A First Nations Voice to Parliament

Australia's Constitutional Referendum Explained

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On 27 May 2017, Aboriginal and Torres Strait Islander peoples 'from all points of the southern sky' gathered on the red dust of Mutitjulu to issue the Uluru Statement from the Heart. Grounded in their inherent rights as the 'first sovereign Nations of the Australian continent and adjacent islands', the Statement called for a First Nations Voice to be enshrined in the Constitution and a Makarrata Commission that would supervise a process of agreement making and truth telling be established in legislation. In the words of the Uluru Statement, these reforms would 'empower our people', remedy the '*torment of our powerlessness*', and enable Indigenous Australians to 'take *a rightful place* in our own country'.

Constitutional change in Australia requires a referendum. Just over six years later, in June 2023, the Commonwealth Parliament passed the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023. The Bill proposes to amend the Constitution by inserting a new section that would recognise the First Peoples of Australia by establishing an Aboriginal and Torres Strait Islander Voice. On 14 October 2023, Australians will go to the polls in the first referendum since 1999. If it succeeds, the Voice will be the first amendment to the Australian Constitution since 1977.

There is a wealth of scholarship and popular commentary on the Voice. This brief post is aimed at introducing the Voice to an international public law audience. I explain what the Voice would do, where the proposal emerged, and why proponents have argued it needs to be placed in the Constitution. I also outline how constitutional change can occur in Australia. I conclude by reflecting on where we are, and where we might go.

What is the Voice?

Aboriginal societies have inhabited the Australian continent for at least 60,000 years. This history and that connection to the lands and waters of Australia are not mentioned in the Constitution. In fact, the Constitution does not refer to Aboriginal and Torres Strait Islander peoples at all, let alone recognise their distinct rights and interests. The reasons for this are complex but can be traced back to the initial encounters with British colonists. Rather than negotiate treaties with the First Peoples, the British declared the continent 'vacant', 'without settled inhabitants or settled law'. Even today, no formal treaties have been negotiated.

The failure to formalise the relationship between the State and Aboriginal and Torres Strait Islander peoples has had many negative consequences. One ongoing challenge is the capacity for Indigenous Australians – who comprise around 4 per cent of the population – to have their interests considered in the processes of governance. As many people have noted, the 'majoritarian arithmetic of electoral politics' leaves Indigenous Australians 'with little leverage over government decision-making', and vulnerable to the 'wavering sympathies of the Australian community'.

The Voice responds to this central challenge. The Voice would be a representative body comprised of Indigenous Australians empowered to make representations to Parliament and the federal government on matters that relate to Aboriginal and Torres Strait Islander people. Its animating objective is to guarantee that Aboriginal and Torres Strait Islander peoples can have a say in the development of law and policy that affects them.

The wording to achieve this effect has been developed carefully over many years to meet several principles. These include that the amendment be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples, be capable of being supported by an overwhelming majority of Australians, contribute to a more unified nation, and be technically and legally sound. In 2022 and 2023, the text was further refined by a 21-member Referendum Working Group of Indigenous leaders co-chaired by Minister for Indigenous Australians Linda Burney and Special Envoy for Reconciliation Patrick Dodson. Their wording was endorsed by the Parliament. The amendment proposes to insert a new Chapter IX into the Constitution, consisting of a single section 129:

> *In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia: (i) there shall be a body, to be called the Aboriginal and Torres Strait Islander Voice;(ii) 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;(iii) 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.*

As the wording makes clear, the referendum concerns the principle of whether there should be a Voice in the Constitution. The question of detail – what the Voice will look like, how it will relate to the Parliament and Government, etc. – will be determined later in legislation. Parliament will retain the authority to revise and refine the operation and structure of the Voice.

Where did the proposal emerge from?

The idea for a Voice emerged directly from Indigenous Australians. In 2016 and 2017, twelve Indigenous-led regional dialogues were held across the country with the aim of understanding how Indigenous Australians wanted to be recognised in the Constitution. These deliberative dialogues revealed that many Aboriginal and Torres Strait Islander peoples feel alienated from the processes of government and the forums where decisions are made that affect their lives. A national representative body was understood to be an empowering institution that would give Indigenous Australians a 'greater say in government decision-making on matters that affect them and their rights', by influencing 'laws and policies that affect First Nations peoples'. A Voice was necessary because existing laws, policies and programs have been developed without asking Aboriginal and Torres Strait Islander people 'what is needed'. In the final constitutional convention at Uluru, delegates from these dialogues delivered the Uluru Statement from the Heart.

The Voice responds to the felt needs of Indigenous Australians and does so in a manner consistent with Australia's constitutional traditions. Reflecting the country's reluctance to embrace a bill or charter of rights, the Voice does not introduce a justiciable right to be consulted nor does it fetter parliamentary or government action. Rather, it seeks to ensure that Aboriginal and Torres Strait Islander peoples can participate 'in the democratic life of the state'. The Voice is also consistent with long-standing aspirations, stretching back to petitions from the 1930s calling for Aboriginal representation in the Australian Parliament.

Why does the Voice need to be placed in the Constitution?

