Australian
National
University

ISSUES PAPER ON A FIRST NATIONS VOICE REFERENDUM

FIRST NATIONS PORTFOLIO

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Executive Summary

In the Uluru Statement from the Heart, Aboriginal and Torres Strait Islander delegates expressed 'the torment of our powerlessness'. The Statement called for a First Nations Voice to be put in the Australian Constitution and a Makarrata Commission to be enacted in legislation that would supervise agreement-making and truth telling. The former Coalition Government objected to these propositions. The Albanese Labor Government, however, has committed to implementing the Uluru Statement from the Heart in full. At the Garma Festival in July 2022, Prime Minister Albanese confirmed his government intends to pursue a referendum, as its first priority, to enshrine a First Nations Voice in the Australian Constitution.

A constitutionally enshrined Voice, because it will be permanent and contribute to self-determination, has the potential to be an important step forward for achieving equity and justice. It has been supported by most Indigenous leaders, organisations, and communities. The purpose of this paper is twofold. First, it identifies key issues that will need to be considered if a referendum is to be successful. Second, it presents the views of the Australian National University's First Nations Portfolio (FNP) on how these issues could be addressed. The paper does not review whether the Voice proposal is the best option for constitutional reform, whether other options should be pursued, or what might happen following a successful referendum. Instead, it has been prepared with a view to ANU playing a constructive role, with respect to the Voice Referendum, in achieving the best outcome for the nation.

A broad consensus on key elements of the Voice already exists

The paper outlines that since the concept of the Voice was first proposed over 5 years ago, Indigenous and non-Indigenous Australians have raised many questions about the design of the Voice, including its composition, functions, and powers. It also notes, however, that there has been considerable work conducted to answer these questions, including through major public inquiries such as a Parliamentary Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples and the Coalition Government's Indigenous Voice Co-design process (led by Professors Marcia Langton and Tom Calma). These public processes have added substance and detail to the proposed Voice, even if significant issues remain uncertain or subject of debate. Questions remain, but a broad consensus already exists over key elements of the shape and role of the First Nations Voice including the following:

- Composition: Members of the Voice should be selected by Aboriginal and Torres Strait Islander peoples, rather than appointed by government. There should be equal gender representation.

- Function: The Voice should be able to present its views to Parliament and the government at the Commonwealth, State/Territory, and local level on matters that it deems relevant (although the Voice's engagement with the Government, in addition to the Parliament, may still be an issue for some Indigenous representatives). Consideration must be given to how the Voice can strengthen and complement existing Indigenous organisations that speak to governments, without duplicating or undermining them. The Voice will not have veto powers or deliver government programs.

- Local communities: The Voice should be connected to local and regional communities. Structural links between local communities and the national body that promote transparency and accountability in both directions will need to be developed and articulated. Local communities should be able to develop their own bodies that reflect practices within their region.

- Justiciability: Parliament and the government may be required or expected to engage with the Voice on certain issues. However, even if set out in legislation, this would be a political requirement not subject to review by the judiciary. Measures aimed at promoting transparency in the relationship between the Voice and the Parliament and government may support the development of a political norm that the views of the Voice should be genuinely considered.

- Funding: The Voice will need to be funded appropriately by the Commonwealth to fulfil its functions.

Nonetheless, some design issues remain

Despite broad consensus on key elements of the Voice, several issues remain uncertain and contested. The paper outlines the main areas of tension. They include:

- The relationship between the Voice and existing Indigenous organisations: How will the Voice connect with and leverage the expertise of existing community-controlled and other organisations who speak to government without undermining them? There is no reason to believe that a constitutionally enshrined First Nations Voice and the extensive Aboriginal and Torres Strait Islander community-controlled sector, represented by the Coalition of Peaks, should not be able to co-exist but how this is achieved will require serious consideration at an early stage. The relationship between the Voice and Native Title Prescribed Bodies Corporate, including if they should have a formal role in selecting members, is also an important consideration for the Voice model.

- The extent of the Voice's functions: Differences exist over whether the Voice is intended to be purely 'advisory' or also exercise an 'inquisitorial' function. Many public law scholars and Indigenous leaders have called for the Voice to be empowered with a broad and proactive scrutiny role, that extends to the power to obtain necessary information, including data, to examine the administration of government programs, inquire into existing law and policy, and present proposals for reform. The Langton and Calma report agreed that the Voice should be proactive and capable of inquiring into existing law and presenting proposals for reform. However, it did not endorse a larger oversight role.

- The relationship between the Voice and the Parliament and government: No proposal recommends that a justiciable obligation to engage be imposed on Parliament and the government. Instead, proposals aim to develop a political obligation or norm that holds that the Voice's views should be considered when developing law and policy that affects Indigenous Australians. Because whether such a norm develops depends on parliamentary and government practice, it is not clear how and whether this can be achieved. This is critical. If the Parliament and government determine to ignore the

Voice, it will fail in its fundamental role of influencing law and policy to better reflect the interests of Indigenous Australians.

Finer details will also need to be considered before legislation to establish the Voice can be drafted

The Langton and Calma report provides the only significant articulation as to what a First Nations Voice might look like and how it might function. Nevertheless, the report does not resolve many finer details that remain to be considered. These issues will need to be resolved before legislation to establish the Voice can be drafted.

- The relationship between the Voice and local communities: The Langton and Calma report provided one model that links local and regional Indigenous communities with a national body. It provides for a 24-member National Voice selected from 35 local and regional Voices. Despite an extensive process of consultation, it is not clear whether this model enjoys widespread support. Among other issues, it will mean that some communities have no member from their region on the national body.

- The relationship between the Voice and states and territories: More work is needed to consider how the Voice may make representations to State and Territory parliaments and governments. It is also necessary to consider what emerging Indigenous representative bodies at the State and Territory level, such as the First Peoples' Assembly of Victoria, mean for the Voice and how they will relate to each other.

- Funding: A sustainable and long-term funding model that does not impact on the Voice's independence, will need to be developed.

The Langton and Calma report is significant and should be respected, but more work is needed

The Indigenous Voice Co-design process led by Marcia Langton and Tom Calma produced a significant report. The process engaged with more than 9,400 organisations and individuals across 18 months and two stages of consultation. The *Final Report* stretches to 272 pages and outlines a comprehensive and detailed model. The work should be respected. However, it may not be appropriate to simply adopt the model that emerged.

First, the consultation process was rushed. Many Aboriginal and Torres Strait Islander peoples and organisations, such as NACCHO and the Central Land Council, have criticised the process, arguing that there was little opportunity for participants to consider or engage with key elements of the model. Second, the terms of reference for the Co-design group pose problems. The Coalition government expressly prohibited the group from considering whether the Voice should be placed in the Constitution and accordingly constitutional enshrinement was not a design consideration. The Uluru Statement was endorsed on the basis that the First Nations Voice would be put in the Constitution. There is no mandate for a legislated Voice on its own.

Assuming that the Langton and Calma report is to provide the basis for the design of the Voice, the evidence is that more engagement with representatives of communities and their organisations needs to be done before legislation establishing the Voice is introduced into the Parliament should the Referendum be successful. A process needs to be put in place by the Government to achieve this. Whatever process is adopted to settle on a final model, it is vital

it is conducted in a transparent manner and with the support of Aboriginal and Torres Strait Islander peoples. The success of the Voice relies on its legitimacy and credibility. If Aboriginal and Torres Strait Islander peoples do not support the process of the Voice's design and/or the final model, its effectiveness will suffer.

Developing legislation prior to holding a referendum is problematic

There has been increasing debate as to whether the Voice referendum should be accompanied by a proposed legislative model. Proponents argue that providing a legislative model will give all Australians the confidence and understanding of what the Voice looks like, increasing the chances of referendum success.

Australians should be provided with details about the key features of the Voice in the lead up to the Referendum and this is likely to be a key factor in its success. However, finalising a comprehensive legislative model prior to or alongside a referendum is another matter. The Uluru Statement from the Heart asked Australians to support the principle of constitutional change rather than a particular legislative model. Not including a model is consistent with the Guiding Principles drawn from the Referendum Council Regional Dialogues and respects Parliament's authority to ultimately determine the functions, composition, and powers, etc., of the Voice. Politically, not including a legislative model also leaves less detail that can be the focus of unjustified attack in a referendum campaign. Instead, as the Indigenous Law Centre at UNSW has suggested, Australians should be provided with an exposure document that outlines key elements of the design of the Voice. Indications are that the Government intends to do this before the year is out.

Nevertheless, not including a model has political risks that will need to be managed. The absence of a comprehensive and final legislative model may lead to the Coalition, now the Federal Opposition, refusing to support the referendum. Australia's referendum history demonstrates that bipartisanship is key to success. A strong No case will argue that without a clear understanding of what the Voice will look like, Australians should reject the referendum

The government will need to be clear on how it intends to design a model and draft legislation to establish a Voice

If the government does not include a detailed legislative model alongside the referendum, it should be clear with the Australian people as to how it intends to develop that final model and draft legislation to establish the Voice.

The Indigenous Law Centre has suggested that, prior to the referendum, a commitment is made by government to pursue an Indigenous-led consultation process, subject to parliamentary oversight, that will lead to legislation to establish the Voice. This approach is not without merit. It maintains the advantages of not including a legislative model accompanying the referendum, while giving all Australians the confidence that they understand the next steps following a successful referendum. It also improves the likelihood that the final model and draft legislation reflects the views and wishes of Aboriginal and Torres Strait Islander peoples.

There are also risks, however. An Indigenous-led consultation process after the referendum that leads to the legislation being brought before the Parliament could result in contentious issues about the establishment of a Voice being re-opened, and lead to more political conflict that delays its establishment. An alternative approach is that the Government develops the

model with national Indigenous representatives having regard to the consultations already done and settle on the model to be the subject of a Bill to Parliament. This option is faster and simpler and will allow the Government to establish the Voice well before the next election. However, without a larger consultation process the Voice may not reflect the views of Aboriginal and Torres Strait Islander peoples and communities. Whatever option the Government adopts must have the support of the Indigenous leadership, noting that failing to do so could undermine the Voice before it is established.

The proposal for constitutional amendment should achieve the purpose of the Voice in clear and simple language

At Garma, Prime Minister Albanese proposed adding three short sentences to the Constitution. The proposed amendment reads:

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.

This proposal reflects the policy objectives flowing from the Referendum Council. It avoids delving into technical details of the Voice's powers and structure, and instead describes its functions in broad detail. It makes clear that Parliament can empower the Voice with additional functions and that the Voice can evolve and adapt. It also clarifies that the Voice is a proactive body, capable of doing more than simply 'advising'. It does this in clear and simple language.

The government has explained that this proposal is a starting point for discussion. It may be developed further to reflect legal and political concerns. Ultimately, to increase the prospects of support from Aboriginal and Torres Strait Islander people, the final wording should be settled between the Government and a leadership group representing Aboriginal and Torres Strait Islander people (composed of those involved in the various constitutional recognition processes, community-controlled organisations, and other leaders).

The Referendum Act needs to be updated prior to a referendum

The arrangements and procedures for running a referendum are outdated. Among other issues, the *Referendum (Machinery Provisions) Act 1984* (Cth) ('*Referendum Act*') prevents the Commonwealth from providing information on the referendum via social media, television, or radio, does not require campaign information to be accurate, does not place limits on the amount that individuals, political parties, or interest groups can spend on a campaign, and imposes no disclosure requirements, nor any limits on foreign donations to referendum campaigns.

In 2021, the House of Representatives Standing Committee on Social Policy and Legal Affairs (on which the Coalition had a majority) recommended several key changes to the *Referendum Act* to modernise the process. Despite this report, it is unlikely that a comprehensive amendment of the Act can be completed prior to holding a referendum on a First Nations Voice.

A simpler approach is to amend the *Referendum Act* for the Voice referendum and defer more substantive change. This approach was adopted for the 1999 referendum. It could be done relatively easily, assuming Coalition support.

A public education campaign is necessary to build support for constitutional amendment

Polling suggests that Australians support putting a First Nations Voice in the Constitution. It is likely, however, that a committed and vocal No campaign will succeed in convincing many Australians to oppose the Voice. Opposition is already forming. A community-based education campaign will be needed to educate and inform Australians about the Voice proposal. This is necessary to ensure the referendum has the greatest chance of success. While there is not much time to develop and initiate such a campaign, it is fortunate that it can build on the work already undertaken by groups such as the Uluru Dialogues and From the Heart.

Additional proposals for constitutional amendment could be pursued at a future date

The proposal for a constitutionally enshrined First Nations Voice commands the support of Aboriginal and Torres Strait Islander peoples and should be pursued in a referendum. The idea of an Indigenous representative body that can influence the development of law and policy is not new, but the proposal substantially emerged in the Referendum Council Regional Dialogues conducted in 2016 and 2017. In contrast, earlier major public inquiries into constitutional recognition made alternative recommendations for constitutional amendment. Among other recommendations was the insertion of a prohibition on racial discrimination, and the elimination of a provision that anticipates a state denying the vote to the people of a particular race. Indigenous leaders and constitutional lawyers have also suggested that a constitutional amendment to protect future treaty rights could be pursued.

Aboriginal and Torres Strait Islander peoples were not involved in the drafting of the Australian Constitution. The document contains several increasingly out-of-date provisions that could be changed. However, Australia's referendum history suggests that a referendum on a First Nations Voice should not be accompanied by additional proposals (accepting that multiple proposals were agreed in the successful 1977 referendum). It should be a standalone question. This will give the referendum the greatest chance of success.

This does not preclude future referendums. If the Voice referendum is successful, further constitutional amendments could be considered. An opportunity might arise when a second republic referendum is eventually held, or perhaps when Indigenous treaties (underway in many jurisdictions already) begin to be finalised.

These issues must be addressed in partnership with Aboriginal and Torres Strait Islander representatives

Australia has a poor record of referendum success. A referendum to put a First Nations Voice in the Constitution is winnable. To give the referendum the greatest chance of success, the issues identified in this paper should be considered in partnership with Aboriginal and Torres Strait Islander representatives. A broad consensus between Indigenous leaders prominent in the national debate on constitutional recognition, the community-controlled sector, and other leaders is possible and necessary.

Introduction

On 27 May 2017, Aboriginal and Torres Strait Islander peoples 'from all points of the southern sky' gathered on the red dust of Mutitjulu and issued the Uluru Statement from the Heart. Grounded in their inherent rights as the 'first sovereign Nations of the Australian continent and adjacent islands', the Statement called for a First Nations Voice to be put in the Constitution and a legislated Makarrata Commission to supervise a process of agreement making and truth telling.[1] On 30 July 2022, on the lands of the Yolngu nation, Prime Minister Anthony Albanese re-affirmed his government's 'promise to implement the Statement from the Heart at Uluru, in full'.[2] As part of that commitment, it intends to pursue a referendum, as its first priority, to enshrine a First Nations Voice in the Australian Constitution.

The intention of this paper is not to review whether the Voice proposal is the best option for constitutional reform, whether other options should be pursued, or what might happen following a successful referendum. It is premised, instead, on the fact that the Government has decided to proceed with a referendum on the Voice as proposed in the Uluru Statement from the Heart. Accordingly, the paper seeks to raise key issues with respect to its implementation and to present the views of the First Nations Portfolio (FNP) on how these issues might be addressed. This is consistent with ANU's original purpose of promoting national unity and because ANU considers it should play a constructive role with respect to the Voice Referendum in achieving the best outcome for the nation.

Some issues have already received significant publicity, such as whether the Voice should be legislated prior to, or following, a referendum. There are others, however, that have not received public attention to the same extent but nonetheless go to the effectiveness of the Voice. One of those challenges is the fact that there is already a voice to Government and the Parliament comprising the extensive community-controlled sector that not only delivers services to First Nations peoples ranging from health to native title but also represents and advocates for them with respect to policies and laws. It is not constitutionally enshrined, nor protected in legislation and it is very dependent on governments, particularly the Commonwealth, for its funding. Yet, the sector, represented by about 70 national and state and territory peak bodies has grown significantly, particularly since the demise of the Aboriginal and Torres Strait Islander Commission, and has a significant stake in the referendum and the proposed constitutionally enshrined Voice.

The 2020 National Agreement on Closing the Gap, developed and negotiated by the Coalition of Peaks, commits all Australian governments to work with and consult Aboriginal and Torres Strait Islander community-controlled organisations when developing policy that affects Indigenous Australians. A constitutionally enshrined First Nations Voice can strengthen the voice of the community-controlled sector and contribute to reframing the relationship between Aboriginal and Torres Strait Islander peoples and the Australian state. Nevertheless, some existing organisations are concerned that a First Nations Voice might also undermine their position and their relationship with government. This concern will need to be considered.

[1] Uluru Statement from the Heart, 26 May 2017.
[2] Prime Minister Anthony Albanese, 'Address to Garma Festival' (30 July 2022).

The paper is divided into five sections.

- Section 1 provides a description of the context and importance of the problem that the constitutionally enshrined Voice proposal in the Uluru Statement seeks to solve.

- Section 2 examines the First Nations Voice in detail. It first provides a brief background locating the development of a constitutionally enshrined First Nations Voice in the abolition of the Aboriginal and Torres Strait Islander Commission in 2004 and the recognition that constitutional conservatives would not support a referendum to insert a prohibition on racial discrimination in the Constitution. Neither the Uluru Statement nor the Referendum Council's Final Report provided much detail on the design and functions of the First Nations Voice. Section 2 continues by outlining the findings of the two key reports that have addressed this crucial issue, before exploring 12 design questions. A short statement providing the perspective of the FNP follows each consideration. This discussion and perspective are intended to identify potentially contentious issues that will need to be resolved if a Voice is to be implemented.

- Section 3 examines the wording of the proposed constitutional amendment to implement a permanent First Nations Voice. At the 2022 Garma Festival of Traditional Culture, the government announced an initial proposal to focus attention and inform debate and discussion. The government's proposed amendment reflects the policy objectives flowing from the Referendum Council. However, legal, and political factors may necessitate some changes. For this reason, the section also explores a range of alternative proposals that meet key principles that enjoy wide support. These alternatives describe the broad features of a Voice while deferring responsibility for defining its structure and functions to the Australian Parliament, clarify that the Voice does not hold a veto power, and provide for a Voice in a manner that renders its structure and functions non-justiciable.[3]

- Section 4 considers questions of implementation. It addresses key practical and strategic questions that will need to be considered prior to holding a referendum on the Voice. It explores whether the Voice should be legislated prior to a referendum, whether (and how) much detail on the Voice model or design process should accompany a referendum, and whether other proposals for constitutional change should be considered at the same time. It also examines the mechanics of a referendum. It notes that key elements of the legislation governing the conduct of referendums will need to be revised and updated before a referendum is held.

- Section 5 concludes. It considers how the questions raised in this Issues Paper should be resolved.

Many of the Indigenous leaders who designed and led the Regional Dialogue process that culminated in the Uluru Statement from the Heart met at Yarrabah, south of Cairns, in April 2022. The Yarrabah Affirmation singled out two dates on which a referendum could be held on the basis that they have resonance with Australian history: 27 May 2023 (the 56th anniversary of the successful 1967 referendum and the sixth anniversary of the Uluru

[3] Parliament of Australia, Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Final Report* (November 2018) 94-95.

Statement), or 27 January 2024 (the day after Invasion Day).[4] September 2023 has also been raised.

These dates do not leave much time for the issues canvassed in this paper to be properly considered and resolved if necessary. If a First Nations Voice is to be endorsed at a referendum, key details about the Voice and the referendum itself, will need to be finalised. Consistent with the National Agreement on Closing the Gap, the question and approach should be developed in partnership with national Indigenous leaders involved in this space. This could include those involved in the various constitutional recognition processes, representatives from the community-controlled sector, and other Indigenous leaders.

[4] Yarrabah Affirmation, 10 April 2022.

1. The Context

The Australian Constitution ignores the distinct rights and interests of Aboriginal and Torres Strait Islander peoples. No Aboriginal and Torres Strait Islander peoples were invited to participate in the drafting of the Constitution, and their rights and interests were not considered in deliberations. Similarly, the historic absence of a treaty relationship means there are no constitutional principles that structure the interaction between government and Indigenous communities. As a result, the Australian Constitution does not recognise Indigenous sovereignty nor the continuing significance and vitality of Indigenous law and law-making systems.

