

Constitutional Limitations on an Australian Referendum Question

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*Paul Jeffreys **

Advocates for the ‘Yes’ case at the 2023 referendum should be urging the Australian Government to amend the referendum question or give voters further detail about the proposed ‘Voice’ at the ballot box to ensure that a majority ‘Yes’ vote is not open to legal challenge.

This is because the form of the referendum question to be submitted to the Australian people, considered alongside legislated rules for the vote, presents a risk that the referendum is not legally capable of effecting a change to the *Australian Constitution*.

To effect such change, section 128 of the *Constitution* requires¹ the Australian people (both as a majority of national voters and as a majority of the six States) to approve the *Voice Alteration Bill*² passed by the Commonwealth Parliament.

Voters will not, however, be given the Bill or the referendum pamphlet³ (which states⁴ the proposed constitutional alterations) when they go to the ballot box. Instead, they will only be given⁵ a ballot paper with a question summarising the purpose of the Bill as being “[t]o alter the Constitution to recognise the First Peoples of Australia by establishing an Aboriginal and Torres Strait Islander Voice.”⁶

As I have recently advised with Stuart Wood AM KC and Jakub Patela,⁷ the deficiencies with this question are that:

- most strikingly, the question fails to refer to the Voice’s core (and only express) function under the Bill (despite the Voice’s capacity to make representations to the Commonwealth Parliament and Executive Government being its supposed *raison d’etre*),⁸
- by this omission, the question misleadingly emphasises the notion of indigenous constitutional recognition (which receives strong public and bi-partisan support) instead of the function of the new Voice (which receives weakening public support),⁹ and

- in the absence of describing the Voice’s function, the question does not otherwise explain what a ‘Voice’ is (which is significant given the nature of the new body is foreign to Australia’s historical constitutional framework and therefore generally unfamiliar to voters).¹⁰

The risk posed by these deficiencies might be negated if it were shown that voters were otherwise materially informed of the detail of the *Voice Alteration Bill*. However, the settings for the referendum point against this:

- first, a large proportion of voters are unlikely to read the Bill or the referendum pamphlet (a survey after the 1999 referendum revealed that only 51% of respondents had read some part of the pamphlet),¹¹ and
- second, as noted, voters will not be given the Bill or the referendum pamphlet at the time of voting; an odd situation where the Bill is the very thing that the Australian people have to approve to effect constitutional change.¹²

In these circumstances, the mere fact that the referendum question mirrors the long title of the *Voice Alteration Bill* does

not guarantee the referendum's validity.¹³ Parliament's power to frame the long title — and therefore the referendum question — is limited by, and must conform with, the purposes and function of a constitutional referendum.¹⁴

The framers of the *Constitution* agreed upon a process — in section 128 — by which future constitutional change was to reflect the expression of the direct will of the Australian people, not their elected representatives.¹⁵ Thus, the power to effect constitutional change 'resides exclusively in the Australian people pursuant to s 128 of the Constitution and is not to be usurped by either the courts or the Parliament.'¹⁶

The agreed mechanism for change — which demands 'compliance with a strict process for its operation'¹⁷ — requires the Australian people to approve the *Voice Alteration Bill*, not a misleading — and potentially biased — summary of the Bill.¹⁸

This conforms with true function of a constitutional referendum. A referendum is not simply the means of ascertaining general endorsement to a policy or sentiment promoted by government. It is a vote into whether a particular

written proposed law — in the form of a Bill of Parliament — will take legal effect or not.¹⁹

The fundamental question for the 2023 referendum is this: if a referendum question incorporates a misleading — and potentially biased — summary of a proposed law for the alteration of the Constitution, can a voter’s answer of ‘Yes’²⁰ to that question be taken — genuinely — as a matter of law — as ‘approval’ of that proposed law in the sense necessary to alter the Constitution under section 128?

Despite the absence of any reference to section 128 in the Solicitor-General’s advice released to the public,²¹ the Government has presumably been advised of the risk²² that they are taking with the form of referendum question adopted.

