LEGAL ISSUES RELATING TO THE ABORIGINAL AND TORRES STRAIT ISLANDER VOICE

AUSTRALIAN ACADEMY OF LAW PANEL – 9 MARCH 2023[1]

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1. I acknowledge the Gadigal people of the Eora nation, the traditional custodians of the land on which we meet. I pay my respects to their elders, past and present. I extend that respect to First Nations peoples here today.

2. Can I begin in the middle, with the currently proposed constitutional text.

3. The language of the current proposal has been provided on handouts distributed within this room, and is as follows:

> 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 Parliament and the Executive Government 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 Aboriginal and Torres Strait Islander Voice.

4. Having identified the text, we can turn immediately to the question: why constitutional reform?

5. The first and obvious proposition is that Constitutional amendment would result in a more enduring reform. It would confer upon the initiative a status superior to legislation. It would have the consequence that any future Parliament seeking to unwind or change the amendment, must take commensurately formal steps. It would, in that connection, betoken an intention of lasting change.

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[1] I received invaluable assistance in researching and drafting this talk from Hannah Ryan, Barrister, 11 Wentworth.

6. More specifically, as concerns the Voice, an amendment to the Constitution would have expressive and symbolic significance.

7. Since the 1967 referendum removed the explicit carve-out of Aboriginal people from the races power in s 51(xxvi) and wholly removed s 127 — which provided that Aboriginal people would not be counted among the people of the Commonwealth — the Constitution makes no mention of Australia's First Nations people.

8. Since at least the mid-1990s, there has been a seriously held national conversation about constitutional recognition and the form it should take. That has produced numerous inquiries and reports. It is appropriate that that conversation convert into action. Australia is anomalous among major former British colonies, for having taken no step towards indigenous recognition through a treaty or constitutional amendment. In that context, the Voice would not only create a deliberate, and deliberative body, to advance Aboriginal and Torres Strait Islander interests, but would provide overdue recognition in the nation's foundational document. It would acknowledge, as formally as our laws allow, the fact of dispossession.

9. Scholars have also observed that embedding the Voice in the Constitution would imbue it with legitimacy. As one group of public law academics put it:[2]

> The success of the Voice in representing and advocating for First Nations will depend in large part on how seriously Parliament and the government engage with the Voice. The Voice's standing with Parliament and government will in turn depend on the perceived legitimacy and authority of the Voice among the Australian public.

10. Constitutional enshrinement would confer a degree of popular legitimacy because the referendum process will involve public education and will demand significant public support to succeed. It involves a collective, conscientious choice.

[2] https://www.indigconlaw.org/home/submission-the-imperative-of-constitutional-enshrinement.

11. In this spirit, speaking at Garma Festival in July 2022, when he announced the draft language for the reform, Prime Minister Anthony Albanese justified constitutional reform in this way, and I quote: “Because a Voice enshrined in the Constitution cannot be silenced.”

12. The proposal could, possibly, take forms other than constitutional reform.

13. It is possible that Parliament has the power to enact the proposed form of words without Constitutionally enshrining them.

14. The races power — or in truth the race power, because in its practical operation it is a power used only in respect of indigenous people — in s 51(xxvi) confers power on the Commonwealth Parliament to make laws with respect to “The people of any race for whom it is deemed necessary to make special laws”.

15. That, alongside the territories power in s 122, may authorise a law having the content of the proposed Constitution Alteration. But a question would arise as to whether the amendment truly concerns race, or whether, as the former Chief Justice has observed elsewhere, it concerns the First Peoples of this nation as the indigenous peoples of this land.

16. However, for reasons I have only sketched, this issue involves not only a question of power but of collective choice. Constitutional recognition exerts significant attraction, as the act commensurate in its formality and foundational character with the matter at hand.

17. Can I come then briefly to the mechanics of constitutional change following a referendum, much of which will be familiar to this audience. The legal requirements for a referendum are set out in s 128 of the Constitution and the *Referendum (Machinery Provisions) Act 1984* (Cth) (**Referendum Act**).

18. In short: the Parliament must initiate a referendum by passing the proposal with an absolute majority in each House. The proposal is conventionally called a Constitution Alteration, rather than a Bill.

19. Between two and six months after the passage of the law, the proposal "shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives".

20. If a majority of voters, in a majority of states, as well as a majority of voters overall, vote yes, it is presented to the Governor-General for royal assent.