The problem of constitutional silence is amplified by the framework of Australian governance. Consistent with the British constitutional tradition, the drafters of the Australian Constitution believed that rights are best protected through the political process rather than the courts. In *Australian Capital Television v Commonwealth*, Chief Justice Anthony Mason explained that this sentiment was 'one of the unexpressed assumptions on which the Constitution was drafted'.[5] However, as many scholars have pointed out, faith in the political process and a belief that rights were generally well protected, was not the sole reason for the absence of rights guarantees. Rather, the drafters were 'driven by a desire to maintain race-based distinctions'.[6] They specifically empowered the Parliament with plenary legislative authority to make laws that discriminate on the basis of 'race' and were careful to ensure any legal constraints on this power were avoided.

The result is two-fold. The Australian Parliament has the capacity to pass laws that specifically discriminate against 'the people of any race', including (since 1967) Aboriginal and Torres Strait Islander peoples. Since the 1990s, the Parliament has used this power at least three times to adversely discriminate against Indigenous Australians.[7] Second, as a marginalised community comprising only three per cent of Australia's population, Aboriginal and Torres Strait Islander peoples struggle to have their voices heard and interests considered in the political process. The 'majoritarian arithmetic of electoral politics' leaves Aboriginal and Torres Strait Islander peoples 'with little leverage over government decision-making'.[8] As a consequence, the government is largely 'not accountable to Indigenous peoples',[9] who are left vulnerable to the 'wavering sympathies of the Australian community'.[10]

Aboriginal and Torres Strait Islander peoples have long called for change to the framework of Australian governance as part of the 'unfinished business' of constitutional reform.[11] Indigenous advocacy has been consistent in seeking to reframe the relationship between

[5] *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 136 (Mason CJ).
[6] George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 52. See further Harry Hobbs, *Indigenous Aspirations and Structural Reform in Australia* (Hart, 2021) Ch 2.
[7] *Native Title Act 1993* (Cth) Pt 2, Div 2; *Native Title Amendment Act 1998* (Cth) Sch 1, s 3; *Northern Territory National Emergency Response Act 2007* (Cth) Pt IV.
[8] Sean Brennan and Megan Davis, 'First Peoples' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 27, 30.
[9] Daryl Cronin, 'Trapped by History: Democracy, Human Rights and Justice for Indigenous Peoples in Australia' (2017) 23 *Australian Journal of Human Rights* 220, 235.
[10] Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Federation Press, 2003) 8.
[11] Patrick Dodson, 'Beyond the Mourning Gate: Dealing with Unfinished Business' in Robert Tonkinson (ed), *The Wentworth Lectures: Honouring Fifty Years of Australian Indigenous Studies* (Aboriginal Studies Press, 2015) 192.

Aboriginal and Torres Strait Islander peoples and the Australian State in a manner that recognises their rights. In the first half of the twentieth century, much focus centred on the dismantling of racist law and policy and legal recognition of their rights as citizens. In 1928, for instance, Noongar elder William Harris led a deputation to Philip Collier, the Premier of Western Australia, arguing for changes to the discriminatory *Aborigines Protection Act 1905* (WA). The following decade, Yorta Yorta man, William Cooper, collected almost 2000 signatures from Aboriginal people in a petition to send to the King. Denied the right to vote, Cooper and his petitioners desired a voice in national affairs, calling for someone 'who can speak for us in Parliament, influencing legislation on our behalf and safeguarding us from administrational officers'.[12] Cooper's demand for dedicated representation in Parliament was dismissed by Cabinet, but First Nations peoples continued to call for political and legal reform.

Aboriginal and Torres Strait Islander peoples' advocacy has also focused on legal and political reform to recognise their distinct rights as First Nations peoples. In August 1966, for example, Vincent Lingiari led 200 Gurindji stockmen, house servants and their families off the Wave Hill Cattle Station in the Northern Territory following years of exploitation. While media and politicians saw the strike as a fight for fair wages and conditions the Gurindji's motivations were clear: they wanted their land back.[13] Their resolve – alongside the determination of the Yolngu and Larrakia peoples who were advocating at the same time – led directly to enactment of the first land rights legislation in the country.[14] Today, the Indigenous land estate is significant, but land rights and native title remain unavailable for many Indigenous communities. Calls for political and legal reform, particularly for self-determination, continue.[15]

A. How the Regional Dialogues Articulated the Problem

The most significant recent call for change comes through the 2017 Uluru Statement from the Heart. The culmination of a series of twelve Indigenous-designed and led deliberative Regional Dialogues, the Uluru Statement calls for a constitutionally enshrined First Nations Voice and a legislated Makarrata Commission to supervise a process of agreement-making and truth telling. The Uluru Statement gives voice to Aboriginal and Torres Strait Islander peoples' longstanding feelings of disempowerment and alienation from the processes of government. The Statement sees constitutional reform as necessary to remedy the '*torment of our powerlessness*', 'empower our people and take *a rightful place* in our country'.[16]

In its Final Report, the Referendum Council characterised the Voice as a 'Voice to the Commonwealth Parliament'.[17] However, an analysis of the records of meetings that were agreed to following each Regional Dialogue makes clear that Indigenous delegates desired a voice to both the Parliament *and the executive*. At Broome, delegates from across the Kimberley and Pilbara 'strongly supported' having a First Nations Voice to 'empower the First Peoples of Australia' and give them a 'greater say in government decision-making on matters

[12] Letter from William Cooper to Joseph Lyons, 26 October 1937. Cited in Andrew Markus, 'William Cooper and the 1937 Petition to the King' (1983) 7 *Aboriginal History* 46, 57.
[13] Gurindji Petition to Lord Casey, Governor-General of Australia, 19 April 1967.
[14] *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).
[15] Aboriginal and Torres Strait Islander Commission, *Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures* (1995).
[16] Uluru Statement from the Heart, 26 May 2017 (emphasis in original).
[17] Referendum Council, *Final Report of the Referendum Council* (30 June 2017), Recommendation 1.

that affect them and their rights'.[18] In Melbourne, delegates 'strongly backed' the development of an 'Aboriginal and Torres Strait Islander body that would be able to influence laws and policies that affect First Nations peoples', understanding it as a pragmatic and substantive reform that 'helps with our day-to-day struggles'.[19] In Central Australia, at Ross River, delegates also supported 'a representative voice to the Parliament that could consider law and policies'.[20] Similarly, in Cairns it was agreed that a constitutionally protected Voice to Parliament that would advise on laws and policy should be the priority. Delegates here argued that Indigenous affairs policies and programmes have been ineffective because Aboriginal and Torres Strait Islander peoples 'haven't been asked what is needed or been involved in the delivery of services'.[21]

The Regional Dialogues ultimately backed a First Nations Voice for two reasons. First, it was recognised that an Indigenous representative body was necessary to express Indigenous voices to Parliament and the government to combat feelings of 'powerlessness',[22] and to ensure that Indigenous peoples would have a 'voice in the political process',[23] and a 'greater role in determining their own future'.[24] In this sense, a Voice could – as delegates from the Torres Strait explained – serve as 'an engine room for change that would facilitate self-determination, safeguard against discriminatory laws and support future agreement-making'.[25] Second, the existence of such a body would also keep the government accountable. As delegates from Perth and Sydney explained, a Voice would 'enhance First People's participation in Australian democracy'[26] by ensuring that 'First Nations People have influence over policy and keep parliamentarians accountable'.[27]

Delegates at the Regional Dialogues saw a First Nations Voice as part of 'a continuation of the long struggle for political representation going back over a century and an expression of the right to self-determination'.[28] An Indigenous representative body capable of presenting its views on law and policy that affects Indigenous Australians would ensure 'Aboriginal participation in the democratic life of the state'.[29] A Voice would 'recognise and empower the First Peoples of Australia',[30] and provide them with the capacity to 'shap[e] our future'.[31]

[18] Referendum Council, Broome Regional Dialogue Discusses Constitutional Reform (Media Release, 13 February 2017)
[19] Referendum Council, 'Constitutional Reform Must Lead to Real Change' (Media Release, 20 March 2017).
[20] Referendum Council, 'Constitutional Reform: Speaking the Same Language' (Media Release, 7 April 2017).
[21] Referendum Council, 'Delegates Determine Self-Determination is a Priority' (Media Release, 28 March 2017).
[22] Referendum Council, 'Constitutional Reform: Speaking the Same Language' (Media Release, 7 April 2017).
[23] Referendum Council, *Final Report of the Referendum Council* (30 June 2017) 32.
[24] Referendum Council, 'Delegates Determine Self-Determination is a Priority' (Media Release, 28 March 2017)
[25] Referendum Council, *Final Report of the Referendum Council* (30 June 2017) 30 (Torres Strait).
[26] Referendum Council, 'First Nations Regional Dialogue in Perth' (Media Release, 3-5 March 2017).
[27] Referendum Council, 'First Nations Regional Dialogue in Sydney' (Media Release, 10-12 March 2017).
[28] Technical Advisers: Regional Dialogues and Uluru First Nations Constitutional Convention (Gabrielle Appleby, Sean Brennan, Dylan Lino, Gemma McKinnon, and Dean Parkin), Submission No 206 to Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples (11 June 2018) 6.
[29] Megan Davis, 'Correspondence: Moment of Truth' (2018) *Quarterly Essay* 70, 147, 158.
[30] Referendum Council, Broome Regional Dialogue Discusses Constitutional Reform (Media Release, 13 February 2017); Referendum Council, 'Structural Reform will Improve State and Commonwealth Decision-Making' (Media Release, 10 April 2017).
[31] Referendum Council, Broome Regional Dialogue Discusses Constitutional Reform (Media Release, 13 February 2017).

B. Are Elected Indigenous Parliamentarians Already a Voice to Parliament?

In recent years, increasing numbers of Aboriginal and Torres Strait Islander people have secured election to Parliament. Only two Indigenous Australians were elected to the Commonwealth Parliament prior to 2010.[32] Since then, 13 Indigenous Australians have been elected, and a record ten Indigenous Australians will serve in the upcoming 47th Parliament.[33] This means that 4.4 per cent of the Parliament will be Indigenous (10 of 227), exceeding the Aboriginal and Torres Strait Islander proportion of the population (3.2 per cent). These are positive developments that could help with Indigenous Australians unique interests and concerns being heard in Parliament. Does this mean that First Nations peoples already have a Voice?

It is often assumed that Indigenous Members of Parliament will act as representatives for their Indigenous nation or Indigenous peoples across Australia more generally. In dismissing the call for a First Nations Voice, for example, Prime Minister Malcolm Turnbull acknowledged that 'people who ask for a voice feel voiceless' but contended that alienation could be rectified with 'more Aboriginal and Torres Strait Islander Australians serving in the House and the Senate'.[34] The conservative Institute for Public Affairs has also rallied against the Voice arguing that because Aboriginal and Torres Strait Islander peoples can stand for Parliament, they 'already have a voice'.[35]

This has a superficial ring of truth, but the structure and function of Australian parliamentary democracy means that it is not accurate.

- Electoral system: Australia's electoral system is built around single-member geographic districts and elected members who represent those districts. As a demographic minority, Aboriginal and Torres Strait Islander peoples do not constitute a majority in any Commonwealth electorate. Politicians and parties must develop policy to attract non-Indigenous voters if they are to be successful at securing election.

- Voting rates: The challenge of Australia's electoral system is amplified by persistently lower levels of voter turnout among Aboriginal and Torres Strait Islander peoples.

- Political practice: Australia has one of the world's highest levels of party discipline which means that representatives almost always vote along party lines. The ALP binds members of the parliamentary party to vote in accordance with caucus. Crossing the floor is also rare among the Coalition parties. For Indigenous representatives to persistently advocate or vote for Indigenous interests they must first convince their party to change its policy.

- Country: Aboriginal and Torres Strait Islander peoples spiritual and political authority is connected to country. While they may be able to represent Indigenous Australians in

[32] Neville Bonner and Aden Ridgeway.
[33] Pat Dodson, Linda Burney, Malarndirri McCarthy, Lidia Thorpe, Dorinda Cox, Jana Stewart, Jacinta Price, Gordon Reid, Marion Scrymgour and Kerrynne Liddle.
[34] Prime Minister, Attorney-General, Minister for Indigenous Affairs, 'Response to Referendum Council's report on Constitutional Recognition' (Media Release, 26 October 2017).
[35] Institute for Public Affairs, 'Four Reasons to Reject the Referendum Council's Recommendations' (Parliamentary Research Brief, 28 July 2017).

> national debate more broadly, individual representatives cannot usurp the authority and role of traditional owners and elders to speak for someone else's country.

Electing Aboriginal and Torres Strait Islander people to the Commonwealth Parliament is important. However, Indigenous members of Parliament cannot solely represent Indigenous interests: they need to prioritise the interests of their party and their electorate if they are to remain in Parliament. Delegates at the Uluru Dialogues lamented this challenge, noting that 'there are Aboriginal people who have been elected to Parliament, but they do not represent us. They represent the Liberal or the Labor Party, not Aboriginal People'.[36] A First Nations Voice, therefore, serves a distinct and complementary function.

C. Will a Voice resolve the Problem Articulated in the Regional Dialogues?

A First Nations Voice is intended to ensure that Aboriginal and Torres Strait Islander peoples can have a significant say in the development of law and policy that affects them. Whether it resolves the problem articulated during the Regional Dialogues depends, in part, on the eventual design of the Voice, including its composition, functions, funding, powers, and legal form, as well as the personal skill and qualities of its members, and the attitude of the government of the day. A Voice is not a veto. It will only be able to influence law and policy through moral and political pressure. That pressure can be built if the Voice is seen as legitimate by Aboriginal and Torres Strait Islander peoples and credible by government and the parliament.

It is worth remembering that the First Nations Voice is only one element of the Uluru Statement from the Heart. The Uluru Statement also calls for a Makarrata Commission to supervise a process of agreement-making and truth telling. These are complementary proposals. Truth-telling is intended to help all Australians understand and come to terms with how colonisation has shaped and continues to shape the experiences of Aboriginal and Torres Strait Islander peoples. It is hoped that hundreds of local and regional truth telling processes running concurrently across the country will help build the moral and political pressure that the Voice needs in order to ensure government listens to its advice.

It is also hoped that these truth telling processes will support and inform agreement-making (this is what is expected to occur as part of the Victorian state-based treaty process). If a First Nations Voice is intended to promote Indigenous input into Australian law and policymaking, agreement-making is intended to re-empower local communities with real decision-making powers. Modern agreements – or treaties – recognise that Indigenous communities have a right to self-determination and recognise or establish culturally appropriate self-governance institutions.[37] It is through Voice, Treaty and Truth that the Uluru Statement from the Heart hopes to build a new political relationship for Aboriginal and Torres Strait Islander communities with the Australian state predicated on a rights framework.

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[36] Technical Advisers: Regional Dialogues and Uluru First Nations Constitutional Convention, Submission No 206 to Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples (11 June 2018) 7. See also Parliament of Australia, Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Interim Report* (July 2018) 10 [2.17].

[37] Harry Hobbs and George Williams, 'The Noongar Settlement: Australia's First Treaty' (2018) 40(1) *Sydney Law Review* 1.

2. An Outline of the Various Solutions Proposed to Design a First Nations Voice

The Final Report of the Referendum Council was released in June 2017. The Council endorsed the Uluru Statement's call for a First Nations Voice. As the report demonstrates, the concept of a Voice to Parliament achieved wide consensus among delegates to the Regional Dialogues; it was the only reform proposal supported at all 12 First Nations Regional Dialogues.[38] However, neither the Uluru Statement nor the Referendum Council provided much detail as to how the Voice might operate or look. Since then, constitutional lawyers, Indigenous leaders, and many Indigenous and non-Indigenous Australians, have offered a number of proposals or suggested key elements and features of the Voice.

This section provides a snapshot of some of the more significant proposals and the various approaches that have been taken to the Voice's design. It begins with a short background explaining where the proposal for an Indigenous representative body to advise on law and policy that affects Indigenous Australians emerged. It then outlines the findings of the two most significant reports yet undertaken on a First Nations Voice: the 2018 Parliamentary Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples Final Report and the 2021 Indigenous Voice Co-Design Process Final Report led by Professors Marcia Langton and Tom Calma. After outlining how these two reports understood the Voice, the section examines in more detail key elements of the Voice's design. It also provides a short assessment of each design element.

A. The Idea of an Indigenous Representative Body

The notion of an Indigenous representative body empowered to advise on the development of law and policy is not new. Since the 1967 referendum, successive Australian governments have created institutions or designed processes to enable the state to consult with and seek advice from Aboriginal and Torres Strait Islander peoples. Key representative bodies include the National Aboriginal Consultative Committee (1973 – 1977), the National Aboriginal Conference (1977 – 1985), and the Aboriginal and Torres Strait Islander Commission (1989 – 2004). Appointed bodies have also been established from time to time, including the National Indigenous Council (2004 – 2008) and the Prime Minister's Indigenous Advisory Council (2013 – 2022 (?)).

The abolition of ATSIC in 2004 left a significant void in this space. There is no question that members of government appointed Indigenous advisory bodies are distinguished individuals with considerable knowledge and expertise. The challenge these bodies have found is that staffed by 'hand-picked' appointees with limited ability to independently consult with Indigenous peoples, they have been unable to demonstrate necessary legitimacy or credibility within Indigenous communities.[39] As members owe their position to the government and not the broader Indigenous constituency, the government is able to deal with Indigenous peoples 'on its own terms'.[40]

[38] Referendum Council, *Final Report of the Referendum Council* (30 June 2017) 15. No result is recorded at the information session hosted by the United Ngunnawal Elders Council in Canberra.
[39] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Building a Sustainable National Indigenous Representative Body* (2008) 43.
[40] William Jonas and Darren Dick, 'Ensuring Meaningful Participation of Indigenous Peoples in Government Processes: The Implications of the Decline of ATSIC' (2004) 23 *Dialogue: Academy of the Social Sciences* 4, 14.

The absence of any representative Indigenous role in Indigenous affairs policymaking, following the demise of ATSIC, led directly to the development of the National Congress of Australia's First Peoples in 2009. Congress, a public company limited by guarantee, was established to provide Indigenous Australians with 'a national platform and voice to advance issues important to our peoples'.[41] However, the Congress never had a formal connection to government. After the Abbott government withdrew funding in 2013, without any formal review or consultation process, the Congress was forced out of operation in July 2019 when its reserves had been exhausted. Congress was largely ignored by successive governments and its demise seemingly accepted by many Indigenous Australians.

Following ATSIC's demise, several proposals for a new representative Indigenous body through which Aboriginal and Torres Strait Islander peoples could speak directly to parliament were raised. In 2008, John Chesterman called for the creation of an Indigenous Review Council, elected by Indigenous Australians, and empowered to 'review all federal legislation that has a significant Indigenous affairs component'.[42] That same year, Eric Sidoti suggested that an Indigenous Parliamentary Committee, modelled on Senate committees, and composed of directly elected Indigenous members (though not members of Parliament) could be established. Sidoti envisaged his Indigenous Parliamentary Committee as enjoying the same protections and powers as ordinary Senate Committees, staffed with a secretariat, and with the ability to inquire into general matters, consider proposed government expenditure, and report on relevant bills.[43]

In 2010, the Gillard government appointed an Expert Panel on Constitutional Recognition of Indigenous Australians to report to the Government on the options for constitutional change and approaches to a referendum that would be most likely to obtain widespread support across the Australian community. The Panel conducted a nationwide consultation process in 2011. The Panel did not consider whether an Indigenous representative body should be put in the Constitution, or the ideas raised by Chesterman and Sidoti more broadly. Instead, it released a Discussion Paper in May 2011 with seven ideas for constitutional change and invited the views of the community on these ideas.

