The Voice: A constitutional and administrative law perspective

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Abstract

The Voice is to be a mechanism through which the views of First Nations people can be received by the key national institutions of public power – the Parliament and the Executive. The Voice has been deliberately designed to fit within existing public law structures and processes. The concerns raised publicly regarding the ability of the Voice to make representations to the Executive fail to take into account the power conferred on the Parliament to make laws about the legal effect of the Voice's representations.

Introduction

The Voice proposal contained in the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) Bill 2023 ('**Voice Bill**') has been approved by the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum and has been debated in Parliament, after which it will be put to the Australian electors in a referendum. The proposed s 129 would read:

'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.'

The Voice is to be a mechanism through which the views of Aboriginal and Torres Strait Islander peoples can be received by Parliament and the Executive Government of the Commonwealth. It was the form of constitutional recognition that received consensus support at the 2017 National First Nations Constitutional Convention, and is contained in the Uluru Statement from the Heart. As that Statement outlines, it is intended to be a response to the political powerlessness of First Nations throughout Australian history. The Voice is intended to give independent advice to the Parliament and the Government about matters that affect First Nations people, with the Parliament to determine the consequences of that advice. The Voice is designed not to have legal power, not to have a program delivery function and not have a veto power.

This article provides an overview of the constitutional and administrative law issues that have been raised in relation to the Voice, and concludes that the Voice has been deliberately designed to fit within existing public law structures and processes.

Constitutional law and the Voice

Changing the Constitution is a rare occurrence in Australia and this proposed change has been the source of much debate in the media and through the recently completed Inquiry process (see the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, Advisory Report on the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 (May 2023)) ('**Voice Report**'). Several constitutional law issues emerged throughout the debate. This section addresses the issues of: enshrinement; constitutional recognition; the evolving constitutional identity of 'the people'; institutional design; and the limited impact of the text of s 129 on the legislative power of the Parliament.

Enshrinement of the Voice in the *Constitution,* rather than through legislation, is desirable for several reasons. First, it would guarantee the existence of the institution of the Voice. A legislated Voice would be amenable to repeal by legislation. Enshrining the Voice in the *Constitution* would ensure that it is a guaranteed and durable institution.

Second, enshrinement would confer legitimacy on the Voice. 'The people' in the *Constitution* exercise their sovereignty through involvement in elections and in constitutional referenda. The highest form of legitimacy comes from the representative Parliament proposing a change to the *Constitution* and 'the people' – through the electors – voting to adopt that change. Third, enshrinement is the form of recognition sought by First Nations through the consensus position outlined in the Uluru Statement from the Heart.

Constitutional recognition through the insertion of s 129 would rectify a constitutional silence. Since the 1967 referendum, there has been no reference to Aboriginal and Torres Strait Islander people in the *Constitution*. Inserting s 129 would also continue the trajectory of the development of who 'the people' are under the *Constitution*. That identity has changed. This concept of identity has developed since Federation – from an expectation of a White Australia to an understanding of a diverse and plural people. We have seen a change in who constitutes 'the people' in the sense of the electors – from a colonial era, where women were excluded in a majority of colonies from voting to adopt the *Constitution* Bill, to the modern era, where the High Court has assumed that all adult citizens should have the right to vote. To enshrine a Voice is not to import an illegitimate racial element into the *Constitution*. It is to recognise the distinct place of First Nations peoples in the Australian polity, consistent with the ongoing development of the constitutional identity of 'the people'.

The structure of the Voice proposal is consistent with Australian constitutional design. Constitutions in general – and the Australian *Constitution* in particular – establish the core elements of institutions

in the constitutional text and defer details to legislation (Dixon & Ginsburg, 'Deciding not to decide: deferral in constitutional design' (2021) 9 *ICon* 636). The Voice is to be established under sub-s (1), and its core function in sub-s (2), and then details are left for determination by the Parliament in sub-s (3).

This constitutional design is not only orthodox but particularly appropriate for representative institutions such as the Voice. Representation requires careful attention to the detail and structure of the form of representation of the relevant groups and must be amenable to change over time. The only way for this to occur in relation to the Voice is for such detail to be left to the Parliament to place in legislation. Those details will then be dependent on the political will of the Parliament, from time to time, to negotiate in concert with Aboriginal and Torres Strait Islander peoples to ensure their effective representation (Arcioni, 'Membership of the Voice' (2023) *Public Law Review*).

