THE VOICE REFERENDUM AND THE IMPLICATIONS FOR CURRICULUM AND SCHOOLS

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Educational sources

- CEFA curriculum materials, including on referendums and Indigenous matters will be forthcoming on the Australian Constitution Centre website: http://www.australianconstitutioncentre.org.au/
- Parliamentary Education Office: https://peo.gov.au/understand-our-parliament/having-your-say/elections-and-voting/referendums-and-plebiscites/
- ANU: 'Indigenous Voice to Parliament' FAQs: https://www.anu.edu.au/about/strategic-planning/indigenous-voice-to-parliament
- University of Melbourne: 'Conversations about the Voice': https://www.unimelb.edu.au/voice/conversations-about-the-voice
- Anne Twomey – Constitutional Clarion (YouTube): https://www.youtube.com/channel/UC3EJDfpqrtS0cX-uptWe8dg
- Blogs (eg AUSPUBLAW) and *The Conversation.*

Official sources

- Government material: https://voice.gov.au/
- Bill, explanatory memorandum and 2nd reading speech: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7019
- Report of the Joint Select Committee: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Aboriginal_and_Torres_Strait_Islander_Voice_Referendum/VoiceReferendum/Report
- Submissions to the Joint Select Committee: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Aboriginal_and_Torres_Strait_Islander_Voice_Referendum/VoiceReferendum/Submissions
- AEC on referendums: https://www.aec.gov.au/referendums/
- AEC referendum disinformation register: https://www.aec.gov.au/media/disinformation-register-ref.htm

New Curriculum

- Year 8, AC9HC8K01 Government and democracy – how Australians are informed about and participate in democracy.
- Year 8, AC9HC8K06 Citizenship, diversity and identity – debates about Australia's national identity and citizenship, including the perspectives of First Nations Australians.
- Year 9, AC9HC9K01 Government and democracy – the process for constitutional change through a referendum.
- Year 10, AC9HC10K03 Laws and citizens – the role of the High Court in interpreting and applying the law, using contemporary Australian examples and exploring concepts of implied rights.
- Year 10, AC9HC10K05 Citizenship, diversity and identity – the impact of social media on the quality of civic debate about controversial matters, the extreme polarisation of views and breakdown in social consensus.

The Proposed Amendment

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:

i. there shall be a body, to be called the Aboriginal and Torres Strait Islander Voice;

ii. 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;

iii. 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.

