



Law Council
OF AUSTRALIA

Office of the President

19 December 2022

Ms Kate Thwaites MP
Chair
Joint Standing Committee on Electoral Matters
PO Box 6022
House of Representatives
Parliament House
CANBERRA ACT 2600

By email: em@aph.gov.au

Dear Chair

REFERENDUM (MACHINERY PROVISIONS) AMENDMENT BILL 2022

1. The Law Council welcomes the opportunity to provide a submission to the Joint Standing Committee on Electoral Matters (**Committee**) in relation to its inquiry into the Referendum (Machinery Provisions) Amendment Bill 2022 (Cth) (**Bill**).
2. This submission was informed by contributions from the New South Wales Bar Association and the Law Council's National Human Rights Committee and Indigenous Legal Issues Committee.
3. Since 2017, the Law Council has consistently advocated for a First Nations Voice to Parliament enshrined in the Australian Constitution, as called for in the Uluru Statement from the Heart and the recommendations of the Referendum Council. Consistent with this longstanding position, following the 2022 Federal Election, the Law Council welcomed the incoming Australian Government's commitment to holding a referendum on the Voice as a matter of priority.¹
4. A well-informed electorate is critical to any referendum process, and it is important that the systems and procedures set out in the *Referendum (Machinery Provisions) Act 1984* (Cth) (**Act**) are fit-for-purpose, particularly given changes in communication since the most recent referendum in 1999.

Suspension of section 11

5. Clause 4 of the Bill would temporarily suspend the operation of section 11 of the Act. Section 11 relates to the distribution to electors of arguments for and against proposed law and provides:

¹ Law Council of Australia, '[47th Parliament must move swiftly toward referendum on Voice to Parliament](#)' (Media Release, 26 May 2022).

- the requirements for the postal distribution of a pamphlet containing arguments for and against a proposed law, authorised by members of Parliament, to all enrolled households; and
- restrictions on the expenditure of Commonwealth money in relation to the presentation of the argument in favour of, or the argument against, a proposed law.

6. The Explanatory Memorandum to the Bill notes:

It has been over 100 years since the introduction of the official pamphlet and its form has changed very little since 1912. It is also the only official material provided to electors prior to a referendum. Since that time, the methods of communication have changed significantly. In 2022, it is appropriate to ask whether there is a more effective way to engage and inform the Australian public about the Constitution and proposed constitutional change.

Temporary suspension will ensure there is more than one way to communicate with electors before a referendum, and allows parliamentarians to choose how, and when to engage with their relevant constituencies.²

7. The suspension of section 11 removes many of the prescriptive restrictions on public expenditure during a referendum. In his second reading speech on the Bill, the Assistant Minister to the Prime Minister, the Hon Patrick Gorman MP, advises that the Australian Government will not be funding ‘yes’ and ‘no’ campaigns, and will instead distribute ‘factual information about the referendum’ to ‘provide voters with a good understanding of Australia’s constitution, the referendum process, and factual information about the referendum proposal’.³
8. The Law Council agrees that section 11 is no longer fit for purpose. In its 2021 submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs’ (**House Committee**) inquiry into constitutional reform and referendums, the Law Council recommended:

1. Abolishing restrictions on expenditure by the Commonwealth Government, including money to a dedicated neutral campaign to lift understanding of process and providing Commonwealth funding to a dedicated ‘Yes’ and ‘No’ committee... [and]

2. Modernising section 11 of the Referendum (Machinery Provisions) Act 1984 (Cth) to allow the use of digital platforms to disseminate information on Yes/No campaigns, rather than restricting the dissemination of information to voters via hard copy.⁴

9. While the Law Council supports the Bill in its current form, including the suspension of section 11 of the Act, it notes that this is a temporary solution to the issues. The practice of previous Australian Governments in suspending section 11 may indicate that a longer-term solution is necessary.⁵ In line with the House Committee’s recommendations, the Law Council suggests that the Australian Parliament should seek

² Explanatory Memorandum, Referendum (Machinery Provisions) Amendment Bill 2022 (Cth) 12-13.

³ Commonwealth, *Parliamentary Debates*, House of Representatives, 1 December 2022, 14 (Patrick Gorman, Assistant Minister to the Prime Minister).

⁴ Law Council of Australia, Submission No 16 to House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into Constitutional Reform and Referendums* (20 August 2021) 3.