The Australian Parliament could pass a law to legislate the establishment of an Aboriginal and Torres Strait Islander Voice, but placing the Voice in the Constitution is important for several reasons. First, the Constitution will provide the Voice with security and stability. The Parliament has established Indigenous representative bodies in the past that empowered Indigenous Australians to speak to government about laws and policies that affected them. Without constitutional protection, however, each body was abolished after clashing with government. These actions have reversed progress, damaged working relationships, fuelled cynicism and distrust, and wasted talent that could be used to solve complex problems. Putting an

Aboriginal and Torres Strait Islander Voice in the Constitution will make it harder for government and Parliament to do away with the Voice.

Putting the Voice in the Constitution will also make it more likely to succeed. The proposed wording is clear: the Voice will not be able to force the Parliament or government to change laws or policies. Its success will rely on political and moral pressure. Parliament and the government are more likely to listen to the Voice if it has been endorsed by the Australian people at a referendum. Australians will have made clear that they want their political leaders to take the Voice seriously. Finally, enshrining the Voice in the Constitution is an act of recognition and respect. Aboriginal and Torres Strait Islander peoples have more than 60,000 years of connection to this continent. Putting the Voice in the Constitution would mean that the Australian people formally recognise that history and status.

How easy is it to change the Constitution?

Constitutional change may be vital, but it does increase the degree of difficulty. Historically, Australians have proven loath to alter the Constitution. Former Prime Minister Robert Menzies described the challenge of securing an affirmative vote as 'one of the labours of Hercules', while some academics have labelled Australia – 'constitutionally speaking…the frozen continent

These comments are not hyperbolic; they are backed up by the record of success and failure. Since the Constitution came into force on 1 January 1901, Australians have voted in 44 referendums, but only 8 have succeeded. This is partly a result of the amendment mechanism itself. A referendum will only be successful if it achieves a 'double majority', that is, a majority of popular support and a majority of support in a majority of States. With six States, the second limb requires four States to vote in favour – put another way, three States can exercise a veto. Even so, the second limb has not proven especially significant in derailing reform. In only five additional cases did a referendum achieve a popular majority but fail to obtain support in at least four States. Clearly, there is something else at play.

The most significant study of Australian referendums has identified four key factors behind successful reforms: bipartisan support, popular ownership, popular education, and a sound and sensible proposal. This seems simple enough but has often proven elusive. Two key points stand out. First, Australians have little awareness of key features of and concepts underlying the Constitution. This is a longstanding issue. Surveys in the early 1990s found 'notoriously low levels of public knowledge' about the Constitution and system of government. The situation does not appear to have improved. A 2021 parliamentary inquiry lamented the 'apparent low levels of understanding of the Constitution'. A similar pattern exists on the proposed amendment, with surveys persistently revealing that many Australians do not know much about the Voice.

Constitutional illiteracy or ignorance creates fertile soil for fear campaigns based on misleading and untruthful statements. In practice, non-government politicians and political parties have found it hard to resist the urge to oppose referendums hoping to take political skin off the government. These two factors are at play in the current referendum.

Where are we now?

In April 2023, the Federal Opposition announced it would formally oppose the referendum. This decision denied the Voice the bipartisan support it was seeking and makes the challenge of securing a successful referendum that much harder. It has also had the unfortunate effect of turning Aboriginal and Torres Strait Islander peoples' request to be heard in the processes of governance into a proxy war between the two major parties. Reports reveal that the public is being bombarded by inaccurate and inflammatory statements designed to confuse and frighten voters. Racist attacks are common on social media and in some other quarters. The febrile atmosphere is likely to negatively affect Indigenous Australians' health and wellbeing.

The Government ignored warnings that this would occur. In advance of the referendum, the Australian Electoral Commission mailed a pamphlet containing

arguments for and against the Voice, authorised by parliamentarians, to each household. A proposal to require an independent panel assess the veracity of these arguments was not adopted. Just as in previous referendums, arguments in the pamphlets contain exaggerated and misleading claims.

Where to next?

Last weekend saw tens of thousands of Australians rally in support of the Voice. Nevertheless, polling suggests support for the Voice has slipped precipitously over the last few months, putting its success in doubt. The Voice is not a silver bullet. But if the referendum fails, basic problems concerning the relationship of Aboriginal and Torres Strait Islander peoples and the State will remain unaddressed. Indigenous Australians will also continue to struggle to have their interests considered in the processes of governance.

The campaign has exposed a deep fault line within Australian society. In 1980 Bernard Smith described the dispossession of Aboriginal and Torres Strait Islander peoples as the 'locked cupboard of our history'. The ferociousness of political attacks against the Voice – a modest and constitutionally sound proposal – suggests that many Australians are intent on keeping that cupboard locked, lest prying it open forces a fundamental re-examination of our society. Equally, for many Indigenous leaders, a failed referendum would leave efforts at reconciliation 'dead'.

A failed referendum will also have larger consequences. The Australian Constitution has not been amended since 1977. It is not surprising that it is replete with 'out-of-date provisions and processes' that produce 'deadlocks, duplication and workarounds'. A no vote will likely dampen government appetite for more comprehensive reforms.

It does not have to be that way. Irrespective of the result, the referendum should be seen as an opportunity for government to invest in community education and constitutional literacy programs. The Voice debate reveals that there is a significant need for greater civics education. This referendum may not succeed, but if it leads to a more informed public, it will have been valuable.

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