Statements of recognition/values
Idea 1. Statement of recognition in a preamble
Idea 2. Statement of recognition in the body of the Constitution
Idea 3. Statement of recognition and statement of values in a preamble
Idea 4. Statement of recognition and statement of values in the body of the Constitution

Equality and non-discrimination
Idea 5. Repeal or amend the 'race power'
Idea 6. Repeal section 25

[41] Australian Human Rights Commission, 'New Congress to Represent Aboriginal and Torres Strait Islanders' (Press Release, 2 May 2010).
[42] John Chesterman, 'National Policy-Making in Indigenous Affairs: Blueprint for an Indigenous Review Council' (2008) 67(4) *The Australian Journal of Public Administration* 419, 424.
[43] Eric Sidoti, 'Indigenous Political Representation: A Parliamentary Option' (Whitlam Institute, 21 January 2008).

Constitutional agreements
Idea 7. Agreement-making power.[44]

The Expert Panel's Final Report acknowledged that submissions 'were constrained by the way ideas were framed in the Panel's discussion paper'.[45] Megan Davis, a member of the Expert Panel, noted succinctly, the Panel 'decided what the options should be', rather than allow them to emerge organically from consultations.[46]

The Expert Panel released its final report in January 2012. It made five recommendations, including that a prohibition on racial discrimination be inserted into the Constitution. In November 2012, the Parliament agreed that a Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples be appointed to inquire into and report on steps that can be taken to progress towards a successful referendum on Indigenous constitutional recognition. The following year, the Parliament established this committee. Its terms of reference required the Joint Select Committee to consider 'the recommendations of the Expert Panel'.[47] Perhaps for this reason, the Committee did not consider the development of an Indigenous representative body. The Committee held sixteen public hearings in 2014 and 2015, across all states and territories, except for the ACT, and received 139 submissions. Ultimately, the Joint Select Committee largely recommended the same reforms as the Expert Panel. This included a racial non-discrimination clause. The then Coalition Government rejected this recommendation. It made clear that it would not pursue a referendum to insert a prohibition on racial discrimination in the Constitution.[48]

Opposition from 'constitutional conservatives' forced a reassessment. In 2014, Noel Pearson proposed inserting an Indigenous representative body into the Constitution that could advise the parliament about laws and policy that affect Indigenous Australians. Pearson explained:

> We want to be guaranteed that in the future history is not repeated and we want to be able to have a say over the laws and policies that apply to us. We want a democratic involvement in the laws and policies that apply to us. We want to be in the tent, we want to be in the life of the nation, contributing to the process whereby these things come to affect our communities, our people and our futures.[49]

In his 2014 Quarterly Essay, Noel Pearson – who had also been a member of the Expert Panel – dropped his support for a racial non-discrimination clause on the basis that he did not believe constitutional conservatives would vote in favour at a referendum.[50]

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[44] Commonwealth, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (January 2012) xii.
[45] Commonwealth, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (January 2012) 9.
[46] Megan Davis, 'Self-Determination and the Right to be Heard' in Shireen Morris (ed), *A Rightful Place: A Road Map to Recognition* (Melbourne University Press, 2017) 119, 136.
[47] Parliament of Australia, Joint Select Committee on Constitutional Recognition of Indigenous Australians, *Final Report* (June 2015) 1.
[48] Natasha Robinson and Sarah Martin, 'Indigenous Constitutional Recognition: PM Listening to Aboriginal Representatives', *The Australian*, 6 July 2015.
[49] Cape York Institute, 'Noel Pearson Proposes Changing Constitution to Create Indigenous Representative Body', *Cape York Partnership* (12 September 2014) <https://capeyorkpartnership.org.au/noel-pearson-proposes-changing-constitution-to-create-indigenous-representative-body/>.
[50] Noel Pearson, *A Rightful Place: Race, Recognition and a More Complete Commonwealth* (2014) 55 *Quarterly Essay* 1.

On 6 July 2015, Prime Minister Tony Abbott and Opposition Leader Bill Shorten met with forty Indigenous leaders at Kirribilli. Abbott and Shorten announced that a Referendum Council would be established to conduct another round of community consultations. In the 'Kirribilli Statement', Indigenous leaders firmly rejected this approach. Those who attended the meeting reiterated their desire for substantive reform that would 'lay the foundation for the fair treatment of Aboriginal and Torres Strait Islander peoples into the future' and called for deliberative Aboriginal constitutional conventions as a means of revitalising debate.[51] The government eventually relented.

In 2015, a Referendum Council was appointed to advise the Prime Minister and Leader of the Opposition on options for constitutional reform. Indigenous members of the Council developed and led 12 Indigenous-only deliberative Regional Dialogues. These dialogues revealed that support for a racial non-discrimination clause remained very high among Indigenous Australians. However, the Final Report of the Referendum Council notes that delegates were concerned about the political viability of such a proposal; 'the dialogues discussed media reports of section 116A being a "one clause bill of rights" and not being politically feasible'.[52] Delegates were also wary that a non-discrimination clause would be reactive and require interpretation by the judiciary.[53] It is for these reasons that a constitutionally enshrined Indigenous representative body emerged as the primary proposal for constitutional recognition. In its Final Report, the Referendum Council recommended a referendum be held to put a First Nations Voice in the Constitution.

B. Two Key Reports

The Uluru Statement and Referendum Council endorsed a First Nations Voice but did not provide much detail as to its design or operation. In 2018, a Parliamentary Joint Select Committee on Constitutional Recognition invited Australians to make submissions on the proposed functions and design of the First Nations Voice. In its Interim Report, the Committee found strong support for the principle of a Voice, but considerable diversity of thinking about the appropriate design and model. Drawing on the evidence it heard, the Committee identified key principles that should underpin the Voice's design. These were:

- Most significant is the strong support for local and regional structures.
- The members of The Voice should be chosen by Aboriginal and Torres Strait Islander peoples, rather than appointed by government.
- The design of the local voices should reflect the varying practices of different Aboriginal and Torres Strait Islander communities—a Canberra designed one size fits all model would not be supported.
- There should be equal gender representation.
- The Voice at the local, regional, and national level should:
    - be used by state, territory and local governments as well as the federal government;
    - provide oversight, advice and plans but not necessarily administer programs or money; and

[51] 'Statement prepared by Aboriginal and Torres Strait Islander attendees at a meeting held today with the Prime Minister and Opposition Leader on Constitutional Recognition', 6 July 2015.
[52] Referendum Council, *Final Report of the Referendum Council* (30 June 2017) 13.
[53] Referendum Council, *Final Report of the Referendum Council* (30 June 2017) 13.

    - provide a forum for people to bring ideas or problems to government and government should be able to use the voices to road test and evaluate policy. This process should work as a dialogue where the appropriateness of policy and its possible need for change should be negotiable.
- Consideration must be given to the interplay of any Voice body with existing Aboriginal and Torres Strait Islander organisations at both local and national level (in areas such as health, education, and law) and how such organisations might work together.
- Cross-border communities should be treated as being in the same region where appropriate.
- Advice should be sought at the earliest available opportunity.[54]

In its final report, the Committee reiterated that strong support for the Voice exists across the Australian community. However, it noted that it had been unable to identify an appropriate model that enjoyed widespread support. It recommended the Australian government initiate a process of co-design with Aboriginal and Torres Strait Islander peoples to determine the detail.[55] A properly conducted process of co-design would ensure that the Voice can be:

- legitimate and credible among Aboriginal and Torres Strait Islander peoples in local and regional communities.
- effective in advancing self-determination and achieving positive outcomes for those communities; and
- capable of achieving the support of the overwhelming majority of Australians.[56]

On 30 October 2019, the Minister for Indigenous Australians, the Hon Ken Wyatt AM MP, announced the Indigenous Voice co-design process, established to develop models to enhance local and regional decision-making and options to provide a voice for Indigenous Australians to government. Led by Professors Marcia Langton and Tom Calma, the co-design process engaged with more than 9,400 organisations and individuals across 18 months and two stages of consultation. The Final Report recommended a federal structure, with 35 Local and Regional Voices and a National Voice.

The report did not outline the Local and Regional Voices in detail. Rather, adopting a flexible approach consistent with Indigenous peoples' right to self-determination and considering the landscape of existing Indigenous organisations within a region, the report envisioned the establishment of diverse local and regional Voices. Local communities would be supported in developing their own Voice. Government would provide resources and support, allowing communities to identify the composition and membership of their Voice, and how existing organisations within the region could link in without duplication. Once a Voice is formed it would be formally recognised by government in a process set out under legislation.

[54] Parliament of Australia, Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Interim Report* (July 2018) 115-116 [7.18]; Parliament of Australia, Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Final Report* (November 2018) 10 [2.19] (emphasis removed)
[55] Parliament of Australia, Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Final Report* (November 2018) Recommendation 1
[56] Parliament of Australia, Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Final Report* (November 2018) 77, [2.311].

Although each Local and Regional Voice may look different, its functions would be the same. Each Voice would draw on existing Indigenous organisations to provide advice to all levels of government (and the non-government sector) on community aspirations, priorities and challenges to influence policy, program, and service responses. Working with governments, the Local and Regional Voices would also undertake strategic regional planning, develop co-design strategies, and provide advice to government decision-makers about how funding can be better aligned to local priorities. Each body would also provide advice to the National Voice on systemic issues associated with national policies and programs and matters of national importance. These bodies would not administer or fund programs.

The National Voice would be structured differently. A 24-member body, the National Voice would comprise 2 members from each State, Territory, and the Torres Strait (one male and one female representative), 5 members representing remote regions, and one member representing the significant number of Torres Strait Islanders living on the mainland. Members would serve 4-year terms (with a maximum of two consecutive terms). Members would be expected to represent Aboriginal and Torres Strait Islander peoples at the national level, as well as the views of Local and Regional Voices within their state, territory or the Torres Strait. The National Voice members would be structurally linked to the Local and Regional Voices. National Voice members would not be elected by Aboriginal and Torres Strait Islander peoples but would be collectively determined by the Local and Regional Voices within each jurisdiction. Two permanent committees on Youth and Disability would support the work of the National Voice. Other committees could be established as necessary.

The National Voice would have a responsibility and right to advise the Parliament and Australian Government on national matters of significance to Aboriginal and Torres Strait Islander people. Its core function would be to advise on matters of 'national significance relating to the social, spiritual and economic wellbeing of Aboriginal and Torres Strait Islander people'. The Voice would be empowered to speak on any matter it considered fell within this remit. Its advice function would be proactive and responsive; it would be able to initiate advice as well as respond to referrals from the Parliament and government. The Voice would not replace or duplicate existing Indigenous organisations but would be expected to engage and link with those organisations where relevant.

The report sees the Voice as an 'integrated system in which Aboriginal and Torres Strait Islander peoples' perspectives are appropriately heard at all levels'.[57] However, it recognised that it would take some time to set up. The report recommended focus begin at the Local and Regional level. An interim National Voice could be set up in the meantime, but a National Voice would not finally be constituted until the vast majority of Local and Regional Voices had been established. It expected this would not occur for at least two years.[58]

The Langton and Calma report is the only significant articulation of what a First Nations Voice may look like. However, for at least two reasons, it may not be appropriate to simply adopt this report as the final model.

- First, the consultation process may not have met the criteria set by the 2018 Parliamentary Joint Select Committee. The Committee called for a 'properly conducted

[57] National Indigenous Australians Agency, *Indigenous Voice Co-design Process: Final Report to the Australian Government* (July 2021) 9.
[58] National Indigenous Australians Agency, *Indigenous Voice Co-design Process: Final Report to the Australian Government* (July 2021) 216.

process of co-design', but many Aboriginal and Torres Strait Islander people and organisations raised concerns over the process. The Central Land Council, for example, considered that the process 'does not appear to have been a genuine, fully equitable and participatory co-design with Aboriginal and Torres Strait Islander peoples in full partnership'.[59] Similarly, the National Aboriginal Community Controlled Health Organisation (NACCHO) expressed concern that the process led by the government was 'not consistent with the commitments from all governments in the Partnership and National Agreements on Closing the Gap'.[60] Others have described the consultation process as 'rushed',[61] with little opportunity for participants to consider or engage with key elements of the model.

- Second, the terms of reference for the co-design group pose problems. The government expressly prohibited the report from considering whether the Voice should be placed in the Constitution and accordingly constitutional enshrinement was not a design consideration. This is problematic because the Uluru Statement was endorsed on the basis that the First Nations Voice would be put in the Constitution. There is no mandate for a legislated Voice. Public submissions understood this. The Final Report notes submissions from the public overwhelmingly support constitutional enshrinement.[62]

The Langton and Calma model is the only model that exists. However, these limitations suggest that more work is needed to consider and resolve key elements of the design of a First Nations Voice. As this Issues Paper notes below, the Indigenous Law Centre at UNSW has proposed that a deliberative, Indigenous-led consultation process is conducted following a successful referendum to finalise key design questions. However, there are concerns that another round of consultations would be costly, take significant time, and may create space for conflict. These issues are considered in more detail below.

The Langton and Calma report proposed a particular model of the First Nations Voice. While no other concrete model has been developed, public law scholars and Indigenous people and organisations have offered various design suggestions. The remainder of this section will examine critical issues that are likely to be in contention and the subject of debate with respect to the development of the Voice. It will then provide a short summary of the FNP perspective on each issue. Before then, however, it is worth outlining two sets of principles that have been used to guide the development of proposals for constitutional recognition.

C. Principles to Guide Proposals for Constitutional Recognition

The Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander peoples adopted four principles to guide the Panel's assessment of proposals for constitutional recognition. For the Panel to recommend constitutional change, the amendment must:

1. Contribute to a more unified and reconciled nation;

[59] Central Land Council, Submission to the Indigenous Voice Co-Design Process: Interim Report to the Australian Government (30 April 2021) 17.
[60] NACCHO, Submission to the Indigenous Voice Co-Design Process Interim Report 2020 (28 April 2021) 6.
[61] Adam Phelan, 'Four Years After Uluru, the Chance for an Enduring Voice Dawns', *UNSW Newsroom*, 26 May 2021 <https://newsroom.unsw.edu.au/news/business-law/four-years-after-uluru-chance-enduring-voice-dawns>.
[62] National Indigenous Australians Agency, *Indigenous Voice Co-design Process: Final Report to the Australian Government* (July 2021) Recommendation 5.

2. Be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples;
3. Be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums; and
4. Be technically and legally sound.[63]

These principles remain key to the success of a referendum.

The Referendum Council Regional Dialogues marked the first time that Aboriginal and Torres Strait Islander peoples were specifically asked their view on constitutional recognition. Ten Guiding Principles for constitutional amendment emerged from the Dialogues. These principles can be understood as elaborating upon the Expert Panel's second principle: that the amendment is of benefit to and accords with the wishes of Aboriginal and Torres Strait Islander peoples. According to the Regional Dialogues, a proposal for constitutional amendment will only be of benefit if it:

1. Does not diminish Aboriginal sovereignty and Torres Strait Islander sovereignty.
2. Involves substantive, structural reform.
3. Advances self-determination and the standards established under the United Nations Declaration on the Rights of Indigenous Peoples.
4. Recognises the status and rights of First Nations.
5. Tells the truth of history.
6. Does not foreclose on future advancement.
7. Does not waste the opportunity of reform.
8. Provides a mechanism for First Nations agreement-making.
9. Has the support of First Nations.
10. Does not interfere with positive legal arrangements.[64]

This Issues Paper does not explicitly assess each design element of the Voice against these criteria. Instead, it offers the FNP perspective, taking into account these principles.

D. Key Design Questions

1. When should the Voice be able to present its views to the Parliament?

The Uluru Statement from the Heart does not set out the functions of the First Nations Voice. The Referendum Council also did not consider in detail the potential functions the Voice could exercise. However, delegates at the Regional Dialogues clearly understood that 'the primary function of the Voice would be to provide a First Nations perspective whenever federal laws were passed that affected Aboriginal and Torres Strait Islander people', but that 'the exact breadth of this mandate' was not decided.[65]

[63] Commonwealth, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (January 2012) 4.
[64] Referendum Council, *Final Report of the Referendum Council* (30 June 2017) 22.
[65] Technical Advisers: Regional Dialogues and Uluru First Nations Constitutional Convention, Submission No 206 to Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples (11 June 2018) 8.

At a minimum all proposals consider that the Voice should be empowered to monitor 'the use of the heads of power in section 51 (xxvi) [the races power] and section 122 [the Territories power]'.[66] This responsibility is described in different terms but essentially would allow the Voice to provide advice to the Parliament when debating laws that would be supported by one of these heads of power.

> **Section 51(xxvi)**
> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to the people of any race for whom it is deemed necessary to make special laws.
>
> **Section 122**
> The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

The races power and Territories power are very broad. The orthodox position is that the race power permits Parliament to enact legislation that imposes a disadvantage on Aboriginal and Torres Strait Islander peoples.[67] The Territories power is a 'plenary' power, meaning that its scope is also extensive.[68]

However, the problem is that while these two heads of power constitute the Commonwealth Parliament's major legislative authority in Indigenous affairs, many laws of general application have a differentiated impact on Indigenous peoples. Recognising this, various proposals have been made to enlarge the Voice's scope while avoiding the apparent risk that the Voice would speak too often and delay or frustrate Parliament.[69]

The Referendum Council gestured towards this problem in its report. It argued that empowering the Voice to present its views on 'all matters "affecting" Aboriginal and Torres Strait Islander peoples' is not realistic as the mandate will be too broad. At the same time, it suggested that it 'may be too narrow to limit the subject matters to laws with respect to Aboriginal and Torres Strait Islander peoples'.[70] Some constitutional lawyers have also discussed the importance of ensuring the Voice speaks only on matters of particular significance. Writing in 2015, Cheryl Saunders argued that Parliament should consult when Indigenous interests 'are affected directly, but not in relation to matters of a general nature affecting society as a whole'.[71] Shireen Morris has adopted similar language, arguing that the Voice should be empowered to comment on laws that are 'directed at, or significantly or especially impacting, Indigenous peoples'.[72]

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[66] Referendum Council, *Final Report of the Referendum Council* (30 June 2017) Recommendation 1.
[67] Robert French, 'The Race Power: A Constitutional Chimera' in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 180, 206; *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373, 461; *Kartinyeri v Commonwealth* (1998) 195 CLR 337.
[68] See for example *Berwick Ltd v Gray* (1976) 133 CLR 603.
[69] Uphold and Recognise, *Hearing Indigenous Voices: Options for Discussion* (2018) 7.
[70] Referendum Council, *Final Report of the Referendum Council* (30 June 2017) 36
[71] Cheryl Saunders, 'Indigenous Constitutional Recognition: The Concept of Consultation' (2015) 8(19) *Indigenous Law Bulletin* 19, 21.
[72] Shireen Morris, *A First Nations Voice in the Australian Constitution* (Hart, 2020) 267.

The Aboriginal members of the Referendum Council and Technical Advisers to the Referendum Council Regional Dialogues[73] favoured a more permissive approach. They argued that the Voice should be empowered to make representations on 'matters relating' to Aboriginal and Torres Strait Islander peoples,[74] leaving it up to the members of the Voice to decide whether a particular matter met the threshold. The Langton and Calma report appear to have adopted a more limited approach. The report provides that Local and Regional Voices should be able to provide advice on 'community aspirations, priorities and challenges',[75] while the National Voice should be able to provide advice on 'matters of national significance to Aboriginal and Torres Strait Islander peoples, relating to the social, spiritual and economic wellbeing of Aboriginal and Torres Strait Islander peoples'.[76]

The government's initial proposal unveiled at the Garma Festival adopts the approach offered by the Aboriginal members of the Referendum Council and Technical Advisers to the Regional Dialogues. It provides that the Voice 'may make representations…on *matters relating* to Aboriginal and Torres Strait Islander peoples'.

It is important to note, however, that prominent conservatives have attacked this proposal, arguing that it is too permissive. Tony Abbott and Peta Credlin have both claimed this mandate is a 'Trojan Horse'[77] that would 'change the way our government works' by providing a 'particular group' with 'an unspecified say, over unspecific topics, with unspecified ramifications'.[78] While noting that Abbott and Credlin's attacks are over the top, *The Australian* journalist Chris Mitchell has also suggested that this proposal may have to be narrowed. Mitchell argues that voters are unlikely to support the wider scope, favouring limiting the Voice's functions to matters 'directly affecting' Aboriginal and Torres Strait Islander peoples.[79] If the wider formulation is ultimately adopted, these concerns will need to be countered.