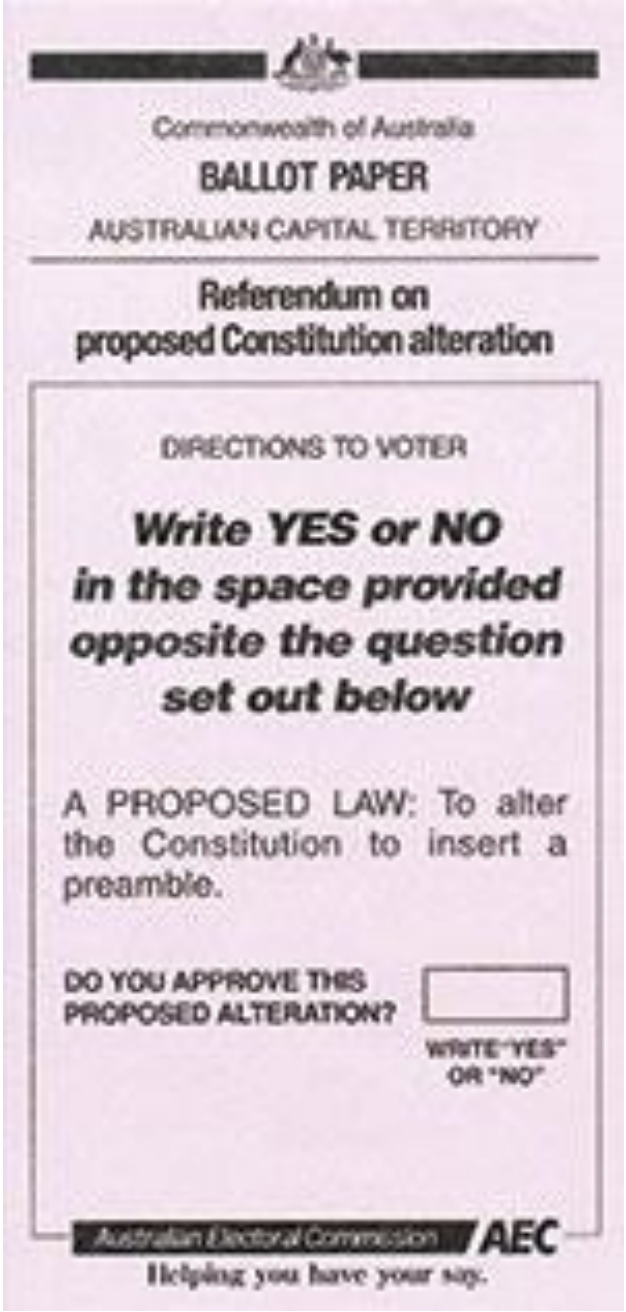
Question

- Section 128 of the Constitution says that for a constitutional amendment to pass, a majority of the electors voting across Australia and a majority of electors voting in a majority of States must '*approve the proposed law*'.
- The form of the question is determined by the *Referendum (Machinery Provisions) Act 1984* (Cth). It uses the long title of the proposed law to identify it. Voters will be asked:

  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?
- The voter then must write Yes or No in the box provided.

1999 ballot paper



Commonwealth of Australia

BALLOT PAPER

AUSTRALIAN CAPITAL TERRITORY

Referendum on proposed Constitution alteration

DIRECTIONS TO VOTER

Write YES or NO in the space provided opposite the question set out below

A PROPOSED LAW: To alter the Constitution to insert a preamble.

DO YOU APPROVE THIS PROPOSED ALTERATION?

WRITE "YES" OR "NO"

Australian Electoral Commission AEC

Helping you have your say.

Background

- The Voice proposal was developed in response to the rejection of a previous proposal to constitutionalise an anti-racial discrimination provision.
- The idea was to flip the approach. Instead of going to court to challenge a law after it was made, it was proposed to seek to influence laws and policies before they were made.
- Instead of giving agency to lawyers and judges, it would put it back into the hands of Indigenous Australians. Each time their voices were heard, this would be an act of recognition.
- This would amount to active and continuing constitutional recognition, rather than just some words on a page.

Background

- The Voice proposal was first developed in 2014 by Noel Pearson, Greg Craven, Julian Leeser, Damien Freeman, Shireen Morris and me.
- It was later put to Aboriginal and Torres Strait Islander groups in dialogues across the country by the Referendum Council, along with a range of other proposals for constitutional reform. The Voice proposal was the most successful by a long way.
- It was confirmed as the key request (along with Treaty and Truth) at the national convention in Uluru in May 2017, resulting in the Uluru Statement from the Heart.
- It was later modified, numerous times, after various committee inquiries, until the Prime Minister announced a draft version at Garma in 2022, and was later modified again as a consequence of the work of the Constitutional Experts Group and the Referendum Working Group and the Solicitor-General.