The issue of the impact of the Voice on the powers and operation of federal Parliament and Executive government received significant attention throughout the process of the Voice Inquiry. In particular, concerns were raised about what a future High Court may imply from the text of s 129. It seems clear that the text would restrict the Parliament in two ways. First, once a Voice is established after a successful referendum it may not be removed: in order to comply with s 129(1) 'there shall be a body … called the … Voice'. Second, it will not be possible to remove the core function of the Voice – that of making representations. So much follows logically from the text of s 129. However, implications beyond these basic requirements are highly unlikely (Voice Report 24—27 [3.26]-[3.34]). That is, only the existence of the Voice and its function of making representations is guaranteed by the proposal. As we address in the next section, what the government and Parliament does (or does not do) with those representations, and whether or not the representations will have legal rather than political effect, are matters that the Parliament will be able to control.

Representations to the Executive and administrative law

Particular concerns have been raised regarding the function of making representations to the Executive. The Liberal Members of the Voice Inquiry were concerned about courts implying a duty to consult and a duty to consider representations from the Voice (Voice Report 61 [1.37]). There are several reasons to think that courts would not recognise in s 129(2) an implied mandatory obligation to consult with and consider the Voice's representations.

The words in s 129(2) do not expressly require the Executive Government to consult with the Voice or consider its representations, and other subsections in s 129 do not suggest such an implication. The extrinsic materials for the constitutional alteration bill indicate that s 129 was deliberately intended not to include such obligations. The Explanatory Memorandum ('**EM**') to the Voice bill states that the Voice's representations will be advisory and the constitutional alteration will not establish consultation obligations. The EM goes on to say the Executive Government's obligations in regard to

the Voice's representations will be established by legislation made under s 129(3) (EM at [21]), and this was repeated in the Attorney-General's second reading speech.

In relation to the concerns that there is a risk the Voice's representations to the Executive Government will disrupt administrative decision-making, it is a risk that can be managed by the Parliament through legislation. That is, the Parliament will be able to control what, if any, legal impact the representations may have. Courts will determine whether there are implied obligations to consider particular matters by interpreting the Act that provides the administrator with decision-making power. The Act is the source of any implied mandatory consideration rather than implications in the *Constitution*. The drafting of those Acts is within the power of the Parliament, which can decide either to make the representations mandatory considerations or not, or to establish a mechanism tailored to particular decisions to manage how the government will or should interact with any representations made by the Voice.

Any consideration of the impact of Voice representations on government is premature at the referendum stage. The appropriate context for managing any such risk is in the development of legislation to be made under s 129(3). This will most likely involve assessing existing consultation provisions in Commonwealth legislation, choosing an appropriate form of consultation, and then adapting it for the relationship between the Voice and the Executive Government. It seems likely that different forms of consultation would be required for regulations affecting First Nations people and administrative decisions that affect them. The development of such legislation would also most likely involve considering the appropriate accountability mechanisms, such as whether the consultation with the Voice will be reviewable exclusively by Parliament, or exclusively by the courts, or maybe by both Parliament and potentially the courts.

Debates about such issues arise in the design of legislation and parliamentary scrutiny of bills and regulations; and subsequently reviewed by courts, in judicial review proceedings, and by administrative law institutions such as merits review tribunals and ombudsmen. The administrative law issues in the context of debates about the Voice cannot be abstracted from the relevant statutory context – the exercise of statutory powers to make regulations and decisions regarding licences, approvals etc.

Existing law and practice allows for challenges regarding judicial review of administrative decisions – in relation to standing or grounds of review. There has been no flood of litigation involving Aboriginal and Torres Strait Islander people or their representative groups bringing cases under the relevant administrative law grounds of review. The existence of the Voice makes no difference to the underlying legal position – any challenge will depend on the details of the legislation in question, which is within the control of the Parliament.

Reform in two stages

The Voice reform involves two stages. The first is seeking a change to the *Constitution* through insertion of s 129. The second is implementing legislation to determine the details of the composition, powers and procedures of the Voice and the political decisions regarding what impact the representations will have.

We are currently in the first stage. Attention should be focused on the core question of whether or not Aboriginal and Torres Strait Islander peoples should have a guaranteed voice in relation to the policies and laws which affect them. That is the referendum question. The Voice proposal is consistent with our public law structures and traditions. The details of its operation and interaction with the public institutions of power are to be determined by our representative Parliament.

The consensus position of First Nations as expressed in the Uluru Statement is for a Voice to address political powerlessness. The Voice is to act as a political institution, not a legal one. It would provide independent advice to the Parliament and the Government but Parliament would determine what, if any, legal impact those representations may have. The proposal is modest, legally sound and does not pose significant risks for the ongoing operation of our political institutions.

It will soon be time for the electors to make known whether or not they support the proposal for a constitutionally-protected institution through which First Nations' voices can be heard. If the referendum is successful, it will be up to the Parliament and the Government to determine from time to time whether, and how, they will listen.

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