

# Referendum machinery

## *Submission*

**Bill Browne**

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### Summary

The Australia Institute welcomes the modernising of Australia’s referendum machinery ahead of the referendum to enshrine an Aboriginal and Torres Strait Islander Voice in the Australian Constitution.

To limit the impact of misinformation on the referendum debate, we recommend that the Parliament legislate truth in political advertising laws and stronger political contribution disclosures.

The existing pamphlet system is flawed, but universally-distributed printed material still has a role to play in Australians’ decision making. Rather than abolishing the pamphlet, the Parliament could require it to be drafted by independent experts to fairly present the case for each side.

Further reforms should be considered to prepare Australia for future referendums, either in this bill or in later legislation.

### Introduction

The Australia Institute welcomes the opportunity to make a submission to the Referendum (Machinery Provisions) Amendment Bill 2022 inquiry.

The Australia Institute’s Democracy & Accountability Program was founded in 2021 to improve the quality of Australian governance and heighten public trust in politics and democracy. Although the program is new, the Australia Institute has written about democracy and accountability issues since it was founded in 1994.

The Institute has an interest in the referendum to enshrine an Aboriginal and Torres Strait Islander Voice in the Australian Constitution (the “Voice referendum”), and

expertise in how Parliament and its institutions function.<sup>1</sup> We conducted polling research showing most Australians plan to vote “Yes”.<sup>2</sup>

There are real concerns that the Voice referendum debate could become the subject of misinformation. Exaggerated claims have been a feature of many earlier referendums.<sup>3</sup> Constitutional experts warn that misinformation could distort how people vote<sup>4</sup> and factchecking has already found some claims made in relation to the Voice were incorrect or misleading.<sup>5</sup> Vitriolic comments are already being anticipated, given the ugly and hyperbolic statements made by some opponents of the same-sex marriage plebiscite.<sup>6</sup>

This submission recommends measures to reduce or counter misinformation in relation to the Voice referendum, as well as reforms to facilitate future referendums.

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<sup>1</sup> See for example Browne & Oquist (2021) *Representative, still*, <https://australiainstitute.org.au/report/representative-still-the-role-of-the-senate-in-our-democracy/>

<sup>2</sup> The Australia Institute (2022) *Polling – Voice to Parliament in the Constitution*, <https://australiainstitute.org.au/report/polling-voice-to-parliament-in-the-constitution/>

<sup>3</sup> Bennett (2003) *The Politics of Constitutional Amendment*, [https://www.aph.gov.au/about\\_parliament/parliamentary\\_departments/parliamentary\\_library/pubs/rp/rp0203/03rp11](https://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/rp/rp0203/03rp11)

<sup>4</sup> Appleby & Hill (2022) *When the Indigenous voice referendum is upon us, be wary of misinformation and scare campaigns*, <https://www.theguardian.com/australia-news/commentisfree/2022/sep/07/when-the-indigenous-voice-referendum-is-upon-us-be-wary-of-misinformation-and-scare-campaigns>

<sup>5</sup> RMIT ABC Fact Check (2022) *We fact checked claims about the Voice to Parliament being a “third chamber”. Here’s what we found*, <https://www.abc.net.au/news/2022-09-23/fact-check-indigenous-voice-to-parliament-not-a-third-chamber/101460726>; RMIT Australia (2022) *Will the proposed Indigenous Voice to Parliament become a third chamber?*, <https://www.rmit.edu.au/news/factlab-meta/will-the-proposed-indigenous-voice-to-parliament-become-a-third->; Summers (2022) *Greens senator wrong on Indigenous consultation claim*, <https://www.aap.com.au/factcheck/greens-senator-wrong-on-indigenous-consultation-claim/>; Tan (2022) *Posts make false claims about proposed Indigenous consultative body to Australian parliament*, <https://factcheck.afp.com/doc.afp.com.32G9699>; Woods (2019) *Is it a beat-up? We fact check the IPA’s campaign against a Voice to Parliament*, <https://www.crikey.com.au/2019/11/01/ipa-voice-to-parliament-fact-check/>

