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Submission of the Susan McKinnon Foundation to an Inquiry into the Referendum (Machinery Provisions) Amendment Bill 2022

Dear Chair,

Referenda are an important part of Australia’s democratic constitutional landscape. Moreover, the iterative and consultative development of the conduct of Australian elections and referenda since Federation has served Australian democracy incredibly well. The attached submission supports your inquiry into the Referendum (Machinery Provisions) Amendment Bill 2022 (**‘the Referendum Bill’**) by discussing the importance of referenda in Australian democracy and the proposed reforms within the Bill.

The [Susan McKinnon Foundation](#) (**‘the Foundation’**) is a non-partisan, philanthropic organisation focused on contributing to Australia’s public policy and democratic landscape with a view to building Australia’s long-term capacity to meet social and economic challenges. The Foundation’s objective is to help Australia achieve a more fit-for-purpose, effective political and policy system overall. That is because the Foundation strongly believes improving the overall political and public policy system will improve Australia’s capabilities to address the social and economic challenges we face now and in the future.

The Government has committed to a referendum on a First Nations Voice to Parliament before the end of 2023. This will be the first referendum since 1999. The twenty-four-year ‘referendum drought’ is the longest period since 1901 without a popular vote on a constitutional amendment. In that time, the Internet, social media, and disruptive online technologies have risen to dominate social and political networks.

While the digital age presents a new opportunity to inform voters, it also creates a greater risk of the dissemination of disinformation and misinformation. The risk of misinformation is heightened by the decline in voter education and awareness on civic issues – including the *Constitution* and the referendum process. Moreover, we estimate over 35 per cent of currently enrolled electors have never voted in a referendum. Therefore, the education of current and future voters on the Constitution, the referendum process, and the referendum proposal, is more important than ever.

Referenda are a critical democratic mechanism for shaping the evolution of the *Constitution*. The Susan McKinnon Foundation endorses the intent of the Australian Government to modernise the machinery of conducting referenda, and to harmonise the *Referendum (Machinery Provisions) Act 1984* ('the **Referendum Act**') with the legislative and procedural reforms of Australian elections in the twenty-first century.

Thank you for the opportunity to make a written submission to your important inquiry.

Susan McKinnon Foundation

15 December 2022

Background to The Susan McKinnon Foundation

The Susan McKinnon Foundation's aspiration is for Australia to have the world's most effective governments, focused on the long term interests of the Australian community. The Foundation incubates, delivers and supports practical improvements to how government works. Its mission focuses on three key areas: effective elected representatives, robust state institutions and quality policy dialogue.

The Foundation is politically neutral and motivated only by the public good.

The Foundation was founded in 2015 by Grant Rule and Dr Sophie Oh. It has a track record of serving the public interest through unique initiatives such as the McKinnon Prize, the McKinnon Institute ('**MKI**') and the Evidence-Based Policy Decision Making ('**EBPDM**') program. Collectively, these initiatives have sought to promote best practice public policy and political leadership.

After the sale of Grant's company, MessageMedia, in 2021, and a large donation made by Grant and Sophie, The Foundation is significantly expanding its scope of operations and mission remit.

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Context of the Referendum Bill

On 1 December 2022, the Referendum (Machinery Provisions) Bill 2022 (‘the **Referendum Bill**’) was introduced to the House of Representatives by the Assistant Minister to the Prime Minister, the Hon Mr Patrick Gorman MP. As summarised in the Second Reading Speech, the Referendum Bill will modernise the legislation that governs how a referendum to enshrine a First Nations Voice in the Australian Constitution will be conducted¹.

The Referendum Bill amends the Act by:

- Updating provisions concerning postal voting, the sorting and counting of votes, authorisation, designated electors, and contingency measures to align with recent changes to the Electoral Act;
- Ensuring the donations disclosure regime for referenda mirrors that of elections, including the prohibition of foreign donations;
- Disapplying the requirement of the distribution of a Yes/No pamphlet;
- Temporarily suspending the expenditure restrictions to ensure the Government can provide voters with factual information about the referendum process, Australia’s Constitution, and the Voice proposal.

Importance of referenda in Australian democracy

Through the referendum mechanism in section 128, the *Constitution* is designed to evolve through democratic participation. The progress of society, through new ideas, technologies, culture, and attitudes, creates an impetus to adapt our institutional framework for social and political organisation. Professor Michael Coper, a leading Australian legal academic and constitutional scholar, remarks that “[a] Constitution, like any instrument of social control, must contain some mechanism for change”². More illustratively, Thomas Jefferson, principal author of the Declaration of the Rights of Man and third President of the United States of America, opined:

“Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment... I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors”³.

¹ The Hon Patrick Gorman MP (2022) ‘Second Reading Speech - Referendum (Machinery Provisions) Amendment Bill’, *Official Hansard*, 1 December 2022, accessible [here](#).

² Michael Coper (1987) *Encounters with the Australian Constitution*, CCH Australia Limited, Sydney, p. 1.

