The Proposal for the Voice to Parliament: Placing the Referendum Proposal in Context

Sophie Rigney*

This article examines the proposed amendment to the Australian Constitution to provide for an Aboriginal and Torres Strait Islander Voice to Parliament and the executive government. This article provides a summary of the history that has given rise to this proposed constitutional change, and examines the drafting history of the proposed amendment. The article particularly examines three issues related to the proposed amendment: the use of the word "may" in the proposed amendment; the Voice speaking to both Parliament and executive government; and the ability of the Parliament to determine the design of the Voice. The article explains where the proposal has come from, why it appears in the form it does, and outlines some of the strengths and challenges of the proposal.

In late 2023, Australians will go to a referendum on enshrining an Indigenous Voice to Parliament in the Australian C*onstitution*. The proposal of a Voice to Parliament – a body that will make representations to the Australian Parliament and government on matters relating to Aboriginal and Torres Strait Islander peoples – has emerged after more than a decade of political and legal discussion about how to "recognise" Indigenous peoples in the Australian *Constitution*. Over this time, there have been five formal government processes,[1] that have ultimately produced a legislated framework, an Act of Recognition,[2] and 10 reports.[3]

In this article, I provide a brief outline of the history that has given rise to this proposed constitutional change. I then outline the proposed amendment to the *Constitution* (which was released in March 2023) and the drafting history of the proposal. I particularly examine three issues: the use of the word "may" in the proposed amendment; the Voice speaking to both Parliament and executive government; and the ability of the Parliament to determine the design of the Voice. My aim in this article is to explain where the proposal has come from, and why it appears in the form it does, as well as offering some views on the strengths and challenges of the proposal.

* Senior Research Associate, University of New South Wales. My thanks to the anonymous reviewer and to Harry Hobbs for comments on this piece; and to Megan Davis and George Williams with whom I work on the project "Recognition after Uluru: What Next for First Nations?" Any inaccuracies are mine.

[1] Expert Panel on Constitutional Recognition of Indigenous Australians (2012); Aboriginal and Torres Strait Islander Act of Recognition Review Panel (2014); Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (2015); Referendum Council (2016); Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples (2018); Indigenous Voice Co-design Process Interim Report to the Australian Government (2020).

[2] *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth).

[3] Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel (2012); Aboriginal and Torres Strait Islander Act of Recognition Review Panel, Parliament of Australia, *Final Report* (2014); Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Interim Report* (2014); Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Final Report* (2015); Referendum Council, *Interim Report of the Referendum Council* (2016); Referendum Council, *Final Report of the Referendum Council* (2017); Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Interim Report* (2018); Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Final Report* (2018); Indigenous Voice Co-design Process Interim Report to the Australian Government (2020); Indigenous Voice Co-design Process Final Report to the Australian Government (2021).

A Short History of Constitutional Recognition and the Voice to Parliament

Australia's First Nations peoples are recognised as the world's longest continuing culture, with a connection to the land that has existed "according to the reckoning of (Indigenous) culture, from the Creation, according to the common law from 'time immemorial', and according to science more than 60,000 years".[4] Nonetheless, when the British settled or invaded this land, they eventually relied on the doctrine of terra nullius to acquire the territory. When Australia's *Constitution* was drafted, Indigenous peoples were not consulted or involved, despite significant activism of Indigenous peoples for greater self-determination and representation in colonial governance.[5] Ultimately, the *Constitution* as drafted in 1901 made two references to Aboriginal people: in s 127 (which stated "In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted") and s 51(xxvi) (which permitted the federal government to make laws for "the people of any race, *other than the aboriginal race in any State*, for whom it is necessary to make special laws"). In a referendum held in 1967, s 127 was repealed entirely, and s 51(xxvi) was amended to delete the words in italics above. As a result, Indigenous peoples were not explicitly mentioned in the *Constitution* at all.

More recently, this absence has been recognised as problematic, both symbolically and practically. The lack of any reference to Indigenous peoples in the document that regulates the relationship between the state and the citizenry has been seen as "unfinished business". Indigenous peoples have called for greater participation in government processes that affect them, to improve those processes and their outcomes. As an example, in 1995, the Aboriginal and Torres Strait Islander Commission (ATSIC) argued for "major institutional and structural change, including Constitutional reform and recognition".[6] This was understood as more than symbolic recognition: "A fundamental component in the recognition of Australia's Indigenous peoples is to provide structures which will guarantee the inclusion of indigenous peoples in Governmental processes."[7]

