

VOICE REFERENDUM FAQs

This document draws on a range of resources listed in the References section. It is a summary or synthesis of what the leading constitutional lawyers, practising and academic, have had to say in support of the First Nations Voice to Parliament.

These include: former High Court Justices Robert French AC and Kenneth Hayne AC KC, the Commonwealth Solicitor-General Stephen Donaghue KC, leading barristers including Bret Walker SC and leading academics including Professors Anne Twomey, Megan Davis, George Williams, former presidents of the Australian Bar Association or Law Council of Australia, and most recently the NSW Bar Association and the Law Society of NSW

They speak with one voice – in support of a yes vote in the referendum.

The aim of this FAQ document is to assist people who have questions about the Referendum, and share with them more detailed resources.

Where possible this document has drawn first on information and resources provided by Indigenous-led organisations or groups, including Uluru Dialogue [UluruStatement.Org], yes23.come.au and the Referendum Council.

This document is in three parts.

- A. Frequently asked questions
- B. Concerns of some indigenous people
- C. Matters to be decided by Parliament after the Referendum

A. FREQUENTLY ASKED QUESTIONS

1. What is the Uluru Statement from the Heart? What is the Voice?

- **The Uluru Statement from the Heart** [“the Uluru Statement”] is an invitation from Aboriginal and Torres Strait Islander peoples to the Australian people calling for Voice, Treaty, Truth - in that order.

- The Uluru Statement was issued in May 2017 at Uluru at the National Constitutional Convention, and it calls for two stages of reforms:
 - **An Aboriginal and Torres Strait Islander Voice to Parliament** [“the **Voice**”], to be contained in the Constitution and then
 - Makarrata - a Yolgnu word meaning ‘a coming together after a struggle’
- The Voice is a constitutionally protected body of Aboriginal and Torres Strait Islander People which may make recommendations to the Federal Parliament and the Executive Government on laws and policies that affect Aboriginal and Torres Strait Islander people – it literally gives them a voice at the table.
- It provides for the first time for recognition of Aboriginal and Torres Strait Islander Peoples in the Constitution.
- The Uluru Statement was the culmination of the 13 Regional Dialogues – the most widespread, grassroots consultation ever conducted with Aboriginal and Torres Strait Islander peoples.
- The 13 Regional Dialogues were set up by the Referendum Council and held in 2016-2017.
- At those Regional Dialogues, delegates were asked to select between five forms of Constitutional recognition. The Voice to Parliament was one of the five.
- The consultation process was Indigenous-led at every stage, with the three-day Dialogues convened by local Aboriginal land councils. About 100 Aboriginal and Torres Strait Islanders attended each Dialogue:
 - 60 % were traditional owners and elders
 - 20 % were local First nations community organisations
 - 20 % were key First Nations individuals (such as grandmothers, youth and members of the Stolen Generations).

There were 1200 Aboriginal and Torres Strait Islander delegates in all.

- At each of the 12 Regional Dialogues the delegates voted for the Voice to Parliament as their chosen form of constitutional recognition.
- The Voice requires an amendment to the Constitution. A treaty does not require Constitutional amendment, nor does ‘truth-telling’.
- **A survey in May 2023 showed that 83 % of Aboriginal and Torres Strait Islander peoples support the Voice.**

2. Why do we need an Aboriginal and Torres Strait Islander Voice?

- The Voice would play two important roles – consultation and recognition
 - **Consultation:** the Voice will for the first time give Aboriginal and Torres Strait Islander peoples a say into laws and policies that affect them.

BUT the Voice is advisory only – it cannot make, change or veto laws. That is up to Parliament, as it always has been.

- **Recognition:** at the moment our Constitution does not recognise Aboriginal and Torres Strait Islander peoples as the original owners of the land
The Voice will for the first time recognise them in the Constitution as the first Peoples of Australia

Practical impact of the Voice

- The status quo is not working - many Aboriginal and Torres Strait Islander people experience lower quality of life outcomes than non-Indigenous Australians.

