



VOICE REFERENDUM: SUMMARY OF THE LEGAL REALITIES OF THE VOICE

The Sydney Institute held an online discussion on the legal realities of the Voice, featuring two legal experts on either side of the Voice debate. The debate can be found at <https://youtu.be/AULx4WKdPY>. This document outlines the points made by both experts during the debate.

On the left hand column in green are comments from the YES side of the debate by George Williams AO, Professor of Constitutional Law at UNSW and member of the Constitutional Experts Group which gave feedback on the Voice. On the right hand column in red are comments from the NO side by Chris Merritt, Vice President of Rule of Law Education Centre (and creators of this resource) and columnist for Legal Affairs in the Australian Newspaper.

YES

**YES TO RECOGNITION,
YES TO CONSTITUTIONAL BODY CALLED THE VOICE**

George Williams supports the Constitutional Amendment.

NO

**YES TO RECOGNITION,
NO TO CONSTITUTIONAL BODY CALLED THE VOICE**

Chris Merritt supports Constitutional recognition of Indigenous people as First Occupants but believes the Voice should be a Statutory body with defined reach and scope.

DURING THE DISCUSSION, THE FOLLOWING COMMENTS WERE MADE REGARDING THE PROPOSED CONSTITUTIONAL CHANGE:

RECOGNISE INDIGENOUS PEOPLES AS FIRST PEOPLES OF AUSTRALIA

Both agree with recognition of Indigenous people as First Occupants in Constitution

INTRODUCE A SEPARATE ENTITY ALONGSIDE JUDICIARY, EXECUTIVE AND LEGISLATURE CALLED 'THE VOICE' (CLAUSE 1)

- Amendments will establish an advisory body that is a political institution with influence in political realm
- Entirely appropriate to have an opportunity for Indigenous peoples to have say on laws due to their unique status- there is no other group with that status in the community and our nation is formed upon their ancestral lands
- 1967 Referendum did not include positive references to Indigenous peoples and left unfinished business
- Constitution permits the States to disenfranchise people, with their race stated overtly and a race based power to make laws because of a person's race and fix upon them negative consequences
- We have a racially discriminatory system as it is

- In a modern Constitution, there should be no place for race at all. We should be removing all references to race
- Sovereignty of land derives from all peoples of this nation
- Amendments will change the system of government whereby Indigenous peoples will have a second method of influencing public policy and the ability to have additional say on every law and administration. This will erode equality of citizenship where everyone should be equal not just before the law but before those who make the law
- As it is entrenched in the Constitution, it would be permanent. Mechanisms (laws) to improve standards should be temporary and terminated when goals (ie closing the gap) have been achieved

MAKE REPRESENTATIONS TO PARLIAMENT AND EXECUTIVE ON MATTERS RELATING TO ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES (CLAUSE 2)

- The Voice has the power to make representations with no power to Veto or direct and no obligation on Parliament or Executive to follow
- This will not affect the ability of Parliament to make decisions
- Executive may need to follow a process that listens to representations
- The High Court will make sure the Voice operates within its remit within constitution (ie matters relating to Indigenous people)
- High Court challenges regarding representations made to Parliament: It is expected that if Parliament ignored the Voice or refused to read its representations, then the High Court has consistently said that it will not intervene in internal workings of Parliament
- High Court challenges regarding representations made to Executive: It is expected that if the Executive ignored the Voice or refused to read its representations, then the High Court may direct them to read everything relevant to decision and remake the decision. The High Court wouldn't direct the outcome but would require the Executive to get the process right

- Unlimited scope of subject matter which the Voice can make representations
- The scope is not limited to matters that relate only to Indigenous people. The only limit on the scope of subject matter is that it must relate to Aboriginal and Torres Strait Islander people ie tax laws relate to Indigenous people
- High Court and not Parliament will have final say on scope of subject matter of representations made to Parliament and Executive
- High Court challenges regarding Representations made to Executive: If Constitution empowers the Voice to make representations, that gives rise to implication that representations should be listened to
- If we are going to change the Constitution, there should be very little room for 'creativity.' There are so many unknowns about what flows from representations, the High Court should not be left to fill in the gaps
- Uncertainty about the role of High Court could be removed if the Voice was legislated and not put in Constitution