The limits on Parliament’s ability to set the referendum question are evident in the rationale underpinning Australia’s implied constitutional freedom of political communication.²³ For instance, current High Court Justice (and soon-to-be Chief Justice) Stephen Gageler has observed how the freedom is necessary to preserve the integrity of the process for constitutional change under section 128.²⁴

If the rationale underpinning that limit on legislative power applies to protecting the means (the communication of political information) to an end (the free and informed expression of political will at the ballot box), how much more so should the rationale apply to protecting the end itself?

Without simple changes to the referendum rules, the High Court may declare any majority ‘Yes’ vote to be void.²⁵ The Government should not be inviting this legal risk when the solutions to address it are so simple, and the costs of the risk eventuating are so high.

The simplest and fairest solution is for the Bill or the referendum pamphlet to be given to voters at the time of voting. Alternatively, the referendum question should be reframed, at least so that it refers to the Voice’s core function under the Bill.²⁶

Why invite the risk of trashing years of hard work by advocates for constitutional change? Why invite a constitutional crisis surrounding the validity of the vote? Why invite the risk of spending another \$364 million²⁷ on a referendum do-over?

The Government should change the referendum rules so that the Australian people, if it is their will, can reliably change the *Constitution*.

Endnotes

- * BCom, LLB (Monash), LLM (Melb); Barrister at the Victorian Bar. This paper is an outline of a speech given on 27 August 2023 to the 33rd national conference of The Samuel Griffith Society held in Melbourne.
- ¹ The test under section 128 for ratification of a proposed alteration to the *Constitution* is satisfied ‘if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law.’ In *Boland v Hughes* (1988) 83 ALR 673 at 674, Mason CJ approved the view that the references in section 128 to the ‘proposed law’ are ‘no more than references to the Bill incorporating the proposed constitutional amendment or amendments to be submitted to the electors at a referendum.’
- ² Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 (Cth), which was passed by an absolute majority of the House of Representatives on 31 May 2023 and passed by an absolute majority of the Senate on 19 June 2023.
- ³ *Referendum (Machinery Provisions) Act 1984* (Cth) s 11(1).

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- ⁴ Australian Government, ‘Your official referendum booklet,’ <<https://www.aec.gov.au/referendums/files/pamphlet/referendum-booklet.pdf>> 6.
- ⁵ *Referendum (Machinery Provisions) Act 1984* (Cth) s 33(1).
- ⁶ Consistent with legislative requirements, this summary reflects the long title of the *Voice Alteration Bill: Referendum (Machinery Provisions) Act 1984* (Cth) s 25(1) and Form B in Sch 1. As to the announcement of the question, see Department of the Prime Minister and Cabinet (Cth), ‘Next Step Towards Voice Referendum: Constitutional Alteration Bill’ (Media Release, 23 March 2023); Department of the Prime Minister and Cabinet (Cth), ‘Launch of ‘Yes’ Campaign’ (Speech, 30 August 2023).
- ⁷ See, eg, Daniel Wild, ‘Voice to Parliament Referendum Question Likely Unconstitutional, Misleading: Expert Legal Advice,’ *Institute of Public Affairs* (18 August 2023); Chris Merritt, ‘Voice wording ‘could be challenged in court’,’ *The Australian* (18 August 2023) 6; Chris Merritt, ‘Young ill-equipped to have say on Constitution,’ *Business Review, The Australian* (18 August 2023) 21; Morgan Begg, ‘Parliamentary Research Brief – Voice Referendum Question May be Constitutionally Invalid For Misleading And Misinforming Voters,’ *Institute of Public Affairs* (21 August 2023); Robert Gottlieb, ‘Voice must be questioned,’ *Business Review, The Australian* (22 August 2023) 21.
- ⁸ The Voice’s representation-making capacity is described in the explanatory memorandum to the *Voice Alteration Bill* as a ‘key component’ of the Bill and the Voice’s ‘core function’: Explanatory Memorandum, Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 (Cth) 2, 4.

