

[Legal opinion on the proposed amendments to the Constitution if referendum on Voice to parliament is successful overwhelmingly suggests changes are both appropriate and legally sound](#)

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Source: <https://pursuit.unimelb.edu.au/articles/educating-australia-on-indigenous-voice>

In an article in its research news website [Pursuit](#), the University of Melbourne has noted a failure of Australia's formal education to produce an informed electorate that understands the need for an Indigenous Voice to parliament. Whilst the University Council and the Executive of the University of Melbourne have [publicly affirmed](#) their support for the Uluru Statement from the Heart and the 'yes' position in the referendum, the statement highlights the need for informed information about the referendum and the changes which will be made should the Voice to Parliament be accepted by Australia on 14 October 2023. The purpose of this Latest Legal Update is to explain what the Voice is, as well as examine expert opinion on the legal basis of proposed amendments to the [Australian Constitution](#).

Where did the Voice originate?

The idea of a voice to Parliament originated in the Uluru Statement from the Heart (the Statement) which the [Australian Human Rights Commission](#) described as an invitation from a group of First Nations people to non-Indigenous Australians. Which was shared in 2017 and calls for substantive reform to help realise Indigenous rights, through the establishment of an Indigenous Voice to Parliament and a Makarrata Commission. Makarrata' is a multi-layered Yolŋu word understood as the coming together after a struggle. The Uluru Statement was the result of decades of research, reports and calls for genuine substantive reform to recognise and protect the rights of Aboriginal and Torres Strait Islander peoples.

The Statement can be accessed [here](#) and the final referendum Council Report on the Statement can be accessed [here](#).

Note that the [Australian Human Rights Commission have affirmed their support for the Uluru Statement and the Voice to parliament](#).

The Prime Minister initially announced his support for the Uluru Statement and the Voice to parliament in his victory speech following his election in May 2022. On 23 March 2023, the Prime Minister announced the referendum question and the proposed alteration to the Federal constitution. The referendum question 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?

For the constitutional amendments, see below.

Also in March 2023, the [Constitution Alteration \(Aboriginal and Torres Strait Islander Voice\) Bill 2023 \(Cth\)](#) (the Bill) was introduced in the Commonwealth Lower House. The Bill was referred to the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum who published their [Advisory Report](#) on 11 May 2023. The report acknowledged (at 4.6) that "The Committee is thus satisfied that the Bill is fit for purpose and meets the request expressed in the Uluru Statement from the Heart". Following this, on 31 May 2023, the Bill passed the Lower House, and on 19 June 2023 the Bill passed the Upper House.

In April 2023 the Opposition leader announced that the Opposition would not be supporting the Voice to parliament.

On 30 August, 2023 the Prime Minister announced that the referendum will take place on October 14 2023.

What constitutional amendment does the Voice propose?

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The proposal is for the insertion of a new Chapter IX into the Constitution which will read:

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.
 - .

See: [Prime Minister's Press Conference dated 23 March 2023](#) .

Does legal opinion support the proposed amendments as legally sound?


Please note the following is limited only to legal, and not political or other opinions concerning the Voice to parliament.



Generally speaking, opinion from legal experts and bodies has confirmed that the proposed amendments to the Constitution is legally sound and appropriate. For example:

- [The Law Council of Australia](#)  has advised that:
 - the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 to amend the Constitution to provide for the Aboriginal and Torres Strait Islander Voice to Parliament and the Executive Government is just and legally sound and should be passed in its current form.
- The Solicitor General, Stephen Donaghue KC stated that the proposed constitutional amendment:
 - is not only compatible with the system of representative and responsible government established under the Constitution, but it enhances that system.

The Solicitor General further stated that:


- First, and most significantly, the introduction of proposed s 129 into the Constitution would not alter the existing distribution of Commonwealth governmental power.
- Second, the Voice's function of making representations will not fetter or impede the exercise of the existing powers of the Parliament.
- Third, the Voice's function of making representations will not fetter or impede the existing powers of the executive government.

See: [Advice attached to a submission by Attorney-General Mark Dreyfus to a joint parliamentary inquiry into the referendum](#) .


- [The Law Society of NSW](#) , in support of the Voice has stated:
 - In our view, the constitutional amendment proposed is a modest one, that appropriately leaves detailed questions of design on 'composition, functions, powers and procedures' up to Parliament. This approach accommodates the need to allow for the Voice as a body to evolve and improve over time, and to respond to the issues of the day.
- The [Law institute of Victoria](#)  has stated, in its public support for the Voice:
 - It will be both a substantive and practical measure to better inform policy and legal decisions that impact the lives of

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Indigenous Australians. The consequences of the constitutional change have been interrogated by constitutional experts and have been found to be sound.

- The [Queensland Law Society](#)  also publicly supports the Voice and has stated:




QLS advocates for the development of good law and in doing so, supports the creation of laws which have sufficient regard to the rights and liberties of individuals, seek to eliminate discrimination and disadvantage and provide access to justice for all members of society.


- The [Law Society of South Australia](#)  have also publicly announced support of the Voice and has stated:

The proposed Voice to Parliament is a powerful means of empowering Aboriginal and Torres Strait Islander peoples to be heard in relation to the development and implementation of policies that affect them, including in respect of the interaction of First Nations Peoples with the legal system. This aligns with the Society's long-held position that the disproportionate adverse impact that Australia's legal system has on First Nations People should be addressed by engaging in genuine, meaningful, and consistent consultation with First Nations People.