FNP Perspective: Consistent with Aboriginal and Torres Strait Islander peoples' right to self-determination, it is reasonable, in-principle, to allow the First Nations Voice to make representations to the Parliament on any laws or policies it considers relevant. This can be adopted by using broad language empowering the body with the power to present its views or make representations on 'matters relating to' Aboriginal and Torres Strait Islander peoples. In practice, the Voice will identify its own priorities and choose to engage more substantively on issues of greater significance, considering its time and resources. Importantly, this language would also make clear that the Voice is not limited to responding to issues put forward by Parliament (as 'advise' suggests), but that it could present new proposals for legislative reform or suggest reviews into policy and service delivery, as an example. The government's initial proposal adopts this approach.

[73] The Technical Advisers are: Gabrielle Appleby, Josephine Bourne, Sean Brennan, Dylan Lino, Gemma McKinnon, Dean Parkin, Nicole Watson.
[74] Pat Anderson, Noel Pearson, Megan Davis, Sean Brennan, Gabrielle Appleby, Dylan Lino and Gemma McKinnon, Submission No 479 to Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples (3 November 2018) 6.
[75] National Indigenous Australians Agency, *Indigenous Voice Co-design Process: Final Report to the Australian Government* (July 2021) 37.
[76] National Indigenous Australians Agency, *Indigenous Voice Co-design Process: Final Report to the Australian Government* (July 2021) 109.
[77] Peta Credlin, 'Dutton's Libs Must Have Guts to Speak Out Against Voice', *The Australian*, 4 August 2022.
[78] Tony Abbott, 'Entrenching Race in Constitution Drives Us Further Apart', *The Australian*, 3 August 2022.
[79] Chris Mitchell, 'Voice Debate is Crowded but Not Informed', *The Australian*, 8 August 2022.

2. What other functions should the Voice have?

In their submission to the Joint Select Committee on Constitutional Recognition, the Aboriginal members of the Referendum Council and Technical Advisers confirmed that the delegates saw the primary function of the Voice as providing First Nations perspectives on laws that affect them. However, the group noted that other possible functions were discussed by delegates, including:

1. Co-designing new policies.
2. Advising Ministers.
3. Reviewing, monitoring and overseeing funding coming into communities or distributing that funding.
4. Auditing and evaluating service delivery in Aboriginal and Torres Strait Islander affairs.
5. Advising State and Territory, and local governments; and
6. Representing Aboriginal and Torres Strait Islander peoples internationally.[80]

These functions also speak to the central problem expressed by delegates at the Regional Dialogues—the inability to influence law and policy that affects them. However, there is less consensus as to whether these additional functions should be held by the Voice. The remainder of this section will explore each of these functions. Several additional questions will also be considered.

3. Should the Voice also present its views to government?

The First Nations Voice is often characterised by proponents and the media as a Voice to Parliament. However, the Uluru Statement describes the body as the 'First Nations Voice'. This language reflects the fact that (as noted in Section 1) within the Regional Dialogues, the Voice was originally envisioned as a mechanism to speak to both the Parliament and the Executive. In Broome, for example, delegates considered that the body 'might be able to be involved not just in providing advice on laws, but also co-designing policies' and service delivery – 'in areas such as health, education, housing, social issues – and evaluating service delivery'.[81] Similarly, in Dubbo, delegates suggested that the body could be empowered to advise government ministers in a range of portfolios, including 'education, land, treasury'.[82]

The larger mandate is important. Legislative and policy proposals are developed within the executive and presented to Parliament. Once a Bill is introduced, government is often reluctant to change course. Views or representations provided at this stage will, therefore, likely prove unable to produce substantive amendments but merely refine already defined policy proposals. The capacity of the Voice to effectively influence law and policy requires that it be involved at an earlier stage of policymaking. In view of this, most proposals empower the Voice to make recommendations to Parliament *and Government*.

[80] Pat Anderson, Noel Pearson, Megan Davis, Sean Brennan, Gabrielle Appleby, Dylan Lino and Gemma McKinnon, Submission No 479 to Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples (3 November 2018) 9-10.

[81] Pat Anderson, Noel Pearson, Megan Davis, Sean Brennan, Gabrielle Appleby, Dylan Lino and Gemma McKinnon, Submission No 479 to Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples (3 November 2018) 8, 10.

[82] Pat Anderson, Noel Pearson, Megan Davis, Sean Brennan, Gabrielle Appleby, Dylan Lino and Gemma McKinnon, Submission No 479 to Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples (3 November 2018) 8.

Constitutional lawyers have been especially prominent in advocating for this role. The Centre for Comparative Constitutional Studies at Melbourne Law School explained that reference to the views of the Voice should be included as part of Cabinet submissions.[83] The Aboriginal members of the Referendum Council and Technical Advisers also believe that the First Nations Voice should be empowered to present its views to Parliament and the Executive.[84] Similarly, the Langton and Calma report conceive the National Voice as an advisory body to the Australian Parliament and Government.[85] It considers that advice to Parliament could include providing formal, tabled advice and giving evidence to parliamentary committees, while advice to Government could include engaging with ministers and officials, including those responsible for mainstream policies and programs. The government's initial proposal would allow the Voice to make representations to both institutions. At Garma, Prime Minister Albanese justified this position by explaining that it would provide the Voice with 'the power and the platform to tell the government and the parliament the truth about what is working and what is not'.[86]

Proposals see the Voice as an independent, constitutionally enshrined body that could rectify the torment of Indigenous Australians powerlessness. As a constitutionally enshrined body, the Voice would be a new institution that complements – and strengthens – the existing constellation of Aboriginal and Torres Strait Islander organisations that speak to government. The Voice is not intended to 'displace or undermine bodies with existing statutory roles or specific functions but provide links for involvement'.[87] Submissions to the Langton and Calma process from Aboriginal organisations were clear on this point. The Central Land Council, for example, warned:

> It is also important that a National Voice is not given undue priority in any engagement with the Australian Parliament. In this regard, we are of a strong view that the National Voice must complement and not undermine the roles, responsibilities and functions of current partnership arrangements, peak bodies, and agreement making processes such as with the Coalition of Peaks on Closing the Gap, and the Partnership Agreement on Closing the Gap, made between the Coalition of Peaks and the Australian Government.[88]

The Langton and Calma report recognise this challenge. The report suggests that the Voice could leverage the expertise and policy strength of relevant organisations to inform its advice. It does not provide detail as to how this might occur in practice.

As this suggests, there is a potential tension. Public lawyers are clear that the Voice will need to be able to speak to government if it is to be effective, but there are many existing Aboriginal

[83] Centre for Comparative Constitutional Studies, Submission No 289.1 to Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples (21 September 2018) 11.
[84] Pat Anderson, Noel Pearson, Megan Davis, Sean Brennan, Gabrielle Appleby, Dylan Lino and Gemma McKinnon, Submission No 479 to Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples (3 November 2018) 6.
[85] National Indigenous Australians Agency, *Indigenous Voice Co-design Process: Final Report to the Australian Government* (July 2021) 109, 148.
[86] Prime Minister Anthony Albanese, 'Address to Garma Festival' (30 July 2022).
[87] National Indigenous Australians Agency, *Indigenous Voice Co-design Process: Final Report to the Australian Government* (July 2021) 23, 156.
[88] Central Land Council, Submission to the Indigenous Voice Co-Design Process: Interim Report to the Australian Government (30 April 2021) 2-3.

and Torres Strait Islander statutory authorities, community-controlled organisations and other bodies that speak directly to government on certain matters. For example, the Aboriginal and Torres Strait Islander Social Justice Commissioner is empowered by statute to advise the government on the operation of the *Native Title Act 1993* (Cth).[89] Peak body organisations like the National Native Title Council also speak to government on issues relating to the native title sector. Similarly, NACCHO has a relationship with government within the healthcare sector. Powerful land councils, like the Central and Northern Land Council, also have legislative responsibilities and long-term relationships with government. These organisations have expressed concern that if the Voice is primarily understood as a Voice to Government, it may undermine or displace their own roles. The CLC asks:

- Would the Voice effectively facilitate shared decision-making at all levels among Aboriginal people in the CLC's area of operation?
- How would the Voice enable the CLC to adequately maintain its strong and influential role as an advocate for Central Australian Aboriginal people?
- How might the Voice impact on the role of the CLC as a 'Shield' for the Aboriginal people it represents, to continue to provide protection against unwarranted actions of governments and corporations.[90]

NACCHO has also raised concerns. In its submission to the Langton and Calma process, NACCHO worried that advice from the Voice 'will be privileged over that of the voice controlled by Aboriginal and Torres Strait Islander peoples', noting that in the event of inconsistency, 'it is likely that the Government will take the advice of its own voice'.[91]

Even if the First Nations Voice is not intended to undermine existing organisations its creation may tend in that direction. A constitutionally enshrined Voice will be invested with significant moral and political capital, having been endorsed by the Australian people through a successful referendum. Australian media and the community will look to the body for leadership; the government too may prefer to deal with a single organisation rather than multiple stakeholder groups. It is likely that members will be asked their opinion on matters falling outside the scope of their role. This may cause tension with other organisations.

If the Voice is empowered to present its views to government this tension cannot be definitively resolved. It can only be managed. One option is for legislation to make clear that the Voice is intended to work collaboratively with Aboriginal and Torres Strait Islander organisations and empower it to enter MOUs for this purpose. This approach can build transparency and accountability into the relationship between the Voice and existing Indigenous organisations, helping to develop relationships built on trust. In the meantime, it is likely that a deliberative consultation process is needed to understand how the Voice can be designed to complement and strengthen existing organisations. This might be difficult, but it is worth noting that this is not a new challenge: ATSIC faced this same problem.

Conservative opponents have strenuously criticised providing a link between the Voice and government. Janet Albrechtsen, for example, has argued that

[89] *Australian Human Rights Commission Act 1986* (Cth) s 46C(2B).
[90] Central Land Council, Submission to the Indigenous Voice Co-Design Process: Interim Report to the Australian Government (30 April 2021) 15.
[91] NACCHO, Submission to the Indigenous Voice Co-Design Process Interim Report 2020 (28 April 2021) 5-6.

> Extending the reach of this body to everything done by executive government means it could permanently second-guess everything that passed across the desk of ministers or public servants. This extension is an act of massive overreach that will radically change our system of government.[92]

Albrechtsen mischaracterises the function of the Voice. As proposed, the Voice will be able to make representations to government (and the Parliament), but the executive will not be required to make changes to law or policy. Nonetheless, arguments like this one will be prominent in the referendum campaign and will need to be countered.

FNP Perspective: Delegates at the Regional Dialogues were clear that they do not feel they are heard in the development of law and policy. They desired a body that could present its views to Parliament and government. Public lawyers agree that if the Voice is to be effective at influencing law and policy it needs to be empowered with the capacity to speak to the government as well as the Parliament. The government has accepted this, and its initial proposal empowers the Voice to make representations to both institutions. In practice, however, there are already many existing Indigenous organisations with a direct relationship to the government on certain matters. There is some anxiety among these organisations that the First Nations Voice may usurp their role and function. This is understandable, but it must be remembered that a constitutionally enshrined Voice is intended to play a distinct and complementary role to existing Indigenous organisations. The success of the Voice – and its capacity to reframe relationships between the State and Aboriginal and Torres Strait Islander peoples – relies on it being able to present its views to government. Those views are likely to be informed by subject matter experts in existing Indigenous organisations. Legislation could make clear that the Voice is expected to engage with existing organisations to leverage their expertise and relationships when engaging with government. This will build in transparency and accountability helping to develop strong relationships between the Voice and the larger constellation of Indigenous organisations.

4. Impact of the Voice on the National Agreement on Closing the Gap

An important policy consideration in the development and implementation of the Voice is the impact on the Coalition of Aboriginal and Torres Strait Islander community-controlled peak organisations (Coalition of Peaks) and the National Agreement on Closing the Gap to which it is a key party. The National Agreement was signed by representatives of the Commonwealth, state and territory governments, the President of the Australian Local Government Association and the Coalition of Peaks in July 2020. The Coalition of Peaks comprises more than 70 peak bodies representing First Nations community-controlled organisations and some independent statutory organisations. Its members include high profile and long-established national peaks like NACCHO, SNAICC National Voice for our Children and First Nations Media Australia, and state and territory peaks such as the NSW Aboriginal Land Council and Aboriginal Peak Organisations NT. The membership comes from every jurisdiction, and they are currently providing a voice for communities across Australia. While never promoting itself as the Voice, and always supportive of the Uluru Statement from the Heart, the Coalition of Peaks will nonetheless want to protect their role, which includes advising on laws and policies of the Commonwealth that impact on First Nations people, and the National Agreement on Closing the Gap. Their support will be important for a successful referendum.

[92] Janet Albrechtsen, 'Libs Left Limp as Voice Poses Legal Nightmare', *The Australian*, 31 July 2022.

Meanwhile, the National Agreement is premised on 'a new approach' where 'policy making that impacts on the lives of Aboriginal and Torres Strait Islander people is done in full and genuine partnership'.[93] There is every reason to conclude from the way the Agreement is written that this policy making extends to the development of the Voice, noting that advising on policies and laws with respect to closing the gap will be a key consideration for the Voice and a primary justification for its creation. The Agreement is built around four Priority Reforms designed to change the way Governments work with First Nations peoples:

- One: Formal partnerships and shared decision-making
- Two: Building the community-controlled Sector
- Three: Transforming government organisations
- Four: Shared access to data and information at a regional level

Importantly, the new Labor Government has confirmed its support for the National Agreement on Closing the Gap. Accordingly, the Agreement is nationally significant. Closing the Gap will need to remain of highest priority to the Federal Labor Government if it is to have any chance of securing the support of the Opposition for the Voice. The Coalition of Peaks claim it is leading to a new relationship between governments and Aboriginal and Torres Strait Islander peoples and there is some evidence for this. Some members of the Coalition of Peaks, however, have raised concerns that a First Nations Voice might undermine or weaken this new relationship.[94]

The weakness in the National Agreement on Closing the Gap is that it is not in legislation and nor is it a legally binding contract. There is no legal redress if the commitments made by Governments are not fulfilled. It is not constitutionally enshrined. Nonetheless, it is reasonable to expect that the Coalition of Peaks will need to be part of any leadership group established by First Nations interests to develop legislation for a referendum, if for no other reason than to avoid disunity among Indigenous leaders. The National Agreement on the Closing the Gap is also an important design consideration for the Voice itself including the role of the Peaks and the future of the priority reforms.

FNP Perspective: A constitutionally entrenched First Nations Voice would play a distinct function to the existing community-controlled sector and the National Agreement on Closing the Gap. It would constitute structural reform to Australia's system of governance by placing a permanent institutional representative body in the Constitution that would speak directly to the Parliament and government. There is no reason to believe that the Coalition of Peaks and the National Agreement on Closing the Gap should not be able to co-exist but how this is achieved will require serious consideration at an early stage.

5. Should the Voice have veto powers?

The Referendum Council did not provide detail on the potential powers of the Voice. Nevertheless, the Council was clear that any Voice would be advisory only; it would not have 'any kind of veto power'.[95] All significant reports have adopted this position. Consistent with maintaining existing constitutional traditions, there is no appetite to empower the Voice with a

[93] Closing the Gap, *National Agreement on Closing the Gap* (July 2020) 4 [18].
[94] See, for example, NACCHO, Submission to the Indigenous Voice Co-Design Process Interim Report 2020 (28 April 2021) 3.
[95] Referendum Council, *Final Report of the Referendum Council* (30 June 2017) 36.

veto power. The government's initial proposal is consistent with this approach. Prime Minister Albanese has described the Voice as 'an unflinching source of advice and accountability. Not a third chamber, not a rolling veto, not a blank cheque'.[96]

It is not clear that all Aboriginal and Torres Strait Islander peoples support this approach. The Referendum Council notes that many delegates at Regional Dialogues were concerned that the Voice 'would have insufficient power if its constitutional function was "advisory" only', and that 'many Dialogues' called for the Voice to 'be given stronger powers'.[97] Stronger powers canvassed included the power to compel Parliament to respond to advice given by the Voice (Broome), the power to hold the Parliament to account against the standards of the UNDRIP (Melbourne), the power to issue advice that is binding on the Parliament (Brisbane), and a power to veto proposed Bills (Dubbo).[98] It is not certain that those who supported a Voice with stronger powers would support an advisory only body. Nevertheless, there is no prospect that the Voice will be granted anything other than advisory powers. As Peter Yu explained to the Joint Select Committee in 2018, the Voice is not intended to:

> contradict the existing nature of the powers of parliament but rather to work with them in a way that we're able to bring a greater understanding and leveraging to the very specific and real concern and interest that we have … it's never been about contradicting the nature of the powers of the parliament but rather to substantially build on the better performance of the Parliament.[99]

In positioning the Voice as a question of respect, Prime Minister Albanese has explained that 'it would be a very brave government' that ignored representations on law and policy made by the Voice.[100] This reflects the fact that while the Voice would not have the power to compel government or Parliament to act, it would, having been endorsed in a referendum of the Australian people, hold political and moral strength. The Australian people would expect the government and Parliament to treat the voice with the level of seriousness it deserves. At no point, however, would the government and Parliament be *required* to change or amend law or policy.

Nonetheless, foreshadowing their likely approach during a referendum campaign, opponents of the Voice have sought to confuse and inflame this issue. Tony Abbott, Peta Credlin, and Janet Albrechtsen have all described the Voice as holding 'something approaching a veto',[101] 'an effective veto over any policy or legislation that affects Indigenous Australians',[102] and 'in effect…a veto power over government policy'.[103] This is incorrect. The proposal makes clear that the Voice will not usurp the power of parliament and will not hold any veto. Parliament and government will be under no obligation to amend draft policy or legislation.

[96] Prime Minister Anthony Albanese, 'Address to Garma Festival' (30 July 2022).
[97] Referendum Council, *Final Report of the Referendum Council* (30 June 2017) 30.
[98] Referendum Council, *Final Report of the Referendum Council* (30 June 2017) 30.
[99] Parliament of Australia, Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Interim Report* (July 2018) 41, [3.101].
[100] Interview with Prime Minister Anthony Albanese (David Speers, ABC Insiders, 31 July 2022).
[101] Tony Abbott, 'Entrenching Race in Constitution Drives Us Further Apart', *The Australian*, 3 August 2022.
[102] Peta Credlin, 'Dutton's Libs Must Have Guts to Speak Out Against Voice', *The Australian*, 4 August 2022.
[103] Janet Albrechtsen, 'Libs Left Limp as Voice Poses Legal Nightmare', *The Australian*, 31 July 2022.

FNP Perspective: There is no prospect that the First Nations Voice will be empowered with a veto with respect to any laws and policies. This is consistent with existing Australian constitutional traditions, though it may reduce support among some Aboriginal and Torres Strait Islander peoples. Without a veto the Voice will not be able to guarantee its views influence the development of law and policy. It will instead need to rely on political and moral pressure linked to its enabling legislation. Ensuring the body is able to proactively review existing law and policy and propose reform may enhance support among Indigenous communities. At the same time, opponents of the Voice have seized on this issue to confuse and inflame the Voice proposal. It is vital that arguments claiming the Voice is a 'political veto' or equivalent are countered.

6. Should the Voice deliver government programs?

Thus far, it is broadly accepted that the Voice will not deliver any government programs.[104] Key to this view has been how Federal Labor and the Coalition have judged the experience of the Aboriginal and Torres Strait Islander Commission (ATSIC). ATSIC combined dual representative and administrative roles. This combination empowered elected Indigenous representatives with considerable authority over matters that affected Aboriginal and Torres Strait Islander peoples, securing a vital domain for self-administration. Commissioners could identify funding priorities, formulate, and implement policy and plans, make decisions over public expenditure, and protect cultural material and information. The capacity to identify, prioritise and implement distinct projects led some scholars to characterise the Commission as exercising a form of regional autonomy,[105] while others argued that creative intergovernmental agreements were suggestive of an implicit recognition as an order of government.[106]

Nevertheless, very real structural and financial impediments limited the Commission's authority. More significantly, the combination of representative and administrative functions created complex accountability arrangements, introduced governance challenges, and saw the Commission being held responsible for issues outside its control.[107] While the dismantling of ATSIC has been lamented by many Indigenous leaders and was keenly felt by delegates at the Regional Dialogues, both Federal Labor and the Coalition have rejected the idea of any national representative body, constitutionally enshrined or not, with representative and program functions.

