Institute of Public Affairs

ONE VOICE

Racial Equality in the Australian Constitution

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Director of Research
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Research Essay • February 2023

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Introduction

Australia is a successful multi-racial and multi-ethnic society precisely because its citizens have an underlying set of shared values. These values—freedom, tolerance, egalitarianism, fairness, and democracy—bring Australians together and have made Australia the great country it is today.

But Australians are being asked to endorse a radical change that runs contrary to these values. The proposal to amend the Australian Constitution to enshrine an Indigenous-only Voice to Parliament (the Voice), to represent and be comprised solely of Indigenous Australians, is an affront to the basic principle that every Australian gets the same say over the future of the country, and that each Australians' voice matters equally.

The federal government has commenced the process to hold a referendum to enshrine the Voice in the Constitution. At the Garma Festival held in East Arnhem Land in July 2022, Prime Minister Anthony Albanese released the proposed wording which would be presented to Australian electors. The new proposed constitutional provisions would read:

> There shall be a body, to be called the Aboriginal and Torres Strait Islander Voice
>
> The Aboriginal and Torres Strait Islander Voice may make representations to Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander Peoples
>
> The Parliament shall, subject to this Constitution, have power to make laws with respect to the composition, functions, powers and procedures of the Aboriginal and Torres Strait Islander Voice.

To date much of the public criticism of the federal government's proposal has been centred around the detail, or lack thereof, that has been revealed about how the proposed Voice would operate in practice. While the question of detail is important, it is only one aspect of the proposal that needs to be debated: indeed, in whichever form it is designed, the Voice if established would risk fundamentally and permanently dividing Australians by their race. The idea that one group of Australians would have different—and separate—political and legal rights based on their racial or ethnic background undermines the most basic values Australians have stood and fought for over generations.

A race-based body as proposed could not merely be appended to our existing institutions, it would reshape and reconfigure how Australian democracy is practiced, in effect operating as a third chamber of Parliament. This is not only incompatible with Australia's legal and political heritage, but inconsistent with the historical trend towards a race-blind Constitution, as exemplified by the overwhelming support at the 1967 referendum to remove two constitutional references to race.

The Australian Constitution is a rule book for our lawmaking institutions, and the Parliament—being open for participation to all Australians—remains the best body to represent all Australians. The Australian people understand this: in a recent opinion survey commissioned by the Institute of Public Affairs asking Australians whether they agreed with the statement that 'all references to race should be removed from the Constitution', 59 per cent agreed and just 12 per cent disagreed. Australians still understand today what they understood in 1967—that race has no place in the Australian Constitution.

The Voice is the latest proposal for constitutional recognition

The Voice is the most recent iteration of what has become known as constitutional recognition. Constitutional recognition means different things to different groups, but at its most broad refers to the formal acknowledgement in the Australian Constitution of the existence of Indigenous habitation and societies on the Australian continent prior to British Settlement. Defining what this means in practice has been a subject of debate between its advocates, and the movement to change the Constitution to recognise Aboriginal and Torres Strait Islander peoples has accordingly taken a variety of forms in a relatively short period of time.

The origins of the modern recognition movement can be traced to a parliamentary committee report into the idea of a treaty with Indigenous Australians. In 1983, the Senate Standing Committee on Constitutional and Legal Affairs published a report of its inquiry into the feasibility of a compact or 'Makaratta' between the Commonwealth and Aboriginal people. The standing committee rejected the idea of a treaty as it concluded that Aboriginal and Torres Strait Islanders were not a sovereign body capable of entering into treaties with the Commonwealth government. In its place, the

standing committee recommended that constitutional change should be considered, to sidestep the problem of sovereignty and create for the government the power to enter into a compact with Indigenous Australians.[1]

In 1991 the federal government established the Council of Aboriginal Reconciliation (CAR).[2] Prior to its scheduled closure in 2001 the CAR produced its final report, calling on the federal government to commit to reconciliation, by way of constitutional recognition and a legislated treaty-making process. A further recommendation was to establish a CAR successor body to continue the advocacy for reconciliation, which was realised in the form of an incorporated non-government entity called Reconciliation Australia.[3] The body operates 'Reconciliation Action Plans' in workplaces, schools, and early learning centres, and organises events such as the annual National Reconciliation Week.

During the 2007 federal election campaign, Prime Minister John Howard announced that a re-elected Coalition government would hold a referendum to 'formally recognise Indigenous Australians in our Constitution, their history as the first inhabitants of our country, their unique heritage of culture and languages, and their special (though not separate) place within a reconciled, indivisible nation' by way of a 'new

Statement of Reconciliation incorporated into the preamble of the Australian Constitution.'[4] Leader of the Opposition Kevin Rudd offered bipartisan support for Howard's proposal, regardless of the outcome of the election.[5] Rudd's Australian Labor Party (ALP) won the 2007 election though little substantive action was taken.

At the August 2010 federal election, both major parties again committed to some form of constitutional recognition. The ALP's 2010 election policy platform stated that 'constitutional recognition of Aboriginal and Torres Strait Islander peoples would be an important step in strengthening the relationship between Indigenous and non-Indigenous Australians, and building trust'.[6] At the same time, the Coalition made a commitment to hold a referendum to recognise Indigenous Australians in a new preamble to the Constitution, claiming recognition of Indigenous Australians in the Constitution 'makes sense, and is overdue'.[7] After the 2010 election failed to return a majority for either of the major parties, the ALP sought support from the Greens and independent MP's Andrew Wilkie and Rob Oakeshott to form government. The crossbenchers agreed to support the ALP in exchange for a commitment from the ALP to hold a referendum on constitutional recognition during that term of parliament.