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- ⁹ See also Louise Clegg, Submission No 41 to the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, *Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum* (14 April 2023) [4].
- ¹⁰ However, some Western nations have, by legislation, established similar bodies to represent their indigenous peoples (such as with the Sámi Parliaments in Finland, Norway and Sweden).
- ¹¹ Australian Electoral Commission, Submission No 24 to House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Machinery of Referendums*, 9 October 2009, attachment C, 2.
- ¹² See n 1 above.
- ¹³ Various commentators have expressed (or at least implied) that Parliament’s power over form of a question for the purposes of a referendum under section 128 is absolute: George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010) 43; Paul Kildea and Rodney Smith, ‘The Challenge of Informed Voting at Constitutional Referendums’ (2016) 39(1) *UNSW Law Journal* 368 at 383, 395; Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (The Federation Press, 2nd ed, 2019) 292–3. However, that view is, strictly speaking, incorrect; there are limitations on the power. As a matter of textual analysis, the wording of section 128 permitting Parliament to set the procure for a referendum vote must be read harmoniously with, and subservient to, the substantive tests for constitutional alteration in section 128, which require the people’s approval of the particular proposed law. That is, the procedure set by Parliament cannot override the substance of what the Constitution mandates. See also n 14 below.

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- ¹⁴ Parliament’s power to make laws with respect to, in the words of section 128, ‘the manner’ in which ‘the [referendum] vote shall be taken’ derives from ss 51(xxxvi) and 51 (xxxix) of the *Constitution*; the same as with federal elections: see *Spence v Queensland* (2019) 268 CLR 355 at 400–1 [45] per Kiefel CJ, Bell, Gageler and Keane JJ. However, the ‘main purpose’ or ‘subject matter’ of this power (to borrow phrases from *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 77 per Dixon CJ, McTiernan, Webb and Kitto JJ) is not the facilitation of *any* kind of plebiscite that the Parliament deems desirable, but a referendum conforming with the essential characteristics prescribed in section 128 of the *Constitution*.
- ¹⁵ See Harry Hobbs and Andrew Trotter (2017) 38 *Adelaide Law Review* 49 at 61–72; and also Arthur Canaway, ‘The Evolution of Section 128 of the Commonwealth Constitution’ (1940) 14 *Australian Law Journal* 274; Susan Crennan, ‘Annual La Trobe Justice Speech: “Section 128 of the Commonwealth Constitution and Constitutional Change”’ (Speech, 22 August 2013) 9–13. The greatest lesson from the drafting history of the alteration clause that became section 128 of the *Constitution* is the ultimate sovereignty of the Australian people over the terms of the *Constitution*: see, eg, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 137–8 per Mason CJ; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 71 per Deane and Toohey JJ; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 173, 180 per Deane J; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 256 [220] per Kirby J; *Singh v The Commonwealth* (2004) 222 CLR 322 at 424 [295] per Callinan J; *McCloy v New South Wales* (2015) 257 CLR 178 at 257 [215] per Nettle J, 284 [318] per Gordon J; *Unions New South Wales v New South Wales* (2013) 252 CLR 530 at 548 [17] per French CJ, Hayne, Crennan, Kiefel and Bell JJ. But cf John Quick and Robert Garran, *The Annotated Constitution*

of the Australian Commonwealth (1901) at 988; *McGinty v Western Australia* (1996) 186 CLR 140 at 274–5 per Gummow J.

¹⁶ *Singh v The Commonwealth* (2004) 222 CLR 322 at 424 [295] per Callinan J.

¹⁷ *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 629 [268] per Callinan J.