Since 1999, some movement was made towards "recognising" Indigenous peoples in the *Constitution*, but much of this focused on symbolic change like recognition in the *Constitution*'s preamble or other minor changes that would not afford Indigenous peoples any substantive ability to exercise their rights of political participation. In 2015, however, several Indigenous leaders met with the then-Prime Minister and then-Leader of the Opposition to discuss the way "constitutional recognition" was being undertaken. They issued the "Kirribilli Statement" which made clear that "any reform must involve substantive changes to the Australian Constitution … A minimalist approach … does not go far enough and would not be acceptable to Aboriginal and Torres Strait Islander peoples".[8] This marked a decisive change in the "constitutional recognition" movement, from symbolism to substantive change. Such a move is in line with greater appreciation by the state – particularly since the passage of the *United Nations Declaration on the Rights of Indigenous Peoples* in 2007 (and Australia's endorsement in 2009) – of the rights to political participation that attach as collective rights particularly to Indigenous peoples (as opposed to the rights exercisable by particular Indigenous individuals).[9] These rights to political participation are crucial to the exercise of Indigenous rights to self-determination.[10]

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[4] Uluru Statement from the Heart (2017).

[5] See Megan Davis and George Williams, *Everything You Need to Know about the Uluru Statement from the Heart* (UNSW Press, 2021).

[6] Aboriginal and Torres Strait Islander Commission, *Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures* (1995) [1.29].

[7] Aboriginal and Torres Strait Islander Commission, n 6, [4.22].

[8] Statement presented by Aboriginal and Torres Strait Islander attendees at a meeting held with the Prime Minister and Opposition Leader on Constitutional Recognition, 6 July 2015.

[9] See particularly UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, UN Doc A/RES/61/295 (2 October 2007) Arts 18, 19 (*UNDRIP*). See also Gabrielle Appleby et al, "Submission to the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs Inquiry into application of the UNDRIP in Australia" (2022).

[10] UNDRIP, n 9, Art 3; Appleby et al, n 9.

In response to the Kirribilli Statement, the Referendum Council was established to "lead the process for national consultations and community engagement about constitutional recognition".[11] The Council was to report on outcomes of these consultations and "options for a referendum proposal, steps for finalising a proposal, and possible timing for a referendum" as well as "constitutional issues".[12] The Council established the process for 12 "Regional Dialogues" held across Australia in 2016–2017, and a National Constitutional Convention held near Uluru on 23–26 May 2017. Around 1,200 Indigenous people were involved in this process of dialogues, making this an "unprecedented" process that represented "the most proportionately significant consultation process that has ever been undertaken with First Peoples" in Australia.[13] Participants in the Regional Dialogues were chosen in order to represent those who had "cultural authority", and therefore 60% of the invitations were sent to traditional owners and elders, 20% to local Indigenous organisations, and 20% to individuals including Stolen Generations members, youth and grandmothers.[14] In terms of structure and content, the dialogues were designed to ensure deliberative decision-making and active participation.[15] It has been noted that the Regional Dialogue design was "an exercise of First Nations' right to determine their own political status, and an example of political participation … and an exercise of Free, Prior and Informed Consent".[16]

The Regional Dialogues ranked the Voice to Parliament as a key reform priority.[17] Prior to the National Convention at Uluru, the Referendum Council established a set of Guiding Principles against which to assess possible reforms.[18] At the National Convention, delegates ultimately endorsed the proposal for the Voice to Parliament. The "Uluru Statement from the Heart" called for this Voice to Parliament and a Makarrata Commission to oversee an agreement-making and truth-telling process. This is often described as "Voice, Treaty, Truth": a sequenced series of law reform objectives, with the Voice to Parliament considered to be the priority because of a "recognition that public institutions, politicians and political parties rarely listen to what Indigenous peoples say about their lives and aspirations".[19] Establishing the Voice as a constitutionally-entrenched body would permit treaty and truth-telling to occur with the support of such a structure.

The Voice to Parliament was envisaged as a body that would represent First Nations views on policies and laws that affect them, to the Parliament and government. The Constitutional amendment would be a substantive change – echoing the position articulated at Kirribilli – rather than a minimalist recognition. The Voice would be:

> a structural reform. It is a change to the structure of Australia's public institutions and would redistribute public power via the Constitution … [it] will create an institutional relationship between governments and First Nations that will compel the state to listen to Aboriginal and Torres Strait Islander Peoples in policy- and decision-making.[20]

[11] Referendum Council (2017), n 3, 46.

[12] Referendum Council (2017), n 3, 46.

[13] Referendum Council (2017), n 3, 46.