On 8 November 2010, Prime Minister Julia Gillard announced the establishment of an expert panel to consult on the best possible options for a constitutional amendment on recognition of Aboriginal and Torres Strait Islander peoples to be put to a referendum. In January 2012, the expert panel handed down its final report, recommending numerous measures, including:

- The removal of sections 25 and 51(xxvi) from the Constitution;
- Recognising Aboriginal and Torres Strait Islander peoples in the Constitution through the insertion of a head of power to make laws on their behalf (to become section 51A);
- A new provision specifically relating to the recognition of Aboriginal and Torres Straits Islander languages (to become section 127A); and
- A new provision removing any future capacity on the part of the Commonwealth, the States, or the Territories to discriminate on the ground of 'race' (to become section 116A).

After considering the expert panel's report, the Gillard government in November 2012 established a

Parliamentary Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples 'to inquire into and report on steps that can be taken to progress towards a successful referendum on Indigenous constitutional recognition'.[8] The Joint Select Committee's final report, published in June 2015, recommended that a referendum be held on constitutional recognition, and that it be held at a time when it has the highest chance of success. The committee chairman, Ken Wyatt MP, noted the 'committee heard that Aboriginal and Torres Strait Islander people will accept nothing less than a protection from racial discrimination in the Constitution.'[9]

In the meantime, the ALP government had introduced into Parliament in March 2013 the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013*, by which parliament 'affirmed its support for constitutional recognition'. Intended to foster 'momentum for a referendum', it provided $10 million towards Recognise, a pro-constitutional amendment campaign entity operated by Reconciliation Australia. The legislation also required the relevant Minister to initiate a review within 12 months of the Act's commencement to 'consider the readiness of the Australian public to support a referendum to amend the

Constitution to recognise Aboriginal and Torres Strait Islanders in the Constitution.' The subsequent review, initiated on 27 March 2014 and chaired by former deputy prime minister John Anderson, concluded that momentum for change was being lost, awareness was low and drifting, and that 'crystallising the question to be put to the Australian voters lies at the heart of the referendum.'[10]

Following the final report of the Joint Select Committee, Prime Minister Malcolm Turnbull and Leader of the Opposition Bill Shorten jointly announced the appointment of the Referendum Council on 7 December 2015. The Referendum Council's terms of reference were: to lead the process for national consultations and community engagement about constitutional recognition, including a concurrent series of Indigenous designed and led consultations; consider past reports and inquiries in its report to the Prime Minister and Leader of the Opposition on the outcomes of such consultations; options for proceeding with a referendum; and other constitutional issues.

The Referendum Council first met on 14 December 2015 with the Prime Minister and the Leader of the Opposition in attendance, and met on eleven subsequent occasions. A discussion paper, published in October 2016, was

followed by a series of taxpayer-funded 'First Nations Regional Dialogues' convened to discuss the options set out in the discussion paper. Additionally, delegates were selected to attend the First Nations National Constitution Convention at Uluru in May 2017 to discuss and find agreement on an approach to constitutional recognition. The outcome of the National Constitution Convention was the Uluru Statement of the Heart, which called for the establishment of a 'First Nations Voice' embedded in the Australian Constitution, as well as a Makarrata Commission to supervise a process of 'agreement-making' and 'truth-telling' between governments and Aboriginal and Torres Strait Islanders.

Prime Minister Turnbull rejected the recommendations of the Referendum Council, commenting that 'The government does not believe such an addition to our national representative institutions is either desirable or capable of winning acceptance in a referendum.'[11] However, the Parliament resolved in March 2018 to appoint a new Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples (JSCCR) to inquire into and report on matters relating to constitutional change, on similar terms as previous inquiries. In its final report, published in November 2018, the JSCCR recommended the

government 'initiate a process of co-design with Aboriginal and Torres Strait Islander peoples' in formulating a design for the Voice, consider legislative, executive and constitutional options to establish the Voice, support the 'process of truth-telling', and the establishment of a 'national resting place' for Aboriginal and Torres Strait Islander remains 'which could be a place of commemoration, healing and reflection.'[12]

Following the JSCCR's report, the Morrison government gave its support to a non-constitutional, legislated model by way of a co-design process. This was launched in October 2019 by the Minister for Indigenous Australians Ken Wyatt through the establishment of the Senior Advisory Group (SAG) co-chaired by Marcia Langton and Tom Calma. The first stage of the co-design process involved the preparation of a report advising the Minister on a path forward for establishing a non-constitutional Voice to the government (the legislated Voice). The report was provided to the Minister in July 2021 but was not released to the public until December 2021. The report provided some details about how a legislated Voice would be composed and how it might operate. The proposed model would be comprised of a 'National Voice' and up to 35 'Local and Regional Voices' which, together with Indigenous community

groups, would engage in 'shared decision making'. It was proposed that the members of the National and Local and Regional Voices would be either elected or appointed to their positions, and be given unlimited scope to provide advice to the Parliament.

