THE VOICE REFERENDUM

Frequently asked questions

Will the Voice lead to substantive change for Aboriginal and Torres Strait Islander peoples?

Yes.

The Voice will lead to substantive change for Aboriginal and Torres Strait Islander peoples by providing practical and informed recommendations to Parliament and the Executive (effectively, the Commonwealth Government and its agencies) on matters relating to Aboriginal and Torres Strait Islander peoples.[1]

Aboriginal and Torres Strait Islander peoples and communities frequently experience multiple forms of disadvantage. This is a product of a history of dispossession and a legacy of systemic social, political and legal discrimination.

A Voice which makes representations to Parliament and the Executive as to how policies, programs and laws would affect Aboriginal and Torres Strait Islander peoples will lead to more informed decision-making, and therefore improve the lives of Aboriginal and Torres Strait Islander peoples and communities.

Are more details about the Voice needed before the referendum?

No.

The referendum will effectively ask the Australian people to support a *principle*. The principle that Aboriginal and Torres Strait Islander peoples should have a representative body through which they can express their views on matters that affect them to Parliament and the Executive.

The referendum will not ask the Australian people to vote on the *model* for the Voice.

The model for the Voice – its composition, functions, powers and procedures – will be created through laws made by Parliament.

This is an orthodox approach to constitutional drafting where the Constitution establishes an institution and empowers the Parliament to make laws to give it form and substance.

Importantly, some details relating to the Voice have already been discussed. For example, the First Nations Referendum Working Group, which is advising the Government on the referendum, has agreed several design principles for the Voice that will inform and shape the development of the draft legislation to establish it.

It is anticipated that there will be comprehensive consultation with Aboriginal and Torres Strait Islander peoples on the legal framework for the Voice.

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Does the Voice create special rights or discriminate based on race?

No.

The Voice does not create special rights for Aboriginal and Torres Strait Islander peoples, nor discriminate on the basis of race. The Voice is a means to give effect to the human rights of Aboriginal and Torres Strait Islander peoples, as Australia's first peoples, rather than a distinction on the basis of race.

Specifically, it gives effect to the right of selfdetermination which is given to all people to allow them to 'freely determine their political status and freely pursue their economic, social and cultural development'.[2] It also gives effect to other human rights, such as the right to equality and non-discrimination and to take part in public affairs.

Given the significance of a constitutionally enshrined Voice as an expression of international human rights principles, multiple international human rights bodies and experts have endorsed constitutional enshrinement of the Voice. These include the United Nations Permanent Forum for Indigenous Issues, the UN Special Rapporteur on the Rights of Indigenous Peoples, and the United Nations Committee on the Elimination of Racial Discrimination.

Does the Voice impact Aboriginal and Torres Strait Islander sovereignty?

No.

The Voice will not cede the sovereignty of Aboriginal and Torres Strait Islander peoples. The sovereignty or authority over land and waters asserted by Aboriginal and Torres Strait Islander people under their traditional law and custom is capable of co-existing with the sovereignty asserted by the British Crown in the colonisation of Australia, which now underpins the Constitution.[3]

The Voice will provide for substantive recognition of Aboriginal and Torres Strait Islander peoples within the legal document that governs the system of government under the Crown. Sovereignty can only be ceded through the agreement or consent of First Nations peoples, typically through treaty agreements.[4] The creation of the Voice in the Constitution does not represent consent or agreement by Aboriginal and Torres Strait Islander peoples to cede their sovereignty.

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Why is it necessary to enshrine the Voice in the Constitution, rather than establish it in legislation?

A successful referendum which enshrines a Voice within the Constitution would present a momentous public act of recognition and demonstrate an enduring symbol of unity between Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians.

It is important to amend the Constitution to provide for the Voice, as opposed to simply providing for it through legislation, because:

- A constitutionally enshrined Voice was the means called for by Aboriginal and Torres Strait Islander peoples in the Uluru Statement. This followed careful and longstanding deliberation of the options available, to recognise and empower them and is therefore an expression of self-determination;
- Constitutional enshrinement of the Voice would provide it with an enduring mandate. This would distinguish it from previous advisory bodies representing Aboriginal and Torres Strait Islander peoples (such as the Aboriginal and Torres Strait Islander Commission), which were able to be established and dissolved, and were consequently subject to the changing political landscape.

Why should the Voice be able to make representations to the Executive?

The Executive is the branch of government responsible for developing federal policies and programs and performing functions and powers under law. Its role includes developing draft legislation that is then introduced to Parliament for its consideration. The Executive is comprised of individuals and entities which exercise executive power, including Ministers and government departments and relevant agencies.

It is important that the Voice can make representations to the Executive to enable the views of Aboriginal and Torres Strait Islander peoples to inform the creation of laws and policies through to their enactment and operation.

The Voice will be able to foster and build collaborative and productive relationships with the Executive which will enable it to contribute views on substantive policy, program and legislation from development through to implementation.

