

Australian public law teachers on what the Australian people need to know before they vote at the referendum

We are public and constitutional law teachers from universities all over Australia with experience teaching law students about the Constitution and referendums.

Very often students come into our classrooms with little knowledge of the Constitution. Our job is to teach them about the history and operation of the Constitution and to equip them with the skills to analyse legal arguments and assess proposals for constitutional reform.

We are in a unique position to help Australians understand the fundamentals of the Constitution. We write this letter in the spirit that we approach our teaching: not as advocacy for a particular position, but to clarify some of the issues that are causing confusion about the proposed constitutional change, to help Australians sift through what they are reading and hearing, and to assist them to make an informed choice at the upcoming referendum.

There are many resources available for voters who want to understand the fundamentals of the referendum question. We understand that Australians can find it difficult to assess the merits of the more technical information, particularly where there are different legal views. In law school, we teach our students techniques to assess competing legal opinions, which include looking at the evidence that the author is using to support their opinion, and the author's experience working in the specialised field.

This skill is important, for instance, in assessing the stated concern of the No Case that the proposed amendment is constitutionally 'risky' and, in particular, that it might lead to dysfunction and delays in government. Certainly, it is impossible to predict exactly what the High Court might say in the future; this is the case for all constitutional and legal provisions. But we know that the vast majority of expert legal opinion agrees that this amendment is not constitutionally risky. These views are supported by careful argument, drawing on precedent (that is, previously decided cases) and a deep understanding of the Court's approach to constitutional interpretation. These experts also agree that the proposed Voice provision is consistent with the Australian constitutional system. The Solicitor-General, the government's top lawyer, and an experienced constitutional barrister, has advised that the Voice is likely to improve the operation of our constitutional system.

As public law teachers we also know the importance of understanding the history of the Australian Constitution when considering changes to that document. This history is important, for example, in responding to erroneous claims that the Voice will introduce 'race' into the Constitution.

The Australian Constitution was drafted in the 1890s and came into force in 1901. The original Constitution was approved through referendums in each of the colonies, but many people, including women, Aboriginal and Torres Strait Islander peoples and people who did not own property, had limited or no voting rights.

The framers (who were all white men) included the concept of 'race' within the Constitution, as they intended for the new Commonwealth Parliament to be able to pass laws that discriminated against people on the basis of race. In particular, they sought to pursue the White Australia Policy, where the rights of white Australians were given preferential treatment in relation to immigration, employment and movement. As such, whether or not we agree that the Constitution should continue to embed this concept, it is wrong to frame the Voice as *introducing* a racial divide into the Constitution. The racial divide has always been there.

UPDATED to reflect signatories as at Monday 9 October

In 1901, the federal power to make laws for ‘people of any race’ specifically excluded Aboriginal people, on the racist assumption that they would likely die out under colonial policies that continued under the States. But in 1967, a constitutional referendum removed this exclusion – and thus expanded the power to allow the federal Parliament to make laws in relation to Aboriginal and Torres Strait Islander peoples. Since then, the only racial group for whom the federal government has passed special laws is Aboriginal and Torres Strait Islander peoples.

It is against this constitutional history that the Voice provides a mechanism for Aboriginal and Torres Strait Islander peoples to have an input into the laws and decisions that are made about them. Importantly, the proposed constitutional amendment is based not on the outdated concept of ‘race’, but through recognition of Aboriginal and Torres Strait Islander peoples’ place as Australia’s First Peoples. This is consistent with contemporary understandings of the rights of Indigenous Peoples. The amendment was also requested by Aboriginal and Torres Strait Islander people in the Uluru Statement from the Heart. Unlike the original draft of the Constitution, the amendment will be decided by a referendum of all eligible Australian voters – regardless of gender, race or wealth – on 14 October 2023.

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