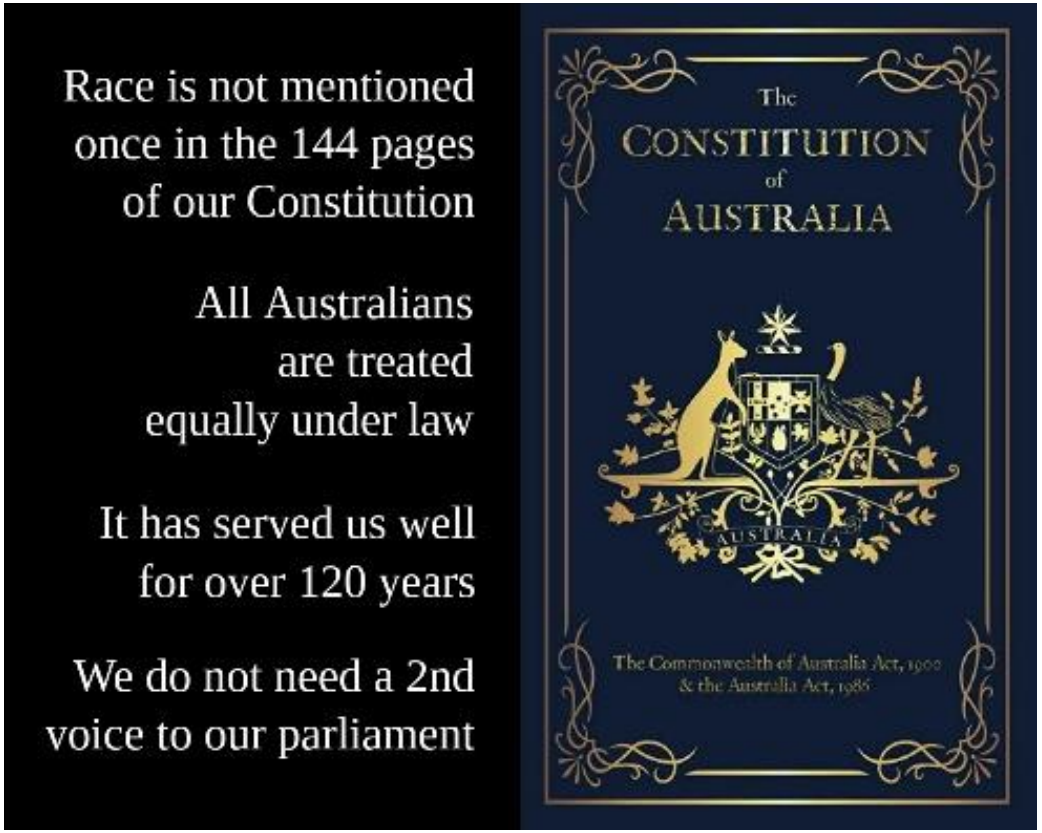
Arguments

- Following are some arguments made about the Voice referendum.
- Some are misconceived and can be easily dealt with.
- Others are more complex and require a degree of legal understanding to be properly addressed.
- These notes are intended to equip teachers with the knowledge to be able to respond to students who raise queries about these matters.

1. We already have Indigenous MPs so there is no need for a Voice.

- Members of Parliament who happen to be Indigenous represent their electorate (or State/Territory in the Senate), not Indigenous peoples.
- A single Aboriginal or Torres Strait Islander MP cannot speak for other Indigenous communities and cannot know how particular laws will impact upon Indigenous peoples in different parts of the country.
- The Voice is intended to provide a mechanism through which local voices from different communities can feed evidence on the ground up to a central body, so that this evidence can be used to seek to influence Parliament and the Government to improve outcomes for Indigenous Australians.

2. It will introduce race into the Constitution and destroy equality of treatment



An example of one of the many incorrect claims on the internet

2. It will introduce race into the Constitution and destroy equality of treatment

- Race is already mentioned in our Constitution – twice.
- It is mentioned in s 25 – which punishes a State if it disqualifies people from voting on the basis of race, by reducing the representation of that State in Parliament.
- It is mentioned in s 51(xxvi) – a power to make laws for the people of any race for whom it is deemed necessary to make special laws.
- Australians have not always been treated equally under the law. People were excluded from voting at the federal level on a race basis for decades.
- The Constitution does not have 144 pages. The people making this claim seem to have been looking at some other Constitution.

3. We can't amend the Constitution because we don't know the detail

- The referendum would give Parliament the power to make laws about how the Voice is comprised and how it functions (proposed s 129(iii)).
- It is important that this be left to Parliament and not frozen in the Constitution, because we need the flexibility to be able to change the law to meet changing times and to correct any problems that arise. If the Voice is not operating properly in the future, this needs to be able to be fixed by legislation.
- Conferring power on Parliament, without knowing every law that Parliament will enact in the future, is not 'signing a blank cheque' or 'signing a contract without reading the detail'. We know the detail of what is being done – it is giving Parliament a specific power in the terms set out in proposed s 129.