- The most recent report by the Productivity Commission on Closing the Gap (July 2023) found that the situation for Indigenous Australians had become worse in the following four key areas:
 - Early childhood development, increased numbers of adults in prison, more children in out-of-home care, an increase in Indigenous suicide
- After receiving this report, Minister Linda Burney said this:

“A Voice to Parliament will help to close the Gap, because we know that listening to communities leads to better outcomes that improve people’s lives.”

- It seems pretty clear that if Aboriginal and Torres Strait Islander peoples have input into laws and policies that impact on them – a Voice – this will lead to better outcomes.

Legal issues

- The Commonwealth has powers under the Constitution to make laws about Aboriginal and Torres Strait Islander people.
- It has used these powers in the past to make laws detrimental to Aboriginal and Torres Strait Islander people – without any input from them.
- The Voice will give Aboriginal and Torres Strait Islander people a say in laws and policies that affect them, so that the people making those laws and policies will be better informed.
- This will lead to better laws and policies, and more effective, targeted expenditure.
- Former High Court Chief Justice Robert French has called the Voice proposal. *“a once in a lifetime opportunity for Australia to fill a gaping hole in our Constitution.”*

3. Would the Voice have power to make/ veto/ amend legislation? Would it be a “third chamber of Parliament”?

- No. The Voice would NOT have power to make, reject/veto or change legislation so it would not be a “third chamber of Parliament”.
- Its role would be to **advise** the Parliament, Government and Executive on laws and policies that affect Aboriginal and Torres Strait Islander peoples.
- **NB:** There are already many other bodies that inform/advise Parliament.
 - eg the Productivity Commission, the Australian Law Reform Commission, the Australian Human Rights Commission.

No one has ever suggested that they are ‘third chambers of Parliament’.

- These bodies make reports directly to Parliament, which are tabled in Parliament – as the Voice’s reports/advice would be
- In the same way, the role of the Voice would be inform Parliament of the views of Aboriginal and Torres Strait Islander peoples

4. How would the Voice work?

- The Voice would be able to respond to requests for representations from the Parliament and the Executive Government.
- The Parliament and Executive Government should seek representations in writing from the Voice early in the development of proposed laws and policies
- The Voice would also be able to make representations proactively.
- The Voice’s advice would be independent
- The Voice would have its own resources to allow it to research, develop and make representations.
- The Voice would work alongside existing organisations and traditional structures

5. *How would members of the Voice be selected?*

- Members of the Voice would be selected by Aboriginal and Torres Strait Islander communities (NOT the Government).
- Members would serve on the Voice for a fixed period, to ensure regular accountability to their communities.
- The method of selecting choosing members of the Voice would be determined by Parliament after the Referendum (see Part C below, ‘Matters to be decided by Parliament after the Referendum’)

6. *Who would those members be?*

- The Voice would be representative of Aboriginal and Torres Strait Islander communities, gender-balanced and include youth
- Members of the Voice would be Aboriginal and/or Torres Strait Islander, The Australian government, uses the ‘three part test’, which as been in common use since the 1980s:
 - that the person is of Aboriginal or Torres Strait Islander heritage,
 - identifies as Aboriginal or Torres Strait Islander and
 - is accepted as such by the community in which they live or have lived. This definition has been in common use since the 1980s
- Members would be chosen from each of the states, territories and the Torres Strait Islands.
- The Voice would have specific remote representatives as well as representation for the mainland Torres Strait Islander population.
- The Voice would have balanced gender representation at the national level.
- Members of the Voice would connect with – and reflect the wishes of – their communities.
- The Voice would consult with grassroots communities and regional entities to ensure its representations were informed by their lived experience.

7. *Would the Voice be able to override the wishes of local Indigenous people?*

No. It would be an advisory body only – its power would be to “make representations”.

8. *How would the Voice be accountable?*

- Voice members would fall within the scope of the new National Anti-Corruption Commission.
- The Voice would be subject to standard governance and reporting requirements.
- Voice members would be able to be sanctioned or removed for serious misconduct.

