
INDIGENOUS VOICE WHERE ARE WE AT?

Given the momentum building in the case for Constitutional Recognition and enshrinement of a Voice to Parliament, the purpose of this update is to provide clarity on what “the Voice” means and, for context, the background evolution. It has been co-authored by Danny Gilbert of Gilbert & Tobin and Berkeley Cox of King & Wood Malleasons.

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Coastal Connection by Bianca Gardiner

WHAT IS THE VOICE?

The “Voice” will comprise a national body and regional local bodies of Aboriginal and Torres Strait Islander peoples formed to consult with communities and be a voice for them in policy development and legislative decision-making processes.

The Voice would enable Aboriginal and Torres Strait Islander people to give advice about laws and policies that impact them to the Federal Parliament and the Executive Government delivering real and practical advice on how laws and policies can best improve the lives of Aboriginal and Torres Strait Islander peoples.

It is important that the Voice be to both the Parliament and the Executive Government to ensure that, when creating new policies and laws, advice from Indigenous people is available to the Parliament and Government of the day.

Constitutional “enshrinement” of the Voice can be as simple as a few additional words in the Constitution. The words should recognise Australia’s Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia and with three important elements:

- that there shall be a body to be called the Aboriginal and Torres Strait Islander Voice;
- the body may make recommendations to the Parliament and the Executive on matters relating to Aboriginal and Torres Strait Islander Peoples; and
- the Parliament shall establish, through legislation, the composition, functions, powers and procedures of the Voice.

The Parliament would, at all times through its legislative function and parliamentary mechanisms and practices retain full sovereign power in relation to the ongoing composition, functions, powers and procedures of the Voice.

Constitutional enshrinement would effectively prevent the Voice from being disbanded by future governments. That said, the legislative functions and operations of the Voice would remain the province of the Parliament and could change from time to time.

This constitutional amendment would require a majority “yes” vote in a majority of States (four out of six) and the electorate nationally.

BACKGROUND TO THE VOICE

HISTORICAL PERSPECTIVE

Since the mid-1880s, Australia’s Indigenous peoples have in various ways called for proper recognition of their place in the Australian nation.

Australia as a nation state was born in 1901 when the States formed the Australian Federation and established the Australian Constitution. Aboriginal and Torres Strait Islander peoples were excluded from the processes and from any recognition in the Constitution.

The 1967 referendum amended the Constitution, including by taking power over Aboriginal and Torres Strait Islander peoples from the states and giving it to the Commonwealth, but it gave nothing in the way of recognition or rights.

Since 2010, various Government processes and reports have considered the issue, some of which are summarised below, and yet, it remains unresolved.

Constitutional Recognition of the Voice is the single most important institutional change that can bring all Australians together in a power moment of unity.

The Federal Government 2022–23 budget includes \$160 million set aside for “funding for the indigenous recognition referendum”.



BACKGROUND TO THE VOICE (CONT'D)

ULURU STATEMENT FROM THE HEART

The Uluru Statement from the Heart, (see below), was issued to the Australian people on 26 May 2017 by some 250 Indigenous leaders who met over four days at Uluru in Central Australia. It was the culmination of wide-spread consultation among Aboriginal and Torres Strait Islander peoples across Australia.

“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 co-exists 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.”



In March 2018 the Australian Government established a Joint Select Committee, co-chaired by Senator Patrick Dodson and Julian Leeser MP, to further consider the Voice and other matters. The Final Report of the Joint Select Committee was delivered to the Australian Government on 29 November 2018. The Committee recommended:

- a process of co-design of the Voice; and
- following completion of that process, the Australian Government consider the legislative, executive and constitutional options for the Voice.

In October 2019, the Hon. Ken Wyatt, Minister for Indigenous Australians, established a co-design process including the appointment of a Senior Advisory Group, co-chaired by Indigenous Leaders, Professors Marcia Langton and Tom Calma, to make recommendations about the Voice. The terms of reference expressly excluded consideration of Constitutional Recognition of the Voice.

The Final Report on the Indigenous Voice Co-Design Process was delivered to the Australian Government in July 2021 and publicly released by Minister Wyatt on 17 December 2021.

The key proposal of the Final Report is the establishment of:

- A National Voice; and
- Local and Regional Voices; and

The Final Report proposes models for the National Voice and Local and Regional Voices and, very importantly, recommends a two-way advice link between the Local & Regional Voices and the National Voice. Local & Regional Voices will undertake community engagement, and provide advice to, and work in partnership with, all levels of government and drive a “shared decision-making” model to deliver better outcomes for regional communities.

Despite the express exclusion of this concept in the term of reference as described above, 90 percent of the public submissions argued that the National Voice should be constitutionally enshrined in line with the Uluru Statement from the Heart.

CURRENT STATE OF PLAY

Prime Minister Anthony Albanese has given his Government’s commitment to a referendum on the Voice during the current term of the Parliament.

Constitutional Recognition of the Voice is the only proposal for the constitutional recognition of Australia’s Aboriginal and Torres Strait Islander People before the nation.

A constitutional referendum on the Voice should occur in the next term of the Australian Parliament.



If you would like to discuss Constitutional Recognition please contact Berkeley Cox, Partner.

Berkeley Cox | Partner, King & Wood Malleons
EMAIL berkeley.cox@au.kwm.com

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