<sup>6</sup> Butler (2022) *Marcia Langton warns of risk of ‘nasty, eugenicist’ debate about race ahead of voice referendum*, <https://www.theguardian.com/australia-news/2022/dec/05/indigenous-voice-to-parliament-referendum-marcia-langton-warns-risk-eugenicist-race-debate>; Collard (2022) *‘Toxic rhetoric’: marriage equality plebiscite offers ugly lessons for Indigenous voice to parliament referendum*, <https://www.theguardian.com/australia-news/2022/dec/11/toxic-rhetoric-marriage-equality-plebiscite-offers-ugly-lessons-for-indigenous-voice-to-parliament-referendum>; Kelly (2022) *Loud and ‘nasty’ voices may not speak the truth on the Voice*, <https://www.smh.com.au/politics/federal/loud-and-nasty-voices-may-not-speak-the-truth-on-the-voice-20221211-p5c5cd.html>

The Institute would welcome the opportunity to discuss research findings in further detail at any committee hearing.

## Truth in political advertising

The Albanese Government has committed to legislating truth in political advertising laws after they have been considered by the Joint Standing Committee on Electoral Matters (JSCEM) in their inquiry into the 2022 election.<sup>7</sup>

The Australia Institute strongly recommends that these laws be in place for the Voice referendum.

Zali Steggall MP has prepared a private member's bill that would regulate misleading advertising in both referendum matter and electoral matter.<sup>8</sup>

To prevent misleading advertising influencing the Voice referendum, Parliament should pass truth in political advertising laws that cover referendums as well as elections. The Government could support Steggall's bill or introduce its own.

## Political contribution disclosures

Under the Referendum (Machinery Provisions) Amendment Bill 2022, the laws for disclosing political contributions in relation to the referendum would be similar to those in place for elections.

It makes sense for referendums and elections to have the same disclosure laws, but Australia's disclosure laws for elections are too weak. The 2022 election inquiry is considering real-time disclosure of political contributions and lowering the threshold before a contribution must be disclosed.<sup>9</sup> As well as providing information about political influence, disclosures help hold contributors to account for the actions of the political campaigns that they fund.

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<sup>7</sup> Karp (2022) *Labor aims to legislate spending caps and truth in advertising, says Don Farrell*, <https://www.theguardian.com/australia-news/2022/jul/10/labor-aims-to-legislate-spending-caps-and-truth-in-advertising-says-don-farrell>

<sup>8</sup> *Commonwealth Electoral Amendment (Stop the Lies) Bill 2022 (Cth)*, [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bld=r6947](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6947)

<sup>9</sup> Joint Standing Committee on Electoral Matters (2022) *Inquiry into the 2022 federal election: Terms of reference*, sec. a, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Electoral\\_Matters/2022federal-election/Terms\\_of\\_Reference](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Electoral_Matters/2022federal-election/Terms_of_Reference)

The Voice referendum should be conducted under stricter disclosure laws, including a lower threshold before a contribution must be disclosed and real-time disclosure requirements. Parliament could guarantee this while keeping referendum and election disclosure laws consistent by strengthening both laws at the same time.

## Information campaigns and discussion of each case

The bill as drafted suspends section 11 of the *Referendum (Machinery Provisions) Act 1984*, which includes the requirement for the government to circulate a pamphlet putting the “Yes” and “No” cases, a feature of Australian referendums since 1912.<sup>10</sup> The arguments are normally prepared by parliamentarians voting for and against the proposed referendum.<sup>11</sup>

The Government argues:

Modern technology allows parliamentarians to express their views to voters directly and regularly through a wide range of sources, such as television, email and social media, that did not exist when the pamphlet was introduced in 1912.<sup>12</sup>

While this is true, printed material remains an effective way to communicate with the vast majority of Australians. Unlike TV or radio broadcasts or most online advertising, printed material can be considered at the recipient’s own pace, as often as needed, when the recipient is in the right mindset to take it in. Certain government documents are distributed physically to ensure universal coverage; for example, the Australian Census is delivered in print and reaches almost every person in Australia.<sup>13</sup>

Another argument for abolishing the pamphlet is that past pamphlets have facilitated misinformation. In 1985, Professor Colin Howard reviewed past pamphlets and concluded that the “Yes” case usually bore a close resemblance to the proposal but the