9. *What does “matters relating to Aboriginal and Torres Strait Islander Peoples” mean? Don’t all laws and policies potentially “relate to” them, so that the Voice would have a say on ALL laws and policies?*

- Professor Ann Twomey says that this could include both:
 - Laws and policies that specifically relate to Aboriginal and Torres Strait Islander peoples - eg native title, cultural heritage AND
 - General laws which have a particular impact on Aboriginal and Torres Strait Islander peoples

- Professor Twomey gives this example of the second type of law:

A future law requiring photo identification for people to be able to vote in federal elections.

- This is a law of general application but could have a serious impact on Aboriginal and Torres Strait Islander peoples in remote areas who might not have photo IDs
- The Voice would make representations about the risk of such a law preventing those people from voting – and would suggest to government how to get around this problem

- As former High Court judge Kenneth Hayne AC KC has said recently on the ABC:

“as a matter of practical reality the Voice will not waste its political and social capital on making representations on matters that are of peripheral concern to Aboriginal and Torres Strait Islander People”

- Even if the Voice did make recommendations on matters that didn't particularly relate to Aboriginal and Torres Strait Islander people, there would be no obligation on Parliament or the Executive to follow its advice/recommendation

10. Why should the Voice be able to make representations to the Executive Government as well as to Parliament?

- Because it is critical for policy-makers (the Executive) as well as lawmakers to hear from Aboriginal and Torres Strait Islander peoples on policies that will impact on them.
- For too long, Aboriginal and Torres Strait Islander peoples have been ignored when policies have been made that affect their lives.

A practical example – recent violence in Alice Springs [repeated from above]

- Local Indigenous communities warned that if alcohol bans were removed/allowed to lapse there would be problems
- Governments did not listen – they allowed the alcohol bans to lapse, leading to recent violence.
- Noel Pearson and Prof Marcia Langton (and many others) argue that if policymakers had been compelled by the Constitution to listened to local communities – if there had been an Aboriginal and Torres Strait Islander Voice – there would have been better policies and the violence may have been avoided

11. Won't there be litigation if it is alleged that the Executive did not seek or follow the Voice's advice?

- It is never possible to entirely rule out the possibility of litigation in the High Court about provisions in the Constitution. That is because we are governed by the rule of law - which is a good thing.
- However, leading Constitutional law experts including previous High Court Justices Robert French and Kenneth Hayne, Professor Ann Twomey and leading constitutional lawyer Bret Walker SC, as well as the Commonwealth Solicitor-General Stephen Donaghue SC— believe that there is unlikely to be very much litigation of this nature, and certainly NOT the deluge which is being referred to by the No campaign.
- Former Chief Justice French has said
“there is little or no scope for Constitutional litigation arising from the words of the proposed amendment”

12. Will the Parliament and Executive be required to follow the advice of the Voice? What if they don't? Could there be a wave of High Court (or other) litigation?

- No – Robert French AC , former Chief Justice of the High Court has said:
“There is no constitutional obligation for the Parliament or the Executive to accept or be bound by such submissions or advice”

but they should respect them and take them into account

- It is always possible that there might be some litigation – this is the case with many Constitutional provisions – but nothing to suggest there would be a ‘flood’.

14. We already have 11 Indigenous MPs in Federal Parliament – why do we need the Voice?

- Having 11 Indigenous Federal MPs does not guarantee Indigenous people a say in laws and policies that affect them because those MPs represent their electorates and their political parties – not Indigenous people and communities.
- There are 151 Members of the House of Representatives and 76 Senators. Eleven is a small proportion of that number.
- Indigenous politicians and Indigenous communities do not always agree – the Voice would be independent of party politics.
- Indigenous representation in Parliament fluctuates from time to time – it is not guaranteed.