The effectiveness of the Voice relies in large part on its support within Indigenous communities. Some concerns have been raised that a purely advisory body without program functions will not be able to secure that support. Although ATSIC struggled to obtain nationwide backing (at least through analysis of voter turnout), the Commission secured real gains in many local communities. Indeed, the Commission's decentralised, regional structure meant each community played a significant role in the design and delivery of programmes and services tailored to their needs. In regional and remote areas, where ATSIC played a larger proportionate role in Indigenous communities, turnout was consistently higher.[108]

[104] National Indigenous Australians Agency, *Indigenous Voice Co-design Process: Final Report to the Australian Government* (July 2021) 154.
[105] W Arthur, 'Indigenous Autonomy in Australia: Some Concepts, Issues and Examples' (Centre for Aboriginal Economic Policy Research, Discussion Paper No 220, 2001) 7.
[106] William Sanders, 'Towards and Indigenous Order of Government: Rethinking Self-Determination as Indigenous Affairs Policy' (Centre for Aboriginal Economic Policy Research, Discussion Paper No 230, 2002).
[107] See generally Harry Hobbs, *Indigenous Aspirations and Structural Reform in Australia* (Hart, 2021) Ch 5.
[108] Harry Hobbs, *Indigenous Aspirations and Structural Reform in Australia* (Hart, 2021) 147.

FNP Perspective: The First Nations Voice is not expected to deliver government programs. The experience of ATSIC has resulted in there being little political support for a permanent Indigenous body with dual representative and program functions. While this may limit potential accountability and governance challenges, it may also make it more difficult for the First Nations Voice to demonstrate its value and obtain the support of Indigenous communities, at least initially. Once again, ensuring the Voice can play a proactive role in presenting its views or making representations to the Parliament and government may assist in building support.

7. Should the Voice undertake a broader scrutiny role?

Many proposals have been advanced for the Voice exercising a broader scrutiny role beyond presenting its views to the Parliament and government on law and policy. As the Aboriginal members of the Referendum Council and Technical Advisers to the Regional Dialogues noted, options discussed in the First Nations Regional Dialogues included reviewing, monitoring, and overseeing funding coming into communities or auditing and evaluating service delivery in Aboriginal and Torres Strait Islander affairs. In Melbourne, one delegate suggested that the Voice could 'hold hearings like Senate Estimates'.[109]

The Technical Advisers recommended that the Voice be granted the powers and privileges of a parliamentary committee 'to compel people to appear as witnesses or produce documents'.[110] Australians for Native Title and Reconciliation also suggested that the Voice should be 'given access to Ministers and senior Public servants through an 'estimates' process as another direct accountability mechanism'.[111] The Melbourne Law School Centre for Comparative Constitutional Studies argued that the Voice could have a proactive role in 'monitoring the administration of laws likely to have a specific or disproportionate impact on [I]ndigenous Australians relative to other Australians'.[112] The Langton and Calma report rejected the first two options (and did not consider the third). It also dismissed the prospect that the Voice could undertake program evaluation.[113] The report argued that these functions would grant the Voice a 'formal inquisitorial role' inconsistent with its role as an advisory body.[114]

[109] Pat Anderson, Noel Pearson, Megan Davis, Sean Brennan, Gabrielle Appleby, Dylan Lino and Gemma McKinnon, Submission No 479 to Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples (3 November 2018) 10.
[110] National Indigenous Australians Agency, *Indigenous Voice Co-design Process: Final Report to the Australian Government* (July 2021) 172. See also Parliament of Australia, Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Interim Report* (July 2018) 37.
[111] National Indigenous Australians Agency, *Indigenous Voice Co-design Process: Final Report to the Australian Government* (July 2021) 172.
[112] Centre for Comparative Constitutional Studies, Submission No 289.1 to Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples (21 September 2018) 13; Parliament of Australia, Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Final Report* (November 2018) 29.
[113] National Indigenous Australians Agency, *Indigenous Voice Co-design Process: Final Report to the Australian Government* (July 2021) 154.
[114] National Indigenous Australians Agency, *Indigenous Voice Co-design Process: Final Report to the Australian Government* (July 2021) 172.

FNP Perspective: The First Nations Voice is intended to give Aboriginal and Torres Strait Islander peoples a permanent voice in the development of law and policy that affects them without interfering with existing constitutional arrangements such as the ability of Parliament to control its own procedures. To fulfil its core rationale, the Voice should, in principle, be empowered to undertake a broader scrutiny role. The Voice should be able to examine and inquire into existing legislation and policy (and propose relevant amendments). The Voice will need to obtain the information necessary (including data) to undertake this scrutiny function. Whether this extends to exercising the powers and privileges of a Senate Committee is a question for the Parliament to determine, but it may require the power to compel documents and information from the government.

8. Should the Voice be empowered to present its views to all levels of government?

The First Nations Voice is intended to ensure Aboriginal and Torres Strait Islander peoples voices are heard in the development of legislation and policy that affects them. The division of constitutional responsibilities across the Australian federation means that many issues of concern will arise at the state/territory and local level, and not merely at the Commonwealth level. In practice, empowering the Voice to speak to all levels of government could also enhance its credibility and legitimacy among the Indigenous community. If the Commonwealth government is unreceptive or indifferent to the Voice, representatives could leverage their relationship with sympathetic state or territory governments to continue to advocate for Indigenous interests.

All proposals have recognised the need for the Voice to provide its views to all levels of government. The Langton and Calma report recommended bifurcation of the Voice, separating it into 35 Local and Regional Voices and a National Voice. Under this model, the Local and Regional Voices would be responsible for advising subnational governments. The support of State and Territory governments (and empowering legislation) would be necessary for this – and indeed any similar – proposal to work.

An added complication arises from the development of State and Territory Voices to Parliament. As part of the process towards Treaty in Victoria, and elsewhere, Aboriginal and Torres Strait Islander peoples have called for the creation of a standing Indigenous representative body. The First Peoples' Assembly of Victoria has already been established as part of the treaty negotiations in that jurisdiction. Governments in Queensland and South Australia have announced they intend to establish voices to Parliament in their jurisdictions. Some consideration as to how these bodies set up under State and Territory legislation relate to a Federal Voice to the Parliament will need to be undertaken.

FNP Perspective: The Regional Dialogues and Uluru Statement reveal a genuine desire among Aboriginal and Torres Strait Islander peoples to have their voices heard in the development of law and policy that affects them. As all levels of government can enact law and implement policy that may affect significant Indigenous interests, in principle, the First Nations Voice should be empowered to speak to all levels of government. In practice, some issues will need to be resolved. State and Territory Parliaments may need to enact their own legislation either to set up State/Territory bodies or to ensure that structural links exist with the Commonwealth Voice. Duplication will also need to be avoided.

9. Should the Voice represent Indigenous Australians internationally?

The Referendum Council Regional Dialogues revealed that many Aboriginal and Torres Strait Islander peoples also believe that the body should have the capacity to represent them internationally. International advocacy proved vital for ATSIC in developing and maintaining transnational relationships with Indigenous peoples globally, as well as differentiating and distinguishing itself from the Australian Government, deepening its legitimacy within Indigenous communities. Proposals that consider this function, including the Langton and Calma report, are supportive.[115] However, no proposal considers it in detail. Instead, it is seen as something that the Voice and government can negotiate.

FNP Perspective: Members on the First Nations Voice will likely desire the ability to represent Aboriginal and Torres Strait Islander peoples in international forums, such as the Expert Mechanism on the Rights of Indigenous Peoples. It is sensible to permit this. Arrangements can be set up under legislation following the establishment of the First Nations Voice.

10. How should the Voice be funded?

An Indigenous representative body must be financed appropriately to effectively realise its responsibilities.[116] The question of resourcing highlights a key tension facing all Indigenous organisations. An institution's legitimacy and credibility are enhanced by secure financing, which enables the body to determine and undertake its own priorities. At the same time, in the absence of independent own-source revenue, stable financing is reliant on government support. Historically, Australian governments have used their control of financing to check the capacity of Aboriginal and Torres Strait Islander representative bodies to determine their own priorities. ATSIC was hamstrung by budgetary cuts, quarantining of expenditure, the transfer of administrative responsibilities and ongoing pressure to reallocate funding from their own priorities to those preferred by the government. In addition to checking self-determination, these practices weakened ATSIC's legitimacy and credibility.

Adequate financing is vital. Representatives must be able to travel widely throughout their constituencies to understand community concerns, relay them to relevant decision-makers and feed those discussions back to community. The precise amount of funding will depend on the breadth of the Voice's functions, including, for example, whether it provides advice to state, territory and local governments, or monitors Aboriginal affairs expenditure, but it must be sufficient to meet several minimum responsibilities. As the Referendum Council recognised, the Voice must be able to hire a secretariat, policy staff and lawyers to ensure representatives can develop their own policy positions and are well-briefed when providing advice to decision-makers or consulting with the executive or Parliamentarians.[117] Officeholders should also be remunerated appropriately to reflect the Voice's status and draw qualified and politically adept individuals to the role.

[115] National Indigenous Australians Agency, *Indigenous Voice Co-design Process: Final Report to the Australian Government* (July 2021) 153.
[116] Referendum Council, *Final Report of the Referendum Council* (30 June 2017) 30-31; Technical Advisers: Regional Dialogues and Uluru First Nations Constitutional Convention, Submission No 206 to Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples (11 June 2018) 8; Harry Hobbs, *Indigenous Aspirations and Structural Reform in Australia* (Hart, 2021) 207-209.
[117] Referendum Council, *Final Report of the Referendum Council* (30 June 2017) 30-31.

There are several ways that the Voice's financial capacity can be protected. Gabrielle Appleby has pointed to political mechanisms. In the ACT, for instance, legislation empowers the Speaker of the Legislative Assembly to recommend an appropriation for offices of the Assembly to the Treasurer, following consultation. If the Treasurer subsequently decides on a lower quantum, he or she must present reasons to the Assembly. By forcing government to publicly justify itself, a similar provision could help 'provide political and moral pressure to maintain appropriate levels of funding' to a First Nations Voice.[118]

Legal mechanisms could also be considered. The NSW Aboriginal Land Council is resourced by the interest generated from a Statutory Investment Fund originally amassed by a 15-year 7.5 per cent levy of land taxes across the state. This approach provides a degree of independence from government and could be considered for the Voice. However, while mechanisms such as this one are valuable, securing the agreement of Government and the Parliament to enact them will be very difficult, particularly a capital fund. In Victoria, as part of the state's treaty process, its recently passed legislation establishing an independent Treaty Authority appropriates funds from the Consolidated Fund each financial year from the 2022–2023 financial year onwards to pay for the entity's costs including remuneration for its members and staff and specifies annual amounts (that are not to be exceeded) including $20.3 million annually from 2025-26.[119] While no doubt politically challenging, a similar arrangement could be made in legislation establishing the Voice

FNP Perspective: It is crucial that the First Nations Voice receives sufficient funding to satisfy its responsibilities. Inadequate funding will inhibit the Voice's activities and weaken its capacity to build legitimacy and credibility within Indigenous communities. In the absence of dedicated own-source revenue, funding will ultimately be determined by the Australian Parliament. For the First Nations Voice to be able to develop and execute its own priorities, funding should not be made through annual appropriations or tied to electoral cycles and instead should be specified in the enabling legislation following negotiations with Indigenous representatives and cover a ten-year period at least.

11. Will the Parliament and government consult with the Voice?

The effectiveness of the Voice will rely on its ability to convince Parliament and/or the government to revise proposed laws and policies in line with its views and recommendations. Because the Voice will not have veto powers, its effectiveness will ultimately rely on:

1. The quality of the representations proffered.
2. The existence of a constructive relationship between the Voice and Parliament built on dialogue and trust; and
3. Clear support from Indigenous peoples and communities for the Voice.

The support of Indigenous communities relies on several factors in turn, including evidence that the Voice is effective at influencing government policy and legislation, as well as that it is genuinely representative (see point 12 below).

[118] Gabrielle Appleby, Submission No 132 to Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, 12 June 2015, 15; *Financial Management Act 1996* (ACT) ss 20-20AC.
[119] *Treaty Authority and Other Treaty Elements Act 2022* (Vic) s 16(2).

Some commentators suggest that the relationship between the Voice and Parliament/government should be left to 'successive ministries', allowing a convention on constructive engagement to evolve.[120] There is some value to this proposition. The flexibility that comes from informal, unwritten rules may enable consultation to develop in novel and productive ways, even beyond that set out in legislation. It is also arguable that a constitutional or legislative provision mandating consultation is inconsistent with embedding a dialogue of mutual respect. However, the experience of previous Indigenous representative bodies (ATSIC, National Congress of Australia's First Peoples, etc.,) should caution against this approach. Without clear procedures for consultation, there is no guarantee that consultation will occur.[121]

There are two general ways that consultation processes could be regulated: make the fact or standard of consultation justiciable, or impose a political obligation that consultation occurs. A justiciable duty to consult exists in Canada, among other places, and has previously been canvassed in the debate on constitutional recognition in Australia.[122] However, no major proposal recommends imposing a justiciable duty to consult. Delegates at the Regional Dialogues favoured an institutional arrangement that would 'not interfere with parliamentary supremacy'.[123] The Referendum Council, Joint Select Committee and Langton and Calma reports have endorsed this approach.[124] Non-justiciability means the Voice will have no legal recourse if Parliament or government fails to engage with their advice. While this weakens the Voice's ability to be heard, this position should be respected as the most critical element of any institutional mechanism is that its design reflects the views of Aboriginal and Torres Strait Islander peoples.

In the absence of a justiciable obligation, alternative measures aimed at promoting respectful conversation and encouraging Parliament/government to meaningfully listen to the representative body should be developed.

Some proposals attempt to promote dialogue by creating tiers of consultation. On this account, on issues of particular importance to Aboriginal and Torres Strait Islander peoples' consultation may be required, while on less significant matters, consultation may only be recommended. The idea is that Parliament may look upon advice more constructively if it is offered only on the most serious of matters and is not used as a mechanism to delay or frustrate parliamentary processes. For instance, Rosalind Dixon has proposed a model where 'Parliament *shall engage* the Voice when relying on sections 51(xxvi) and 122 of the Constitution and *may engage* it in respect of any other' constitutional provisions.[125]

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[120] Evidence to Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, Canberra, 18 June 2018, 9 (Damien Freeman).

[121] Harry Hobbs, *Indigenous Aspirations and Structural Reform in Australia* (Hart, 2021) 215. On National Congress see Jackie Huggins and Rod Little, 'A Rightful Place at the Table' in Shireen Morris (ed), *A Rightful Place: A Road Map to Recognition* (Black Inc. Books, 2017) 147, 168-69.

[122] See Megan Davis and Rosalind Dixon, 'Constitutional Recognition through a (Justiciable) Duty to Consult? Towards Entrenched and Judicially Enforceable Norms of Indigenous Consultation' (2016) 27 *Public Law Review* 255.

[123] Referendum Council, *Final Report of the Referendum Council* (30 June 2017) 38.

[124] Referendum Council, *Final Report of the Referendum Council* (30 June 2017) 38; Parliament of Australia, Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Final Report* (November 2018); National Indigenous Australians Agency, *Indigenous Voice Co-design Process: Final Report to the Australian Government* (July 2021) 166.

[125] Rosalind Dixon, Submission No 316.1 to the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples (18 September 2018) 2.

The Langton and Calma report rejected this model as too limited and complicated, given it is not always clear under what head of power legislation will be supported. Nonetheless, they accepted the tiers approach, providing that:

- Parliament would have an obligation to consult the Voice on primary legislation that: (i) overwhelmingly relates to Aboriginal and Torres Strait Islander peoples; or (ii) is a special measure for Aboriginal and Torres Strait Islander people within the definition of the *Racial Discrimination Act 1975* (Cth). The obligation arises because 'Aboriginal and Torres Strait Islander peoples are the only "racial" groups subject to' the special laws.[126] It would not apply to legislative instruments.

- Where a proposed law or policy would have a significant or distinctive impact on Aboriginal and Torres Strait Islander peoples, government would be expected to consult the Voice. Langton and Calma envision government and Parliament proactively assessing whether the proposed law or policy would meet this requirement by assessing several principles, including whether the law or policy would differentially impact Aboriginal and Torres Strait Islander peoples.[127]

The constitutional amendment proposed by the government does not include tiers of consultation. It provides simply that:

> 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.

If it is seen as desirable, legislation to establish the Voice could impose different consultation obligations, like those proposed in the Langton and Calma report. There is no need to include this detail in the Constitution.

In any event, while these proposals can helpfully outline when consultation should occur, they cannot guarantee that consultation will occur. Ultimately, the Voice is left hoping that a 'political norm' develops along these lines.[128] Commentators have recognised this and offered various solutions to facilitate the development of such practice. Dylan Lino has pointed to the process of constitutional amendment, arguing that a successful referendum will 'express Indigenous peoples' foundational importance to the polity',[129] helping to ground a political convention that government does not just consult, but follows the body's advice or justifies its failure to do so. The Aboriginal members of the Referendum Council and the Technical Advisers also point to the referendum. They argue that constitutional enshrinement will give the Voice the 'legitimacy and status' it needs to build positive political influence and political

[126] National Indigenous Australians Agency, *Indigenous Voice Co-design Process: Final Report to the Australian Government* (July 2021) 162
[127] National Indigenous Australians Agency, *Indigenous Voice Co-design Process: Final Report to the Australian Government* (July 2021) 160.
[128] See Megan Davis and Rosalind Dixon, 'Constitutional Recognition through a (Justiciable) Duty to Consult? Towards Entrenched and Judicially Enforceable Norms of Indigenous Consultation' (2016) 27 *Public Law Review* 255, 258.
[129] Dylan Lino, *Constitutional Recognition: First Peoples and the Australian Settler State* (Federation Press, 2018) 117.

respect from Parliament and the Executive.[130] This may occur but there is no guarantee that it will.

Other proposals aim to impose a political cost on a Parliament and government that fail to engage. Transparency measures are most often identified, the idea being that government may be shamed by public and media pressure into engaging genuinely with the Voice. The Langton and Calma report recommend three transparency mechanisms.[131]

1. All bills would be required to include a statement in the accompanying explanatory memorandum explaining whether consultation has occurred;
2. The National Voice would be able to table formal advice in Parliament; and
3. A new parliamentary joint committee tasked with considering whether the National Voice is being appropriately consulted

Various other options have also been raised, including:

- Empowering the Voice with the powers and privileges of a parliamentary committee;[132]
- The Cabinet secretariat could report annually on the body's involvement in the Cabinet process, including by noting the number of draft Cabinet documents the body is consulted or provides comments on;[133]
- The Chair of the Voice may be provided with observer status, allowing them to speak to either House of Parliament, and/or deliver an Annual Report to the nation on Indigenous affairs.

The Langton and Calma report noted but did not endorse these proposals.

Developments in Canada may be usefully considered. In 2021, Canada enacted legislation to implement the United Nations Declaration on the Rights of Indigenous Peoples.[134] This Act provides a roadmap for Indigenous peoples and government to work together to implement the Declaration based on lasting reconciliation, healing, and cooperative relations. The Act requires the government to work in consultation and cooperation with Indigenous peoples to ensure all laws are consistent with the Declaration, including the requirement that government must obtain the free, prior, and informed consent of Indigenous peoples before enacting legislation and policy that affects them. This requirement goes beyond the existing duty to consult in Canadian law. A Senate Committee is currently inquiring into whether and how Australia should enact similar legislation. An Australian version would place more pressure on the Parliament and government to engage genuinely with the Voice, even if it was framed in a manner to retain non-justiciability.