3. We can't amend the Constitution because we don't know the detail

- The issue is fundamental to the system of democracy. Parliament is free to make laws on particular subjects, but is accountable to the people for them. If you don't like the law that Parliament makes – eg how the Voice is comprised – then you vote for someone else at the next election. If you don't trust Parliament to make those laws, then you have a bigger problem, because you don't support the existing democratic system in Australia.
- Australians have voted in referendums before to confer powers on Parliament without knowing the detail of every future law that would be made under the power. This occurred in: 1929 (power to make laws about financial agreements between the Commonwealth and the States); 1946 (power to make social security laws, such as laws granting unemployment benefits and family allowances); and 1967 (special laws about Indigenous Australians). All were reasonable decisions that left it to Parliament to make laws appropriate to the relevant time.

4. It will create a race-based House of Parliament

Another example of one of the many incorrect claims on the internet

4. It will create a race-based House of Parliament

- The only power the proposed amendment will give the Voice is to ‘make representations’ to the Parliament and the Executive Government.
- Anyone or any organisation can make representations to Parliament and the Executive Government – eg you, me, the ACSA, the Minerals Council and the Ethnic Communities’ Council of NSW can. It doesn’t make us or them a ‘House of Parliament’.
- The Voice will have no power to initiate a bill, debate a bill, pass a bill or veto a bill. It will have none of the powers or privileges of a House of Parliament.
- The amendment does not alter Ch I of the Constitution which establishes the Parliament and its two Houses and confers legislative power on them. This will remain the same.
- Parliament cannot ‘abdicate’ its power by requiring the permission of another body to make a law. It retains full freedom to consider what it wants in law-making.

5. The amendment will destroy equality of treatment under the Constitution

- The High Court recognises that sovereignty in Australia is held by the people – i.e. popular sovereignty.
- The Constitution guarantees that the people of Australia are able to enjoy 'equality of opportunity to participate in the exercise of political sovereignty' (*McCloy*).
- That equality has to be substantive, rather than formal. Treating people the same, when there are genuine differences, does not result in equality or fairness.
- For example, to achieve substantive equality, some voices may need to be quietened (eg the rich) so that other voices can be heard (eg the disadvantaged). This means Parliament can cap political donations, because the uncontrolled use of wealth can undermine the practical enjoyment of popular sovereignty by others. (*McCloy*)

Equality can mean recognising difference and creating an equal playing field

- In a Canadian case (cited by the High Court), it was noted that there were two ways the State can equalise participation in the political system. ‘First, the State can provide a voice to those who might otherwise not be heard. … Second, the State can restrict the voices which dominate the political discourse so that others may be heard as well.’ (*Harper v Canada*)
- The Aboriginal and Torres Strait Islander Voice to Parliament and the Executive Government is proposed for the purpose of enhancing the voices of those who might otherwise not be heard, so that they can fully participate, with equality, in Australia’s system of representative and responsible government, which finds its source in popular sovereignty.
- This is particularly important because of the special laws and policies made about Aboriginal and Torres Strait Islander peoples. It allows Indigenous voices to be heard about them.

6. The scope of what the Voice can make representations about is too wide

- The Voice may make representations about ‘matters relating to Aboriginal and Torres Strait Islander peoples’. Is this too broad? Should it be matters ‘directly affecting’ Aboriginal and Torres Strait Islander peoples?
- It needs to be broad because many laws of general application have a greater or particular impact upon Indigenous Australians.
- If it were narrowed to matters ‘directly affecting’, it would result in endless litigation about where the line is drawn.
- This is why it was left broad – to avoid litigation and to leave it to political pressures to ensure that the Voice focuses on relevant matters.

Political constraints on the Voice

- There will be three political constraints upon the Voice.
- First, it will have limited resources in terms of money and staff, so it will need to focus on the matters most important to Indigenous Australians.
- Second, its constituency of Indigenous Australians, who choose their representatives, will either insist that their representatives focus on relevant and important matters, or remove their representatives and replace them with others.
- Third, Parliament retains the power to legislate about how the Voice is comprised. If the Voice were to squander its resources and authority by making representations on matters with little relationship to Indigenous Australians, Parliament would be entitled to change the way the Voice is comprised or its procedures to ensure it was more focused on what matters.