³ Thomas Jefferson (1816) ‘Letter from Thomas Jefferson to Henry Tompkinson (Samuel Kercheval)’, *The Papers of Thomas Jefferson, Retirement Series*, Vol 10, p. 220, accessible [here](#).

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Distinct from philosophical debate on the legal interpretation of provisions in a ‘living constitution’, section 128 of the *Constitution* establishes referenda as the mechanism through which the *Constitution* can evolve through democratic means⁴.

The current form of section 128 was not a settled issue in the Convention Debates. In the 1891 Sydney Australasian Federal Convention, views on the mechanism for constitutional amendment were divided between the United States Convention model, and the democratic model proposed by Mr Andrew Thynne. The Convention model provided for an alteration proposal that has passed the Parliament to be submitted for ultimate approval to a convention of elected members from the eligible electors of the States⁵. Mr Thynne’s counter-proposal sought to submit constitutional amendments directly to the electors to harness the ‘sovereign power’ of the people⁶. Sir Samuel Griffith challenged the efficacy of the democratic model because he believed it would not be practicable for electors to be familiar with every detail of a “complicated document”, and therefore would not be able to exercise an “intelligent vote”⁷. However, foreshadowing the ultimate conclusion, Mr Alfred Deakin contended that a democratic model of popular deliberation could strike the right balance between popular sovereignty and the system of representative and responsible government⁸.

Compromise was reached at the 1897 Adelaide Convention. The provision agreed upon required a direct, popular vote, and incorporated the ‘double majority’ safeguard. The resulting mechanism of constitutional amendment therefore balanced the progressive view of empowering individual civic engagement, and the conservative intent to preserve a federal system. Sir Edward Braddon said that "... while I would not say the Constitution should be such as could only be amended by force of arms, I hope we shall provide all necessary safeguards against its being lightly amended"⁹. By accommodating the ‘double majority’ requirement to have a majority of voters in a majority of States agreeing, the voices of the smaller colonies were protected. In addition, referendum proposals could only be formally initiated by the Federal Parliament, rather than by State Parliaments or citizens. The safeguards imposed therefore constrained referenda as a democratic yet strict mechanism for altering the *Constitution*.

Reflecting on the constitutional design, Quick and Garran commented that “safeguards have been provided... to prevent change being made in haste or by stealth, to encourage public discussion and to delay change until there is strong evidence that it is desirable, irresistible, and inevitable”¹⁰. With only eight of 44 referendum proposals ever succeeding, historical evidence and the intention of the constitutional drafters evidence a high bar to achieve constitutional change through democratic means. This threshold for a successful referendum relies on public education and awareness on the process and proposal arguments.

We would suggest that a prerequisite to achieving worthwhile and necessary changes to our *Constitution* is not only public education and engagement in the referendum proposal, but

⁴ Johnny Sakr and Augusto Zimmerman (2021) ‘Judicial Activism and Constitutional (Mis)Interpretation: A Critical Appraisal’, *University of Queensland Law Journal*, 40(1), pp. 119-148, accessible [here](#).

⁵ *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 8 April 1891 at 884.

⁶ *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 6 March 1891 at 107.

⁷ *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 8 April 1891 at 894.

⁸ Susan Crennan, 2013, ‘Section 128 of the Commonwealth Constitution and Constitutional Change’, Melbourne, *Annual La Trobe Justice Speech*, 22 August 2013, accessible [here](#).

⁹ *Official Record of the Debates of the Australasian Federal Convention*, (Adelaide), 20 April 1897 at 1021.

¹⁰ John Quick and Robert Garran, 1901, *The Annotated Constitution of the Commonwealth of Australia*, Angus & Robertson, Sydney, p. 988.

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also investment in the education and awareness of our *Constitution*, its timeless values, and the ability for it to be changed to reflect contemporary society.

Proposed reforms of the Referendum (Machinery Provisions) Amendment Bill 2022

The Commonwealth Parliament's provision of the machinery of referenda through the Referendum Act sources its authority from section 128 of the *Constitution*. The constitutional provision states that "when a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes."

Harmonisation reforms

The continued development of electoral laws and regulatory framework is the mark of a functioning democracy. Since the 1999 referendum, the *Commonwealth Electoral Act 1918* has been amended 56 times. From electoral funding, donation disclosure, authorisation of materials, sorting and counting of votes, and electronic enrolment, these amendments have adapted Australia's electoral framework to accommodate technological advancement and preserve the integrity of the democratic process.

In assessing the form of the amendments in the Referendum Bill, policy makers should be conscious of the unique circumstances of the conduct of a referendum vis-a-vis a federal election or by-election. The particular nature of a referendum as a point-in-time event creates different incentives and opportunities for accountability and transparency. As such, the design of enforcement provisions should seek to take account of those factors as accountability and transparency is critical to any well-informed democratic process.

Informed voters and the Yes/No Pamphlet

The intended effect of the Yes/No pamphlet is an important feature of the referendum process. Introduced in the early twentieth century, the Yes/No pamphlet was envisaged as a tool to ensure every voter was informed to a minimum standard of the referendum question, and both arguments in favour and against. The mechanism served as a guardrail against a referendum proposal succeeding or failing based on voters' lack of awareness or understanding. The AEC Commissioner, Mr Tom Rogers, has commented that the "AEC's research indicated that the guide posted to households at every election was used by large numbers of Australians to inform them about the electoral process"¹¹.

