

Federalism and a First Nations Voice

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Introduction

1. I would like to say a few short things about Australian Federalism and the proposed Aboriginal and Torres Strait Islander Voice, and about the South Australian legislation establishing a First Nations Voice at the State level.
2. Australia is a federal nation, comprising six state governments as well as two internal self-governing territories and several other relatively minor territories. The Australian nation and the Australian Constitution were formed by the union of the six self-governing colonies that became the States. The States are preserved as autonomous units of government, each with its own legislature, executive and judiciary. Much of the Australian Constitution can only be understood against this historical and structural backdrop.
3. So, for example, we have a Westminster system of government, and the national Parliament comprises a Senate which is organised along State lines – with each State electing the same number of senators, despite vast differences in population.
4. One of those States, South Australia, has recently independently enacted legislation for the establishment of its own First Nations Voice. Unlike the

Commonwealth Constitution, the State Constitutions are ordinary Acts of the State Parliament which can be amended without a referendum and, in relation to most provisions, without a special majority or procedure. I will say a little more about the South Australian Voice towards the end of what I have to say.

5. The proposed First Nations Voice at the Commonwealth level intersects with Australian federalism in various different ways.
6. First, the primary function of the Voice, as envisaged, is to make representations to the federal Parliament and the federal executive government. As such, it would be a “federal” institution in the sense of being a part of the central government in a dual system of government.

National Voice to State parliaments and governments

7. Beyond its primary function, the Voice could be given other functions by Commonwealth legislation. That could potentially include empowering the Voice to make representations to State (as well as Territory) parliaments and governments – at least where a State Parliament is receptive to the national Voice having such a role.
8. There are many matters of common policy concern extending across all States, on which the Voice may well have valuable contributions. Of course each State may be expected to consult with Indigenous People living within that State on matters that affect them, but it can readily be seen that there are issues on which it may be valuable for States to have the benefit of a *national* First Nations

perspective. An example might be the recent debate about the appropriate age of criminal responsibility, an issue that disproportionately affects Aboriginal children and communities.

9. Another reason it would be desirable for the Voice to be able to make representations to State or Territory parliaments and governments, as well as the Parliament and government of the Commonwealth, is that the regulation of Aboriginal and Torres Strait Islander affairs often requires the interaction or coordination of government action at both levels. A recent illustration that highlights overlapping Commonwealth and State regulatory responsibility (and the shortcomings of existing regulatory frameworks) is seen in the tragic destruction of 46,000-year-old rock shelters at Juukan Gorge in the Pilbara region of Western Australia – Aboriginal heritage sites constituting a vital part of the living culture of the traditional owners – by a mining company, Rio Tinto, in 2020.
10. A Joint Standing Committee of the Commonwealth Parliament reported on the incident, finding that it had become “apparent that there are serious deficiencies across Australia’s Aboriginal and Torres Strait Islander cultural heritage legislative framework, in all states and territories and the Commonwealth”. The Report emphasised the need for the Commonwealth and State legislative framework to be developed through a process of co-design with Aboriginal and Torres Strait Islander peoples – an undertaking in which a First Nations Voice and its associated infrastructure would seem particularly suited to assist.

Organisation and election along State lines?

11. Moving to a different topic, the organisation and selection of the national First Nations Voice would not be addressed directly by the proposed Constitutional provisions but would be left to Commonwealth legislation.
12. That legislation could, though it need not, provide for a Voice organised, or selected, along State lines.
13. For example, the Voice might be comprised of representatives chosen *as* representatives of the Aboriginal and Torres Strait Islander people in each State and Territory. Or, like the single-member geographical electorates in the House of Representatives, the Voice could be comprised of representatives of smaller groups, each of which is wholly comprised of people residing within one State or Territory.
14. One possible advantage of a Voice organised wholly or partly on either of those bases is that it would provide, within the Voice as a whole, an identifiable group of chosen Aboriginal and Torres Strait Islander representatives with special responsibility for a particular State or Territory (or for groups or geographical areas wholly within a particular State or Territory).
15. There are, of course, countervailing considerations. There may be other ways to provide for representation of Aboriginal and Torres Strait Islander Australians within the Voice that may be more meaningful from the perspective of those people. Aboriginal societal and cultural groups and ties do not necessarily

observe State and Territory borders. Torres Strait Islander people occupy a position culturally distinct from Australian Aboriginal peoples, which may warrant distinct treatment. There is a question as to how meaningful representation should be provided to First Nations people who live in a different State or area than their own groups' traditional lands.