The ALP, led by Anthony Albanese, formed government following the 2022 federal election and has indicated it is committed to implementing the Uluru Statement in full by holding a referendum during the present term of Parliament.

While previous proposals for change have lacked clarity and consistency, the Uluru Statement and the demand for a Voice to Parliament marked a significant departure from the prior direction of constitutional recognition. This only served to highlight how fundamentally uncertain constitutional recognition is on a conceptual level, and revealed how swiftly more minimal options for change transformed into something more substantive and radical.

The Voice would permanently divide Australians by race

A fundamental value underlying the Australian way of life is the idea of egalitarianism. Every Australian is entitled to have a say in the future of their country, and their right to do this is not dependent on immutable characteristics such as their race, heritage, or background. These ideas are the product of centuries of legal and political tradition, dating back in some form to the sealing of the *Magna Carta* in 1215, the first significant attempt to codify principles of the rule of law.[13] The principle that the rulers and the ruled would be subject to the same rules and laws has been a part of the Australian story since the very beginning of British settlement. Indeed, Australia's colonial inheritance, the work of the framers in drafting Australia's Constitution, and societal attitudes over time reveal Australia enjoys a uniquely egalitarian attitude which is expressed in our institutions.

Despite being established as a penal colony, the British government evinced an intention that New South Wales would inherit the common law, and through it the legal protections handed down through *Magna Carta,* the *Petition of Right,* the *Bill of Rights 1689*, and others. It is perhaps no surprise that only months after the First Fleet arrived, a new court—presided over by an Englishman

absent legal training—heard the colony's first civil case, allowing two convicts under sentence to sue the captain of the ship *Friendship* for losing their belongings. This established at an early date that Australia was not a lawless detention camp, but a subscriber to the rule of law, where officials were accountable for transgressions against convicted criminals.[14] As Dr Sherry Sufi notes, there is considerable evidence for the proposition that Australia possesses a fundamentally egalitarian, majoritarian, and democratic character:

> The Australian colonies were some of the first places in the world to give every man the vote and they were also some of the first places to give women the vote. Our colonial parliaments were characterised first by the fulfilment of the Chartist program—the seemingly forlorn hopes of working-class Britain made a firm reality in the antipodes—and then by the populism of the land laws, as the people demanded that squatter estates were broken up and made available to them at a reasonable price. Our egalitarianism is perhaps best embodied by the concept of 'mateship,' a national order that admits no entrenched deference of any kind. [15]

This significant and defining characteristic of Australian civic and cultural life is being challenged by appeals to entrench divisive ideas about race into the founding document of the country.

As with any country, Australia's record is not without blemish. It is true that the introduction of a British political, legal, cultural, and economic system was a shock to the Indigenous inhabitants of the Australian continent, to put it mildly.[16] Historically the law has at times been used as an instrument to divide Australians by their race, most glaringly by the persistence until the 1960s of some jurisdictions to deny some Australians the right to vote because of their race.[17] This was always a mistake, and a key development in the twentieth century was to recognise that this was inconsistent with the principle of egalitarianism. When our values were held up as a mirror against our actions, it was recognised that the latter must change to reflect the former. That this was done with the widespread support of the Australian people reflects positively on the egalitarian spirit of the country.

More and more, elite discourse in Australia appears to be divorced from Australia's egalitarian virtues and reflects a return to race-based thinking. According to this perspective, a person's worldview is dependent

on their racial profile, and because of this there is an Indigenous interpretation of events and policies that is only relevant to Indigenous Australians. In this case, some individual Indigenous Australians are assumed to represent and speak on behalf of Indigenous Australians as a group. Implicit then in the argument for the Voice is the assumption that, because Indigenous Australians have Indigenous-specific ideas about policy, that at least on some issues a non-Indigenous Australian could not accurately or genuinely represent the interests of an Indigenous Australian.

It is undeniable that there are real and significant challenges facing many Indigenous Australians and remote Indigenous communities. High rates of suicide, incarceration, joblessness, violence, and family and community breakdown have ruined many lives. The most recent analysis by the Productivity Commission in 2017 estimated that direct welfare expenditure per person on Indigenous Australians is $44,886, around twice the rate for non-Indigenous Australians.[18] Yet, according to the Australian Institute of Health and Welfare, by 2021 15 per cent of households in social housing programmes included an Indigenous member, almost five times higher than the Indigenous share of the population.[19] In 2018-19, 60 per cent of working age Indigenous

Australians are in the labour force, compared with 80 per cent of non-Indigenous Australians;[20] in 2021 the rate of children receiving child protection services was almost seven times higher for Indigenous children; and in 2020 the age-standardised Indigenous imprisonment rate was 13 times that for non-Indigenous Australians.[21]

The assertion that non-Indigenous Australians should divest themselves of the responsibility to these issues is counter to the idea that we are ultimately all Australians, and we all share a duty to care for our fellow countrymen and women and create a better future. Moreover, the assumption that non-Indigenous Australians are not able to represent or speak on behalf of Indigenous Australians ignores the reality that joblessness, suicide, family breakdown, violence, and drug and alcohol abuse, are challenges that affect Australians across the country, even if they are less prevalent among some demographic groups. They are not unique to Indigenous communities, but are tragically present for Australians of all backgrounds. In many cases, race and racial prejudice is used as an explanation when many of the challenges may be more readily explained by the lack of opportunity that comes with geographic remoteness and economic circumstances.

