



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/AULx4WKDkPY>. 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

VOICE REFERENDUM: FURTHER DETAILS

The question the Parliament will now consider to be put to the Australian people at the 2023 referendum will be:

**" 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?"

PROPOSED CONSTITUTIONAL AMENDMENT

Chapter IX Recognition of Aboriginal and Torres Strait Islander Peoples

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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."

A Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum was appointed to inquire into and report on the provisions of the Bill introduced by the Government to be submitted to a referendum on the Aboriginal and Torres Strait Islander Voice. Details of the Inquiry and copies of all the Submissions and hearings can be found on the Parliament of Australian website:

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Aboriginal_and_Torres_Strait_Islander_Voice_Referendum/VoiceReferendum

Over 100 Submissions have been made with many perspectives and differing opinions. Both legal experts who spoke to the Sydney Institute 'Legal Realities of the Voice' made submissions.

Professor George Williams AO Submission #3 to the Select Committee was made in a personal capacity, noting that he was a member of the Government's Constitutional Expert Group that provided the Referendum Working group with legal support on Constitutional matters relating to the referendum.

Chris Merritt's Submission #36 to the Select Committee, was made on behalf of our sister organisation The Rule of Law Institute of Australia. The Rule of Law Education Centre and the Rule of Law Institute of Australia are independent, non-political, non-partisan organisations that focus on whether key rule of law principles as outlined in our Rule of Law Wheel are impacted. such as the law is applied equally and fairly, the presumption of innocence, fair and prompt trials etc

Regardless of where we stand on these issues, it is important as a nation under the rule of law, that laws are made in an open and transparent way and are able to be subject to open and free criticism. These discussions and debates are important as the Constitution is not just another law. It is the fundamental framework of our system of government that allocates and limits power and is not easily amended or repealed. It can only be changed by the community - not Parliament.

THE RULE OF LAW

All people should be ruled by just laws
subject to the following principles:



The rule of law must be supported by informed and active citizens