- The [Law Society of Western Australia](#)  has:

endorsed the Law Council of Australia's (LCA) position as set out in the June 2023 Guide for the legal profession – Referendum for an Aboriginal and Torres Strait Islander Voice, that the constitutional amendment, as proposed, is constitutionally orthodox, just and legally sound.

The Law societies of the [Northern Territory](#)  and the [Australian Capital Territory](#)  have also confirmed their support of the Voice to parliament. The Law Society of the ACT has stated “that there is a fundamental injustice in our Constitution, in its failure to recognise Aboriginal and Torres Strait Islander peoples as the First Peoples on these lands”. The [Law Society of Tasmania](#)  is the only representative solicitor's body which has not publicly issued a position on the Voice but determined to take an educative approach on the Voice, calling on its members to do their own research and engage with the Voice conversation to assist in guiding the wider Tasmanian community.

In terms of Bar Associations, the Australian Bar Association in its submission to the [Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples](#)  indicated its support the Uluru Statement's call for a “Voice” in the Constitution on the basis that:

- it has been adopted by the representatives of First Nations at Uluru;
- the Voice is proposed to operate within the current constitutional structure and not against it;
- there will be continuing dialogue to develop any proposed constitutional amendment to recognise the role and position of the First Nations peoples; and
- following any appropriate amendment of the Constitution the Voice might be implemented in a number of ways outside the Constitution so as to provide both institutional flexibility and longevity for First Nations peoples and the Commonwealth of Australia. In principle the ABA supports the idea of an independent permanent advisory body to be enshrined in the Constitution. Any constitutional amendment should, preferably, be flexible as to the design of the Voice.


The [NSW Bar Association](#)  and the [Victorian Bar Association](#)  are the only state Bar Associations to publicly support for the Voice to parliament. The Queensland Bar Association has confirmed it would not take a formal position, either for or against. The Bar Associations of the other states and territories  have also not indicated a position on the Voice.

- Professor George Williams AO, Anthony Mason Professor of Law and Scientia Professor at the University of NSW and expert in constitutional law stated in his Submissions to the Joint Select Committee on the Aboriginal Torres Strait Islander Voice Referendum that:


The change is well-drafted to create an advisory body of Indigenous peoples able to make representations to Parliament and government, without introducing problematic and unintended consequences. The limited scope of the body is made clear by the use of the word ‘representations’

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There is also a smaller amount of legal expert opinion which raises questions the appropriateness of the amendments to the constitution, including:


- [Submissions to the Joint Select Committee on the Aboriginal Torres Strait Islander Voice Referendum](#)  by the Honourable Ian Callinan; and
- Submissions to the Joint Select Committee on the Aboriginal Torres Strait Islander Voice Referendum by the Honourable Philip Ruddock, who states that:
 - He holds concerns about the proposed s 129(iii), on the basis that the scope is extraordinarily broad;
 - The range of matters the voice may make representations on is essentially unlimited;
 - There is an implication that conferring a constitutional function on “making representations” implies some sort of reciprocal obligation.
- Shadow Attorney General, Michaela Cash who has suggested that the amendments to the Constitution will give:

rights that no one else in Australia has... these rights would in normal circumstances breach discrimination laws and be found to be unlawful, but as they are superior rights and are embedded in the Constitution, they will be an exception that the Parliament cannot override.

Note however that former Australian Bar Association Presidents, Dr Matt Collins AM KC and Fiona McLeod AO KC have both publicly said Ms Cash’s claims are [factually incorrect](#) .

For further information on the Voice to parliament, the Law Council of Australia, along with other Constituent bodies have published a range of resources on the Referendum as follows:

- Law Council Fact Sheets:
 - Factsheet 1 – [Amending the Constitution](#) 
 - Factsheet 2 – [Compelling case for the Voice](#) 
 - Factsheet 3 – [Explanation of the proposed constitutional amendment](#) 
 - Factsheet 4 – [Frequently Asked Questions](#) 
 - [Guide for the Legal Profession - Referendum for an Aboriginal and Torres Strait Islander Voice](#) 
- New South Wales Bar Association – [The Aboriginal and Torres Strait Islander Voice resource webpage](#) .
- Law Society of New South Wales – [The Voice to Parliament resource webpage](#) .
- Law Institute of Victoria – [Reconciliation Hub webpage](#) .
- Law Institute of Victoria – [Webinar: 'Understanding the Voice to Parliament' by the Hon Kenneth Hayne AC KC, Jon Faine and Rachel Perkins](#) .
- Law Institute of Victoria – [‘Simplicity of Voice proposal is its strength: Kenneth Hayne’ by Karin Derkley, Law Institute Journal](#) .
- Law Institute of Victoria – [‘The Voice referendum: What role can lawyers play?’ by Paul Gerber and Katie O’Byrne, Law Institute Journal](#) .
- Law Society of Western Australia – [Voice to Parliament Portal](#) .
- Queensland Law Society – [Voice to Parliament Portal](#) .

LexisNexis® has also compiled a [Referendum information Hub](#)  with expert commentary, curated news, legislative updates and educational material to keep people informed about the upcoming Referendum on the Indigenous Voice to Parliament. The dedicated site provides insights on legal and emerging policy issues, answer questions on the Referendum process and much more. All resources in the site are free to access and can be shared

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