[14] See Referendum Council (2017), n 3, 8; Davis and Williams, n 5, 133, Public Lawyers, *The Imperative of Constitutional Enshrinement: Submission to the Voice Secretariat* (20 January 2021) 2.

[15] Megan Davis, "The Long Road to Uluru" (2018) 60 *Griffith Review* 13, 41–45. See also Referendum Council (2017), n 3, 10.

[16] See also Appleby et al, n 9.

[17] Referendum Council (2017), n 3, 29.

[18] Referendum Council (2017), n 3, 22.

[19] Davis and Williams, n 5, 151.

[20] Davis and Williams, n 5, 151–152. See also Dani Larkin and Sophie Rigney, "State and Territory Legislative Vulnerabilities and Why an Indigenous Voice Must Be Constitutionally Enshrined" (2021) 46(3) *Alternative Law Journal* 205; Gabrielle Appleby and Eddie Synot, "A First Nations Voice: Institutionalising Political Listening" (2020) 48(4) *Federal Law Review* 529. See also the Attorney-General's Second Reading Speech: "This bill is about … listening … it is up to the parliament and the executive to listen", and the final words of that speech, "It is time to listen" (Attorney-General Mark Dreyfus, *Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 Second Reading Speech* (30 March 2023)).

Following the National Convention at Uluru, the Referendum Council endorsed the Voice and recommended that a referendum be held.[21] It considered the reform to be modest and substantive; reasonable; unifying; and capable of attracting the necessary support for a successful referendum.[22] Nonetheless, the proposal was rejected by the then Prime Minister,[23] and instead, the government established a Joint Select Parliamentary Committee (chaired by Patrick Dodson and Julian Leeser). This committee ultimately recommended that the government "initiate a process of co-design [of the Voice] with Aboriginal and Torres Strait Islander peoples"[24] and that the government "consider, in a deliberate and timely manner, legislative, executive and constitutional options to establish The Voice".[25]

In 2019, a process of "co-design" for an "Indigenous voice to government" and voices "at the local, regional and national levels" was announced.[26] This process, chaired by Tom Calma and Marcia Langton, consisted of two stages. First, three groups (consisting of individuals picked by the government) worked to develop "models to improve local and regional decision-making and a national voice".[27] The second stage involved "consultation" on the proposed models and suggestions in the Interim Report.[28] The terms of reference for this process excluded the issue of constitutional status of the Voice,[29] but nonetheless 90% of public submissions to the consultation process supported a referendum on a First Nations Voice to Parliament.[30] The final report was publicly released in December 2021.[31]

In the lead-up to the 2022 Federal election, the Liberal-National Coalition ruled out a referendum on the Voice if they were re-elected,[32] while the Australian Labor party promised to hold a referendum to enshrine the Voice to Parliament as well as to progress the Treaty and Truth aspects of the Uluru Statement.[33] The Labor Party was elected on 21 May 2022, and reiterated the new government's support for the Uluru Statement and for a referendum.[34] The referendum is anticipated for late 2023.[35] It has taken eight years since the Kirribilli Statement, nearly 30 years since ATSIC's call for substantive constitutional change, and around 100 years since the Indigenous activism of the 1920s–1930s for greater rights to political participation.[36]

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[21] Referendum Council (2017), n 3, 2.

[22] Referendum Council (2017), n 3, 38–39.

[23] Malcolm Turnbull, *Response to Referendum Council's Report on Constitutional Recognition* (26 October 2017).

[24] Joint Select Committee on Constitutional Recognition (2018), n 3, [2.314].

[25] Joint Select Committee on Constitutional Recognition (2018), n 3, [3.152].

[26] National Indigenous Australians Agency, *Indigenous Voice* <https://www.indigenous.gov.au/topics/indigenous-voice>; National Indigenous Australians Agency, *Co-Chairs Announced for Indigenous Voice Co-Design Process* (5 November 2019) <https://www.indigenous.gov.au/news-and-media/stories/co-chairs-announced-indigenous-voice-co-design-process≥.

[27] See National Indigenous Australians Agency, "Indigenous Voice Co-Design" (Fact Sheet).

[28] Indigenous Voice Co-design Process Interim Report (2020), n 3.

[29] National Indigenous Australians Agency, *Terms of Reference: National Co-Design Group* (13 March 2020) 19(d).

[30] Gabrielle Appleby, Emma Buxton-Namisnyk and Dani Larkin, *Indigenous Voice Co-Design Process: An Expert Analysis of the NIAA Public Consultations* (Indigenous Law Centre, UNSW, 29 June 2021).