Just as many public policy, social, cultural, and economic challenges do not emanate from one's biological background, so too are the fundamental building blocks of a successful life independent of race. Access to the dignity of work, communities free of crime, stable families, economic opportunity, and adequate provision of education, health, and infrastructure resources are foundational to human flourishing and success. Access to such resources does not imply a successful life will necessarily follow; nor is it the case that those who are deprived of such resources will necessarily fail, though of the two options it is self-evidently clear which is preferable and which produces more opportunities. An Indigenous-only body is not required to communicate this basic truth.

The claim that Indigenous Australians could legitimately be represented by a single Voice is an affront to the dignity of each individual Australian. When she was the Director of the Indigenous Program at the Centre for Independent Studies, Jacinta Nampijinpa Price (now a Senator representing the Northern Territory) argued that treating all Indigenous Australians as interchangeable was a grotesque denial of their rights to see themselves as distinct linguistic and cultural groups, with their own distinct histories of contact with Europeans and

experience of colonisation. Price continued:

> We would not want to send Tiwi and Warlpiri to Tasmania to sort out their problems for them and we wouldn't expect Palawa to come to the NT to sort out the problems of remote communities. Each of these groups are the only ones who can solve their own problems in their own unique way.[22]

Indigenous Australians bring a range of views to different policy issues. There is no more a single Indigenous view on policy than there is a single non-Indigenous view. Any claim that a Voice could speak on behalf of Indigenous Australians rests on faulty foundations, and denies the reality of individual autonomy and ignores the substantial diversity of thought and beliefs amongst Indigenous groups across the nation. Even at the Uluru Convention which produced the Statement from the Heart, 'consensus' was only achieved after seven delegates walked out after complaining their voices weren't being heard.[23]

In the event the Voice makes a recommendation to the Parliament, this will represent only one of the countless possible views that could be given, but will be given special consideration as the official Voice of

Indigenous Australia by way of its constitutional status. The consequence may be that in elevating the voices of some, the views of other Indigenous Australians who do not align with the Voice will be crowded out of the public debate.

Indigenous Australians are first and foremost individual Australians, each with their own experiences, values, and interests. In this respect, Indigenous Australians, as with non-Indigenous Australians, already have a 'voice to parliament' – the Parliament of the Commonwealth of Australia. Parliament ought to represent all Australians regardless of their gender, ethnicity, religion, or race, and it is dangerous to suggest that Indigenous Australians are uniquely excluded from the democratic process. In addition to standing and voting at elections, all Australians are entitled to participate in the democratic policy-making process, including through petitioning government, establishing civil society and non-government organisations whose objective is to influence public policy, and participating in inquiries being undertaken in the Senate and the House of Representatives.

The Australian Constitution is a rule book for our governing and law-making institutions, and Parliament, being open for participation for all Australians, remains

the best body to represent all Australians. To amend the Constitution to permanently alter the functioning and representative capacity of Parliament will undermine the universality of the Constitution itself, and any attempt to assign new political or legal rights to one group could make Australian society less harmonious and permanently divided.

The Voice would be a third chamber of Parliament

Being enshrined in the Australian Constitution, the Voice would be a parallel system of political representation that would wield influence over the Commonwealth Parliament. Being mandated to participate in the political process, the Voice would compete with the legitimacy of the House of Representatives and the Senate and thereby amount to a *de facto* 'third chamber' of Parliament with a nearly limitless scope to exercise an informal veto over major legislation.

As of writing, the federal government intends to hold a referendum on enshrining a Voice into the Australian Constitution, while reserving to the Parliament the power to define its functions, powers, representative character and procedures by way of ordinary legislation.[24] In other words, the Parliament would be under a constitutional obligation to make laws to enable an Indigenous-only body to provide 'advice' to the Parliament. As former Victorian barrister and member for the federal division of Menzies, Keith Wolahan, noted in a paper presented to a Samuel Griffith Society conference in 2016, 'such a body would be unique in Australian law.'[25]

> ... a constitutionally-entrenched indigenous voice to the Parliament would not be analogous to any Commonwealth statutory body, and would require consideration and adjustment of administrative and constitutional law surrounding, for example, its operation, funding and accountability ... functional questions including how advice would be tabled, the temporal relationship between the body's advice and Parliament's procedures, the duty of Parliament to the Executive Government to consider the advice, and the scope of matters affecting indigenous Australians all remain outstanding.[26]

A key concern of any proposed Voice is how it would be used to exert pressure on the political process. Indeed, that is its purpose: to provide a platform for advocacy within the lawmaking process and thereby produce different legislative outcomes. As former Chief Justice of the High Court of Australia Murray Gleeson acknowledged, the merit of the Voice would be 'that it is substantive, and not merely ornamental'.[27] While advocates have claimed the Voice would not be empowered with a formal veto over laws debated in Parliament, any Voice model would at a minimum

exercise an *informal* veto. A natural consequence of such bodies is that they act as special advocates in the political process and exert influence over the policies and issues discussed by Parliament. As Sir Robert Menzies is said to have remarked when a parliamentary committee proposed to establish a special economic advisory council, 'the power to advise is the power to coerce.'[28] Menzies elaborated during debate in Parliament in 1965:

> In the Australian democratic system of government based upon the consent of a free community, no government can hand over to bodies outside the government the choice of objectives and the means of attaining them in important fields of policy, particularly when such bodies would, through the power of publication, [have] a coercive influence upon governments. ... a standing body of what would come to be regarded as authoritative advice would have the dangers I have described.[29]

The power of the Voice would be its ability to pressure elected politicians into agreeing to its advice, or risk being seen to oppose the official opinion representing Indigenous Australians. The threat of being labelled akin to a racist would be a powerful incentive to heed the

advice of the Voice. Prime Minister Albanese alluded to this in an interview with ABC News' David Speers when he said 'it would be a very brave government' who ignored a representation put forward by the Voice.[30]

The scope of the Voice will be nearly limitless. If the Voice is to be consulted or give advice on matters relating to policies affecting Indigenous Australians, then the remit of the Voice would apply to all policy matters. Indigenous Australians are Australian and as such are affected by all policy debated in Parliament. The Senior Advisory Group acknowledged this point in its co-design interim report where it claimed a 'National Voice would have a proactive, unencumbered scope to advise on priorities and issues as determined by the National Voice.'[31]

Imposing a duty to consult another body would impose a substantial burden on the ability of the Parliament to represent the electorate, undermining parliamentary sovereignty itself. In a case heard in the Supreme Court of Canada, a parliamentary duty to consult a body representing an Indigenous group was held to be 'ill-suited for legislative action.'[32] In that case, the Misikew people argued they were entitled under a treaty to be notified of relevant provisions of a bill and given the opportunity to make a submission of their views. The

Canadian court found that a duty to consult in this way would 'fetter the sovereignty of parliament itself' with the potential to both 'undermine its ability to act as the voice of the electorate' and 'grind the day-to-day internal operation of the government to a halt.'[33]

The problems identified in the Canadian court would only be amplified in a body constitutionally enshrined. By way of contrast, a statutory body such as the extinct Aboriginal and Torres Strait Islanders Commission (ATSIC) was established by Parliament, and derived its powers and authority directly from the Parliament. A body that derives its existence from the constitution on the other hand, is essentially an equal to the Parliament, since the Parliament itself derives its own authority on an identical basis.

Underlying the case for transforming Australia's democratic institutions are two apparently separate but conflated claims. However, both claims are difficult to prove, and fail to meet any standard of certainty that would justify unprecedented constitutional change. The first is an epistemic claim (a claim relating to knowledge or understanding) that Indigenous policy has not been effective because the Parliament lacks appropriate information or awareness about Indigenous culture or conditions. The claim has been made for instance that

without the Voice, the objectives of the 'Closing the Gap' strategy cannot be met.[34] Therefore, Parliament requires a body to provide advice in order to solve this knowledge problem.

The epistemic claim may be true inasmuch as it argues Parliament has a knowledge problem, but an advisory body is not necessarily a better solution to other alternatives, such as localism and subsidiarity.[35] The claim of an epistemic problem resembles the 'local knowledge problem' postulated by economist and philosopher Friedrich Hayek, which argues knowledge is naturally dispersed throughout society in such a way that attempts to concentrate it into a central authority are either inefficient or impossible.[36] As a central authority, the Parliament may suffer from the knowledge problem, but as a new central authority, the Voice to Parliament would be prone to suffer from the same 'preoccupation with statistical aggregates' that Hayek identifies. Hayek's solution, decentralisation,[37] may make sense in particular for Indigenous policy as there are, by some counts, more than 500 different Indigenous 'tribes' or 'clans' across Australia, each dealing with unique issues and interests. As former ALP national president Nyunggai Warren Mundine argued in 2019, the Voice

> doesn't reflect the way indigenous Australians are. We aren't one people and we don't think of ourselves as one people. We think of ourselves in terms of the countries or nations we're born into or descended from... only traditional owners can speak for their country. Bundjalung speak for Bundjalung country. Yuin speak for Yuin country. Yolngu speak for Yolngu country. But a national voice can't speak for any country.[38]

Since there are a variety of experiences and perspectives among Indigenous Australians, just as there are among all Australians, the advice of a Voice may not provide the information the Parliament allegedly lacks. Moreover, solving the knowledge problem through an Indigenous advisory body does not require a constitutional amendment, as the existence of numerous other advisory bodies proves, including numerous bodies devoted specifically to the welfare of Indigenous Australians. Indeed, the number of bodies already advising ministers and governments is an indicator that another body will not solve the knowledge problem.

The second claim is a deeper moral demand for dignity through constitutional change. It is a response to the argument that explicit recognition of cultural differences

is required to address the biases inherent in the established political institutions, and that such change should be constitutional because it is the Australian Constitution that establishes the political community in which individuals exist. The moral claim conflicts with an alternative understanding of dignity, which understands that individual human dignity comes from participation in the polity as an equal, and where the polity treats individuals on an equal basis.

The Voice would undermine the egalitarian spirit of 1967

Any proposal for constitutional change must be measured against the fundamental principles underlying Australia's liberal democracy. Australia's colonial inheritance, the work of the framers in drafting a national constitution, and Australia's landmark referendum in 1967 to remove constitutional references to race reveal Australia enjoys a uniquely egalitarian tradition in our legal and political institutions.