16. It might well be possible for the membership of the Voice to be decided by a combination of methods. One example of a model that would take into account practical and cultural considerations, while also featuring representation organised partly along State lines, is that which was proposed in the Indigenous Voice Co-design Process Final Report – commonly referred to as the Langton-Calma report. That's a really informative report that should not be treated as necessarily providing *the* assumed model, but as providing real insight into the *kinds* of considerations that could and should inform a model.

Section 128

17. The next point I make about federalism and the Voice is that, because this is a proposal to alter the Commonwealth Constitution, the proposal must first be approved at a referendum, under s 128 of the Australian Constitution. Constitutional entrenchment is an important aspect of the proposal, and a key plank of what was sought by the Uluru Statement from the Heart.
18. A strong argument in favour of constitutional entrenchment is that, precisely because of the need for popular support, it would likely result in greater and more immediate acceptance of the political legitimacy and importance of the

Voice, which in turn will be pivotal for its success. An example of a recent measure that was put to a popular vote in Australia – though not involving a constitutional amendment – was the establishment of same-sex marriage. The approval of that proposal by the people has been important, I think, in effectively settling the issue and providing a clear democratic mandate for the enactment and wide acceptance of the legislation.

19. The referendum process in Australia is itself a unique “federal” process – requiring not only an overall majority in favour of a constitutional amendment, but also a majority of electors in a majority of States (though not, notably in the territories, whose residents’ votes count only toward the national total). So a successful referendum would provide not only a democratic mandate but a *federally* legitimate one.

First Nations People in South Australia are to have a Voice

20. Finally, because we have a federal system with autonomous State governments, there is the capacity for each State to take its own steps to implement the calls from the Uluru Statement from the Heart. One example of this is that the South Australian Government has committed to taking steps to implement the Uluru Statement at State level. (Other steps have been taken in Victoria, in particular, but I will just mention the South Australian legislation.)
21. I do not have too much time to talk about this, obviously, so can I recommend a blog post that will be coming out on the AusPubLaw blog, by Anna Olijnyk and Cornelia Koch.

22. But here is a fairly brief summary.
23. The South Australian First Nations Voice has been created by the *First Nations Voice Act 2023* (SA) and is recognised also in an alteration to the South Australian *Constitution Act*.
24. The Act establishes a two-tiered structure consisting of Local First Nations Voices and a State First Nations Voice.
25. The primary function of the State First Nations Voice is to “engage with and provide advice to the South Australian Parliament and the South Australian Government on matters of interest to First Nations people” (s 28(1)(c)). The members of the State First Nations Voice will be drawn from Local First Nations Voices who will be directly elected by First Nations people resident in South Australia.
26. For that purpose, the State is divided into regions which function as geographical electorates – six, initially, though this is able to change – with First Nations people voting to elect their representatives – rather than, for example, according to traditional rules or selection by elders or the like. This was the model that was strongly supported by South Australian First Nations people in the two rounds of detailed consultation. The elections for membership of the Local First Nations Voices will be run by the State Electoral Commissioner. The first elections have now been scheduled to take place on 16 March 2024.

27. The State First Nations Voice will be made up of the two presiding members of each Local First Nations Voice – one man and one woman. This means the State First Nations Voice will be gender-balanced and will initially consist of 12 members. Gender equity on both the Local and State First Nations Voices was also a principle that gained strong support in consultations.
28. In addition to those two tiers, the Act also provides for Advisory Committees for Elders (s 30), Youth (s 31), Stolen Generations (s 32), and Native Title Bodies (s 33), each of which will advise the State First Nations Voice. Those committees will be made up of people who are not members of the State or Local Voices.
29. The legislation makes detailed provision for the functions of the Voice with respect to the Parliament and, separately, the Executive. These are the kinds of details that would need to be included in legislation if the Federal First Nations Voice is created.
30. The practical working out of the South Australian model may provide insights into what works well and, potentially, what may not. Many of the principles that have underpinned the detailed legislative regime for the South Australian Voice reflect principles that have been articulated in the Federal Voice Design Principles. The Federal First Nations Voice may therefore draw inspiration from the South Australian model in some respects.

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