[31] Indigenous Voice Co-design Process Final Report (2021), n 3.

[32] Natassia Chrysanthos and Angus Thompson, "'Why Would I?': Morrison Rules Out Referendum on Indigenous Voice If Re-elected", *The Sydney Morning Herald*, 2 May 2022 <https://www.smh.com.au/politics/federal/why-would-i-morrison-rules-out-referendum-on-indigenous-voice-if-re-elected-20220502-p5ahue.html>.

[33] Australian Labor Party, *Labor's Commitment to First Nations Peoples* (18 May 2022) <https://www.parlinfo.aph.gov.au/parlInfo/download/library/partypol/8638543/upload_binary/8638543.pdf;fileType=application%2Fpdf#search=%22library/partypol/8638543%22>.

[34] National Indigenous Australians Agency, *Australian Government Commits to the Uluru Statement* (22 May 2022) <https://www.voice.niaa.gov.au/news/australian-government-commits-uluru-statement>.

[35] Anthony Galloway, "Voice Referendum as 'Early as August', Burney Reveals", *The Sydney Morning Herald*, 1 January 2023 <https://www.smh.com.au/politics/federal/voice-referendum-as-early-as-august-burney-reveals-20221229-p5c9br.html>.

[36] Including work of the Australian Aboriginal Progressive Association, William Cooper's petition to the King, and the "Day of Mourning" in 1938.

THE PROPOSED AMENDMENT

An initial draft of the proposed amendment was released in July 2022, and a consultation process followed (as outlined below). Following this, the wording of the proposed amendment was released on 23 March 2023. It reads:

> **Chapter IX Recognition of Aboriginal and Torres Strait Islander Peoples**
>
> **s. 129 Aboriginal and Torres Strait Islander Voice**
>
> In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia:
>
> 1 There shall be a body, to be called the Aboriginal and Torres Strait Islander Voice;
> 2 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;
> 3 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.

History of Drafting the Proposal

This proposal closely reflects others that have been suggested since the 2015 Kirribilli Statement and the Regional Dialogues and National Constitutional Convention. In 2015 Professor Anne Twomey suggested a new s 60A for the *Constitution*.[37] The Twomey proposal was then used as an "example" of a possible amendment at the Regional Dialogues and the Constitutional Convention.[38] Subsequently, the Indigenous Law Centre (ILC) at the University of New South Wales used the Twomey proposal as "a logical point from which to commence the ILC's consideration of constitutional drafting".[39] The ILC advanced a different proposal, which "developed Twomey's drafting but was founded in and drew directly from the aspirations expressed during the Dialogues and at the Uluru Convention", where members of the ILC had been in attendance.[40] This proposal was submitted to the 2018 Joint Select Committee on Constitutional Recognition.[41] The proposal read:

> Chapter 9 First Nations
>
> Section 129 The First Nations Voice
>
> (1) There shall be a First Nations Voice.
> (2) The First Nations Voice shall present its views to Parliament and the Executive on matters relating to Aboriginal and Torres Strait Islander peoples.
> (3) The Parliament shall, subject to this Constitution, have power to make laws with respect to the composition, functions, powers and procedures of the First Nations Voice.

The Joint Select Committee received 18 different models of proposed constitutional amendments, nine of which addressed solely a national Voice.[42] Many shared common features. Of the nine proposals which

[37] Anne Twomey, "Putting Words to the Tune of Indigenous Constitutional Recognition", *The Conversation*, 20 May 2015 <https://www.theconversation.com/putting-words-to-the-tune-of-indigenous-constitutional-recognition-42038>. See also Anne Twomey, "An Indigenous Advisory Body: Addressing Concerns about Justiciability and Parliamentary Sovereignty" (2015) 8(19) *Indigenous Law Bulletin* 6; Shireen Morris, "'The Torment of Our Powerlessness': Addressing Indigenous Constitutional Vulnerability through the Uluru Statement's Call for a First Nations Voice in Their Affairs" (2018) 41(3) *UNSW Law Journal* 629. On the different options for reform, see Shireen Morris, *A First Nations Voice in the Constitution* (Hart, 2020) 265–303.

[38] Gabrielle Appleby, Sean Brennan and Megan Davis, "Constitutional Enshrinement of a First Nations Voice: Issues Paper 1: The Constitutional Amendment" (2022) 8.

[39] Appleby, Brennan and Davis, n 38, 8.

[40] Gabrielle Appleby, Sean Brennan and Megan Davis, "A First Nations Voice and the Exercise of Constitutional Drafting" PLR (forthcoming, 2023 March edition).