15. What are the practical benefits for Indigenous people and communities? Is the Voice just symbolic?

- No – the Regional Dialogues, an extensive consultation process with Indigenous Australian, unanimously selected the Voice to Parliament as their preferred form of Constitutional recognition because it is NOT purely symbolic – unlike a Preamble to the constitution, which would be.
- A Voice will give the Parliament and Executive better quality information about Aboriginal and Torres Strait Islander communities and issues, delivered directly by a body of Aboriginal and Torres Strait Islander representatives.
- This will result in better quality laws and policies.
- Better laws and policies mean improved outcomes - across health, housing, criminal justice and education. The status quo is not working.

16. Why should Aboriginal and Torres Strait Islander peoples get special treatment in the Constitution by having a Voice?

What about other groups such as migrants, and people with a disability?

- Aboriginal and Torres Strait Islander peoples have a unique political and cultural existence in Australia because they have been here for over 60,000 years.
- Enshrining an Aboriginal and Torres Strait Islander Voice in the Constitution is formal recognition for the first time of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia.
- Under our Constitution, Aboriginal and Torres Strait Islander peoples are the only racial group about which special laws are made.
- These laws are sometimes for their benefit – eg about native title, cultural heritage, BUT they can also be to their detriment (for example laws exempting the Government from complying with the Racial Discrimination Act) . It is only fair that they have a say in those laws

17. I don't want to see race in the Constitution/ Will the Voice divide the country by race?

- Enshrining the Voice in the Constitution will not 'introduce' race into the Constitution - it is already there, in the race power [section 51 (xxvi)] which has been used to make laws detrimental to Aboriginal and Torres Strait Islander peoples
- It will not divide the country – but unify it, by giving every Australian the chance to vote on recognising the unique place of Aboriginal and Torres Strait Islander peoples in Australia
- As Noel Pearson says 'recognition is foundational to reconciliation'
- Robert French AC, former Chief Justice of the High Court, has said this:

“The Voice is not about race. It is about our First Peoples as the indigenous people of Australia ... by providing for the Voice in the constitution, the

Australian people perform and act of recognition... of First Peoples as the bearers of the first history of our continent””

18. Why do some notable Indigenous people of different backgrounds such as Warren Mundine, Jacinta Nampinjinpa Price and Lidia Thorpe oppose the Voice?

- The most recent survey (May 2023) shows that **83%** of Aboriginal and Torres Strait Islander people DO support the Voice
- There will always be some people who disagree – that is the beauty of democracy.

19. We don't have enough detail about the Voice. How can people vote on something they don't know enough about?

- we do have a lot of detail already (see questions 4-8 especially)
- see Part C below on what is to be decided post-referendum
- There are many examples of the Constitution giving a power to Parliament, but leaving the detail of how that power is to be exercised to Parliament
- eg in 1967 the Constitution gave Federal Parliament the power to make laws for Aboriginal and Torres Strait Islander people – it did not detail how those powers would be used. [French example]
- Professor Anne Twomey, from the University of Sydney Law School has said:
“Constitutions are not places where you want to freeze details. It is appropriate to leave it to parliament as this gives greater flexibility to adjust for future needs. If the Voice is not working well, its composition or procedures can be changed to improve it. If people don't like what parliament has done, they can impose pressure to get change or exercise their rights at the ballot box. Ultimately, it is left to the democratic process and the will of the people.

- There will be ongoing discussion about how the Voice would operate. The government has set up the First Nations Referendum Working Group to consult with representatives from First Nations communities across Australia.

20. Why does there need to be a referendum – can't we just legislate the Voice?

- The Voice needs to be enshrined in the Constitution of Australia so that future governments can't easily overturn or remove it
- Past Indigenous bodies set up only in legislation have been abolished when political priorities changed.
eg the Aboriginal and Torres Straits Islander Commission (ATSIC) was abolished by the Howard Government in 2005
- The strongest form of recognition is in the Constitution. The constitutional guarantee provides independence, stability and longevity.
- Constitutional enshrinement can only be achieved through a referendum.
- Australians can only change the Constitution by referendum.