GIVE PARLIAMENT, SUBJECT TO THE CONSTITUTION, THE POWER TO MAKE LAWS RELATING TO VOICE (CLAUSE 3)

- Parliament has a key role in determining how the Voice will operate, with broad powers to make laws generally in respect of the Voice including to regulate procedures, composition and workings

- Once in the Constitution, if Parliament makes laws to limit the scope and reach of the Voice, the legislation would be subject to High Court interpretation

AMENDMENT IS MORE THAN RECOGNITION

- Recent dialogues with Indigenous peoples sought the Voice to have a say on laws and policies that affect them, Treaty to Provide for mutual co-existence and Truth Telling on their History. The only one that requires Constitutional change is the Voice, as this would guarantee a say in making laws and policies

- Amendment would open door to New Zealand style system of co-governance and would remove doctrine of Equality of Citizenship

THE CONSTITUTION AND THE VOICE REFERENDUM

The question that will be put to the Australian people at the 2023 referendum is:

**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?

The Australian Constitution

Chapter I. The Parliament

Part I. General

Part II. The Senate

Part III. The House of Representatives

Part IV. Both Houses of Parliament

Part V. Powers of the Parliament

Chapter II. The Executive Government

Chapter III. The Judicature

Chapter IV. Finance and Trade

Chapter V. The States

Chapter VI. New States

Chapter VII. Miscellaneous

Chapter VIII. Alteration of the Constitution

Chapter IX. Recognition of Aboriginal and Torres
Strait Islander Peoples

Chapter IX Recognition of Aboriginal and Torres
Strait Islander Peoples

129 Aboriginal and Torres Strait Islander Voice

In recognition of Aboriginal and Torres Strait Islander
peoples as the First Peoples of Australia:

1. There shall be a body, to be called the Aboriginal and
Torres Strait Islander Voice;
2. The Aboriginal and Torres Strait Islander Voice may make
representations to the Parliament and the Executive
Government of the Commonwealth on matters relating
to Aboriginal and Torres Strait Islander peoples;
3. The Parliament shall, subject to this Constitution, have
power to make laws with respect to matters relating to
the Aboriginal and Torres Strait Islander Voice, including
its composition, functions, powers and procedures.

CONSTITUTION BASICS

Key Purpose of the Constitution

The Constitution is a legal document setting out the 'basic laws' for the government of Australia. It does not contain a Bill of Rights like other Constitutions such as the United States of America. It is a mechanical document that outlines the allocation of power and responsibilities between the federal and state governments and sets up the three branches of government.

What is the Preamble?

The preamble is at the start of the Constitution and highlights the colonial origins of the Act, that is, where people of the separate and self-governing colonies (now called the States) agreed to join together to unite and become a new nation, the Commonwealth of Australia. *The 2023 Referendum does not propose a change to the preamble.*

The Structure

The Constitution is deliberately structured into chapters to create a legal and political system that governs Australia. Rather than one central body holding all power, the Constitution is broken up into eight chapters to spread power between; the Federal and States Governments (called the Division of Powers); and the Legislature, Executive and Judiciary (called the Separation of Powers). *The 2023 Referendum proposes a new chapter into the Constitution to establish a new body, called the Aboriginal and Torres Strait Islander Voice that has the power to make representations to Parliament and the Executive on matters relating to Aboriginal and Torres Strait Islander Peoples.*

The High Court (Judicature) is a powerful check that ensures the Legislature and Executive act within their roles as defined in the Constitution. In particular, it ensures all people, including those in power, follow the law.

A Referendum

The Constitution is the people's document, so it can only be changed by the people. As a result, the Constitution has outlined a specific process that is required to get the consent of the people before the Constitution can be changed (known as a Referendum). The proposed change must be passed by majority in both house of Federal Parliament, the majority of Australians must vote in favour (i.e. more than 51% of the voting age population) and the majority of 6 states (i.e. 4 of the 6 states) must have a majority of voters in favour.