[41] Patricia Anderson et al, Submission No 479 to Parliament of Australia, *Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples* (3 November 2018).

[42] Joint Select Committee on Constitutional Recognition (2018), n 3, [3.31], [3.38]–[3.46].

addressed a national Voice, the Albanese March 2023 proposal most closely reflects the ILC proposal.[43] The Committee expressed some concern about the number of draft proposals, and thus suggested the "co-design" process as the next step. However, as the terms of reference for the co-design process precluded examination of the constitutional status of the Voice, no draft Constitutional amendments were examined.

Following the change of government, on 30 July 2022 in a speech at the Garma Festival, Prime Minister Anthony Albanese released a draft Constitutional amendment and referendum question.[44] However, the Prime Minister also indicated that this proposal was not final and could be changed after greater consultation. To undertake such consultation, the government established three advisory groups. The "First Nations Referendum Working Group" was tasked with advising the government on "how best to ensure a successful Referendum", particularly focusing on the timing of the referendum, "refining the proposed constitutional amendment and question" and "the information on the Voice necessary for a successful referendum".[45]

In addition, there was a "First Nations Referendum Engagement Group", which was tasked with providing advice "about building community understanding, awareness and support for the referendum".[46] Finally, the government established a Constitutional Expert Group to provide the Referendum Working Group "with legal support on constitutional matters relating to the referendum" including advice on the draft referendum question and constitutional amendments.[47]

Ultimately, the proposed amendment was the result of consultations between the government and these advisory groups. One consequence of releasing an initial draft nine months before settling the proposal, was that there was a great deal of political and media speculation on the content of the proposal. The March 2023 draft has been able to address some of those issues.

The March 2023 proposal was substantively very similar to the first draft released at Garma but had some additions which clarified many of the issues that had been left unresolved. First, the placement of the amendment in the *Constitution* was made clear, with a Chapter heading indicating the location of the new section. Second, both the Chapter title and a preliminary sentence were included, emphasising the importance of recognition in the *Constitution* of Aboriginal and Torres Strait Islander peoples as the "First Peoples" of Australia. Third, in subs (2) the words "of the Commonwealth" were included to clarify that it was the federal parliament and government being referenced, as was always envisaged. Finally, subs (3) was altered. Initially it read that the Parliament would have the power to make laws "with respect to the composition, functions, powers and procedures of the Aboriginal and Torres Strait Islander Voice" but this was ultimately altered to "with respect to matters relating to the Aboriginal and Torres Strait Islander Voice, including its composition, functions, powers and procedures". This alteration appears to be a response to some questions around the Voice's ability to speak to executive government and the role of Parliament in determining the legal effect of this, as will be discussed in more detail below. At the same time as releasing the draft proposal, a set of eight design principles was also released, which will guide the design of the Voice after a successful referendum.

Issues in the Draft Proposal

The wording of the current draft raises three particular issues. These are (1) the wording that the Voice "may" make representations; (2) that those representations are to be to "parliament and the executive government"; and (3) the role of Parliament in designing the Voice. As a preliminary point, in any future instance where the High Court is required to interpret an inserted s 129, it is likely that they will interpret

[43] Joint Select Committee on Constitutional Recognition (2018), n 3, [3.38]–[3.46].

[44] Prime Minister, Address to Garma Festival (30 July 2022) <https://www.pm.gov.au/media/address-garma-festival>.

[45] Aboriginal and Torres Strait Islander Voice, *Who Is Involved* <https://www.voice.niaa.gov.au/who-involved#:~:text=The%20Referendum%20Working%20Group%2C%20co,Reference%20on%20the%20Resources%20page>.

[46] Aboriginal and Torres Strait Islander Voice, n 45.

[47] Aboriginal and Torres Strait Islander Voice, n 45.

the provision in line with the intention of the amenders, undertaking a textual approach.[48] This intention may be gleaned from materials including the Second Reading Speech, broader parliamentary debates, the yes/no pamphlets, and the advice of the Solicitor-General.[49]

"May Make Representations"

Although the March 2023 draft largely reflects the proposal drafted by the ILC, there is one major difference: the ILC proposal used the words "The First Nations Voice **shall** present its views" while the March 2023 draft is "The Aboriginal and Torres Strait Islander Voice **may** make representations". An initial concern is that the proposal is weaker than the proposal drafted by the ILC, softening the Voice's capacity to make representations and of the Parliament and government to seek such representations. "May" leaves open the possibility that the Voice will not be called upon to make representations. The possibility theoretically exists that the constitutional enshrinement of the Voice would be effectively toothless: it would exist but would have no real function.

