

## PARLIAMENTARY RESEARCH BRIEF

A Research note from the Institute of Public Affairs distributed to all federal parliamentarians



# VOICE REFERENDUM QUESTION MAY BE CONSTITUTIONALLY INVALID FOR MISLEADING AND MISINFORMING VOTERS

The Institute of Public Affairs recently received legal advice from leading Victorian barrister and constitutional law expert Mr Stuart Wood KC about the lawfulness of the proposed referendum question to insert into the Australian Constitution an 'Aboriginal and Torres Strait Islander Voice'.

The federal government has proposed the following referendum question for voters to answer:

A Proposed Law: to alter the Constitution to recognise the First Peoples of Australia by establishing an Aboriginal and Torres Strait Islander Voice.

Do you approve this proposed alteration?

Mr Wood's advice, written jointly with barristers Paul Jeffreys and Jakub Patela, states that the proposed referendum question:

- 'Misleads and misinforms voters'.
- Has a 'serious deficiency'.
- 'Fails to state the core function of the Voice'.
- Would be 'open to challenge' in the High Court of Australia.<sup>1</sup>

## Section 128 of the Australian Constitution requires a referendum to be free and fair

Section 128 of the Australian Constitution provides that a constitutional amendment, known as a 'proposed law', will only pass if a majority of electors in a majority of states, and a majority of all electors, **approve the proposed law**.

Mr Wood's advice states that in order for electors to give **approval** to a proposed law:

- The referendum question must accurately reflect the proposed change.
- The referendum process must allow electors to 'exercise a free and fair choice'.

## The Voice referendum question may be unconstitutional for failing to accurately reflect the proposed change

Mr Wood's advice states that there is a requirement implicit in section 128 of the Australian Constitution that the referendum question submitted to voters:

sufficiently corresponds to the proposed law so that an affirmative answer to it can be interpreted as an elector's 'approval' of the proposed law.<sup>2</sup>

According to the advice, the question to be put to voters is 'deficient'<sup>3</sup> because it 'fails to state the core function of the Voice'.<sup>4</sup>

The referendum question is framed as a proposal to 'recognise the First Peoples of Australia' by establishing 'an Aboriginal and Torres Strait Islander Voice'.

The proposed change to the Constitution is to create a new Chapter IX. The question does not provide information about the role and function of the Voice, or the content and scope of the proposed new Chapter IX.

Only the introductory line of the proposed change to the Constitution mentions recognition, whereas the substantive terms of the proposed Chapter IX—subsections 129(1), 129(2), and 129(3)—all relate to the scope, powers, and role of the Voice.

This includes the provisions of subsection 129(3) which make Parliament's powers to pass laws in respect to the Voice 'subject to this constitution', meaning subject to the interpretations of the High Court of Australia as to what the scope, powers and role of the Voice are.<sup>5</sup>

Mr Wood concludes that this 'misleads and misinforms voters' and thus makes the referendum 'open to challenge'<sup>6</sup> in the High Court of Australia.

## The referendum process has denied voters the ability to exercise a free and informed choice

Mr Wood's advice also states that there is a reasonable argument that the Constitution requires electors be able to exercise a 'free and informed choice' when voting in a referendum. He observes that the ability of electors to exercise a free and informed choice in the Voice debate has potentially been undermined due to:

- Unequal public funding of the Yes and No campaigns.<sup>7</sup>
- Unfair tax concessions granted to the Yes campaign.<sup>8</sup>
- The absence of a 'constitutional convention'.<sup>9</sup>

Added to this is the flawed process conducted by the Joint Select Committee into the Aboriginal and Torres Strait Islander Voice Referendum, where

- 10 of the 13 MPs and Senators on the Committee were already in favour of the Voice before it received submissions,
- 94% of all witnesses invited by the Committee to give evidence at public hearings were in favour of the Voice, including 80% that supported the government's proposed model.<sup>10</sup>
- The Joint Select Committee's final report recommended no changes to the proposed referendum wording.<sup>11</sup>

Social media platforms have been censoring opinions online that are critical of the Voice. These decisions are often based on biased and misleading 'fact check' reports by organisations that are given semi-official imprimatur by government agencies such as the Australian Electoral Commission and the Australian Broadcasting Corporation.<sup>12</sup>

Given this background, if the referendum question itself is misleading, it places the legitimacy of the referendum result in doubt and open to legal challenge.

## Options to ensure the referendum question is constitutionally valid

The IPA proposes the following options to ensure the referendum is constitutionally sound:

- Cancel or delay the date of the referendum.
- Conduct a proper constitutional convention, in which all Australians are invited to participate and express their views.
- Include the full wording of the proposed change in the referendum question, so there is no misunderstanding as to its content.

The current wording is only 112 words long, so there is no need to summarise it.

- If the question does summarise the proposed change, it must accurately describe the scope, powers, and role of the Voice. In Mr Wood's opinion, the following wording would satisfy this requirement:<sup>13</sup>

A PROPOSED LAW: To alter the Constitution by establishing a body to be called the Aboriginal and Torres Strait Islander Voice that, despite any Act of Parliament to the contrary, may make representations to the Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander peoples.

Do you approve this proposed alteration?

- Amend the referendum question by separating it into two questions:
  1. the first on the matter of constitutional recognition for Indigenous people, and
  2. the second on the establishment of the Voice.

### End Notes

1. Stuart Wood, Paul Jeffreys, and Jakub Patela, Advice relating to Aboriginal and Torres Strait Islander Voice Referendum: Constitutional and other matters (Signed 30 May 2023) [12].
2. Legal Advice [10].
3. Legal Advice [20].
4. Legal Advice [12].
5. Morgan Begg and John Storey, *Voice to Parliament: Research report provided to the Parliamentary Joint Committee into the Aboriginal and Torres Strait Islander Voice Referendum* (Institute of Public Affairs, April 2023) 24-25.
6. Legal Advice [20].
7. Legal Advice [30]-[35].
8. Legal Advice [36]-[42].
9. Legal Advice [43]-[44].
10. Daniel Wild. '95% of referendum committee witnesses 'Yes' activists' (Institute of Public Affairs Analysis, 1 May 2023): <https://ipa.org.au/publications-ipa/media-releases/95-of-referendum-committee-witnesses-yes-activists>.
11. Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, Parliament of the Commonwealth of Australia, *Advisory Report on the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023* (2023).
12. John Storey, *IPA Submission to the Senate Finance and Public Administration References Committee inquiry into the administration of the referendum into an Aboriginal and Torres Straits Islander Voice* (Institute of Public Affairs, 24 April 2023).
13. Legal Advice, Appendix 1.

For more information contact John Storey, Director, Legal Rights Program at [jstorey@ipa.org.au](mailto:jstorey@ipa.org.au)