electoral Commission Indigenous Electoral Participation Project Getting the Engagement Right', pp. 9-10

¹⁷ Committee Hansard, Joint Standing Committee on Electoral Matters Hansard, 2022 Federal Election Inquiry, Thursday 3 November, 2022, Canberra, p. 10

Question wording

Finally, we note that the proposed amendment to the *Referendum (Machinery Provisions) Act 1984* does not allow for a “simple and clear” question to be posed for the Voice Referendum, as the Prime Minister suggested should be the case.¹⁸ At the Garma Festival in July 2022, the Prime Minister suggested that electors would vote on the question: ‘Do you support an alteration to the Constitution that establishes an Aboriginal and Torres Strait Islander Voice?’

However, putting such a question to voters would require amendments to the *Referendum (Machinery Provisions) Act 1984* (s. 25) that are not included in the present Bill. Currently, voters are presented with the long title of the proposed law, followed by the question ‘DO YOU APPROVE THIS PROPOSED ALTERATION?’ This makes the wording of the referendum unnecessarily confusing. We suggest that amendments to s. 25 be made to allow a clear, plain language question, like the one proposed by the Prime Minister, to be put to the people of Australia in the referendum on the Voice.

- 6. That the *Referendum (Machinery Provisions) Act 1984* be amended to allow for the posing of clear referendum questions, rather than the potentially confusing wording currently required by s.25.**

¹⁸ Lorena Allam, *Anthony Albanese reveals ‘simple and clear’ wording of referendum question on Indigenous voice*, The Guardian, 30 July 2022, <https://www.theguardian.com/australia-news/2022/jul/29/anthony-albanese-reveals-simple-and-clear-wording-of-referendum-question-on-indigenous-voice>