Membership of the Voice

This is a pre-published version of a piece forthcoming March 2023 in the Public Law Review

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The proposal for a First Nations Voice is to be put to the Australian electors at a referendum this year. This comment addresses the key issue of membership of the Voice. Legal determinations of membership and identity are complex and vexed. The High Court has struggled to articulate membership of 'the people' under the Constitution and has recently grappled with whether 'Aboriginal Australians' can be 'aliens'; concluding that they cannot.[1] Establishing legal rules of membership of First Nations peoples raises distinct challenges and Australian law has been notoriously imperfect in making, changing and applying such rules. Yet, the law must be involved to ensure that the Voice is both realised and representative. This comment argues that, taking into account the purpose of the Voice and Australian constitutional traditions, the best resolution for these tensions is that the institution of the Voice must be constitutionally entrenched, but its membership should be determined by Parliament, and that legislative drafting must occur in collaboration with First Nations people to ensure the promise of the Voice is realised.

The Voice – a mechanism for self-determined peoples to be heard

The Voice must be constitutionally enshrined to ensure its ongoing existence and constitutional legitimacy as a forum through which First Nations can be heard. The Voice is a structure intended to guarantee representation of First Nations peoples within Australian political and governmental processes.[2] It is a manifestation of self-determination of First Nations peoples, understood as 'self-determination achieved within the State, and focussed on restructuring the relationship between Indigenous Peoples and the State.'[3] The Voice is 'a new start' for First Nations people

[1] *Love v Commonwealth; Thoms v Commonwealth* (2020) 270 CLR 152.
[2] *Final Report of the Referendum Council* (30 June 2017), *Indigenous Voice Co-Design Process Final Report to the Australian Government* (2021).
[3] Indigenous Law Centre Submission to the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, INQUIRY INTO APPLICATION OF THE UNDRIP IN AUSTRALIA 31 OCTOBER 2022 at p 8, available at https://www.aph.gov.au/DocumentStore.ashx?id=183fda15-decf-447b-9e39-1809f0af8547&subId=724519. See also *Final Report of the Referendum Council* (30 June 2017) at 22, 29, 30.

to be heard,[4] Minister Burney noting that the Voice comes first in the sequence of reforms because 'it will start to address the political disempowerment of Indigenous Australians.'[5]

To ensure that the Voice reflects the voices, interests and concerns of First Nations peoples, its membership must be determined by First Nations peoples.[6] The guiding principles of the Government's Referendum Working Group, reflecting key elements of the Regional Dialogues that delivered the Uluru Statement, reflect this imperative, including that the Voice:

- is chosen by Aboriginal and Torres Strait Islander people based on the wishes of local communities
- is representative of Aboriginal and Torres Strait Islander communities
- is empowering, community led, inclusive, respectful, culturally informed and gender balanced, and includes youth
- works alongside existing organisations and traditional structures.[7]

The identity and cultural traditions of First Nations across Australia are complex and diverse, and their composition and laws are not static. First Nations peoples are heterogeneous, with distinct internal rules for membership and structures of representation. Acknowledging this leads to the conclusion that the best way to ensure that First Nations determine the membership of the Voice is to have the rules of its membership contained in legislation, the drafting of which is informed by, and amenable to refinement and change in collaboration with, First Nations people.

This exercise will take time to be done properly, and will require ongoing monitoring, input and consultation with First Nations communities. It is thus important to allow sufficient flexibility to ensure that the Voice – through its composition – continues to deliver on its promise of representation. Leaving the detail of Voice membership to the Parliament allows time for membership issues to be determined within First Nations communities,[8] and then for the composition of the Voice to be negotiated in concert with the government in the course of legislative drafting, as well as future development and refinement.

Work regarding the composition of a *legislated* Voice had commenced under the previous government, with the resulting Report[9] providing one example of how membership may be

[4] Sana Nakata, 'On Voice, and finding a place to start', *Indigenous Constitutional Law* (3 March 2021), available at https://www.indigconlaw.org/sana-nakata-on-voice-and-finding-a-place-to-start

[5] Linda Burney, *2022 Evatt Lecture*, University of Sydney, 21 October 2022, available at https://ministers.pmc.gov.au/burney/2022/2022-evatt-lecture-university-sydney

[6] See Hobbs, Harry. "Principles of Institutional Design." *Indigenous Aspirations and Structural Reform in Australia*. Oxford: Hart Publishing, 2020 at 105-111.