[130] Pat Anderson, Noel Pearson, Megan Davis, Sean Brennan, Gabrielle Appleby, Dylan Lino and Gemma McKinnon, Submission No 479 to Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples (3 November 2018) 5.
[131] National Indigenous Australians Agency, *Indigenous Voice Co-design Process: Final Report to the Australian Government* (July 2021) 168
[132] Gabrielle Appleby, Sean Brennan, Megan Davis and Dylan Lino, 'A Constitutionally Enshrined First Nations Voice: Submission to the Co-Design Process for an Indigenous Voice (30 April 2021); National Indigenous Australians Agency, *Indigenous Voice Co-design Process: Final Report to the Australian Government* (July 2021) 172.
[133] Harry Hobbs, *Indigenous Aspirations and Structural Reform in Australia* (Hart, 2021) 220.
[134] *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14.

A related question asks how the Parliament will receive the advice offered by the Voice. While it is expected that in advising the government, the Voice may speak directly to various Ministers both informally and formally and any advice may be included in Cabinet submissions,[135] it is less certain how the Voice will speak to the Parliament. Some commentators have suggested that the Voice could present its views to a Parliamentary Committee modelled on the Joint Committee on Human Rights and empowered to receive and consider advice.[136] The Voice may also be empowered to speak directly in Parliament from time to time. In either case, the Voice will rely on parliamentarians introducing amendments to any Bill. Consistent with the fact that the Voice is not a third chamber of Parliament, it will not be entitled to introduce amendments or vote on bills.

FNP Perspective: Ensuring consultation with the Voice is another challenging issue. The Voice will only secure legitimacy within Indigenous communities if it is seen as making a difference. It will only make a difference if it is capable of influencing law and policy to better reflect the rights and interests of Aboriginal and Torres Strait Islander peoples. There is no guarantee that this will happen. If Parliament and government are under a non-justiciable obligation to consult the Voice, failure to consult will have no legal effect. Even if Parliament and government choose to consult, they can dismiss the views they receive. There is no clear work around. The Voice will need to rely on its moral strength and build community and public pressure to compel the Parliament and government to engage. This requires politically adept leaders as well as clear evidence that the Voice is supported by Aboriginal and Torres Strait Islander peoples.

12. How should local communities be involved in the Voice?

All proposals understand the importance of ensuring local and regional communities are involved in the Voice. Delegates at the Regional Dialogues were adamant that the Voice should be built up from local communities. At Ross River, delegates agreed that the body 'must represent communities across Australia and have legitimacy in remote, rural and urban areas'.[137] Similarly, in Adelaide, the First Nations Voice was conceived as being 'drawn from the First Nations and reflect[ing] the song lines of the country',[138] while in Perth, very strong support for the body was conditioned on it 'represent[ing] all lands and waters across Australia'.[139] This support was reiterated in evidence to the 2018 Joint Select Committee. For example, the National Native Title Council argued that 'the proposition that a National Voice should have effective local and regional structures upon which the National Voice is founded is unarguably correct'.[140]

Commentators have envisioned the Voice acting as a 'channel' or 'interface' for local and regional voices, as well as simultaneously reporting back to the community.[141] A number of solutions for engaging local and regional communities in this manner have been proposed. Pat

[135] See Centre for Comparative Constitutional Studies, Submission No 289.1 to Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples (21 September 2018) 12.
[136] Parliament of Australia, Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Interim Report* (July 2018) 40, [3.98].
[137] Referendum Council, *Final Report of the Referendum Council* (30 June 2017) 30.
[138] Referendum Council, *Final Report of the Referendum Council* (30 June 2017) 30.
[139] Referendum Council, *Final Report of the Referendum Council* (30 June 2017) 30.
[140] National Native Title Council, Submission No. 464 to Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples (26 September 2018) 3.
[141] Referendum Council, *Final Report of the Referendum Council* (30 June 2017) 30 (Hobart, Darwin, Brisbane).

Turner has suggested that 20 regional authorities might elect one representative in each state and territory, while Peter Yu has argued that every Native Title Prescribed Body Corporate could elect a member to the national Voice.[142] This approach would connect to the cultural and legal authority of country.

The most significant articulation is the work undertaken by Langton and Calma. The Langton and Calma report creates two levels of Voice: 35 Local and Regional Voices set up around the country, and a National Voice. The report does not prescribe how each Local and Regional Voice should look; rather, reflecting the diversity of Aboriginal and Torres Strait Islander communities, it sees each region deciding how best to select its members (subject to certain minimum principles around inclusive participation, cultural leadership and transparency and accountability). These Local and Regional Voices are expected to draw from and build around existing Indigenous organisations within the region.

The Langton and Calma model proposes a 24-member National Voice. This means that each Local and Regional Voice will not necessarily be able to elect their own member to the national body. Instead, the voices within each state and territory will select members for the National Voice (perhaps via election or another approach). The model proposes the following distribution:

State or Territory	**Local and Regional Voices**	**National Voice Members (gender balance)**
New South Wales	7	2 plus 1 remote member
Queensland	7	2 plus 1 remote member
Western Australia	7	2 plus 1 remote member
Northern Territory	6	2 plus 1 remote member
South Australia	3	2 plus 1 remote member
Victoria	2	2
Tasmania	1	2
ACT	1	2
Torres Strait	1	2 plus 1 mainland Torres Strait Islander member
Total:	**35**	**24**

For example, the 7 Local and Regional Voices in Western Australia, Queensland and New South Wales will each appoint 3 members to the National Voice (two base members plus an additional remote member). The National Voice will, therefore, be directly accountable to Local and Regional Voices, rather than the Aboriginal and Torres Strait Islander electorate.

Concerns have been raised over the size of the National Voice. Some Indigenous leaders have argued that 24 members is too few, arguing that each Indigenous nation should be represented on the body. Others have remarked that 24 members may be too many, hindering its effective administration. This issue will need to be considered.

[142] Parliament of Australia, Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Interim Report* (July 2018) 33.

FNP Perspective: The First Nations Voice's relationship to local and regional communities is critical to its success. If Indigenous communities on the ground do not feel that their interests are represented in the Voice, they are unlikely to engage with the system. This will compromise the legitimacy and credibility of the Voice, weakening its ability to influence law and policy. The Langton and Calma model provides the necessary structural linkage and accountability between the national and local bodies. This is not to say it is the only possible approach and the connection with Native Title Prescribed Bodies Corporate is also likely to be an important consideration. Whatever model is adopted will need to ensure that local and regional bodies can engage with and draw on the expertise and strength of existing Indigenous organisations. This relationship is likely to be an ongoing source of tension that will need to be managed through personal relationships and political sensitivity.

3. Constitutional entrenchment

Two questions arise when considering constitutional entrenchment. First, what form of words should be inserted into the Constitution to give effect to the First Nations Voice. Second, can a constitutional amendment guarantee that the Parliament will legislate to establish a First Nations Voice? Each will be considered in turn.

A. The Form of Words

The 2018 Joint Select Committee on Constitutional Recognition noted in its final report that it received 'no fewer than 18 different versions of constitutional amendments which might be put at a referendum'.[143] The Committee divided these proposals into three groups: (1) provisions dealing with local and regional voices; (ii) provisions dealing with a national voice; and (iii) provisions dealing with a hybrid of matters. Another way to divide these proposals is by focusing on the level of detail. Some proposals outline key distinct functions that the Voice may exercise, while others prefer to leave all detail for Parliament to determine at a later date. This section of the paper will outline several major proposals. It will begin with the form of words presented by Prime Minister Albanese at the Garma Festival in July 2022.

1. The Government's Proposed Amendment

At Garma, the Prime Minister proposed adding three short sentences to the Constitution. The proposed amendment reads:

> 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.

Prime Minister Albanese has made clear these words are intended to be 'the next step in the discussion about constitutional change' and 'may not be the final form of words'.[144] The government's proposal is drawn from the model offered by the Aboriginal members of the Referendum Council and Technical Advisers to the Referendum Council Regional Dialogues. This group has consistently offered a simple amendment. In 2018, they proposed the introduction of a new Chapter 9 into the Constitution, consisting of a single section 129. It has changed slightly since 2018.

> 2018 Proposal
>
> Chapter 9 First Nations
> Section 129 The First Nations Voice
> 1. There shall be a First Nations Voice.

[143] Parliament of Australia, Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Final Report* (November 2018) ix, 86.
[144] Prime Minister Anthony Albanese, 'Address to Garma Festival' (30 July 2022).

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.[145]

Updated Proposal

Section 129 The First Nations Voice
1. There shall be a body, to be called the First Nations Voice.
2. The First Nations Voice
    a. shall present its views to Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander peoples; and
    b. may perform such additional functions as the Parliament provides.
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.[146]

These proposals are similar and will be considered together. The table below sets out similarities and differences. Brief commentary follows.

Element	**Technical Advisers**	**Government**
Name of Body	First Nations Voice	Aboriginal and Torres Strait Islander Voice
Primary function	Present its views	Make representations
To what Institutions?	Parliament and the Executive	Parliament and the Executive Government
On what issues?	Matters relating to Aboriginal and Torres Strait Islander Peoples	Matters relating to Aboriginal and Torres Strait Islander Peoples
What is Parliament's role	Make laws with respect to the composition, functions, powers and procedures Provide the Voice with additional functions	Make laws with respect to the composition, functions, powers and procedures
Justiciable?	No	No

The Uluru Statement from the Heart called for a First Nations Voice. It is not clear why the government has adopted a different name. It may reflect a political or strategic concern that some Australians are unfamiliar with the terminology 'First Nations', or do not support the implicit recognition of sovereignty that the language carries. It may also reflect a legal concern. There is a clear (though contested) legal definition of Aboriginality. There is no similar legal definition of 'First Nations' person.

[145] Pat Anderson, Noel Pearson, Megan Davis, Sean Brennan, Gabrielle Appleby, Dylan Lino and Gemma McKinnon, Submission No 479 to Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples (3 November 2018) 6.
[146] Sean Brennan, 'NAIDOC Week 2021: The Wording is Not the Problem', *Indigenous Constitutional Law Blog* (6 July 2021) <https://www.indigconlaw.org/home/naidoc-week-2021-the-wording-is-not-the-problem>.

The government's proposal empowers the Voice to 'make representations', rather than 'present its views'. It is not clear whether this is a broader or narrower scope. Both forms of words make clear that the Voice is not limited to a reactive function, responding to issues that arise in Parliament. Rather, on both accounts, the Voice is a pro-active institution, capable of developing its own positions and carrying them to government and the Parliament. Similarly, both models confirm that there is no obligation on Parliament to follow those views or representations.

Janet Albrechtsen has claimed that 'make representations' draws on a large body of migration law jurisprudence which requires 'active intellectual consideration'.[147] This phrase, Albrechtsen suggests, will be interpreted by an activist High Court to give 'activists who are members of the voice…leverage over parliament that previously they, and we, never imagine possible'.[148] Albrechtsen is not a constitutional lawyer. No constitutional lawyer has made this argument. Indeed, two former Chief Justices of the High Court of Australia – Murray Gleeson and Robert French – see no danger.[149] Nonetheless, it once again emphasises the tenor of the campaign that will need to be countered during the referendum.

The government's model does not include a clause making clear that the Parliament can provide the Voice with additional functions. However, such a clause is not legally necessary. Each model confirms that Parliament has significant authority in developing – and revising – the Voice. This allows the body to evolve in line with the views and wishes of Aboriginal and Torres Strait Islander peoples. It also makes clear that Parliament may set up in legislation 'the extent to which, and how, the Parliament and the Executive might respond to the views presented'.[150]

The Voice is intended to be a representative body but neither model explicitly provides that the Voice shall 'represent' or be 'representative of' Aboriginal and Torres Strait Islander peoples. On the one hand, this may allow the Parliament to simply appoint a group of prominent Indigenous (and perhaps even non-Indigenous Australians) to advise them on law and policy. Such a decision would clearly run counter to the spirit of the Voice, but the proposed amendment does not prevent this. On the other hand, there may be some concern that an amendment describing the body as 'representative', may leave the body open to challenge. A disaffected or unsuccessful candidate might be able to challenge the composition of the Voice in court arguing that it is not truly 'representative' of Aboriginal and Torres Strait Islander peoples.

2. Other Proposals

Discussion on the form of words should commence with the model offered by Prime Minister Albanese. However, over the years, several other options have been proposed. This section will outline several major alternatives that may help inform the design of a final model.

[147] Janet Albrechtsen, 'PM's Proposal Ensures a Voice will be a Disaster', *The Australian*, 13 August 2022.
[148] Janet Albrechtsen, 'PM's Proposal Ensures a Voice will be a Disaster', *The Australian*, 13 August 2022.
[149] Murray Gleeson, 'Recognition in Keeping with the Constitution: A Worthwhile Project' (Uphold and Recognise, 2019); Robert French, 'Voice of Reason Not Beyond Us', *The Australian*, 31 July 2019.
[150] Pat Anderson, Noel Pearson, Megan Davis, Sean Brennan, Gabrielle Appleby, Dylan Lino and Gemma McKinnon, Submission No 479 to Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples (3 November 2018) 10.

Noel Pearson has endorsed Albanese's initial proposal. However, Pearson has suggested adding a short preliminary sentence formally 'recognising' Aboriginal and Torres Strait Islander peoples 'as a prelude to the three substantive sections'.[151] Pearson has in mind a preambular or introductory phrase along the lines of the following:

> In recognition of Aboriginal and Torres Strait Islanders as the First Peoples of Australia
> 1. There shall be a body, to be called the Aboriginal and Torres Strait Islander Voice. …

Prior to Garma, a range of other proposals have been offered. In 2018, the Cape York Institute proposed a similar – though less neat – model.

> Section 60A
> There shall be a First Nations body, external to Parliament, established by Parliament, to advise Parliament and the Executive on proposed laws and other matters relating to Aboriginal and Torres Strait Islander affairs, under procedures to be determined by Parliament, and with such powers, processes and functions as shall be determined by Parliament.[152]

The model offered by 'Uphold and Recognise', a conservative non-profit organisation committed to both upholding the Australian Constitution and the substantive recognition of Indigenous Australians, is similar again. However, instead of referring to a National Voice, it proposed the recognition of local Voices.

> Section 70A
> Aboriginal and Torres Strait Islander bodies
> There shall be local Aboriginal and Torres Strait Islander bodies, with such composition, roles, powers and functions as shall be determined by the Parliament, including the function of collectively advising the Parliament on proposed laws relating to Aboriginal and Torres Strait Islander affairs.[153]

While it is now expected that any First Nations Voice will connect with a series of local and regional Voices, it seems odd to specifically cite local Voices in the federal Constitution. It may be more appropriate to choose a form of words that entrenches a national body and leaves legislation to set up local and regional Voices as needed. An early model by constitutional lawyer, Anne Twomey, proposed the creation of a national Voice and provided more detail on the relationship between the Voice and the Parliament.

> Section 60A
> 1. There shall be an Advisory Council, which shall have the function of providing advice to the Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander affairs.

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[151] James Elton, 'Constitution Should Recognise Indigenous People as First Australians, Says Noel Pearson,' *ABC News*, 1 August 2022 <https://www.abc.net.au/news/2022-08-01/constitution-should-recognise-indigenous-people-first-australian/101290044>.

[152] Parliament of Australia, Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Interim Report* (July 2018) 55 [3.167].

[153] Parliament of Australia, Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Interim Report* (July 2018) 56 [3.170].

2. The Parliament shall, subject to this Constitution, have power to make laws with respect to the composition, roles, powers and procedures of the Advisory Council.
3. The Speaker of the House of Representatives and President of the Senate shall cause a copy of the Advisory Council's advice to be tabled in each House of Parliament as soon as practicable after receiving it.
4. The House of Representatives and the Senate shall give consideration to the tabled advice of the Advisory Council in debating proposed laws with respect to Aboriginal and Torres Strait Islander affairs.[154]

Rosalind Dixon, also a constitutional lawyer, has offered several similar proposals that include additional detail on the functions and membership of the Voice. One model refers to both local and regional voices as well as a National Voice.

1. There shall be a national Aboriginal and Torres Strait Islander Voice to Parliament, and various regional, state and local Voices, with such powers as the Parliament deems necessary and appropriate to inform its use sections ss 51(xxvi) and 122, or the exercise of any other provisions of this Constitution.

2. The Parliament shall engage with the Voice and Voices when relying on sections ss 51(xxvi) and 122 of the Constitution and may engage either the Voice or Voices in respect of any other provision of this Constitution, or laws made thereunder.

3. Until the Parliament otherwise provides, the Voice and Voices shall:
    a. Be comprised of Aboriginal and Torres Strait Islander representatives chosen according to procedures agreed between the Commonwealth and Aboriginal and Torres Strait Islander peoples, based on principles of democracy, regional and local empowerment, gender equality and respect for traditional authority; and
    b. Have power to engage with any other Commonwealth state, territory or local government body or entity it deems appropriate.[155]

Another model enshrines a national body but empowers the Parliament to create local and regional bodies as well.

1. There shall be an Aboriginal and Torres Strait Islander Voice to Parliament, with such powers as the Parliament deems necessary and appropriate to inform its use sections ss 51(xxvi) and 122, or the exercise of any other provisions of this Constitution.

[154] Parliament of Australia, Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Interim Report* (July 2018) 53-54 [3.160]; Anne Twomey, 'Putting Words to the Tune of Constitutional Recognition', *The Conversation* (20 May 2015) <https://theconversation.com/putting-words-to-the-tune-of-indigenous-constitutional-recognition-42038>.
[155] Rosalind Dixon, Submission No 316.1 to the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples (18 September 2018) 2.

2. The Parliament shall engage the Voice when relying on sections ss 51(xxvi) and 122 of the Constitution, and may engage it in respect of any other provision of this Constitution, or laws made thereunder.

3. Until the Parliament otherwise provides, the Voice shall:
    a. Be comprised of Aboriginal and Torres Strait Islander representatives chosen according to procedures agreed between the Commonwealth and Aboriginal and Torres Strait Islander peoples, based on principles of democracy, regional and local empowerment, gender equality and respect for traditional authority; and
    b. Have power to engage with any other Commonwealth state, territory or local government body or entity it deems appropriate.
    c. Create appropriate regional, state and local councils to advise it on the exercise of its powers and functions, including its engagement with state and local entities, and empower such councils directly to engage with those entities in appropriate cases.[156]

In 2018, the Joint Select Committee considered that the large number of proposals to entrench a First Nations Voice in the Constitution revealed some uncertainty amongst constitutional lawyers over the most appropriate model.[157] However, the Committee noted that common features across the proposals do exist. Generally speaking, amendment proposals:

1. Describe the broad features of a First Nations Voice but defer responsibility for defining its structure and functions to the Australian Parliament
2. Unequivocally uphold the sovereignty of the Australian Parliament by providing for a Voice which is external to Parliament, and which has functions which do not constitute a veto over Parliament; and
3. Provide for a First Nations Voice in a manner which renders its structure and functions non-justiciable, so as to avoid legal uncertainty.[158]

The Joint Select Committee nevertheless remained concerned that key elements of the proposals differed significantly according to the drafter's understanding of the purpose, structure, and operation of the Voice.[159] The Committee noted that several important elements would need to be resolved before a referendum could be held. They included uncertainty over the existence, role, and structure of local and regional Voices, as well as how the Voice spoke to Parliament and how consultation would occur. The Government's initial proposal does not resolve all of these questions. While these details do not need to be incorporated into the Constitution, they will need to be resolved if legislation to establish the Voice is to be drafted.

[156] Rosalind Dixon, Submission No 316.1 to the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples (18 September 2018) 2-3.
[157] Parliament of Australia, Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Final Report* (November 2018) 117-8 [3.138], [3.143]
[158] Parliament of Australia, Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Final Report* (November 2018) 94-95.
[159] Parliament of Australia, Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Final Report* (November 2018) 96.

FNP Perspective: The success of a referendum on a First Nations Voice depends on clarity over the conceptualisation and function of the Voice. This clarity will inform the words of the constitutional amendment. At Garma, the Commonwealth Government proposed a clear and simple amendment that should form the basis of discussions. As noted in the following section, the question and amendments should be finalised between the Government and a leadership group representing Aboriginal and Torres Strait Islander people (composed of those involved in the various constitutional recognition processes, community-controlled organisations, and other leaders).