7. The Voice should not be able to make representations to the Executive Government

- The most controversial aspect of the amendment is the power to make representations to the Executive Government. Why?
- Administrative law requires Ministers and other decision-makers to make decisions that affect individuals fairly. This may include taking into account relevant considerations. If they fail to do so, a court may require them to re-make the decision by a fair process.
- Under administrative law, however, a matter is only a mandatory relevant consideration if the statute conferring the decision-making power actually says so, or a court implies from the terms of the statute that this is necessarily intended.

Mandatory relevant considerations - example

- For example, s 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) requires that before a Minister makes a decision to protect a particular area, a notice is published in a local newspaper stating that the protection is being considered and inviting interested persons to make representations.
- Due consideration must be given by an official to those representations. The official prepares a report, and the representations must be forwarded with it to the Minister, who must also take them into consideration.
- If the Minister fails to do so, then a person could go to a court for judicial review and the court could require the Minister to re-make the decision following the correct process.

Mandatory relevant considerations – matters for Parliament

- Such provisions already exist in abundance at the Commonwealth and State level, but have not stopped the ability of the Commonwealth and the States to function or resulted in massive litigation.
- It is up to Parliament to decide whether to impose such an obligation upon a decision-maker.
- If a court held that such an obligation was implied by the statutory provision, but Parliament disagreed, then Parliament could amend the legislation that confers the power so that there is no such obligation.
- Ultimately, Parliament retains its control over the issue.

Constitutional implications?

- Some have argued that the High Court will draw an implication from proposed s 129(ii) that any representation by the Voice is a mandatory relevant consideration in relation to all decisions made by government decision-makers that could fall within the category of ‘matters relating to Aboriginal and Torres Strait Islander peoples’.
- They add an obligation to advise the Voice in advance of making such a decision, provide the Voice with all relevant information about it, and provide the Voice with adequate time to make informed representations about it.
- The argument is that because this is a constitutional requirement, Parliament won’t be able to control it.

Constitutional implications?

- Where would this implication come from? There is nothing in the text of the amendment.
- It is argued that the High Court might find that the power conferred upon the Voice to ‘make representations’ to Parliament and the Executive Government would be ineffective if the Voice was not advised and informed in advance about proposed relevant exercises of legislative or executive power and if neither the Parliament nor the Executive was required to consider those representations and give adequate time for them to be made.
- Therefore, it is argued, it must be intended that the Voice be given the opportunity to make effective representations and that they have to be considered by Parliament and the Executive Government.

Constitutional implications?

- The answer is that the effectiveness of the Voice is intended to lie in politics rather than legal obligations.
- It is intended that Parliament be able to decide what kind of prior consultation might occur with the Executive Government and whether it is a mandatory relevant consideration to take a representation of the Voice into account when making a particular decision.
- This is made clear from: (a) the text of the amendment which imposes no obligations on Parliament or the Executive Government, but allows Parliament to legislate about such matters; (b) the context and history of the amendment; (c) the second reading speech and Explanatory Memorandum; (d) the Solicitor-General's opinion; (e) the report of the Joint Select Committee; and (f) (presumably) the 'Yes' case.

A recent example – *Gerner v Victoria*

- During the COVID-19 lock-downs in Victoria, Mr Gerner argued in the High Court that s 92 of the Constitution, which protects interstate 'intercourse' (i.e. movement across State borders) also contains an implication of freedom of movement within a State. He argued that intra-state movement was necessary to give full effect to interstate movement (i.e. to get to the border, so you can freely cross the border).
- This was rejected by the High Court. Their Honours noted that this would be contrary to the terms of the Constitution, which expressly guarantee 'interstate' movement, as distinct from intrastate movement. The Court stressed that if the text is explicit then it is conclusive in what it directs or forbids.

Gerner v Victoria

- The Court looked to the mischief at which s 92 was directed and concluded it was not directed at intrastate movement.
- The Court also looked at the Convention Debates of the 1890s, where it was stated that s 92 would not remove the powers of the States to prevent persons with contagious diseases from entering the State.
- Their Honours also pointed out that a broader form of words that would have covered movement ‘throughout the Commonwealth’ was proposed and rejected in the course of the Convention Debates. The Court concluded:
- ‘It would be a distinctly unsound approach to the interpretation of the constitutional text actually adopted by the framers to attribute to that text a meaning that they were evidently “united in rejecting”.’

