

SPEAKER HUGH M. BARTELS, CHAIR | PRESIDENT PRO TEMPORE LEE SCHOENBECK, VICE CHAIR
REED HOLWEGNER, DIRECTOR | SUE CICHOS, DEPUTY DIRECTOR | JUSTIN GOETZ, CODE COUNSEL
500 EAST CAPITOL AVENUE, PIERRE, SD 57501 | 605-773-3251 | SDLEGISLATURE.GOV



MJJ
Attorney General
APR 11 2023

April 3, 2023

Mr. Brian Bengs
1314 S. 8th Street
Aberdeen, South Dakota
57401

Dear Mr. Bengs:

SDCL 12-13-25 requires the South Dakota Legislative Research Council (LRC) to review each proposed initiated constitutional amendment submitted to it by a sponsor, for the purpose of assisting the sponsor in writing the amendment "in a clear and coherent manner in the style and form of other legislation" that "is not misleading or likely to cause confusion among voters."

The initiated constitutional amendment proposes new constitutional language relating to voter-approved measures. Specifically, the amendment attempts to provide:

1. An effective date for initiated or referred measures;
2. For conflicting measures approved simultaneously, that the measure receiving the highest number of votes becomes law;
3. A prohibition on amending measures approved by electors for seven years following enactment of the measure, and
4. The Legislature with the authority to refer a measure for repeal or amendment to the electors upon a three-fourths vote of the House of Representatives and the Senate.

The proposed constitutional amendment is drafted as follows:

Legislative Repeal or Amendment of Initiated Measures

If a majority of votes cast upon an initiated or a referred measure are affirmative, it is enacted. An enacted initiated or referred measure shall become law on the thirty-first day after the election. A referred measure that is rejected is void immediately. If conflicting measures are approved simultaneously, only the one receiving the highest number of affirmative votes shall become law. A measure approved by the electors may not be repealed or amended by the Legislature within seven years from its effective date. Upon three-fourths vote of the members of both the Senate and House of Representatives, a measure for repeal or amendment may be referred to the electors at any subsequent general election.

SDCL 12-13-24 requires an initiated amendment to the Constitution to be written in the "form of other legislation." The LRC suggests several changes and considerations to conform to this requirement.

1. When amending the Constitution, the typical lead-in clause is as follows: "That Article III, § 1 of the Constitution of the State of South Dakota, be AMENDED:". The LRC recommends that this lead-in clause be used to be consistent with the form of other legislation.

2. S.D. Const. Art. III, § 1 provides that the enacting clause of all laws approved by vote of the electors is as follows: "Be it enacted by the people of South Dakota." The LRC recommends that this enacting clause be used for the proposal.
3. When proposing new law language, the new text is underscored. Thus, the LRC recommends that the proposed constitutional amendment language be underscored to show that the language is new.
4. The proposed constitutional amendment language did not include a recommendation for the placement of the language in the constitution. Since the proposed constitutional language addresses voter-approved measures, the assumption is that the language would be placed in S.D. Const. Art. III, § 1. Thus, the LRC recommends that the final proposed constitutional language be drafted as an amendment to S.D. Const. Art. III, § 1.
5. The *Guide to Legislative Drafting*¹ discourages the use of "shall" for statements of law. To say what the law is—that is, to make a statement that is true by operation of law—the present tense should be used. The proposed text uses the phrase, "shall become law..." in two instances. The LRC recommends, in the first instance, that the language be changed to "is effective" and "becomes law" in the second instance.
6. The proposed constitutional language provides that, if a measure is enacted, it becomes law on the thirty-first day after the election. SDCL 2-1-12 provides that an initiated measure or referred law that is approved by the electors is "effective on the first day of July after the completion of the official canvass by the State Canvassing Board." The sponsor may want to consider having the effective date come after the State Canvassing Board certifies the election results, thereby making them official.
7. The use of the sentence providing that a referred measure rejected by the electors is "void" is likely not necessary. The courts have held that the exercise of a referendum is, in effect, the exercise of veto power. See *Brendtro v. Nelson*, 720 N.W.2d 670 (S.D. 2006). Therefore, the rejection of a measure by the electors vetoes the measure, having the effect of preventing the measure from becoming law.
8. The final sentence of the proposed constitutional language may need to be rewritten for clarity. It appears the intent of the sentence is to provide the Legislature a mechanism to enact legislation that amends or repeals an initiated or referred measure that was previously approved by the electors, notwithstanding the temporary prohibition on repeals or amendments in the previous sentence. A few questions are raised by the proposed language.
 - a. Is more exacting language necessary to describe what type of "measure" is being referenced?
 - i. Is the "measure" an enactment of the Legislature that repeals or amends a measure previously approved by the electors of the state? If so, does that need to be stated?
 - ii. Does "measure" include both initiated measures and measures enacted by the Legislature and referred either by the people or by the Legislature?
 - iii. Should it include both initiated and referred measures?
 - b. To repeal or amend a measure, is the Legislature first required to enact Legislation repealing or amending the measure by a three-fourths majority vote and then also required to refer the matter to the electors by a three-fourths majority vote?
 - c. Who or what is referring the "measure" to the electors? Is it the Legislature or the people?
9. Finally, the LRC suggests a several minor changes to the text for clarity. Those changes are reflected below.