B. Will the Parliament Establish the Voice?

A constitutional amendment to provide Parliament the power to establish a Voice does not mean that Parliament must enact legislation to establish a Voice. Section 101 of the Constitution mandates the existence of an Inter-State Commission in language similar to the government's proposed amendment to insert an Aboriginal and Torres Strait Islander Voice. It provides:

> There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder.

An Inter-State Commission was first established in 1913. The Commission was intended to administer and adjudicate matters relating to inter-state trade. To fulfil its functions, the Commission exercised a combination of executive and judicial powers. However, in a 1915 decision, the High Court of Australia held that the Constitution implicitly created a separation of powers, such that judicial power could only be exercised by courts established in accordance with Chapter III of the Constitution.[160] The Commission was not a Chapter III court and therefore could not exercise judicial powers. Without its adjudicatory functions, the Commission lost its sense of purpose; it became 'merely a body of inquiry without any power of enforcing its decisions'.[161] When the initial term of its commissioners expired, new appointments were not made. Although subsequent attempts have been made to revive the Commission, no Inter-State Commission exists.

The Commission's non-existence is 'somewhat remarkable' given 'the mandatory language of s 101'.[162] Could the same thing happen to the Voice? It could, but it is very unlikely. Shireen Morris has argued that there 'are several reasons to be optimistic' that Parliament will establish a Voice.[163]

First, Morris argues that the Inter-State Commission was fatally weakened by the High Court. As a First Nations Voice is intended to be non-justiciable, there is no reason to believe that the High Court will read down the constitutional amendment to weaken the effectiveness of the Voice. Of course, whether this is true depends ultimately on the form of words adopted and the approach of the High Court. It may be that some elements of the Voice are drafted so as to

[160] *New South Wales v Commonwealth (The Wheat Case)* (1915) 20 CLR 54.
[161] John La Nauze, 'The Inter-State Commission' (1937) 9(1) *The Australian Quarterly* 48, 55.
[162] Andrew Bell, 'The Missing Constitutional Cog: The Omission of the Inter-State Commission' (2009-2010) (Summer) *Bar News* 59, 59.
[163] Shireen Morris, *A First Nations Voice in the Australian Constitution* (Hart, 2020) 257-262

create justiciability. For example, a constitutional clause might be drafted to ensure that the body is representative of Aboriginal and Torres Strait Islander peoples, to prevent the government from simply appointing chosen people or indeed from appointing non-Indigenous Australians. The High Court might then read this clause in unexpected ways.

Second, Morris argues that the Commission's broad adjudicatory powers threatened other institutional actors such as the High Court and Parliament. Morris explains that as a representative body the Voice would not complicate existing constitutional principles like the separation of powers. This is true. However, the Voice will not be welcomed by all members of Parliament and the government. The history of Indigenous representative bodies at the federal level suggests that governments are not afraid of abolishing institutions when circumstances present themselves.[164]

Third, Morris notes that while the Inter-State Commission does not exist, many of its functions are exercised by other bodies. The absence of a constitutionally enshrined First Nations Voice is keenly felt by Aboriginal and Torres Strait Islander peoples. Although many Indigenous organisations speak to government, the Regional Dialogues revealed that the lack of a permanent national representative body created a fundamental torment of powerlessness.[165] A constitutionally entrenched First Nations should exercise a distinct and complementary function to the existing landscape of Indigenous organisations. Relatedly, if a First Nations Voice is endorsed by the Australian people in a referendum, it will carry significant moral and political weight. It will be politically very difficult for Parliament to not enact legislation to establish a Voice. The Inter-State Commission did not enjoy this same popular mandate.

FNP Perspective: A referendum to provide Parliament the power to establish a First Nations Voice will not guarantee that Parliament will exercise that power. However, if the Voice proposal is endorsed by the Australian people in a referendum there will be significant political pressure on the government and Parliament to enact legislation to establish a Voice. It is very unlikely that legislation will not be passed by the Parliament. Even so, a future Parliament will retain the authority to abolish the Voice. As the Government's initial proposal is drafted, there will be no legal redress to force the government or Parliament to replace the Voice. Nevertheless, there will be substantial political and moral pressure on the government and Parliament to legislate a new body.

[164] See Harry Hobbs, *Indigenous Aspirations and Structural Reform in Australia* (Hart, 2021) ch 5.
[165] Uluru Statement from the Heart, 26 May 2017.

4. Implementation Questions

Once the final form of words is chosen, attention will turn to the referendum and the process of implementing constitutional change. There are several related questions that need to be considered:

1. Should the Voice be legislated prior to a referendum, or should the referendum be held first?
2. How much detail about the Voice should be included, or accompany, the referendum question?
3. Should other proposals for constitutional change be included or should the Voice be considered by itself?
4. Should the mechanics of the referendum itself be amended prior to holding a vote?
5. What can be done in a public education campaign?

This section will explore each question in turn.

A. Should the Voice be Established Before a Referendum is Held?

Australia has a poor record of referendum success. Only 8 out of 44 referendums to alter the Constitution have succeeded. Some commentators have suggested that to improve the likelihood of a successful Yes vote, the Voice should be established via legislation prior to any referendum. For instance, the current Human Rights Commissioner, Lorraine Finlay has explained that the benefit of this approach is that it would 'provide an opportunity to establish mechanisms, see how they work and make whatever amendments are necessary in the parliamentary context'. Finlay has argued further that testing and refining the concept through legislation might increase the likelihood of a successful referendum as all Australians would see the strengths and merit of the Voice.[166] Former High Court Chief Justice Murray Gleeson (who served on the Referendum Council), and Father Frank Brennan have also argued that the Voice should be legislated first. Brennan explains:

> It's not only sensible but also imperative first to legislate and road test any Voice … I doubt the wisdom of trying to get it up at referendum before you have first constructed the Voice, so voters can see what it sounds like.[167]

Finlay, Gleeson, and Brennan's view is in the minority. Almost all Indigenous leaders and constitutional lawyers do not believe that the Voice should be legislated first. The key concern that many share is that by legislating first the momentum for constitutional reform will be lost. In 2018, Kyam Maher, the then Shadow Minister for Aboriginal Affairs in South Australia explained:

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[166] Parliament of Australia, Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Interim Report* (July 2018) 60, [3.187].

[167] Frank Brennan, 'Walking Together for a Better Future', *Eureka Street*, 1 October 2018 <https://www.eurekastreet.com.au/article/walking-together-for-a-better-future>. See further Murray Gleeson, 'Recognition in Keeping with the Constitution: A Worthwhile Project' (Uphold and Recognise, 2019) 9.

> Once you take half the step, it's very easy not to take the full step. There's a bit of incentive to say, "It's working okay, so let's not take that next step to constitutionally enshrine it'.[168]

The law firm, Gilbert + Tobin, made a similar point:

> Legislating a voice to Parliament as a first step toward constitutional enshrinement may very well be damaging and counter-productive. It could unnecessarily and significantly, if not permanently, delay the introduction of a constitutionally entrenched voice without contributing to the likelihood of success of any subsequent referendum.[169]

Gabrielle Appleby, Sean Brennan, Megan Davis and Dylan Lino favour a referendum first. In a comprehensive submission to the Langton and Calma co-design process, the group explained that legislating a Voice 'predetermines that constitutional enshrinement will never happen':[170]

> Legislating the Voice first will fatally undermine the public's sense that the further step of constitutional enshrinement needs to be taken – even though constitutional enshrinement is essential for the Voice's legitimacy, independence and longevity. Furthermore, legislating first is premised on the erroneous idea that constitutional enshrinement will naturally follow once the Voice has shown itself to be effective. That idea is erroneous for two reasons. First, it is highly unlikely that a legislated-only Voice will be able to demonstrate its effectiveness: only constitutional enshrinement can guarantee that the Voice has the legitimacy, independence and durability it needs to be effective. Second, even if a legislated-only Voice could somehow operate effectively, it is extremely unlikely that a Parliament or government confronted with an effective legislated Voice – that is, a Voice that successfully tempers the exercise of political power by Parliament and the government in Indigenous affairs – will want to confer greater legitimacy, independence and permanence on that institution by writing it into the Constitution. Instead of strengthening an effective legislated Voice through constitutional enshrinement, the Parliament and government are far more likely to weaken or even abolish it, as they have with earlier Indigenous representative bodies.[171]

It is also important to recall that the Regional Dialogues saw constitutional entrenchment as a key feature of the Voice. Delegates in Brisbane recalled that ATSIC had been abolished 'at the stroke of a pen'.[172] As delegates in Adelaide noted, focusing on the Constitution is critical 'because unless change is embedded deep in the system, structural change, governments will

[168] Parliament of Australia, Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Interim Report* (July 2018) 60, [3.189].
[169] Gilbert + Tobin, Submission No 315.1 to the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples (3 October 2018) 2.
[170] Gabrielle Appleby, Sean Brennan, Megan Davis and Dylan Lino, 'A Constitutionally Enshrined First Nations Voice: Submission to the Co-Design Process for an Indigenous Voice (30 April 2021) 9.
[171] Gabrielle Appleby, Sean Brennan, Megan Davis and Dylan Lino, 'A Constitutionally Enshrined First Nations Voice: Submission to the Co-Design Process for an Indigenous Voice (30 April 2021) 9.
[172] Pat Anderson, Noel Pearson, Megan Davis, Sean Brennan, Gabrielle Appleby, Dylan Lino and Gemma McKinnon, Submission No 479 to Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples (3 November 2018) 5.

keep changing their minds and undoing reforms'.[173] In fact, the Voice was only endorsed by Aboriginal and Torres Strait Islander peoples on the basis that it would be put in the Constitution. There is no mandate in the Uluru Statement for a legislated Voice.

FNP Perspective: Before they decide to vote Yes in a referendum, many Australians will want to know what the Voice will look like and how it will work. This is understandable and sensible. However, it does not require establishing a Voice in legislation prior to a referendum. A detailed model (as discussed below) may be sufficient. There is also no guarantee that legislating first will enhance the likelihood of a successful referendum. Many commentators argue persuasively that legislating first will delay or frustrate a referendum. Furthermore, in any event, the Uluru Statement from the Heart endorsed the Voice on the basis that it was constitutionally enshrined. There is no mandate for a legislated Voice. On this basis, it is preferable to pursue a referendum before establishing the Voice.

B. What Sort of Detail about the Voice Should Accompany the Referendum Question?

There is firm agreement that some level of detail will need to accompany the referendum question if it is to be successful. It is assumed that a No case will be able to exploit a lack of detail to derail a referendum. A study of referendum history in Australia reveals that No cases have 'repeatedly characterised the proposals as threatening Australian traditions and have urged voters to stick with the less risky course, the status quo'. In the 1999 Republic Referendum, this strategy was memorably expressed as 'Don't Know? Vote No'.[174] Conservative forces are already lining up to run a repeat of this strategy. As former Prime Minister Tony Abbott told Radio National in July 2022, Australians are entitled to be given the information necessary to make an informed decision:

> You can't ask the people for a blank cheque on something as significant as this. If asked to vote on an unspecified voice, the natural response will be to say, 'If you don't know, vote no.' The last thing we want is a referendum designed to forward reconciliation defeated and inevitably that puts reconciliation back.[175]

Some level of detail is needed to give the referendum a chance of success. The key question is how much detail and detail on what: the model or the design process? There are three related options that could be taken:

1. Option 1: A Specific Constitutional Model

2. Option 2: A Legislated Model or Models

3. Option 3: Design Principles and Process incorporated into an Exposure Document

[173] Pat Anderson, Noel Pearson, Megan Davis, Sean Brennan, Gabrielle Appleby, Dylan Lino and Gemma McKinnon, Submission No 479 to Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples (3 November 2018) 5.
[174] George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010) 80.
[175] Paul Karp, '"I am Uncomfortable with this Voice": Abbott on Indigenous Voice to Parliament', *Guardian Australia*, 12 July 2022. See also Janet Albrechtsen, 'Show Respect for Voters—Give Us Full Details of a Voice', *The Australian*, 27 July 2022.

1. A Specific Constitutional Model

The first option is for the referendum question to ask Australians to support a particular model of a First Nations Voice to be put in the Constitution.

This option can be discarded. While several proposals for constitutional alteration provide some detail of the functions or design of the First Nations Voice, no proposal recommends a complete model be set out in the Constitution. All proposals agree that the constitutional amendment should describe the broad features of the First Nations Voice but defer the detail to Parliament. This approach constitutes best practice in constitutional design, is consistent with Australian constitutional traditions, and accords with Indigenous peoples' right to self-determination. It is also consistent with the Uluru Statement from the Heart. The Uluru Statement called for a First Nations Voice to be put in the Australian Constitution. It did not ask for a particular model, but for the principle that Aboriginal and Torres Strait Islander peoples are entitled to be heard in law and policy that affects them.

Constitutional deferral is standard practice in constitutional design. As the Aboriginal members of the Referendum Council and the Technical Advisors who assisted the Indigenous working groups in the Regional Dialogues and the national constitutional convention noted, 'it is both usual and desirable that the detail of constitutional institutions is not precisely determined at the point of constitutional change. Rather, the broad parameters of the institutions are enshrined in the Constitution, with the detail determined later in legislation'.[176] This approach allows the institution to evolve in practice and ensures Parliament retains the authority to modify the body's power and functions as it determines. It is also consistent with Australia's Constitution. The Constitution establishes many key institutions but leaves their detail and design to be worked out later by Parliament in legislation. Rosalind Dixon has noted that the phrase 'until the Parliament otherwise provides' occurs on at least 18 occasions.[177] Similarly, this approach is consistent with Indigenous peoples right to self-determination. It will provide flexibility to enable the Voice to evolve in accordance with the wishes of Aboriginal and Torres Strait Islander peoples. Placing too much detail in the Constitution would mean a referendum is required to adapt and develop the body. It is far simpler to change legislation if needed.

It appears that the Government recognises this. At the Garma Festival, Prime Minister Albanese suggested that the referendum question might ask Australians a simple proposition:

> Do you support an alteration to the Constitution that establishes an Aboriginal and Torres Strait Islander Voice?[178]

While this question may change, there is little appetite for the referendum question to ask Australians to endorse a specific constitutional model.

[176] Pat Anderson, Noel Pearson, Megan Davis, Sean Brennan, Gabrielle Appleby, Dylan Lino and Gemma McKinnon, Submission No 479 to Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples (3 November 2018) 11.
[177] Parliament of Australia, Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Interim Report* (July 2018) 51, [3.150].
[178] Prime Minister Anthony Albanese, 'Address to Garma Festival' (30 July 2022).

2. A Legislative Model or Models

The second option is for the referendum question to be accompanied by one or more legislative models. The referendum question will remain at the level of principle, but Australians will be provided with details in the form of draft legislation, outlining either a particular model that will be adopted, or one or more models that could be adopted. This approach would provide all Australians with sufficient information as to what the Voice would look like and how it would operate to inform their vote.

Several Indigenous leaders prominent in the national debate on constitutional recognition have endorsed this approach. In a major speech to the National Museum of Australia in 2021, Noel Pearson (a member of the Referendum Council), called for a legislative model to be developed prior to the referendum:

> Let us complete the legislative design of the voice, and produce an exposure draft of the bill so that all parliamentarians and the members of the Australian public can see exactly what the voice entails. Let us set the bill aside and settle on the words of a constitutional amendment that recognises Indigenous Australians and upholds the Constitution and put the amendment to a referendum of the people at the next best opportunity.[179]

Thomas Mayor, a prominent campaigner for the Uluru Statement, has made similar statements. In 2018, he argued that a co-design process should develop the Voice before proceeding to a referendum.[180]

However, it is important to note that Pearson and Mayor's statements were made when the Coalition was in government. They may have changed their mind now that the ALP is in government. This is not the case for everyone. In recent comments to the *Australian*, Marcia Langton has argued that legislation for the voice should be tabled in parliament 'before the referendum':

> Clarity on the question to be put to the people is essential and avoiding the matter of the structural arrangements for the voice does not achieve the clarity that many Aboriginal and Torres Strait Islander people will require. If you don't present the voter with the available information in some form, then the voter is going to say 'I don't know what I am voting for'.[181]

Pat Turner, the Coalition of Peaks Convenor, has also argued that more detail is needed before a referendum can be held. In June 2022, Turner noted:

> I accept the totality of the Uluru Statement and I am very supportive of a national voice to the parliament, but I need to see some detail here. I want some meat on the bones. And the proponents of the voice have got to start putting that out

[179] Noel Pearson, 'It's Time for True Constitutional Recognition' (Speech to the National Museum of Australia, 17 March 2021) <https://capeyorkpartnership.org.au/its-time-for-true-constitutional-recognition/>.
[180] Parliament of Australia, Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Interim Report* (July 2018) 58 [3.178].
[181] Greg Brown, 'Voice Should be Fully Formed before Poll: Langton', *The Australian*, 12 July 2022.

> because I am not the only Aboriginal person wondering what this is going to look like.[182]

The Langton and Calma report is the only significant articulation of the Voice. Marcia Langton has argued that this report should form the basis of the legislative model:

> What we've set out in our report for a Voice is very straightforward and clear and is the preferred option of most Aboriginal and Torres Strait Islander people. We consulted widely throughout the country. …When people say they want more detail, all that tells me is that they refuse to read our report, because all the detail is there. There's over 500 pages of detail, and I see this demand for more detail as just a mystery of making and sewing confusion.[183]

However, a key problem in putting out a legislative model before a referendum is that the Langton and Calma report remains controversial amongst Indigenous interests. Many Aboriginal and Torres Strait Islander people and organisations considered the Co-design consultation process problematic, and some questions have not yet been resolved. Given the Federal Government's preference to hold a referendum in this term of Parliament, it is very likely that any legislative model will be substantially based on this report. It is unlikely there will be enough time to conduct another comprehensive consultation process if the Government wants to have a Voice established before the next Federal election. It is also risky and could cause more conflict and delay. The Langton and Calma model could be adapted and developed further to finalise these issues, but this would have to be done in partnership with Indigenous representatives if the model is to have majority support.

The Federal Opposition has not yet outlined its position but is calling for more detail. When it was in Government, the Coalition strongly opposed the Referendum Council's recommendation to establish a constitutionally enshrined Voice to Parliament. However, the Opposition Leader has publicly indicated that the Coalition parties are prepared to consider the Government's proposal if it will improve life outcomes for Aboriginal and Torres Strait Islander peoples. It has also appointed Julian Leeser MP as Shadow Attorney-General and Indigenous Australians spokesman, who is a previous Co-Chair of the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples. Leeser has been open, as a backbencher, to considering the Voice. In recent comments to the media, Leeser has been clear that the Opposition needs to see more detail before they decide whether to support the referendum or not:

> Leeser said that the difficulty with referendums in Australia was that they were "never about the broad principle", but rather about the detail, and many people were not engaged on the issue.
>
> "There are many Australians who haven't paid any attention to this, and in a referendum, people will go to the polls and whether they've been following the

[182] Paige Taylor and Sarah Ison, '"I'm Struggling to See Way Forward on Recognition', *The Australian*, 25 June 2022.
[183] Bridget Brennan, Dana Morse and Kirstie Wellauer, 'Marcia Langton Calls for Decisive Action from the Government to Fix Past Failures and Constitution that "Remains Racist" Ahead of Garma Festival', *ABC News*, 29 July 2022 <https://www.abc.net.au/news/2022-07-29/uluru-statement-from-the-heart-in-focus-at-garma-festival/101280520>.

> debate closely or haven't followed it at all they will be asked about to vote on this, and this is why it's important to get the detail right," he said.[184]

Liberal Senator Kerrynne Liddle, one of the Coalition's two Indigenous parliamentarians has echoed Leeser's position, arguing that the Voice 'lacks detail' and is 'being rushed to meet a pointless deadline':

> The critical thing is they have to explain the detail. If people are going to go to a referendum and say yes, the details have to be settled first. How can you possibly agree to something where you don't know the detail? The deadline is far too close if that's the deadline that the government is aiming for [a referendum within three years].[185]

It is not clear what level of detail will satisfy members of the Federal Opposition. In an editorial, *The Australian* newspaper argued that considerable detail will be necessary for a referendum to succeed:

> Before they back it, voters will want to know more. How will membership of a voice be elected or appointed? If voted in by Indigenous people, how will Indigenous be defined? How many people will serve on a voice, and for how long? How much will it cost? Will discussions on issues such as grog bans in remote communities be confined to voice members from those areas?[186]

These questions are very specific. The Langton and Calma report do not provide answers to all of them. The government also cannot simply provide answers. Aboriginal and Torres Strait Islander peoples will need to reach a consensus on these issues. Developing a consensus on issues at this level of detail may take considerable time.