Applying *Gerner* to the Voice

- This unanimous High Court authority from 2020 suggests how the Court would approach the interpretation of the Voice amendment.
- It would focus primarily on the text but would also look to what was intended. It would take into account the fact that those involved in framing the amendment were "united in rejecting" any implication that the Voice must be advised in advance of a decision, given information and time to make adequate representations and that its representations must be considered.
- In addition to these barriers of text and intention, there are two others. They concern (a) the practicality of drawing such an implication; and (b) the previous approach of the Court to applying mandatory relevant considerations.

Impracticality

- It is not possible to apply such an implication to representations made to Parliament, because the courts have long declared they will not interfere with the internal deliberations of Parliament.
- The Courts have also previously refused to apply such implications to high policy matters that are political in nature and apply generally (rather than decisions affecting particular people).
- This undermines drawing any implication from s 129(ii) as it could only apply to a sub-set of representations, not all.
- Finally, it would be impracticable to have to advise the Voice in advance regarding every decision that might affect Indigenous Australians. Some argue that this would make the system of government dysfunctional – but if so, why would the High Court draw an implication that this was intended?

Contrary to authority

- The High Court has never previously imposed a constitutional implication as a mandatory relevant consideration.
- When this was once argued before it (*Comcare v Banerji* – 2019), the High Court held that the implied freedom of political communication operates as a limitation on legislative power, not a constitutionally imposed mandatory relevant consideration.
- The majority accepted that *legislation* which confers a power on a decision-maker could, expressly or impliedly, make the implied freedom a mandatory relevant consideration, but this was a matter for Parliament.
- Accordingly, whether representations by the Voice would be mandatory relevant considerations would be a matter for Parliament – not imposed by the High Court in relation to all government decision-making.

8. The consequences of removing ‘Executive Government’ from s 129(ii)

- As the concerns about constitutional implications derive from the words ‘Executive Government’ in proposed s 129(ii) – what would happen if you took them out?
- Indigenous campaigners have strongly objected to their removal, because Indigenous peoples are most commonly adversely affected by policies and decisions by government decision-makers, which they wish to influence.
- They work on the assumption that removing these words would remove their power to make representations to the Executive Government. Is this so? In my view, no.

Representations to Executive Government

- Every legal person (individuals, corporations and bodies that have a legal existence – eg they can own property, sue and be sued, employ people, etc) can make representations to the Executive Government.
- The Voice will be established as a legal person and be able to make representations to the Executive Government without the need for any separate legislation.
- It is likely, however, that the current Parliament would also give it an express legislative power to make representations to the Executive Government.
- Could a future Parliament legislate to remove this power if it is not constitutionally protected in s 129(ii)? No.

The implied freedom of political communication

- The implied freedom of political communication provides constitutional protection to communications between legal persons in Australia and the Executive Government and Parliament.
- Legislation that removed the ability of the Voice to make political communications to the Executive Government would 'burden' the implied freedom of political communication.
- Such a law would be invalid unless it was made for a legitimate purpose that was compatible with the constitutional system of representative and responsible government, and was proportionate to that purpose.
- I cannot think of any legitimate purpose that would justify preventing the Voice from making representations to the Executive Government. So removing the words would effectively not make a legal difference – it is a political issue.

Conclusion

- Many of the arguments about the Voice referendum require an understanding of constitutional law, constitutional history or administrative law to be able to assess their value.
- Often commentators are simply making assertions about how words will be interpreted by the High Court or how the provision would operate, with little knowledge or reasoning to back it up.
- Their intention is often to confuse or create doubt.
- The most insidious argument in *any* referendum is: ‘If you don’t know – vote No’.
- Voting in a referendum is a sacred responsibility entrusted to the Australian people. If you don’t know – find out. The role of teachers is to equip students so that when they become voters, they can find out and fulfil their sacred responsibility by giving an informed vote in the future.