¹ See pages 29-30.

Based on the above suggestions, the LRC recommends the proposed constitutional amendment language be redrafted as follows:

Be it enacted by the people of South Dakota:

That Article III, § 1 of the Constitution of the State of South Dakota, be AMENDED:

§ 1. The legislative power of the state shall be vested in a Legislature which shall consist of a senate and house of representatives. However, the people expressly reserve to themselves the right to propose measures, which shall be submitted to a vote of the electors of the state, and also the right to require that any laws which the Legislature may have enacted shall be submitted to a vote of the electors of the state before going into effect, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions. Not more than five percent of the qualified electors of the state shall be required to invoke either the initiative or the referendum.

If a majority of votes cast upon an initiated or a referred measure are affirmative, ~~it~~ [the measure] is enacted. An enacted initiated or referred measure ~~shall become law~~ [is effective] on the thirty-first day after the election. ~~A referred measure that is rejected is void immediately.~~ If conflicting measures are approved simultaneously, only the one receiving the highest number of affirmative votes ~~shall become~~ [becomes] law. A measure approved by the electors may not be repealed or amended by the Legislature ~~within~~ [for] seven years from its [the] effective date [of the measure]. Upon three-fourths vote of the members of both the ~~Senate~~ [senate] and ~~House of Representatives~~ [house of representatives], a measure for repeal or amendment may be referred to the electors at any subsequent general election.

This section shall not be construed so as to deprive the Legislature or any member thereof of the right to propose any measure. The veto power of the Executive shall not be exercised as to measures referred to a vote of the people. This section shall apply to municipalities. The enacting clause of all laws approved by vote of the electors of the state shall be: "Be it enacted by the people of South Dakota." The Legislature shall make suitable provisions for carrying into effect the provisions of this section.

LRC encourages you to consider the edits and suggestions to the proposed text. The edits are suggested for sake of clarity and to bring the proposed measure into conformance with the style and form of South Dakota legislation. LRC comments are based upon the *Guide to Legislative Drafting*, which may be found on the South Dakota legislative [website](#).

Although a sponsor is not statutorily required to make changes based upon the suggestions and comments provided above, you are encouraged to be cognizant of the standards established in [SDCL 12-13-24](#) and [12-13-25](#) and ensure that your language is in conformity.

[SDCL 12-13-25](#) also requires the issuance of a written opinion "as to whether the initiated amendment embraces only one subject under S.D. Const., Art. XXIII, § 1" and whether it is in fact an "amendment under S.D. Const., Art. XXIII, § 1," or a "revision under S.D. Const., Art. XXIII, § 2." The proposed constitutional change appears to embrace only one subject—voter-approved measures. Given the limited nature of the proposed language, it appears to be an amendment and not a revision of the constitution.

April 3, 2023

Page 4

Fiscal Impact

To determine whether the proposed initiated amendment to the Constitution in its final form has an impact on revenues, expenditures, or fiscal liability of the state and its agencies and political subdivisions, please provide the LRC, as required by SDCL 12-13-25.1, with a copy of the initiated amendment to the Constitution as submitted in final form to the Attorney General.

Compliance

This letter is issued in compliance with statutory requirements placed upon this office. It is neither an endorsement of the proposed initiated amendment to the Constitution nor of any of the edits suggested by the LRC. This letter is not a guarantee of the proposal's sufficiency. If you proceed with the initiated constitutional amendment, please ensure that neither your statements nor any advertising contain any suggestion of endorsement or approval by the Legislative Research Council.

Sincerely,



Reed Holwegner
Director

Enclosure

CC: The Honorable Monae L. Johnson, Secretary of State
The Honorable Marty Jackley, Attorney General