However, the subsection should be read in conjunction with subs (1), that there "**shall** be a body". In this way, the existence of the body itself is constitutionally enshrined, even if it chooses not to make representations in particular circumstances. Indeed, Gabrielle Appleby, Sean Brennan and Megan Davis have noted that the wording of "may" might have been intended "to counter any idea that the Voice must present its views on every single matter relating to Aboriginal and Torres Strait Islander peoples".[50] Indeed, this is reflected in the Attorney-General's *Second Reading Speech*, where it was noted that:

> The Voice will not be required to make a representation on every law, policy or program. The Voice will determine when to make representations by managing its own priorities and allocating its resources in accordance with the priorities of First Nations peoples.[51]

This has been further clarified since the release of the Solicitor-General's advice on the proposed amendment. The advice notes that the proposed section does not require the Parliament to consult with the Voice before legislating.[52] The text of the section "imposes no obligations of any kind upon the Voice, the Parliament or the Executive Government" and "no such requirements can be implied" because of the "deliberate textual choice to empower the Voice to make 'representations' rather than to 'consult' and with the ordinary operation of representative government".[53] Moreover, the proposal would not "impose any enforceable obligation upon the Parliament to consider representations from the Voice, let alone to follow such representations", as Courts tend to take the view that "these are matters for the Parliament itself to regulate".[54] In the Solicitor-General's view, then, representative government will be "unaffected" by the Voice, and the "influence of the Voice's representations to the Parliament will be a matter to be determined by political considerations, rather than legal considerations".[55]

Nonetheless, it has been questioned whether the wording leaves uncertainty about "whether the Parliament can remove the function" in subs (2).[56] Given that Parliament retains legislative power with relation to the Voice (under subs (3) and considered in more detail below), the possibility might theoretically exist for a future government to neuter the functionality of the Voice, by limiting its ability

[48] See *Wong v Commonwealth* (2009) 236 CLR 573; [2009] HCA 3. On the approach to interpreting amended provisions (like the amended s 51(xxvi) after the 1967 referendum), see *Kartinyeri v Commonwealth* (1998) 195 CLR 337; [1998] HCA 22.

[49] See *Wong v Commonwealth* (2009) 236 CLR 573; [2009] HCA 3; see *Kartinyeri v Commonwealth* (1998) 195 CLR 337; [1998] HCA 22.

[50] Gabrielle Appleby, Sean Brennan and Megan Davis, *Constitutional Enshrinement of a First Nations Voice Issues Paper for Public Discussion: Issues Paper 3: Finalisation of the Voice Design* (Indigenous Law Centre, UNSW, 2022).

[51] Dreyfus, n 20.

[52] Solicitor-General, *In the Matter of the Proposed Section 129 of the Constitution* (19 April 2023) [18 (a)].

[53] Solicitor-General, n 52, [18 (a)].

[54] Solicitor-General, n 52, [18 (b)].

[55] Solicitor-General, n 52, [18 (c)].

[56] Appleby, Brennan and Davis, n 38, 14.

to make representations – all while still technically adhering to the Constitutional requirement that a Voice exist. We can imagine that this would be an ideal cover for hostile governments, to give lip service to the existence of the Voice while effectively demolishing its purpose. However, the Solicitor-General's Advice further sheds light on this, arguing that:

> [T]he Parliament could not validly pass a law that would contradict the express words of proposed s 129(ii), such as by providing that the Voice may not make representations on some "matters relating to Aboriginal or Torres Strait Islander peoples". Nor could it validly prohibit the Voice from making representations either to the Parliament or the Executive Government. While laws of both those kinds would undoubtedly be laws "with respect to matters relating to the … Voice", they would purport to take away from the Voice a function that proposed s 129(ii) of the Constitution would have conferred upon it. Proposed s 129(iii) being "subject to this Constitution", such laws would be invalid.[57]

It therefore appears that the wording "may make representations", read in the context of the proposal as a whole, permits the Voice the flexibility of choosing when to make representations while also providing the Constitutional guarantee that the ability to make these representations is protected.

