



CONSTITUTIONAL ENSHRINEMENT OF A FIRST NATIONS VOICE

ISSUES PAPER FOR PUBLIC DISCUSSION

Issues Paper 2: The Referendum Question

September 2022



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Executive Summary

This is one of a set of three issues papers released by the Indigenous Law Centre in September 2022, addressing three critical matters in the lead up to the referendum to constitutionally enshrine a First Nations Voice:

1. **Issues Paper 1: The Constitutional Amendment**
2. **Issues Paper 2: The Referendum Question**
3. **Issues Paper 3: Finalisation of the Voice Design**

In each issues paper, we set out the background to the issues covered in the paper, the principles by which these issues should be resolved, and provide some proposals for discussion that seek to satisfy those principles. These issues papers have been designed to develop public discussion at an important moment prior to these matters being finalised by government in the lead up to the referendum.

In this issues paper, we consider the legal and constitutional requirements for setting the referendum question, and the issues that they raise. We offer two principles to assist in resolving these issues: constitutional prudence, and ensuring voters have sufficient information to fulfil their constitutional functions. Drawing on these two principles, we offer a proposal to amend the *Referendum (Machinery Provisions) Act 1984* (Cth). This would empower a parliamentary committee, informed by an Independent Referendum Panel of relevant experts. The committee's task would be to recommend a question that is easily understood and that captures, in a neutral way, the essential nature of the reform.

Behind these papers sits more than five years of work. That work was initially led by the Indigenous Steering Committee of the Referendum Council, and since May 2017 and the delivery of the Uluru Statement to the Australian people, by the Uluru Dialogues, a group of First Nations people and non-Indigenous supporters who are committed to pursuing the reforms of the Uluru Statement from the Heart. This work has been undertaken out of the Indigenous Law Centre, at the University of New South Wales, and has also engaged constitutional, public law and Indigenous experts from across Australia and the world, as well as leading practitioners. It has also reckoned with public contributions from former Chief Justices of the High Court, parliamentary committee submissions and reports, and other aspects of the public debate on constitutional reform.

ISSUES PAPER 2: The Referendum Question

1. Background

1.1 *Constitutional and Legal Requirements:*

The Constitution in s 128 specifies for a successful Yes vote that the electors ‘approve the proposed law’. This sets a minimum requirement for any referendum question, that the voters are directed to the proposed law that they are approving. This is currently achieved in s 25 and the schedule of the *Referendum (Machinery Provisions) Act 1984* (Cth) by requiring the referendum question to state the long title of the proposed law, followed by the question: ‘Do you approve this proposed alteration?’.

The long title of the proposed law is determined by the Parliament, and must be sufficiently accurate to cover the scope of all clauses in the Bill.¹ Reliance on the long title, however, introduces technicalities for the voter and interferes with direct expression of the substantive question being put.

1.2 *Recent review of the Referendum (Machinery Provisions) Act 1984* (Cth)

Last year, the House of Representatives Standing Committee on Social Policy and Legal Affairs conducted a review into the *Referendum (Machinery Provisions) Act 1984* (Cth). Its final report contained the following recommendation:

Recommendation 9

The Committee recommends that an Independent Expert Panel be established to provide advice to the Joint Parliamentary Committee [on Constitutional Matters] recommended at Recommendation 4 in the lead up to each referendum on aspects of the referendum process, including but not limited to:

- the form of the wording of the referendum question ...

The Joint Parliamentary Committee would consider the advice of the Panel before providing that advice to the Parliament, along with the considered views of the Committee.

The Committee recommends that the Panel be appointed by the Prime Minister in consultation with other parliamentary party leaders, and should include experts in constitutional law, public communication, representatives from the Australian Electoral Commission and/or other relevant government entities, and community representatives.

¹ Standing Order 140, House of Representatives Standing Orders.

1.3 Prime Minister's Proposed Question:

The Prime Minister has released the following draft question for consultation:

Do you support an alteration to the Constitution that establishes an Aboriginal and Torres Strait Islander Voice?

2. The issues

The constitutional, legal and political context raise **three** key issues that need to be resolved in relation to the referendum question.

1. **Reference to proposed law:** Whether and how the proposed law must be referred to in the referendum question, as may be implied from the requirements of s 128 of the *Constitution*.²
2. **Reference to the long title:** Whether the *Referendum (Machinery Provision) Act 1984* (Cth) should be amended so as to remove the requirement that the question must be set by reference to the long title of the proposed law.
3. **How should the question be finally determined:** If the *Referendum (Machinery Provision) Act* is amended, by what process should the question be finally determined.