[7] See https://ministers.pmc.gov.au/burney/2022/communique-referendum-working-group

[8] See Janine Gertz, 'Determining the Self in Self-determination' *Indigenous Constitutional Law*, (31 March 2021) available at https://www.indigconlaw.org/home/determining-the-self-in-self-determination

[9] *Indigenous Voice Co-Design Process Final Report to the Australian Government* (2021), see critique of the process by M C Dillon, CODESIGN IN THE INDIGENOUS POLICY DOMAIN: RISKS AND OPPORTUNITIES, CAEPR DISCUSSION PAPER NO. 296/2021 available at https://caepr.cass.anu.edu.au/sites/default/files/docs/2021/3/CAEPR_DP_no_296_2021_Dillon.pdf, Gabrielle

determined. However, the process which led to the Report expressly excluded the making of any recommendations regarding constitutional recognition.[10] The consultation process and design options were limited in scope and extent through the terms of reference and the impact of the COVID pandemic. Therefore, the proposed composition arising from that process is an insufficient basis for determining the membership of a constitutionally entrenched Voice compliant with the guiding principles set out above

Constitutional traditions I – institutions, deferral to legislation and the need for good faith

Parliamentary determination of membership of the Voice – the drafting of which should be driven by First Nations people – is also consistent with Australian constitutional traditions. The Constitution establishes the existing branches of government – the Parliament, Executive and the Judiciary – but leaves detail to legislation which is then assessable for constitutional validity by the High Court. The precise way in which default provisions are established by the Constitution and then what details are amendable to change by the Parliament differ across the institutions. However, the underlying structure remains - not all detail should be entrenched in the Constitution and it is both legitimate and desirable to allow the Parliament to determine matters such as the composition of an institution like the Voice.Two of the key institutions established by the Constitution – the Parliament and the federal judiciary – are both examples of allowing Parliament to determine detail. The text of the Constitution establishes the Houses of Parliament, their respective powers and the outline of their composition, in that senators and members of the House of Representatives shall be directly chosen by 'the people' of the States and Commonwealth respectively.[11] Some details regarding its composition are entrenched as a result of negotiations between the constituent colonies. However, Parliament was given the power to make laws regarding the electoral system through which members of Parliament are chosen, the precise number and qualifications of such members as well as the qualifications of electors.[12] Over time, the size of each House of Parliament has changed to reflect the growing Australian population, members and senators have been included to represent the Australian Capital Territory and the Northern Territory and the qualifications for members of Parliament and electors have been changed to reflect evolving norms of democratic representation.[13]

Appleby & Eddie Synot, 'What do we know about the Voice to Parliament design, and what do we still need to know?' *The Conversation,* 6 December 2022, available at https://theconversation.com/what-do-we-know-about-the-voice-to-parliament-design-and-what-do-we-still-need-to-know-195720.

[10] See the terms of reference for each of the advisory groups, as set out in *Indigenous Voice Co-Design Process Final Report to the Australian Government* (2021) pp 239-245.

[11] See *Constitution,* Chapter 1, esp ss 7, 24.

[12] See ss 7, 10, 24, 30, 31, 34 and s 51(xxxvi).

[13] See the current manifestation of these details in: *Commonwealth Electoral Act* 1918 (Cth) s 48 and *Representation Act 1983* (Cth), s 3 for the sizes of the Houses of Parliament, for the other details see respectively: *Commonwealth Electoral Act 1918* (Cth) ss 40, 163, 93.

The judiciary is also established through the text of the Constitution, with detail being left to the Parliament. The existence of federal courts is enshrined within the text[14] but the number of courts and their precise membership and jurisdiction (including that of the High Court of Australia) can all be affected by legislation.[15]

This approach is equally suitable for the establishment of the Voice – with its existence and primary functions protected within the text of the Constitution and the Parliament given the power to make laws regarding, amongst other things, its composition. As noted above, there are particular reasons connected to the underlying purpose and nature of the Voice which support its composition being a matter left for legislation rather than being entrenched in the constitutional text. Beyond the Australian constitutional tradition, this approach is consistent with the practice of 'deferral' as seen in other constitutions around the world,[16] and balances the constitutive power of the people in authorizing the text of the Constitution while allowing the people's elected representatives in Parliament to negotiate ongoing detail.