"To the Parliament and Executive Government"

The second issue is the ability of the Voice to speak to both Parliament and the Executive government (including the federal cabinet and the public service). In this way, the Voice should be able to advise both the institution that makes the law, and the institution that implements the law. This is particularly important so that the advice is not ignored by one arm or the other, with no recourse. For example, if the Voice only advised Government, we can imagine that the government of the day could ignore the advice with little push-back from the opposition or other parties. The ability of the Voice to speak to Parliament "would enable Indigenous voices to be heard by all, not solely the government", and would thereby "ensure Indigenous people were no longer trapped within a web of bureaucracy and government priorities".[58] On the other hand, if the Voice only advised Parliament, it may not be able to provide comment on administrative and bureaucratic decisions made by the government, including under delegated legislation. Ensuring that the Voice can advise both these arms of government both increases its scope, and the probability of it being heard. It is also in line with Australia's system of responsible government and the correct relationship between the executive and the legislature.

Nonetheless, there has been some contention over the inclusion of "executive government" in the proposed amendment. In particular, some have claimed that this makes the proposal more likely to be subject to court challenge, and a concern that the High Court might interpret subs (2) such that representations by the Voice would need to be considered by public servants prior to making a valid decision – delaying decision-making and leading to litigation. In response, the Attorney-General had suggested that the initial subs (3) be amended, to clarify that Parliament had authority to determined "the legal effect" of the Voice's representations.[59] However, this proposal was not taken up by the referendum advisory groups consulting to the government. Instead, subs (3) now makes clear that the Parliament shall have the power to make laws "with respect to matters relating to [the Voice], including its composition, functions, powers and procedures". Rewording subs (3) to include the words "relating to" and "including" provides Parliament a wide remit of powers regarding the Voice, and would allow Parliament the power to determine the cases in which representations of the Voice must be considered prior to decisions being taken.[60] As was made clear by the Attorney-General, "It will be a matter for

[57] Solicitor-General, n 52, [30].

[58] Eddie Synot, "Ken Wyatt's Proposed 'Voice to Government' Marks Another Failure to Hear Indigenous Voices", *The Conversation*, 30 October 2019 <https://www.theconversation.com/ken-wyatts-proposed-voice-to-government-marks-another-failure-to-hear-indigenous-voices-126103>.

[59] See Paul Sakkal and James Massola, "The Seven Extra Words that Could Broker a Compromise Deal and Win the Referendum", *The Age*, 13 March 2023 <https://www.smh.com.au/politics/federal/the-seven-extra-words-that-could-broker-a-compromise-deal-and-win-the-referendum-20230312-p5crct.html>.

[60] These words ensure that Parliament "may enact any law that has more than an insubstantial, tenuous or distant connection either to the Voice itself or to any subject relating to the Voice": Solicitor-General, n 52, [25].

the parliament to determine whether the executive government is under any obligation in relation to representations made by the Voice",[61] and that the Voice:

> will not have to wait for the parliament or the executive to seek its views before it can provide them. But nor will the constitutional amendment oblige the parliament or the executive government to consult the Voice before taking action.[62]

As such, any concern that the Voice would need to make representations to the executive government in all matters (otherwise risking a court challenge) is addressed, with Parliament having authority over such matters.[63]

The Role of Parliament in Designing the Voice

Under subs (3), Parliament will have the power to legislate the design of the Voice. The changes to subs (3), made between the Garma draft and the March 2023 draft, broaden, clarify, and strengthen Parliament's powers with regards to the design of the Voice. This is appropriate, as Parliament is supreme. It is also essentially what was anticipated by the Referendum Council.[64] The decisions on the structure and design of the Voice would be left until after the referendum, consistent with the constitutional amendment technique of a "decision to defer",[65] a technique which has been referred to as being in line with constitutional change "best practice".[66] In relation to the Voice, this approach has been described by former High Court Judge Murray Gleeson as a "constitutionally entrenched but legislatively controlled" structure.[67]

Such an approach is familiar in the Australian context: for example, the High Court of Australia was established by s 71 of the *Constitution*, but the detail was determined by Parliament in legislation two years later.[68] In the case of the Voice, there are (at least) four rationales for this deferral: first, as noted, this fits with Australia's system of representative government, where the Parliament has supreme legislative power and is responsible to the electorate; second, this approach works to separate the higher-order principle question from the technical question, to allow the Australian voters to directly vote on the existence of the Voice in the Constitution; third, this attempts to separate that principle question from the technical details issues in political debate, so that the debate does not become mired in a question about "models"; and finally – arguably most crucially – this approach then will permit a design process after the successful referendum, in which First Nations peoples may be able to determine a model that is appropriate, for ultimate submission to parliamentary legislative processes.