Australia's political and legal institutions and traditions are chiefly derived from two sources: the United Kingdom (the Crown and Westminster parliamentary democracy) and the United States (federalism, the senate and the written constitution). A commonality from both sources is the rule of law, which itself is one of the most important legal and cultural developments in the history of Western Civilisation. The principle underpinning the rule of law is that all citizens are subject to the same set of laws.

The rule of law has a rich and deep history, stemming from the philosophies of Aristotle in antiquity, to the sealing of the *Magna Carta* in 1215 and the passage of the *Bill of Rights* in 1689, to the modern development of the theory by constitutional scholars such as AV

Dicey in the 19th century. An idea commonly considered fundamental to the rule of law is the idea of equality before the law. This sentiment also has significance through history, famously being reflected in the United States' Declaration of Independence, where Thomas Jefferson wrote that 'all men are created equal.' Equality before the law holds that all citizens are equally subject to a given set of laws. No exceptions are to be made depending on one's wealth, heritage, gender, ethnicity, and so on. These principles were inherited by the colonies of the Australian continent upon British settlement and remain a bedrock value of Australia's contemporary liberal democracy.

This tradition is also reflected in the Australian Constitution, which is a fundamentally egalitarian and democratic document. Being in the tradition of the 'procedural constitution' the Australian Constitution is a formal rule book which provides a basic outline of how power is to be divided and exercised.[39] According to American constitutional historian Donald Lutz, this constitutional model distributes power 'in a way that leads to effective decision making over a range of all possible issues... and they provide a framework for continuing political struggle.'[40] The Australian Constitution provides no grand vision for how society should be run, but rather

reserves to the Commonwealth Parliament the ability to debate and decide on the content of Australian law (subject to a few exceptions relating to the judicial system, how elections are held, and matters relating to the maintenance and operation of the federal system of government).

The implication of the procedural constitution is that by neglecting to state substantive political ambitions, it treats all who are subject to its rules in a neutral way. This includes how it treats people on the basis of their race or skin colour. Friedrich Hayek stated this ideal succinctly in *The Constitution of Liberty*: 'It is the essence of the demand for equality before the law that people be treated alike in spite of the fact that they are different'.[41]

Australia's post-Federation tradition also reveals a preference among Australians for a race-blind Constitution. Its history of proposed constit-utional change shows that proposals to insert race into the Constitution have faced considerable challenges, while the single proposal to remove race from the Constitution was overwhelmingly successful. Where issues such as treaties have caused division, and a proposal to add a preamble to the Constitution in 1999 referencing prior Indigenous habitation in Australia was rejected, proposals to break down the barriers between

Indigenous and non-Indigenous Australians have been far more successful. The landmark referendum in 1967 is evidence of a societal preference for discarding racial distinctions in the law.

The 1967 referendum is rightly remembered as a momentous constitutional development in Australian history, but it was a process which started two decades earlier, during the 14 powers referendum conducted in August 1944, which proposed to change the Constitution for a period of five years so as to give the Commonwealth government 14 new or expanded legislative powers for the purpose of post-war reconstruction.[42] Among the 14 powers was the power to make laws with respect to the people of the Aboriginal race. The proposal was opposed by the Coalition, with Country Party leader Arthur Fadden opening his party's 'No' case in Toowoomba by saying the powers sought by the ALP government would enable it to implement a socialist agenda. The referendum obtained a majority in only two states, and failed to obtain an overall majority nationally.

A report from the Joint Committee on Constitutional Review (JCCR) published in 1959 considered provisions of the Constitution which affected the composition of the House of Representatives, including section 25.

Under the Constitution, the number of seats in the House of Representatives is based on a quota derived from the number of people in the Commonwealth, and the number of seats from each state is determined by 'dividing the number of people of the State, as shown by the latest statistics of the Commmonwealth, by the quota'. Section 25 describes the consequences to a state's allotment of seats in the House of Representatives if it disqualifies all persons of any race from voting. While the JCCR considered it worthwhile to repeal section 25, it also explained that 'it has never operated to affect the reckoning of the number of people of any state', and a state could 'easily circumvent its provisions'. Consequently the JCCR found 'the matter is not of any great importance.'[43]

During the 1964-1966 federal parliamentary term, the Commonwealth Parliament debated three unsuccessful referendum bills relating to the constitutional references to Indigenous Australians. The first was the *Constitutional Alteration (Aboriginal) Bill 1964*, introduced by the opposition leader Arthur Calwell, which would have deleted the terms excluding Indigenous Australians from the Commonwealth's legislative race power, and repealed section 127, which mandated the exclusion of Indigenous Australians from population counts which were conducted for electoral purposes.

The second bill was the *Constitution Alteration (Repeal of Section 127) Bill 1965* introduced by Prime Minister Sir Robert Menzies, which sought to repeal section 127 only. Menzies, while not prepared to take out the exclusionary terms from the race power, was said to be sympathetic to removing the race power altogether.[44] The bill passed the House of Representatives but Menzies' retirement and the 1966 general election meant that the legislation lapsed.

It wasn't until the premiership of Harold Holt that the Australian people were asked to approve the *Constitution Alteration (Aborigines) Bill 1967*. On 27 May 1967 the following question was put to electors:

> Do you approve the proposed law for the alteration of the Constitution entitled – 'An Act to alter the Constitution so as to omit certain words relating to the People of the Aboriginal Race in any State and so that Aboriginals are to be counted in reckoning the Population.'?