Having rules of membership within the law is unavoidable in order to create an institution such as the Voice which is designed to be representative. However, it must also be remembered that the law is an imperfect vehicle for determining questions of membership and identity. Australian law has a particularly poor history regarding legal tests for Aboriginality, in part due to the discriminatory and racist purposes for which many definitions were developed and implemented.[17] Legal tests have been developed with the aim of avoiding some of the worst elements of past practices.[18] In order to overcome the frailties of the law as a means for determining identity, First Nations must be involved through a process of true co-design and consultation, which in turn requires good faith in negotiating the detail, both at the point of establishment, and over time.

There are external indications of good faith on the part of the current government through the creation of the Referendum Working Group and the government's commitment for 'Aboriginal and Torres Strait Islander voices' to be 'heard in the process leading up to the referendum'.[19] The fact that the 15th edition of the Cabinet Handbook (2022) includes for the first time a reference to 'meaningful consultation' when considering the impact of federal policy on 'Indigenous Australians'[20] also suggests a governmental willingness to be proactive. These are positive signs that both the negotiation regarding the composition of the Voice and the way in which the

[14] See Ch 3, especially s 71.
[15] See ss 71, 76-79, 51(xxxvi).
[16] See for deferral generally: Rosalind Dixon and Tom Ginsburg, 'Deciding not to decide: Deferral in constitutional design' (2011) 9 *International Journal of Constitutional Law* 636.
[17] For an overview of the definitions which have applied across the country, see John McCorquodale, Aborigines and the Law: A digest (Aboriginal Studies Press, 1987).
[18] See discussion in *Helmbright v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2*) [125]–[128] (Mortimer J).
[19] See at https://voice.niaa.gov.au/sites/default/files/2022-11/referendum-working-group-terms-of-reference.pdf
[20] *Cabinet Handbook* (15th ed, 2022) at p 7, available at https://www.pmc.gov.au/resource-centre/government/cabinet-handbook.

government and Parliament will respond to representations by the Voice may be more than rhetorical and symbolic and will in fact allow for a true structural reform through which First Nations are heard.

Constitutional traditions II – judicial review and constitutional interpretation

The Australian constitutional tradition is to allow the Parliament latitude regarding policy details while ensuring that legislation does not go beyond the powers conferred by the Constitution. It is neither possible nor desirable for legislation regarding the composition of the Voice to be non-justiciable in the sense of being immune from consideration by the High Court as to its validity.[21] The High Court's interaction with the political arms of government is a manifestation of the rule of law. A key function of the High Court is to ensure that public power is exercised within constitutional limits. Judicial review is essential as a mechanism to ensure that any legislation regarding the composition of the Voice is valid.

The way in which judicial review of such legislation is put into practice cannot be predetermined and is subject to the difficulty of addressing Indigeneity in the courts and the uncertainty of how the High Court may interpret a provision inserted through referendum. Despite these complexities, the Court has existing tools and approaches which provide some guidance and we can expect prudence in their response to any challenges.

The case of *Love v Commonwealth; Thoms v Commonwealth* (*'Love/Thoms*'),[22] decided in 2020, provides a salient reminder of the way in which judicial review in interaction with questions of Indigeneity can be fraught and yet the Court has demonstrated its ability to respond. In that case, a majority of the Court concluded that 'Aboriginal Australians' could not be 'aliens' under the Constitution and instead 'belonged' as part of the Australian polity. The majority adopted a definition of Aboriginality proposed by the parties[23] but left open the possibility that other tests may be applicable.[24] Their conclusion rested on an understanding of First Nations peoples' unique connection to Country which has been recognised by Australian law and society. The majority recognised the distinctive nature of First Nations law, society and connection to territory. The reasoning across the majority was open to an understanding of the Australian constitutional 'people' that was sufficiently plural and diverse to encompass distinct First Nations peoples.[25]

[21] See also Stephenson's contribution to this series of comments on the issue of justiciability more generally.
[22] (2020) 270 CLR 152.
[23] Namely the tripartite test from Brennan J in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 70: '[m]embership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people'.
[24] See *Love/Thoms* at [458] (Edelman J). See also [80] (Bell J).
[25] See further in Elisa Arcioni, 'Competing visions of 'the people' in Australia: First Nations and the state' (2023) 1 *Comparative Constitutional Studies* (forthcoming).