Indeed, as Appleby, Brennan and Davis write, providing a "full, detailed model of the Voice" before the referendum could "mislead voters and impair the constitutional function of the referendum: that is, voters may think they are voting on the detail of the model, and not the constitutional provision which is pitched at a much higher level of generality and principle".[69] They argue that this may lead to future governments being reluctant to change a model which had the support of the electors, undermining the flexibility of the design and its ability to respond to changed circumstances. Instead, they argue that questions of "how and when" to finalise the Voice design "should be resolved by reference to three principles: respect for the Australian people as voters in the referendum, assurance to First Nations that the design of the Voice

[61] Dreyfus, n 20.

[62] Dreyfus, n 20.

[63] See also Solicitor-General, n 52, [22]–[40].

[64] Referendum Council (2017), n 3, 2.

[65] See Rosalind Dixon and Tom Ginsburg, "Deciding Not to Decide: Deferral in Constitutional Design" (2011) 9(3–4) *International Journal of Constitutional Law* 636; Rosalind Dixon, "Constitutional Design Deferred" in David Landau and Hanna Lerner (eds), *Elgar Handbook on Comparative Constitution Making* (Edward Elgar, 2019).

[66] The Joint Select Committee on Constitutional Recognition Interim Report, n 3, Section 3: Design Principles.

[67] Murray Gleeson, "Recognition in Keeping with the Constitution: A Worthwhile Project" (Uphold and Recognise, 2019). See also Public Lawyers, n 14; Referendum Council (2017), n 3, 2.

[68] *Judiciary Act 1903* (Cth). See Anderson et al, n 41, 11.

[69] Appleby, Brennan and Davis, n 50, 6.

will not be imposed on them by the Parliament without their input, and flexibility in the future design of the Voice".[70] The Australian public "should be asked first to vote Yes or No on a simply stated question of constitutional principle, fully informed about the primary function of the Voice and the design process and principles which will follow. If they vote Yes, the Parliament, who are the representatives of the Australian people, should then move to legislate the details of the Voice, according to that process and those principles".[71] I agree with the approach put forward by Appleby, Brennan and Davis, particularly its conceptualisation of the different roles of electors, Indigenous peoples, and the Parliament in relation to the Voice; and the distinction between the existence of the Voice and its detailed design.

However, in the lead-up to the referendum, there has been some contention about the design of the Voice. For example, Opposition Leader Peter Dutton wrote to the Prime Minister with 15 "questions" about the design, role, and functions of the Voice.[72] Many of these questions have existing answers, because even though the exact model is yet to be determined, the potential model of the Voice has been the subject of several processes and reports. The eight design principles which were released alongside the proposed amendment to guide the ultimate design of the Voice allow the design to be flexible and open to future change, but to have some certainty around how design is linked to function. Given the importance of Indigenous political participation to both the rationale and operation of the Voice, it is fundamental that there is a further process for First Nations peoples to guide the Voice design in line with these principles.

Conclusions

At the time of writing, the proposed amendment to the *Constitution* had been introduced to Parliament, and was under consideration by a parliamentary committee. The proposed amendment has significant strengths: it ensures that the Voice would appropriately speak to both Parliament and executive government, and it ensures Parliament is responsible for designing the Voice. In turn, this provides flexibility to future governments to adapt the Voice as needed, protects parliamentary supremacy, and is grounded in the correct conceptualisation of the role of Parliament in designing the Voice (rather than having a model prior to the referendum). The wording of "may" in subs (1) raises some questions but is defensible, particularly considering the desire to clarify the role of the Voice vis-à-vis the Parliament and executive, and the Constitutional protections of the ability of the Voice to make representations. Any referendum in Australia faces a daunting prospect for success, due to the requirement of a double majority – an overall majority, and a majority in a majority of states.[73] The idea of a Voice currently retains a significant amount of popular support,[74] but the wording of the amendment will come under scrutiny. Clear communication around why the proposal has been drafted in this manner and what this change will enable will enhance the likelihood of public support for constitutional change.[75]

[70] Appleby, Brennan and Davis, n 50, 4.

[71] Appleby, Brennan and Davis, n 50, 6.

[72] Peter Dutton, *Letter to the Prime Minister* (7 January 2023) <https://twitter.com/PeterDutton_MP/status/1611919809880666112?lang=en>.

[73] *Constitution* s 128.

[74] Simon Benson, "Five States Raise Voice to Back Recognition: Newspoll", *The Australian*, 5 April 2023 <https://www.theaustralian.com.au/nation/five-states-raise-voice-to-back-indigenous-recognition-newspoll/news-story/027f9c23aaa6aa4bd0e61965eab65688>.

[75] See, eg, George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010), where they point out that "sound and sensible proposals" are one of the "pillars" of successful referenda.