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<sup>10</sup> Twomey (2022) *The government will not send out Yes and No case pamphlets ahead of the Voice to Parliament referendum. Does this matter?*, <http://theconversation.com/the-government-will-not-send-out-yes-and-no-case-pamphlets-ahead-of-the-voice-to-parliament-referendum-does-this-matter-195806>

<sup>11</sup> *Referendum (Machinery Provisions) Act 1984* (Cth), sec.11, <https://www.legislation.gov.au/Details/C2022C00073/Html/Text>

<sup>12</sup> Gorman (2022) *Referendum (Machinery Provisions) Amendment Bill 2022: Second Reading*, <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F26234%2F0045%22>

<sup>13</sup> Noting that households are encouraged to fill out the forms electronically. Australian Bureau of Statistics (2022) *How the data is collected*, <https://www.abs.gov.au/census/guide-census-data/census-methodology/2021/how-data-collected>

“No” case “is usually a totally unreliable guide to what the amendment is all about”, often seemingly designed to confuse readers about the nature of the proposal.<sup>14</sup>

Despite these flaws, the pamphlet need not be abolished. Academics have proposed alternatives. Professor Anne Twomey describes how New South Wales referendums use public servants to draft the pamphlet in consultation with experts, a practice that may contribute to the state’s high success rate (6 of 7 referendums to amend the Constitution were carried).<sup>15</sup>

Professors Gabrielle Appleby and Lisa Hill have also proposed reforms:

New rules should be introduced to require the pamphlet to include a clear and neutral explanation of the parts of the constitution that the government proposes to change. The arguments for and against should be brief, objective and factual, and the pamphlet should include a list of MPs who voted for and against the amendment. All of this should be overseen by an independent, diverse and expert-informed panel.<sup>16</sup>

A factual, neutral pamphlet putting the arguments of both sides may be preferable to removing the pamphlet altogether.

The Australia Institute does not object to the other purpose for suspending section 11, to allow expenditures for the purpose of educating Australians about the referendum, although we note the suggestion of academic Paul Kildea that an independent panel should advise on or run the campaign.<sup>17</sup>

## Further reforms worthy of consideration

Australia has gone 22 years without a referendum and 45 years without a successful referendum; the longest gaps in Australian history. Because referendums have a low success rate, governments are reluctant to hold them – but this only reinforces the conventional wisdom that constitutional reform is prohibitively difficult.

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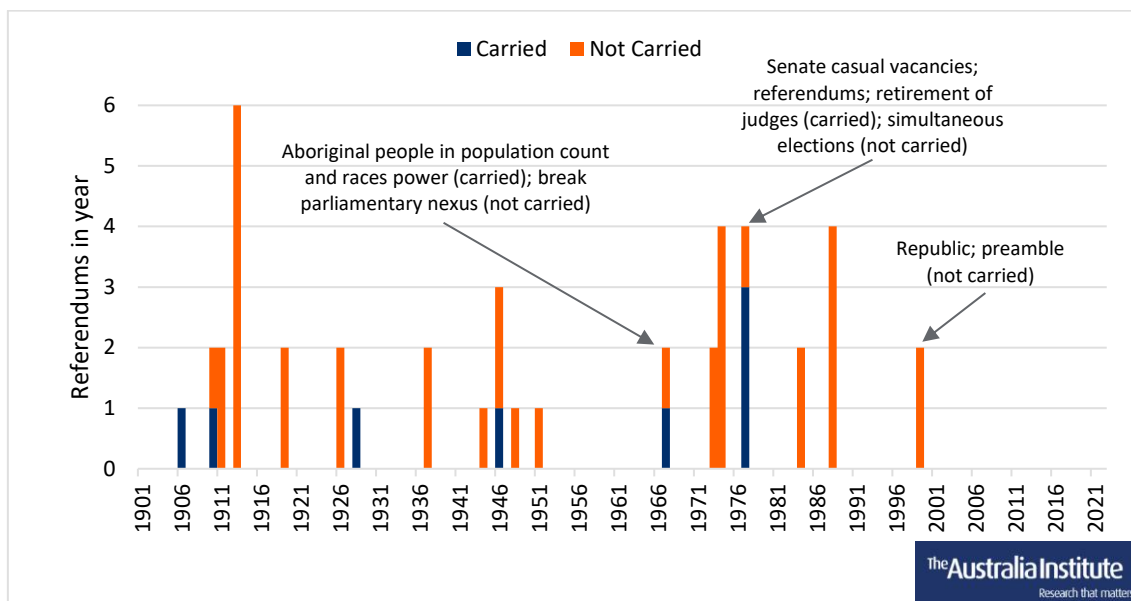
<sup>14</sup> Howard (1985) *Australia’s Constitution*, Penguin cited in Bennett (2003) *The Politics of Constitutional Amendment*