The 'Yes' campaign received bipartisan support from the Coalition government and the ALP opposition with Prime Minister Holt giving several speeches supporting the campaign. A major theme of the campaign was to equate the question with claims about

removing discriminatory laws and providing for equal citizenship.[45] In reality, the bulk of discriminatory laws by this point had been removed from the statute books, and Indigenous Australians were regarded as British subjects and then included among the Australians who were subject to the *Nationality and Citizenship Act 1948*. But inherent in the claim of the 1967 referendum was a question about bringing Indigenous Australians more fully into the Australian polity as equals. In this sense 1967 was not about citizenship in the literal sense, but about the concept of 'Equal Citizenship' as it dealt with enshrining the equal treatment of Australians under the Constitution. In hindsight, it is unsurprising that the result of the referendum was an overwhelming 'Yes', with 91 per cent of valid votes approving the change.

This is a message that Australians continue to support. A survey of Australian adults commissioned by the Institute of Public Affairs and conducted by Dynata in November 2019 found that, by a wide margin, more Australians support removing race from the Australian Constitution than oppose it. To the proposition that 'All references to race should be removed from the Australian Constitution,' 45 per cent of the 1,016 Australians surveyed said they either strongly or somewhat agreed, while just 16 per cent either strongly or somewhat disagreed.

A follow up survey asking the same question in July 2022 found that this gap had widened even further: 59 per cent now agree with removing references to race from the Constitution, while just 12 per cent disagree. While identity politics rhetoric has become increasingly prevalent in elite public and political discourse, this is not being reflected among mainstream Australians who still aspire to live in a race-blind and equal society.

The lesson from 1967 is that proposals for constitutional change should be clear and straightforward. Removing references to race from the Constitution was a simple proposition that aligned with the higher values of Australia and its legal and political traditions. In 1967, the movement was for securing equal citizenship, which is in stark contrast to proposals now to insert race back into the Constitution.

All Australians are equal

The arguments that have been raised in this essay are separate but intrinsically interrelated claims: the Voice would fundamentally and permanently divide Australians. The permanence of this division would manifest itself in our institutions in the form of a race-based third chamber with an informal veto over major legislation. The structural changes based on these ideas are fundamentally incompatible and inconsistent with Australia's legal and political tradition, illustrated by events such as the 1967 referendum. And the steps taken toward racial equality in 1967 would be reversed by the permanent division posed by the Voice.

Human dignity is best secured when the law treats everyone as equals, and where people are held to the same expectations, and are allowed to own their own successes or failures. This is consistent with the principle that all people are equal before the law and the liberal democratic legacy that people must not be divided on the basis of their race or skin colour. These are cornerstones of Australian freedoms and the rule of law.

Continuing a campaign which forces Australians to view policy and the Constitution through the prism of race—regardless of whether the change is actually

accepted or not—is damaging to the national fabric. All Australians, regardless of their heritage, have a shared destiny on this continent, and asking Australians to divide themselves by race is not conducive to harmonious co-existence.

We are all Australians. The Australian Constitution is a legal instrument that defines the institutions which govern us. It should not be used to engineer the division of Australians into first Australians and second Australians.

About the author

Morgan Begg is the Director of Research at the Institute of Public Affairs. After joining the IPA in 2014 to advance research into the fundamental legal rights in Australia, Morgan has written numerous research reports, articles, and submissions on a variety of topics relating to the rule of law and the civil and political liberties of Australians. Throughout his tenure at the IPA, Morgan has been extensively involved in investigating the constitutional, political, and cultural consequences of the various proposals for constitutional change, including the proposal to insert an indigenous Voice to Parliament in the Australian Constitution. Morgan's publications can be accessed online at ipa.org.au/author/morganbegg

Notes

1 Senate Standing Committee on Constitutional and Legal Affairs, *Two Hundred Years Later...: Report by the Senate Standing Committee on Constitutional and Legal Affairs on the feasibility of a compact or 'Makaratta' between the Commonwealth and Aboriginal people* (1983) xii.

2 *Council of Aboriginal Reconciliation Act 1991* (Cth).

3 Sean Brennan et al, *Treaty* (The Federation Press, 2005) 20-22.

4 'Former Prime Minister John Howard's speech,' *The Age*, 9 February 2008 <https://www.smh.com.au/national/former-prime-minister-john-howards-speech-20080209-gds08i.html>.

5 Anne Twomey, 'The Preamble and the Indigenous Recognition' (2011) 15(2) *Australian Indigenous Law Review* 4, 6.

6 Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (2012) 2.

7 Ibid.

8 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Final Report* (2015) 1.

9 Ibid, vi.

10 John Anderson, Tanya Hosch and Richard Eccles, *Final Report of the Aboriginal and Torres Strait Islander Act of Recognition Review Panel* (2014) 21.

11 Malcolm Turnbull, 'Response to Referendum Council's report on Constitutional Recognition' (Media release, 26 October 2017) <https://www.malcolmturnbull.com.au/media/response-to-referendum-councils-report-on-constitutional-recognition> accessed 10 June 2019.

12 Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Final Report* (November 2018) xvii.