The dissenting judges' concerns were all framed around how they perceived their role as judges to be limited in light of the lack of text upon which to rely. Their view was that any development should be left to constitutional amendment.[26] That is exactly what is provided by the Voice referendum. If the amendment took place, the Court would have the text upon which to rely such that reasons to resist a pluralistic conception of the people along the lines of the majority would become moot. Instead, the focus would turn to the question of how to approach the determination of whether legislation complied with the power conferred.

There is a paucity of case law regarding how constitutional provisions inserted or altered through referendum are to be interpreted. Nevertheless, some basic elements of constitutional interpretation are instructive. The Court relies on the text of the Constitution, as placed within its context. If the composition of the Voice were challenged, the Court would not be relying on a judicially determined test of Indigeneity such as the one applied in *Love/Thoms* as there would be legislated details to refer to. The Court generally defers to legislative choices where there are a range of options available to the Parliament in the implementation of a policy, focusing instead on the larger question of whether the choice as made falls within the realm of those legitimately available as against the underlying constitutional requirement. In the circumstances of the Voice, it would be a question regarding whether the composition as structured through the legislation can be understood as resulting in a representative Voice. A future court may approach this informed by the level of consultation that preceded the passing of such legislation.

The Prime Minister's proposed amendment for the Voice is simple. It does not in its express terms qualify the Voice as 'representative' or give any other indication of the nature of the Voice. However, it is likely that the underlying purpose of the Voice may be derived from the context of the referendum, or from a preambular opening statement of the provision, or simply from the word 'Voice'. Whether the representative nature of the Voice is left implicit or made explicit, it is likely that the Court will have legitimate interpretative sources to rely upon in order to determine whether the legislation is consistent with the conferral of power in the sense of being representative. Given the indications we see across the Court in the *Love/Thoms* case, we can expect the Court to be alert to the distinctive nature of First Nations peoples and the need to be sensitive to the complexity of representation of multiple peoples within the Voice. It is then up to the processes of litigation to ensure that that detail is provided to the Court to assist them in their deliberation.

The judicial review function of the Court is generally undertaken with care and prudence and is necessary to ensure compliance with the conferral of power. Whilst one cannot know the outcome of a challenge to the validity of legislation in advance, the existing general approach to constitutional interpretation includes elements which should reassure the electorate that their will in the referendum will be respected. Of course, that will be dependent on ensuring that

[26] *Love/Thoms* [46] (Kiefel CJ), [128], [133] (Gageler J), [210] (Keane J),

relevant parties participate in any challenges such that the Court is provided with the relevant materials to allow as careful an assessment of the legislation as possible.

Concluding note – reform as an act of faith and hope

The First Nations Voice must be constitutionally entrenched but its membership should be for Parliament to determine, in consultation with First Nations. This structure of an enshrined institution, the details of which are left for ongoing negotiation through political processes, is consistent with our constitutional traditions and with the necessary conditions for legitimacy. There are inevitable challenges in the detailed implementation of any reform. The same is true regarding the Voice, but the risks are not of a nature which justify rejection of the reform itself. The political negotiations regarding detail require good faith and judicial review of any legislation should be conducted prudently. We have reason to expect both to be forthcoming.

Constitutional reform is an act of faith and hope. We can have faith in the general structures of our constitutional system to distribute powers between the Parliament and the Court in implementing and providing appropriate oversight of the reform. We can hope for a realisation of the reform as envisaged while continuing to be vigilant and ready to engage legal and political levers and democratic processes to ensure the promise of reform is realised. The Voice is a step towards establishing a new foundation for a relationship between First Nations peoples and the Australian polity. The modest proposal is consistent with our constitutional traditions and is worth the inevitable risks and uncertainties that come with any reform.