21. How does the Referendum work? How many votes are needed?

There must be a double majority:

- A majority of people across Australia AND
- A majority of people in a majority of States (that means 4 of the 6 states)

22. Didn't Aboriginal and Torres Strait Islanders get recognition in the 1967 Referendum?

What did that do?

- No – the 1967 Referendum did not recognise Aboriginal and Torres Strait Islanders. That has never happened.
- Prior to the 1967 Referendum only the States were permitted to make laws specifically about Aboriginal people, and Aboriginal and Torres Strait Islander people were not included in official population statistics.

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- The 1967 Referendum changed the Constitution to give the Federal Government power to make laws about Aboriginal and Torres Strait Islander people (in the same way that it already had the power to make laws about people from other races).
- The 1967 Referendum also changed the Constitution to include Aboriginal and Torres Strait Islander people in the Census count, so that all Aboriginal and Torres Strait Islander people could be included as part of the electorate for Federal elections.
- The 1967 Referendum didn't 'recognise' Aboriginal and Torres Strait Islanders in the Constitution, it merely ended their formal exclusion from the Constitution, and from the protection of Federal laws, and gave them the same citizenship rights already enjoyed by every other Australian citizen at the time.

23. I'm an average Australian. What will the Voice do for me?

- From a practical, pragmatic point of view – a Voice will mean that taxpayers' money is better spent because the laws and policies on matters relating to Aboriginal and Torres Strait Islander people will be better because they will be based on the advice of the people on the ground
- The act of Constitutional recognition will contribute to greater unity and harmony between non-Indigenous and Indigenous Australians
- It will also create path toward reconciliation, which is in everyone's interests

B. CONCERNS OF SOME INDIGENOUS PEOPLE EG GREENS LIDIA THORPE

1. The Voice doesn't represent the wishes of First Nations people

- **The most recent survey, by YouGov in May 2023, shows that 83% of Aboriginal and Torres Strait Islander people DO support the constitutional enshrinement of Voice**

- There was wide consultation with diverse representatives from Aboriginal and Torres Strait Islander communities during the 13 Regional Dialogues in 2016/2017 , which led to the Uluru Statement in 2017
- The Dialogues were one of the largest and most extensive consultation processes ever undertaken in Australia.
- Some opponents of the Voice (eg. Warren Mundine) have proposed a form of symbolic recognition – the Regional Dialogues rejected that
- Some opponents (such as Senator Lidia Thorpe) are concerned that the Voice proposal doesn't go far enough and would prefer to see a Treaty negotiated first. However, enshrining the Voice will not prevent future Treaty negotiations – it will assist with establishing meaningful Treaty negotiations.
- Some opponents (such as Senator Jacinta Nampinjinpa Price) are concerned about whether a Voice will be an effective way to represent the views of local and remote communities. A key aspect of the Voice proposal is that it will have representation from communities from around Australia, chosen by those communities, so it will have the capacity to reflect a wide range of views, including those from regional and remote communities.
- Many leaders in regional and remote communities have expressed their public support for the Voice proposal,
- While there will be people who have different views about how to include or recognise Aboriginal and Torres Strait Islander people in our Constitution, we are being asked to consider the model that has emerged from widespread consultation and years of development
- It is what Aboriginal and Torres Strait Islander people, following wide and extensive consultation with them, have asked for
- There will be ongoing consultation with First Nations people about how the Voice would operate. The government has set up the [First Nations Referendum Working Group](#) and the [First Nations Referendum Engagement Group](#) to consult with representatives from First Nations communities across Australia.

2. *The Voice will just add another layer of bureaucracy and be just for the city elites.*

- Nothing could be further from the truth. The Voice is a product of wide consultation with regional communities – it is what they have asked for as their preferred form of constitutional recognition.

3. *Why should everyone in Australia get to vote on things that affect First Nations people.*

- The only way to ensure that the Voice to Parliament remains a permanent part of our democracy is to enshrine it in the Constitution.
- Changes to the Constitution can only happen through a referendum, which means that all Australians of voting age must vote on the proposed change.