⁵ As noted in the Explanatory Memorandum, the suspension of section 11 is not a novel approach, and is consistent with the approach prior to the 1999 referendum and the proposed 2013 referendum: Explanatory Memorandum, Referendum (Machinery Provisions) Amendment Bill 2022 (Cth) 13.

to modernise this provision, and the Act more generally, ahead of any referendums that may occur beyond the term of this Parliament.

10. The suspension of section 11 does not engage with the broader questions relating to the extent of the obligation to inform the public about the proposed constitutional change (including, the arguments for and against the change) and how public money should be used to this end. The approach of suspending section 11 removes any obligation to inform the public at all about the referendum. The Law Council recognises that there is, nevertheless, a clear Government commitment to provide information about the forthcoming referendum in a neutral manner. However, the Law Council considers that funding the distribution of referendum information in an ad-hoc and less principled way may leave the public unclear on what constitutes an authoritative ‘yes’ versus ‘no’ case.
11. This may be a particular concern where persons on each side might have unequal access to public discourse using their own resources. It would be unfortunate if a well-resourced supporter or opponent of a referendum were to spend excessively on a campaign, and opponents or supporters of the referendum simply did not have the resources to respond. The Law Council notes that the proposed amendments, in Schedule 4 to the Bill, to the financial disclosure and foreign donations frameworks are important to providing transparency around the funding of referendum campaigns. However, many potential electors may not be in a position to readily access this information or to analyse campaign materials.
12. The deleterious effect of factually incorrect and extreme views on democratic processes, civil society and vulnerable minority groups is now notorious. This is particularly so when promulgated through the targeted and narrowing information streams provided online, particularly on social media. The impact of such misinformation, if not properly countered, including through publicly funded distribution of information, could have a significant impact on the outcome of a referendum.
13. To address these issues in the longer term, the Parliament could consider the legislative establishment, and public funding, of an independent referendum panel—as was recommended by the House Committee.⁶ The panel could oversee ‘Yes’ and ‘No’ committees, formulate the ultimate question used in the referendum ballot, and manage neutral information and education activities including ongoing public education initiatives leading up to a referendum.
14. The establishment of such a panel could provide an independent, neutral, and reliable source of information about the referendum, and provide an important moderating function in relation to privately funded campaigns.
15. In the Law Council’s view, the Australian Parliament should also establish a set of principles to inform the use of public funding to provide information to the electorate ahead of a referendum. These principles could underpin the work of the independent referendum panel, were it to be established.

Financial disclosure and foreign donations frameworks

16. The Law Council notes that Schedule 4 to the Bill seeks to bring the financial disclosure and foreign donations frameworks under the Act in line with Part XX of the *Commonwealth Electoral Act 1918* (Cth). This accords with the recommendation of the House Committee and is supported by the Law Council.⁷

⁶ House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into constitutional reform and referendums* (Report, December 2021), recommendation 9.

⁷ *Ibid*, recommendation 8.

Effective access to information about the Referendum and access to voting

17. It is important that all Australians are able to access accurate and understandable information regarding any questions being put forward in a referendum, but also about how to participate in the referendum process.
18. The Law Council notes that the recent Budget included \$16.1 million over two years from 2022–23 to the Australian Electoral Commission to increase First Nations enrolment and participation in future electoral events, including a referendum on the Voice to Parliament.⁸
19. In this regard, the Law Council refers the Committee to its 25 October 2022 submission to the Committee in relation to the inquiry into the 2022 Federal Election. That submission dealt significantly with encouraging increased electoral participation of First Nations people and other members of the Australian electorate who may be disenfranchised.⁹

Contact

20. Thank you for your consideration of the matters raised in the submission. If the Law Council can be of any further assistance to the Committee in the course of its inquiry, please contact Nathan MacDonald, Deputy Director of Policy, on (02) 6246 3721 or at nathan.macdonald@lawcouncil.asn.au.

Yours sincerely



Mr Tass Liveris
President

⁸ Australian Government, *Budget October 2022-23* (Budget Paper No 2, 25 October 2022), 107.

⁹ Law Council of Australia, Submission No 1379 to Joint Standing Committee on Electoral Matters, Parliament of Australia, *Inquiry into the 2022 federal election* (25 October 2022)
<<https://www.lawcouncil.asn.au/resources/submissions/inquiry-into-the-2022-federal-election>>.