21. The Referendum Act, as its parenthetical name denotes, supplies the machinery to support the process. For example, it requires that ballot papers present voters with the long title of the Constitution Alteration Bill, following by the question: "Do you approve this proposed alteration?".

22. As well as propounding an amendment, the Albanese government is seeking to reform the referendum process.

23. In December 2022, it introduced the *Referendum (Machinery Provisions) Amendment Bill 2022* to Parliament to do so. The reforms included changes to campaign finance and public education, such as abolishing the official Yes/No pamphlet, which puts the case for both sides in 2000 words or fewer.

24. Can I come then to the related issues of whether the amendment, if passed, ensures consultation, including on matters that directly affect indigenous Australians, and whether the Parliament or Executive would be under a legal obligation to consult the Voice or to give effect to a representation to it made by the Voice?

25. These questions are among the most discussed in debates about the Voice and the proposed model. That is because they are a gateway to the controversy concerning justiciability and the role of the High Court, about which the former Chief Justice has already spoken.

26. If there were an obligation to consult or give effect to representations, that could be enforceable in the High Court.

27. To the extent that there was an obligation on the Parliament to consult the Voice, or give effect to the Voice's representations, questions could arise concerning parliamentary supremacy. This has been the genesis of confused

concerns that the Voice could become a "third chamber" of Parliament, with "veto power".

28. However, the current proposal does not have this effect.

29. The language of the proposal does not expressly deal with the form of representations, nor with what should happen if a representation is made. It does not (explicitly) create an obligation to elicit representations, to take them into account, or to give them effect. There would be no constitutional legal obligation for the Parliament or the Executive to accept any submission or advice. Neither then, could they be bound by it.

30. It might perhaps be argued that such an obligation is to be implied. In respect of Parliament, the better view is that the High Court would not imply any duty or obligation to consider representations.

31. Professor Twomey has stated that the doctrine of the separation of powers would mean that the courts could not instruct Parliament to give effect to representations by the Voice.[3]

32. Similarly, Kenneth Hayne has written: "insofar as the voice makes representations to parliament, it will be for the parliament to decide what to do in response. The courts have always shown great reluctance to interfere in the internal affairs of parliament. I think litigation about what parliament does or does not do in response to representations would fail."[4]

33. Yet, the proposal does give Parliament the power and responsibility to legislate to enact the Voice. There is the prospect that Parliament could enact a statute which required certain government decision-makers to give effect to, or at least consider, representations from the Voice. That will of course depend on the language of any future statute.

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[3] https://theconversation.com/what-happens-if-the-government-goes-against-the-advice-of-the-voice-to-parliament-200517.

[4] https://www.theaustralian.com.au/commentary/fear-of-the-voice-lost-in-the-lack-of-legal-argument/news-story/9696d03a566d3d946a74b7035175a9e4?amp

34. There is then a question as to the implications of this lack of binding effect. What is the substantive value of the Voice if the Parliament and the Executive are free to ignore the Voice's representations?

35. The former Chief Justice has noted the high democratic obligation that would arise to respect the Voice and take it into account.

36. Professor Twomey has likewise argued that a lack of enforceability does not render the Voice ineffective: "The point of the Voice is to use political pressure to influence parliament and the government *before* laws and decisions are made, rather than to take legal action to attack laws and decisions *after* they are made."[5]

37. Indeed, in that respect the Voice could be compared with other profoundly valuable bodies which make recommendations to Parliament, such as the Australian Law Reform Commission and the Australian Human Rights Commission.[6]

38. Can I come then to a specific aspect of the language of clause 2 of the current proposal, and ask whether "matters relating to Aboriginal and Torres Strait Islander peoples" means matters which particularly or specifically effect such people?

39. A first, and obvious, observation is that the phrase is not defined in the draft proposal.

40. A second observation is that the phrase is a broad one. As former Chief Justice French has remarked, the term "relating to" "can cover a broad range of matters, with its limits likely to be defined by common sense and political realities".

41. Similarly, Anne Twomey has written that the current drafting gives the Voice a "wide remit", which could include laws and policies specifically relating to

[5] https://theconversation.com/what-happens-if-the-government-goes-against-the-advice-of-the-voice-to-parliament-200517.