C. MATTERS TO BE DECIDED BY PARLIAMENT AFTER THE REFERENDUM

- As many constitutional lawyers have explained, it is normal for much of the detail concerning a new Constitutional power to be decided by Parliament
 - The Constitution sets out the key principles
 - The detail is decided later by Parliament
- The proposed amendment to the Constitution (new section 129) provides in paragraph 3 that the Parliament will have power to make laws with respect to matters relating to the Voice,

“including its composition, functions, powers and procedures”
- After the referendum, there will be wide consultation with Aboriginal and Torres Strait Islander communities, the Parliament, and the broader public to decide on the design of the Voice.

- Legislation to establish the Voice will then go through standard parliamentary processes to ensure adequate scrutiny by elected representatives in both houses of Parliament.
- It makes sense to put much of the detail about the Voice design in legislation (not the Constitution) so that the Voice design remain flexible and can be changed as needed
- The new Constitutional provision [section 129] gives Parliament power to pass laws on matters relating to the Voice, including its composition, functions, powers and procedures.
- It is likely that those laws will answer the following questions:

1. Composition

- How many members of the Voice will there be?
- How will members be appointed and what will be the length of their term?
- Will each Voice member represent a community? Will this community be their current home or traditional land?

2. How will the Voice function?

- How, and by whom will the Voice body be designed?
- What are the functions and powers of the Voice?
- How will the Voice members make decisions?
- How will the Voice determine which issues to prioritise?
- How will the Voice inform itself about the needs and issues affecting local communities and regional Indigenous bodies? Will there be local and regional Voices?

3. How much will the Voice cost taxpayers annually?

The Uluru Statement from the Heart

We, gathered at the 2017 National Constitutional Convention, coming from all points of the southern sky, make this statement from the heart:

Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under our own laws and customs. This our ancestors did, according to the reckoning of our culture, from the Creation, according to the common law from ‘time immemorial’, and according to science more than 60,000 years ago.

This sovereignty is a spiritual notion: the ancestral tie between the land, or ‘mother nature’, and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. It has never been ceded or extinguished and coexists with the sovereignty of the Crown.

How could it be otherwise? That peoples possessed a land for sixty millennia and this sacred link disappears from world history in merely the last two hundred years?

With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia’s nationhood.

Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are alienated from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.

These dimensions of our crisis tell plainly the structural nature of our problem. This is the torment of our powerlessness.

We seek constitutional reforms to empower our people and take a rightful place in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.

We call for the establishment of a First Nations Voice enshrined in the Constitution.

Makarrata is the culmination of our agenda: the coming together after a struggle. It captures our aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination.

We seek a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history.

In 1967 we were counted, in 2017 we seek to be heard. We leave base camp and start our trek across this vast country. We invite you to walk with us in a movement of the Australian people for a better future.

References

- Uluru Statement ulurustatement.org
- Yes23 <https://www.yes23.com.au/faq>
- Uluru Statement from the Heart Information Booklet, Melbourne University, https://law.unimelb.edu.au/_data/assets/pdf_file/0005/2791940/Uluru-Statement-from-the-Heart-Information-Booklet.pdf
- Final Report of the Referendum Council, 30 June 2017: <https://www.referendumcouncil.org.au/final-report>
- Australian Government, Aboriginal and Torres Strait Islander Voice - <https://voice.niaa.gov.au/#>
- Various articles by legal experts including:
 - former High Court Justices Robert French and Kenneth Hayne
 - leading constitutional silk Bret Walker SC
 - Noel Pearson
 - leading constitutional law academics including Professor Anne Twomey, Professor Gabrielle Appleby, Professor AJ Wood, Associate Professor Elisa Arcioni
- *Everything You Need to Know About the Uluru Statement From the Heart* by Megan Davis and George Williams (published by NewSouth Publishing in 2023)
- *The Voice to Parliament Handbook* by Thomas Mayo and Kerry O'Brien