<sup>15</sup> Twomey (2004) *The Constitution of New South Wales*, p. 320, Federation Press in Twomey (2022) *The government will not send out Yes and No case pamphlets ahead of the Voice to Parliament referendum. Does this matter?*

<sup>16</sup> Appleby & Hill (2022) *When the Indigenous voice referendum is upon us, be wary of misinformation and scare campaigns*

<sup>17</sup> Kildea (2022) *The government wants to change Australia’s referendum laws. How will this affect the Voice to Parliament?*, <http://theconversation.com/the-government-wants-to-change-australias-referendum-laws-how-will-this-affect-the-voice-to-parliament-195632>

**Figure 1: Referendums since Federation (with details of key years)**



Source: Prepared by the Australia Institute

While this bill is understandably focused on the conduct of the 2023 referendum, broader reforms in this or a subsequent bill could facilitate future referendums. The House of Representatives Standing Committee on Social Policy and Legal Affairs has recommended structural reforms worthy of further consideration:

1. Expanding the National Schools Constitutional Convention (NSCC) program.
2. Attorney-General’s Department to “commission a study on the Australian people’s awareness of the Constitution, referendums and constitutional matters”.
3. A public education campaign.
4. Parliament to establish a Joint Standing Committee on Constitutional Matters.
5. The Australian Government to establish a process for regular constitutional conventions.<sup>18</sup>

The fifth recommendation is from Labor members rather than the report of the committee as a whole. The committee made other worthy recommendations, some of which are implemented in this bill.

<sup>18</sup> Standing Committee on Social Policy and Legal Affairs (2021) *Inquiry into constitutional reform and referendums*, pp. ix–xiii, 85–86, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/House/Social\\_Policy\\_and\\_Legal\\_Affairs/Constitutionalreform/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/Constitutionalreform/Report); paraphrased in Browne (2022) *Democracy Agenda for the 47<sup>th</sup> Parliament*, pp 37–38, <https://australiainstitute.org.au/report/democracy-agenda-for-the-47th-parliament-of-australia/>

## Conclusion

The Voice referendum is a rare opportunity for Australians to decide whether to change the Australian Constitution. That choice should be informed by the best possible information and be free from misinformation.

Truth in political advertising laws should be legislated ahead of the referendum, to ensure that referendum material is not misleading or inaccurate. Stricter laws regarding political contributions would inform the public about who is funding the respective campaigns.

Problems with the traditional pamphlet that sets out the “Yes” and “No” cases are well documented, but that does not mean that it should be scrapped altogether. Academics have described alternatives that would keep the pamphlet but make it a reputable, neutral description of the choice before voters.

Over the longer term, the Australia Institute hopes the committee and the Government give thought to other referendum reforms. Making referendums easier to propose and hold is important because there are other constitutional amendments that are also worthy of consideration, including:

- Adopting the recount method for senators, a fairer way of distributing seats after a double dissolution election.
- Section 44 reform or abolition, addressing outdated and ambiguous restrictions on the eligibility of parliamentarians on the basis of other citizenships, bankruptcy or certain financial relationships with the Commonwealth.
- Recognition of local government in the Constitution.
- A Constitutionally-enshrined right to freedom of expression or a broader Bill of Rights.
- Changes to allow for country-wide proportional representation.<sup>19</sup>

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<sup>19</sup> For more details, see Browne (2022) *Democracy Agenda for the 47<sup>th</sup> Parliament*, pp 33–38