[6] https://www.rmit.edu.au/news/factlab-meta/will-the-proposed-indigenous-voice-to-parliament-become-a-third-

Aboriginal and Torres Strait Islander peoples (such native title legislation) or laws of general application which have a particular impact upon Indigenous Australian (such as a law requiring photo ID to be able to vote).[7]

42. The outer limits of the phrase may be determined by pragmatism on the part of the Voice, rather than by a strict legal boundary. It may also be the case that it will be the Voice itself that decides what the phrase means.

43. Professor Twomey, for example, makes the point that, if the Voice makes representations on matters that are peripheral to Aboriginal and Torres Strait Islander people, or that are not informed by expertise or local experience, then it is much less likely to have influence. Its own imperative to sustain its legitimacy will act as a moderating force on its interpretation of the scope of its operation. I would add that, although it is not yet known how well resourced the Voice will be, the inevitably finite nature of its resources will focus the matters on which it engages.

44. In principle, however, it will be important to have a Voice early in the process of legislation, or perhaps even a Voice that the public service should develop legislation.

45. A related textual question is whether the words "Aboriginal and Torres Strait Islander" have a specific meaning or whether that would be a matter for the courts to decide in any justiciable dispute.

46. I venture that the words do not have a settled meaning. There is a long and difficult history of legal definitions of Aboriginality.

47. Legal historian John McCorquodale has observed that, since the time of white settlement, governments have used at least 67 classifications, descriptions, or definitions to determine who is an Aboriginal person.[8]

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[7] https://theconversation.com/what-happens-if-the-government-goes-against-the-advice-of-the-voice-to-parliament-200517.

[8] https://www.alrc.gov.au/publication/essentially-yours-the-protection-of-human-genetic-information-in-australia-alrc-report-96/36-kinship-and-identity/legal-definitions-of-aboriginality/#:~:text=36.11%20The%20legal%20historian%2C%20John,who%20is%20an%20Aboriginal%20person.

48. Recently, a majority of the High Court in *Love v Commonwealth* (2020) 270 CLR 152 embraced the tripartite *Mabo* test developed by Justice Brennan.

49. However, because this phrase would not be used to determine an individual's membership of a group, but rather whether a matter is within the Voice's remit or not, fine distinctions may matter less.

50. Can I come then finally to an aspect of the topic on which the former Chief Justice has addressed: justiciability.

51. Associate Professor Scott Stephenson has written a helpful paper, due to be published soon in the *Public Law Review*.[9] He urges against discussing "justiciability" as a general concept in relation to the Voice, and instead suggests disaggregating the aspects of the Voice that might be subject to judicial review. He identifies four such aspects, which involve different constitutional relationships. There is potential for judicial review of:

    (a) legislation for compatibility with the Voice's representations;

    (b) executive acts for compatibility with the Voice's representations;

    (c) legislation constituting the Voice;

    (d) the Voice's representations.

52. An important question is what role the courts *should* play.

53. Stephenson argues that the justiciability-based objections to the Voice are targeted to the first, and to a lesser extent, the second aspects of justiciability, rather than the third and fourth. As long as Parliament has broad power to constitute the Voice, there is no reasonable basis for arguing that the third and fourth types of justiciability would undermine parliamentary supremacy.

54. One question worth considering is, if the courts do play a role, how they will discharge that role. What interpretive principles will apply?

[9] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4347586

55. Associate Professor Elisa Arcioni has noted that there is limited judicial consideration of constitutional provisions introduced by referendum.[10] Will the public debate before the referendum inform the interpretation of the amendment it results in?

56. A final, related, issue is the extent to which drafters of the final proposal should aim to ensure non-justiciability, and how they can do so.

57. For example, constitutional scholar Shireen Morris has suggested that the second clause of the proposal be amended to read: "The Aboriginal and Torres Strait Islander Voice may make representations to Parliament and the Executive Government on proposed laws and matters relating to Aboriginal and Torres Strait Islander peoples."[11]

58. This is an adaptation of language developed by Anne Twomey in 2015, the aim of which is to "confirm and signpost" non-justiciability.

59. Stephenson has warned against attempting to "overengineer" the constitutional text, arguing that Morris' proposal might suggest that representations made to the Executive are justiciable, and invite more legal challenges such as to attempts to Parliament to seek the Voice's representations on the effect of *existing* legislation on Aboriginal and Torres Strait Islander peoples.

60. Soon, however, we will know the proposed text and we can continue this conversation into action.

61. Thank you.

[10] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4344248

[11] https://theconversation.com/a-constitutional-voice-to-parliament-ensuring-parliament-is-in-charge-not-the-courts-193017