It is agreed that "the days of mailed leaflets...have probably long gone"¹² due to the advent of internet and SMS communications. However, the digital age poses a new threat of rapidly disseminated, and concerningly consumed, disinformation and misinformation. As explained by constitutional expert and academic, Professor Anne Twomey:

*"If there is no officially sanctioned information, then this just leaves open a free-for-all on social media with even more misleading material circulating. There surely needs to be at least one source of authoritative information to which people can turn"*¹³.

¹¹ Standing Committee on Social Policy and Legal Affairs (2021) 'Final Report - Inquiry into constitutional reform and referendums', December 2021, p. 59, accessible [here](#).

¹² Damon Muller (2022) 'Should Australia's referendum rules be reformed?' *Parliamentary Library - FlagPost*, 30 November 2022, accessible [here](#).

¹³ Anne Twomey (2022) 'The government will not send out Yes and No case pamphlets ahead of the Voice to Parliament referendum. Does this matter?' *The Conversation*, 2 December 2022, accessible [here](#).

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The digital age also presents an opportunity for the distribution of information relating to the *Constitution*, the conduct of the referendum, and the official arguments in favour or against the referendum proposal. In addition, the provision of the information online would allow for the reduction of costs, the translation of information into key voter languages, and the presentation in a form accessible by visually-impaired voters. To counteract the risk of misinformation relating to the arguments in favour or against a referendum proposal, and provide electors the opportunity to inform themselves on the voting options, the intended effect of the Yes/No pamphlet could be transposed to an online medium. Education campaigns on the referendum process, Australia's Constitution, and factual information about the proposal are an essential guardrail to ensure voters are informed.

Education campaign expenditure

The Government's proposal to suspend the public funding prohibition to allow for education campaigns on the referendum process, Australia's Constitution, and factual information about the proposal is important. The power of democracy is not only its facilitation of individual civic participation, but also the confidence of individuals and the community in the fairness and integrity of the democratic process. The ability of voters to access official information from trusted sources, such as the Australian Electoral Commission ('AEC'), on the procedure and integrity of the referendum process is essential to public faith and confidence in the referendum process and outcome.

In the 1999 referendum there were 12,361,694 enrolled electors¹⁴. As of 30 September 2022, there are 17,302,252 Australians enrolled to vote¹⁵. Of those currently enrolled to vote, 5,973,529 are aged 18-39 years old. Not accounting for current electors who have immigrated to Australia since November 1999, this means that over 35% of the current electorate have never voted in a referendum.

Firstly, referendum education campaigns should seek to lift the standard of awareness and comprehension of constitutional concepts. Evidence provided to a parliamentary inquiry into constitutional reform and referendums showed that 62% of Year 10 students were not at a proficient standard for the civics and citizenship curriculum in 2019¹⁶. Furthermore, a submission of the AEC to the same inquiry stated that their research had found "there is little or no knowledge of referendums and their purpose within the Australian voting public"¹⁷.

Secondly, government-sponsored information must combat the increasing risk of misinformation and disinformation in the digital age. The AEC's innovative methodology to combat disinformation is pioneering and a proven success. The methods include a notably conspicuous social media presence, the 'Stop and Consider' campaign in the 2019 and 2022 federal elections, as well as the use of a 'Disinformation Register' to provide an authorised source of information to rebut the proliferation of disinformation and misinformation online.

Government expenditure on education campaigns for referenda should be retained as an ongoing feature of our referendum process.

¹⁴ AEC (2012) '1999 referendum report' *Referendums*, 24 October 2012, accessible [here](#).

¹⁵ AEC (2022) 'Enrolment statistics' *Enrol to vote*, 14 November 2022, accessible [here](#).

¹⁶ Standing Committee on Social Policy and Legal Affairs (2021) 'Final Report - Inquiry into constitutional reform and referendums', December 2021, pp. 8-9, accessible [here](#).

¹⁷ *Ibid*, p 11.

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Conclusion

Regular public opinion polls indicate that public faith in democracy is at its lowest level. The robustness of Australia's electoral and representative institutions is critical to inspiring public confidence.

A generation of Australians has reached voting age and are yet to experience voting in a referendum of the Commonwealth Constitution. An additional number of Australians have immigrated since 1999 and are now able to participate in their first referendum.

Engaging the public through a referendum of informed voters to adapt the *Constitution* in line with contemporary social and political values is one of the most important mechanisms to instil faith in Australian democracy.

As an organisation focused on contributing to and improving Australia's democratic governance, the Susan McKinnon Foundation commends the proposals to improve and modernise Australia's provisions for referenda.

However, while this legislation provides the framework and guardrails for an improved referenda process, investment in the public understanding and engagement of all Australians in our democratic processes - both referenda and elections - as well as in civic participation in public policy is also critical to improve the health of our democracy.