13 See for instance Sir Edward Coke's argument that the Magna Carta affirmed the laws and liberties that always existed in England—it was the 'roote' from which 'many fruitful branches of the Law of England have sprung': Chris Berg and John Roskam, *Magna Carta: The Tax Revolt that Gave us Liberty* (Institute of Public Affairs, 2015) 104-5. See also Victor Windeyer, 'The Birthright and Inheritance: The

Establishment of the Rule of Law in Australia' (1962) 1(5) *University of Tasmania Law Review* 635, for a recounting of 'the quickening in Australia of customs and doctrine that are both the source and the safeguard of liberties.'

14 Bella d'Abrera, 'Laws of Conviction' (2017) 69(2) *IPA Review* 45-47.

15 To read more on Australia's egalitarian tradition, see Zachary Gorman, 'Australia's Egalitarian Hope' (2021) 1 *Essays for Australia* 69, 86.

16 As Australian historian Geoffrey Blainey has noted: 'In the world today no two cultures are so far apart as those that lived side by side in many Australian regions after 1788. Mecca and Washington today have far more in common than did the paternal Governor Phillip and the Aborigines who he met in Sydney in 1788.' Geoffrey Blainey, 'I can see parts of our history with fresh eyes,' *The Australian*, 20 February 2015.

17 In 1962,when the federal government amended the *Commonwealth Electoral Act* to provide that all Indigenous people should have the right to enrol and vote at federal elections, Indigenous people in Queensland, Western Australia and 'wards of the state' in the Northern Territory had been excluded from voting unless they were ex-servicemen).

18 Steering Committee for the Review of Government Service Provision, *Indigenous Expenditure Report 2017,* Productivity Commission (2017) 14.

19 Australian Institute of Health and Welfare, 'Australia's Welfare 2021 – Housing Assistance' (Accessed 30 November 2022) <https://www.aihw.gov.au/reports/australias-welfare/housing-assistance>.

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22 Jacinta Nampijinpa Price, 'Power, inclusion and exclusion: my concerns about a 'Voice'', *SBS, 20 July 2019.*

23 Calla Wahlquist, 'Uluru talks: delegates walk out due to sovereignty and treaty fears', *The Guardian*, 25 May 2017 <https://www.theguardian.com/australia-news/2017/may/25/uluru-talks-delegates-walk-out-due-to-sovereignty-and-treaty-fears>.

24 See full proposal in introduction.

25 Keith Wolahan, 'A Colour-blind Constitution' (Paper presented to the 29th Conference of the Samuel Griffith Society, Perth, 27 August 2017) 331.

26 Ibid at 331-2.

27 Murray Gleeson, *Recognition in Keeping with the Constitution* (Uphold & Recognise, 2019) 11.

28 This is a quote frequently attributed to Robert Menzies by former Treasury secretary and Senator for Queensland, Mr John Stone. See 'The Recognition Racket', *The Spectator Australia*, 1 June 2017.

29 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 21 September 1965, 1085 (Sir Robert Menzies, Prime Minister).

30 Interview with Anthony Albanese (Television Interview – *ABC Insiders with David Speers*, 31 July 2022).

31 Senior Advisory Group, Indigenous Voice Co-design Process Interim Report to the Australian Government (Commonwealth of Australia, 2020) 1.

32 *Misikew Cree First Nation v. Canada* [2018] 2 SCR 765, 767.

33 *Misikew Cree First Nation v. Canada* [2018] 2 SCR 765, 774, 794, & 831.

34 See for instance Prime Minister Albanese's claim that the gaps in education, health, housing, life expectancy and incarceration rates 'will be closed' as a consequence of establishing the Voice: Michelle Grattan, 'Albanese insists Voice will help 'close the gap' as divisions flare in Nationals,' *The Guardian*, 29 November 2022. Others, such as Law Council of Australia president Pauline Wright, have explicitly blamed a lack of progress in the 2020 Closing the Gap report on the absence of a Voice to Parliament: Pauline Wright, 'Closing the Gap report show indigenous input vital' (Media release, 12 February 2020).

35 'Localism' refers to the prioritisation of local, community-based interests above other interests. 'Subsidiarity' is a principle of social organisation that holds that social and political issues should be dealt with at the level closest to the people being affected.

36 Friedrich A. Hayek, 'The Use of Knowledge in Society' (1945) 35(4) *The American Economic Review* 519-530.

37 Hayek (1945) at 524-5: 'We must solve it by some form of decentralization. But this answers only part of our problem. We need decentralization because only thus can we insure that the knowledge of the particular circumstances of time and place will be promptly used.'

38 Nyunggai Warren Mundine, 'Why a national voice to parliament is doomed to fail,' *The Australian Financial Review*, 10 September 2019.

39 For a discussion on 'procedural constitutions' see Elliot Bulmer, 'What is a Constitution? Principles and Concepts' (International Institute for Democracy and Electoral Assistance, 2nd ed, 2017). Alternative labels include 'political' per Donald Lutz, *Principles of Constitutional Design* (Cambridge University Press, 2006) 26; and 'institutional' per Hanna Lerner, *Making Constitutions in a Deeply Divided Societies* (Cambridge University Press, 2011) 18.

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41 Friedrich Hayek, *The Constitution of Liberty* (The University of Chicago Press, 1960) 85-6.

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45 Bain Atwood & Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (Aboriginal Studies Press, 2nd ed, 2007) 44.


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