Parliament will be able to provide for an efficient and effective means by which the Voice can make representations to the Executive.

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Will the Voice be a third chamber of Parliament or have veto power over Parliament?

No.

The Voice is a Voice *to* the Parliament, not a Voice *in* the Parliament. The Voice will not have any veto or law-making power. It will not have power to issue any command to Parliament. The Voice will be an advisory body. Its function will be to 'make representations'—that is, provide views to Parliament in relation to proposed or existing laws or policies which relate to Aboriginal and Torres Strait Islander peoples.

The weight given by Parliament to such representations is a matter for the Parliament to decide.

Will the constitutional amendment create any obligations on Parliament or the Executive?

No.

The constitutional amendment would not create any obligation on Parliament or the Executive to consult the Voice or follow its representations.

It would be a matter for Parliament to create internal procedures relating to how it seeks or receives the Voice's representations.

The Parliament will also have the power to make laws to establish obligations or procedures relating to the way that the Executive seeks or receives representations from the Voice. Such laws may, for example, determine whether and when a representation by the Voice must be sought or considered by the Executive.

Will the Voice lead to excessive litigation that will impact the functioning of Government?

No.

The procedures developed by *Parliament* relating to representations it receives from the Voice would be non-justiciable.[5] That is – unable to be challenged in court proceedings.

The success of any legal challenge to an *Executive* action or decision relating to a representation by the Voice to the Executive will depend on laws that are made by the Parliament. Parliament will be empowered to determine the legal effect of representations to the Executive.

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Further, Parliament has the ability in the future to make or amend laws to ensure the Voice functions effectively.

This means that if processes relating to the Voice are not working well, they can be amended.

The possibility of a legal challenge to an Executive decision or action (judicial review) is not unusual within the Australian legal system. Judicial review is available to correct errors of governments and government agencies which affect people's legal rights and contravene existing laws. The Law Council considers that the Australian public should have trust in the court performing its judicial review function, as it does on a daily basis.

Has the referendum process been rushed?

No.

The referendum to provide for a Voice to Parliament and the Executive in the Constitution will be the culmination of decadeslong advocacy by Aboriginal and Torres Strait Islander peoples for Constitutional recognition. It follows a long public consultation process, extending across multiple inquiries and reports, directed towards the best means to provide for that recognition.[6]

The Referendum Council and 2015 Final Report process was particularly formative in relation to the proposal for a First Nations Voice. As part of its mandate to consult with Aboriginal and Torres Strait Islander peoples in relation to meaningful recognition, the Referendum Council conducted:

- twelve *Regional Dialogues* held across the nation and one held in Canberra, described as the most proportionately significant consultation process that has been undertaken with Aboriginal and Torres Strait Islander peoples; and
- the *National Constitutional Convention at Uluru*, which resulted in the *Uluru Statement*, an articulation of the consensus position reached during the Regional Dialogues.

The process to the referendum on the Voice has been a significant and considered process, involving multiple opportunities for the members of the public to provide their views. This is a process that has resulted in a constitutional amendment proposal which is just and legally sound.

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1 See, Fiona Stanley, et al, 'Australian First Nations response to the pandemic: A dramatic reversal of the 'gap'' (2001) 57(12), *Journal of Paediatrics and Child Health,* 1853; Harvard Kennedy School, 'Project on Indigenous Government and Development' (Webpage) <https://indigenousgov.hks.harvard.edu/home>.

2 See, *International Covenant on Civil and Political Rights,* Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976), Article 1; *International Covenant on Economic, Social and Cultural Rights,* Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), Article 1.

3 See, the Hon Robert French and Prof Geoffrey Lindell, Submission to the Joint Select Committee on Aboriginal and Torres Strait Islander Voice Referendum (Submission 98), [33]-[36]; See also, advice provided by Bret Walker SC in Commonwealth of Australia, *Final Report of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander People* (Report, June 2015), <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/2015_Constitutional_Recognition_of_Aboriginal_and_Torres_Strait_Islander_Peoples/Constitutional_Recognition/Final_Report> [7.18].

4 Dr Hannah McGlade, 'Voice will empower us, not undermine Sovereignty' *National Indigenous Times* (Online, 16 January 2023) https://nit.com.au/16-01-2023/4736/voice-will-empower-us-not-undermine-sovereignty; see also LexisNexis, *Halsbury's Laws of Australia,* (online at 14 March 2023) Foreign Relations 'Territory and Jurisdiction' [215 -290]; *Oxford Public International Law* (online at 14 March 2023, 'Cession'.

5 See, *The State of Western Australia v The Commonwealth* (1995) 183 CLR 373, [140].

6 Law Council of Australia, Submission to the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum (21 April 2023) Appendix A <https://www.lawcouncil.asn.au/publicassets/91815baf-48e2-ed11-9480-005056be13b5/4345%20-%20Inquiry%20into%20the%20Constitution%20Alteration%20%20Aboriginal%20and%20Torres%20Strait%20Islander%20Voice%20%202023.pdf>.