3. Principles

The Indigenous Law Centre proposes that the resolution of each of the issues set out above should be informed by the following principles:

- **Constitutional prudence:** if there are simple ways to head off future constitutional challenges based on technical procedural points, these should be taken.
- **The voters must have sufficient information to fulfil their constitutional functions:** It is imperative that the question that is put on the ballot paper is easily understood, and captures the essential nature of the reform. It must be clear, simple and neutral. For some voters, the referendum question will be the first time that they have engaged with the issue at the level of decision-making seriousness.

² See, for instance, Anne Twomey, 'Creating a Constitutional Voice: The words that could change Australia' (30 July 2022) <<https://theconversation.com/creating-a-constitutional-voice-the-words-that-could-change-australia-187972>>.

4. Proposal

In light of the constitutional, legal and political context set out above, the Indigenous Law Centre offers the following proposal for setting the referendum question:

1. The referendum question should include reference to the proposed law, as may be required by s 128 of the Constitution.
2. The *Referendum (Machinery Provision) Act* should be amended so as to allow the following:
 - (a) The referendum question to be put in accordance with the following formulation: 'Are you in favour of [short description of proposed reform], as provided in the [short title of Act]?' This approach would comply with section 128, while also being easier to understand for voters.
 - (b) The short description of the proposed reform should be developed by a joint parliamentary committee, whose responsibility is to recommend proposed wording for approval by the Parliament.

The Committee should be assisted by an 'Independent Referendum Panel'. This body should be appointed by the Prime Minister, in consultation with the Opposition Leader and other parliamentary party leaders, and include experts in constitutional law and public communication, a representative from the Australian Electoral Commission, and community representatives, including First Nations representatives. The Panel's role would be to conduct public research, including surveys and focus groups, to ascertain public responses to different question formulations. The Panel would be responsible for advising the Committee on the clarity and neutrality of proposed descriptions.

This model is similar to that adopted in the UK, where the Electoral Commission has a role in ensuring clear and balanced referendum questions, while the final say rests with Parliament.

This recommendation has many similarities to that recommended last year by the House of Representatives Social Policy and Legal Affairs Committee. It would require a minor change to section 25 and Schedule 1 of the *Referendum (Machinery Provisions) Act*. This should be considered as part of a suite of reforms that would also allow for more independent input into the government-provided information to voters as part of the lead-up to the referendum, that we have detailed elsewhere.³

³ See Gabrielle Appleby, Sean Brennan, Megan Davis and Dylan Lino, 'Reforming the rules for a free and fair referendum' *IndigConLaw Blog* (10 October 2021) <<https://www.indigconlaw.org/home/reforming-the-rules-for-free-and-fair-referendum>>

Below, in Option 1, is an example of the kind of question such a process might produce (though the actual question would be subject of course to the advice of the Panel and the work of the joint parliamentary committee).

Option 1:

Referendum on proposed constitutional alteration

Are you in favour of establishing a body, to be called the First Nations Voice, that will guarantee Aboriginal and Torres Strait Islander peoples an institution to make representations to the Parliament and the Executive Government of the Commonwealth about the development of Commonwealth laws and policies affecting them, as provided in the *Constitution Alteration (First Nations Voice) 2023*?

WRITE YES OR NO

An example of what a ballot paper question about a First Nations Voice would look like, if section 25 was left unamended, is set out below as Option 2.

Option 2:

Referendum on proposed constitutional alteration

DIRECTIONS TO VOTER:

Write “YES” or “NO” in the space provided opposite the question set out below.

A PROPOSED LAW:

To alter the Constitution to recognise Aboriginal and Torres Strait Islander peoples by establishing a body, to be called the First Nations Voice, that will guarantee Aboriginal and Torres Strait Islander peoples an institution to make representations to the Parliament and the Executive Government of the Commonwealth about the development of Commonwealth laws and policies affecting them.

Do you approve this proposed alteration?

WRITE YES OR NO

Should section 25 be left unamended, we would still recommend that the setting of the long title for the Bill be informed by a similar process to that which we have recommended for Option 1: engaging a joint parliamentary committee assisted by an Independent Referendum Panel, which can provide the Parliament with advice on the clarity and neutrality of proposed descriptions.