¹⁸ Associate Professor Paul Kildea and Professor Rodney Smith have observed how Parliament’s control over the title of the Bill — and therefore the wording of the referendum question — ‘creates the potential for ‘loaded’ or misleading questions to be put to the people in a way that could undermine informed voting’: Paul Kildea and Rodney Smith, ‘The Challenge of Informed Voting at Constitutional Referendums’ (2016) 39(1) *UNSW Law Journal* 368 and 383. This risk has been exacerbated by the historical shift towards use of the ‘long title’ of the proposed law as the foundation for a referendum question. Up to 1951 (comprising 24 of 44 referendum questions), the question reflected the short title of the proposed law. However, since 1967 (comprising 20 of 44 referendum questions), the question has, in varying forms, reflected the long title of the proposed law, which is typically a longer form summary of the purpose or effect of the proposed law. Although the framing of a referendum question by reference to the long title of a proposed law will not, of itself, offend the requirements of section 128 of the Constitution, there is risk that the Parliament of the day will manipulate the long title of the Bill in such a way that misrepresents the substance of the proposed law in order to bias a particular answer (either for or against the proposed law). Earlier this year, Associate Professor Kildea revisited these issues, expressing that ‘[t]he Prime Minister’s proposed question [for the 2023 referendum question] probably does not comply with the *Constitution*, as it makes no

reference, direct or indirect, to the amendment Bill’: Paul Kildea, ‘Yes or No?: The Government’s Proposed Changes to Australia’s Referendum Laws,’ *Australian Public Law* (Blog, 3 February 2023). See also Michael Detmold, ‘Unconstitutionality in the Voice Amendment’ (2023) LXVII, Number 6, No. 597 *Quadrant* 70 at 75.

- ¹⁹ Prior to the people’s approval in accordance with section 128, the *Voice Alteration Bill* may be regarded as an exercise of legislative power (*Sankey v Whitlam* (1978) 142 CLR 1 at 31 per Gibbs A-CJ), but it is not yet law (*Buzzacott v Gray* [1999] FCA 1525 at [4] per von Doussa J). However, once the Bill is passed in accordance with section 128, ‘the proposed law is spent’ (*Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 385 [100] per Gummow and Hayne JJ), and the alteration ‘becomes part of the Constitution — part of the fundamental law from which the Parliament of the Commonwealth derives its legislative power’ (*Sankey v Whitlam* (1978) 142 CLR 1 at 31 per Gibbs A-CJ).
- ²⁰ See *Referendum (Machinery Provisions) Act 1984* (Cth) s 24(a).
- ²¹ Opinion of the Solicitor-General, *In the Matter of Proposed Section 129 of the Constitution*, SG No. 10 of 2023, enclosed in Mark Dreyfus KC MP, Submission No 64 to the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, *Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum* (21 April 2023).
- ²² The High Court has not considered a challenge to the validity of a referendum question in the history of the Australian federation. (*Boland v Hughes* (1988) 83 ALR 673 considered whether there were particular requirements for the content of a proposed law, but not the form of the referendum question itself.) The rarity of such a challenge may be a consequence of the fact that, until 1967, the

referendum question was framed by reference to the relatively bland short title of the proposed law (rather than any fine-tuned long title) (see n 18 above), or alternatively the fact that, on each of the eight occasions in Australia’s history on which a proposed alteration to the *Constitution* has been approved, there was no major political party opposing the alteration, and therefore no obvious political contradictor to the referendum question’s validity.

²³ See, eg, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 137–8 per Mason CJ.

²⁴ *McCloy v New South Wales* (2015) 257 CLR 178 at 229 [121], 231 [128] per Gageler J.

²⁵ A challenge could be brought either before or after the referendum. A challenge after the referendum could be brought by challenging the validity of the referendum return (see *Referendum (Machinery Provisions) At 1984* (Cth) pt VIII) or by challenging the constitutional validity of the statute purportedly altering the *Constitution* (see *Judiciary Act 1903* (Cth) s 30(a)).

²⁶ This can be achieved (without requiring Parliament to repass the *Voice Alteration Bill* with an amended long title) by Parliament either amending the general legislative requirements for the ballot paper (see n 6 above), or otherwise introducing a specific prescription for the 2023 ballot paper. An example of a ballot paper question that refers to the Voice’s core (and only express) function is as follows:

A PROPOSED LAW: To alter the Constitution by establishing a body to be called the Aboriginal and Torres Strait Islander Voice that 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?

See also Louise Clegg, Submission No 41 to the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, *Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum* (14 April 2023) [6].

- ²⁷ Commonwealth of Australia, *2023–24 Budget Measures: Budget Paper No. 2* (9 May 2023) 85.