Megan Davis has argued that some calls for detail are disingenuous.[187] This is likely true. However, what is also true is that many Australians of good faith will want more detail – including a clear and simple model of how the Voice will work – before they feel comfortable voting in favour of a Voice in a referendum. As Senator Jacquie Lambie has explained:

> I think that if you don't give that detail before you run this referendum, I'm not sure that you're going to get the votes. You're going to have to be very open and honest with the Australian people, you're going to have to take them with you.[188]

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[184] Sarah Martin, 'Coalition has Open Mind on Indigenous Voice Referendum, But Says PM Must "Bring Australians With Him"', *Guardian Australia* (27 June 2022) <https://www.theguardian.com/australia-news/2022/jun/27/coalition-has-open-mind-on-indigenous-voice-referendum-but-says-pm-must-bring-australians-with-him>.
[185] Ellie Dudley, 'All the Voice on the Voice to Parliament', *The Australian*, 19 July 2022.
[186] 'Lack of Detail on Voice is Risky', *The Australian*, 1 August 2022.
[187] Megan Davis, 'What Happens Next for the Voice?', *The Saturday Paper*, 6-12 August 2022.
[188] Ellen Ransley and Courtney Gould, '"It Will Fail": Lambie's Message to Albo', *The Australian*, 1 August 2022.

3. Design Principles and Process incorporated into an Exposure Document

The third option asks Australians to support the principle of a First Nations Voice rather than a specific model. The referendum question will not be accompanied by a detailed legislated model or models of how the Voice might look and operate. Instead, the government will provide Australians with a document outlining the key principles that will inform the design of a Voice, following a referendum. This may include detail concerning the composition, functions, and powers of the Voice. The document will also explain how a design process will be run following the referendum.

The Indigenous Law Centre (ILC) at UNSW have recommended this approach. In a submission to the 2018 Joint Select Committee, the ILC argued that presenting an 'exposure draft' or similar that set out a model of what the Voice might look like 'has the capacity to mislead the public'. This is because Australians will be asked to support the broad principle of a First Nations Voice, while empowering Parliament to determine the functions, composition, powers, etc. of the Voice.

> The people of Australia are not being asked to vote for a particular design of the Voice, say, 'Model A'. What they are being asked to vote upon is more like an enabling provision that will allow the Parliament to select 'Model A', or 'Model B', or 'Model C', or 'Model X', in the future. Indeed, it would be misleading to say to the Australian people that they should vote 'YES' in a referendum for a particular model. That model might not be enacted by the Parliament for any number of reasons. Even if it is enacted, it might be amended, to a greater or lesser degree, so it is 'Model AA'. It might be entirely repealed and replaced so it is 'Model B'.[189]

However, the ILC recognise that some level of detail will be necessary to provide sufficient confidence among all Australians that they understand what they are voting for. They argue that 'What can and should be determined prior to the referendum is the process by which the design of the Voice will be worked out'.[190] They continue:

> Before the referendum, the Voice design process should be set out in a draft Bill that is endorsed in a motion by Parliament and released to the public alongside the referendum question. Setting out the Voice design process in detail before the referendum will provide sufficient certainty and confidence to First Nations, the Parliament, the Executive, the States and the Australian people to approve the constitutional amendment.[191]

The ILC has developed a draft Bill outlining their preferred approach to designing the First Nations Voice. They envision an extensive and deliberative Indigenous-led process that looks

[189] Pat Anderson, Noel Pearson, Megan Davis, Sean Brennan, Gabrielle Appleby, Dylan Lino and Gemma McKinnon, Submission No 479 to Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples (3 November 2018) 12.

[190] Pat Anderson, Noel Pearson, Megan Davis, Sean Brennan, Gabrielle Appleby, Dylan Lino and Gemma McKinnon, Submission No 479 to Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples (3 November 2018) 13.

[191] Pat Anderson, Noel Pearson, Megan Davis, Sean Brennan, Gabrielle Appleby, Dylan Lino and Gemma McKinnon, Submission No 479 to Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples (3 November 2018) 13.

'something like that which produced the Uluru Statement from the Heart itself',[192] and which is then examined by a Parliamentary Joint Committee before legislation is put to the Parliament. Former Prime Minister Malcolm Turnbull has recently recommended a similar approach.[193]

a) No Accompanying Legislated Model is Sensible

This option is consistent with the Guiding Principles drawn from the Referendum Council Regional Dialogues and respects Parliament's authority to ultimately determine the functions, composition, and powers, etc., of the Voice. It also maintains focus on the principle of constitutional change: whether Aboriginal and Torres Strait Islander peoples should have a voice on law and policy that affects them, rather than on any particular legislative model. The risk of pointing to a model is that it may lead Australians to vote No on the basis that they prefer a different approach—a problem that derailed the 1999 republic referendum.

It appears – but it is not clear – that the Government is supportive of this approach. Linda Burney MP, the Minister for Indigenous Australians, has gestured towards not providing a legislative model, noting: 'I don't know having a detailed model out there would lead to a clean question about what should be observed in the Constitution'.[194] In the lead up to the Garma Festival, Senator Patrick Dodson explained that the government will present an 'exposure document' that sets out key elements of the proposed model for the Voice. It is not clear whether this document will outline a legislative model or design principles to inform a consultation process that leads to the development of the Voice. However, Senator Dodson has noted that he does not believe a model needs to be finalised before a referendum.[195] Prime Minister Albanese has also argued that releasing every possible detail about the Voice is 'not the recipe for success'.[196] This suggests the government will not release an exposure draft model of legislation.

This option is complicated by the fact that one significant model exists. Whether it is endorsed or not, critics may point to features of the Langton and Calma model they do not support in an effort to derail the campaign. There are also practical concerns with adopting this approach. Australians are rightly entitled to sufficient detail on the Voice before they choose whether to amend the Constitution. Many Australians who have not followed the 12-year process of constitutional recognition closely, will expect to see a legislative model. Without a model, a strong No campaign will likely allege that proponents of the Voice are hiding their real agenda.[197] It will be difficult to respond to these attacks. Of course, as this paper demonstrates, there is a lot of detail out there, even if the specific detail has not been finalised.

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[192] Pat Anderson, Noel Pearson, Megan Davis, Sean Brennan, Gabrielle Appleby, Dylan Lino and Gemma McKinnon, Submission No 479 to Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples (3 November 2018) 14.

[193] Malcolm Turnbull, 'I Will Be Voting Yes To Establish an Indigenous Voice to Parliament', *Guardian Australia*, 15 August 2022 <https://www.theguardian.com/australia-news/commentisfree/2022/aug/15/i-will-be-voting-yes-to-establish-an-indigenous-voice-to-parliament>.

[194] Greg Brown, 'Voice Should be Fully Formed before Poll: Langton', *The Australian*, 12 July 2022.

[195] Paige Taylor, 'Labor to Lay Out Key Elements of its Indigenous Voice by Christmas', *The Australian*, 24 July 2022.

[196] Ellen Ransley and Courtney Gould, '"It Will Fail": Lambie's Message to Albo', *The Australian*, 1 August 2022.

[197] See, for example, Janet Albrechtsen, 'Show Respect for Voters—Give Us Full Details of a Voice', *The Australian*, 27 July 2022.

b) Considering the Design Process

The ILC has proposed a comprehensive Indigenous-led deliberative consultation process following the referendum. As noted above, this process would look 'something like that which produced the Uluru Statement from the Heart itself'.[198] The model that emerges would then be examined by a Parliamentary Joint Committee before legislation is put to the Parliament. This model is consistent with Indigenous peoples' right to self-determination. It also has the potential of building Indigenous consensus on the final version of the Voice which is critical if the Voice is to be effective and successful. However, it is also costly and may not result in consensus on key issues. It will also take significant time. A Voice may not be established before the 2025 election.

The Government is likely to want to introduce legislation to establish the Voice as quickly as possible after a successful referendum. If the Government does not believe the ILC consultation process is feasible, it could engage with as many Indigenous communities and leaders as possible, including with strategic places such as the Torres Strait, early and in the lead-up to the referendum. These meetings would not only build support for the principle of the Voice but consider key elements from the Langton and Calma model. These conversations would inform the Government's exposure document that will outline the key elements and principles of the Voice. A transparent process developed with communities and endorsed by Indigenous leaders could build support and consensus around key elements of the Voice. This process could also be used to develop draft legislation to establish the Voice. Following a successful referendum, that draft legislation could be introduced into Parliament and reviewed by a Senate Committee (in the usual way legislation is dealt within the Parliament), to allow all Australians to have their input.

4. The Role of the Federal Opposition

The Opposition has kept their position open. However, following the Prime Minister's Address to the Garma Festival, conservative media opposition to the Voice appears to have firmed. In addition to the comments of Tony Abbott, Peta Credlin and Janet Albrechtsen discussed above, Greg Sheridan has described the Voice as a 'betrayal' of the 'ideals of liberalism',[199] while Henry Ergas has complained an enshrined Voice would be inconsistent with political equality.[200] This is likely to impact on the thinking of Coalition members of Parliament. Reports in the *Sydney Morning Herald* suggest that there is 'a growing rebellion in Liberal party ranks' over the issue.[201]

As noted, Liberal Senator Kerrynne Liddle, one of the Coalition's two Indigenous parliamentarians has argued that the Voice is being rushed and lacks detail. Senator Jacinta Price, the second Indigenous member of the Coalition, is opposed to the Voice. That both Indigenous members of the Coalition are on the record against the Voice (at this stage) may place pressure on the Opposition to oppose any referendum.

[198] Pat Anderson, Noel Pearson, Megan Davis, Sean Brennan, Gabrielle Appleby, Dylan Lino and Gemma McKinnon, Submission No 479 to Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples (3 November 2018) 14.
[199] Greg Sheridan, 'Enshrined Voice Betrays Ideals of Liberalism', *The Australian*, 1 August 2022.
[200] Henry Ergas, 'Enshrined Voice Won't Advance Equality', *The Australian*, 4 August 2022.
[201] James Massola and Lisa Visentin, 'Liberal MPs Opposing Voice to Parliament Because of a Lack of Detail', *Sydney Morning Herald*, 29 July 2022.

The support of the Federal Opposition is important and preferable. The most significant study of Australian referendums has concluded that bipartisan support 'has proven essential to referendum success':

> Referendums need support from the major parties at the Commonwealth level. They also need broad support from the major parties at the state level. The history of referendums in Australia provides many examples of proposals defeated by committed opposition from a major party at either the Commonwealth or state level.[202]

Proponents of the Uluru Statement have challenged this assessment. In their view, lessons from Australian referendum history 'are a bit stale', given that the last successful referendum was held in 1977 and the last time the country voted on a proposal was in 1999.[203] They point to the 2017 same sex marriage plebiscite which was successful despite not obtaining clear bipartisan support, as well as evidence of declining trust in politicians and the rise of social media, to suggest that bipartisanship may not be as important as it once was.

They could be correct. However, given the consequences of a failed referendum vote – not only for the cause of Indigenous constitutional recognition but also the Albanese government – the government is likely to work slowly and methodically to do everything possible to secure bipartisan support and community ownership of the proposal.

FNP Perspective: The Government appears to be leaning towards the position that it will not provide a legislative model to accompany the referendum. Rather, it will provide an exposure document that outlines key elements and principles that explain how the Voice will look and how it will operate. This document should also include detail about the process of designing and securing agreement of Indigenous leaders to the final model. This approach is consistent with the Guiding Principles drawn from the Referendum Council Regional Dialogues and respects Parliament's authority to ultimately determine the functions, composition, and powers, etc., of the Voice. It also maintains focus on the principle of constitutional change. Not including a model also leaves less detail that can be the focus of political attack in a referendum campaign. Nonetheless, it has political risks.

- The absence of a clear model may lead to the Federal Opposition refusing to support the referendum. Without bipartisanship the referendum may fail.

- A strong No case will argue that without a clear understanding of what the Voice will look like, Australians should reject the referendum.

Proposing a legislative model raises its own concerns. If a model is identified, a future Parliament may be wary of amending that model, even when it is necessary, because it was endorsed by the Australian people in a referendum. It also obscures the principle of reform with the legislative detail. Finally, it also carries political risks.

[202] George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010) 244.
[203] Paul Kildea, 'NAIDOC Week 2021: 1967 to 2021: What Will A Successful Referendum Look Like in 2021/2022?', *Indigenous Constitutional Law Blog*, 7 July 2021 <https://www.indigconlaw.org/home/naidoc-week-2021-1967-to-2021-what-will-a-successful-referendum-look-like-in-2021/2022>.

- The more detail available the more there is for a No case to attack.

- The only model that exists may not be appropriate. The terms of reference for the Co-design process excluded consideration of constitutional change, the consultation process itself was rushed, and the model is not unanimously supported amongst the Indigenous community. There is also no guarantee that the Federal Opposition will ultimately support this model.

Assuming the Government adopts Option 3, the design process needs to be considered. An Indigenous-led deliberative consultation process following the referendum is important and valuable. However, it will also be costly and take considerable time. If the Government wants to establish the Voice as quickly as possible after a successful referendum, it will need to reach consensus with Aboriginal and Torres Strait Islander communities and leaders in the lead-up to the referendum or immediately after should it be successful.

Ultimately, whatever option is adopted needs to be done in a transparent manner and have the support of Aboriginal and Torres Strait Islander peoples. This is not only a question of respect. The effectiveness, legitimacy and credibility of the Voice relies on it having the support of Aboriginal and Torres Strait Islander peoples. If the Government is commencing conversations with Indigenous communities and national Indigenous representatives now to settle on the best way to proceed, these should be transparent, documented and made public.

C. Should Other Proposals for Constitutional Amendment be Included?

Major public inquiries during the 12-year debate on constitutional recognition have identified several provisions of the Australian Constitution that could be altered. Among others, these include repealing section 25 of the Constitution which anticipates that a State may disqualify the people of a particular race from voting, amending the race power in section 51(xxvi) to prevent the Parliament from passing laws that adversely discriminate against Aboriginal and Torres Strait Islander peoples, and recognising Indigenous languages. This part explores whether these or any other proposals for constitutional amendment should be included in a referendum.

The Referendum Council Guiding Principles hold that constitutional reform must have the support of First Nations peoples.[204] This is a non-negotiable. The Council asserted that a First Nations Voice is the 'only option for a referendum proposal that accords with the wishes of Aboriginal and Torres Strait Islander peoples',[205] and endorsed it on that basis. However, other proposals for constitutional change supported by Aboriginal and Torres Strait Islander peoples do exist. The Final Report of the Referendum Council, for example, reveals that a prohibition on racial discrimination was endorsed in over half of the Regional Dialogues: Hobart, Darwin, Perth, Sydney, Ross River, Brisbane, and Thursday Island.[206] While it does not appear to have been endorsed as a priority in every Regional Dialogue, it enjoys genuine and widespread support.

[204] Referendum Council, *Final Report of the Referendum Council* (30 June 2017) 27-28, Guiding Principle 9.
[205] Referendum Council, *Final Report of the Referendum Council* (30 June 2017) 2.
[206] Referendum Council, *Final Report of the Referendum Council* (30 June 2017) 15. No evidence is available in the Records of Meetings in the remaining Dialogues on this question.

A referendum to put a First Nations Voice in the Constitution may be paired with a proposal to incorporate a prohibition on racial discrimination. This could be done through an amendment to the races power in section 51(xxvi), or through a standalone section. A third question might seek the removal of section 25. These three questions complement each other; they would clean up Australia's Constitution by removing sections that allow or anticipate laws that discriminate on the basis of race, while also enshrining a First Nations Voice in the country's founding document. Many Australians may find it strange (and offensive) that our Constitution allows the Parliament to pass laws that can discriminate adversely against people on the basis of their race. They might be surprised that a referendum to put a First Nations Voice in the Constitution does not propose to alter that power. Indeed, the 2018 Joint Select Committee considered that:

> there would be broad political support for recognition of Aboriginal and Torres Strait Islander peoples comprising:
>
> - The repeal of section 25; and
> - The rewording of section 51(xxvi) to remove the reference to "race" and insert a reference to "Aboriginal and Torres Strait Islander peoples"[207]

There are complications, however. First, the Coalition parties have been consistent in their opposition to constitutional change to prohibit racial discrimination.[208] A referendum that includes this question risks a committed No campaign.

Second, many referendums have included multiple issues or multiple questions. The infrequency of constitutional reform has often led governments to put several proposals to the people on the one day. An examination of Australia's referendum history reveals that there is a significant risk of including too much in one question and too many questions in one referendum. As George Williams and David Hume have explained, 'questions containing multiple ideas aggregate opposition'.[209] An unpopular idea can drag down a popular proposal. Two popular proposals can also be defeated when groups opposing one of the ideas marshal together to vote No to the entire package. The same challenge can arise when a government asks multiple questions on the same day:

> Where a government asks multiple questions on the one day, some of which have broad support, but some of which are divisive, opponents of the divisive proposals may choose to run an indiscriminate, across-the-board No case. This may be based on the view that some voters may find it easier to understand a blanket call for a No vote.[210]

Opponents ran successful blanket No campaigns in 1974, 1988 and 1999. It is likely a similar campaign will be run on an Indigenous constitutional recognition referendum if there are multiple issues or questions – even in circumstances where multiple questions complement each other.

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[207] Parliament of Australia, Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Final Report* (November 2018) 136 [4.59].
[208] Victoria Laurie and Natasha Robinson, 'Time to Get a Move on with Recognition: Ken Wyatt', *The Australian* (10 July 2015); Patricia Karvelas, 'Historic Constitution Vote Over Indigenous Recognition Facing Hurdles', *The Australian* (19 January 2012).
[209] George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010) 212.
[210] George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010) 214

FNP Perspective: There are several provisions in the Constitution that arguably should be put to a referendum. The document has been changed only 8 times in over 120 years and it contains a number of increasingly outdated provisions. Nonetheless, Australia's referendum history suggests that a referendum on a First Nations Voice should not be accompanied by additional proposals. It should be a standalone question. This will give the referendum the greatest chance of success. However, there will need to be an agreed response formulated to those who seek more changes now. One point to note is that the Federal Government is also interested in pursuing a republic referendum. This may be pursued in a second term of government. Assuming that a First Nations Voice referendum is successful in 2023, there may be an opportunity to pursue more constitutional change after 2025.

D. The Mechanics of a Referendum

The arrangements and procedures for running a referendum are set out in the *Referendum (Machinery Provisions) Act 1984* (Cth) (the *Referendum Act*). However, the framework for conduct of referendums was first adopted in 1912, and little has changed since then. In a recent inquiry, the House of Representatives Standing Committee on Social Policy and Legal Affairs heard evidence that the Referendum Act is 'outdated and should be modernised to support referendums in contemporary Australia'.[211]

1. Setting the question

The *Referendum Act* requires the ballot paper at a referendum to include the long title of the proposed law. The long title of an Act is often wordy and technical, which may confuse voters.[212] The House of Representatives inquiry heard evidence that the Act could be amended to allow the question to be in clearer terms. The Indigenous Law Centre and Paul Kildea recommended using the short title, alongside a short factual description of the proposed reform developed by a joint parliamentary committee.[213]

2. Information and advertising

Under the *Referendum Act*, arguments in favour of and against the proposed constitutional amendment are printed in a Yes and No pamphlet. Both sides have 2000 words to make their case, which is authorised by a majority of the members of Parliament who voted for and against the amendment. The AEC must distribute the pamphlet to each address on the electoral roll no later than 14 days prior to the referendum. Several concerns have been raised with this approach:

- 2000 words is unnecessarily long and may confuse voters.
- There is no provision for the creation and distribution of neutral material that explains the proposed amendment, its context, and how it fits within the Constitution.

[211] Parliament of Australia, House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into Constitutional Reform and Referendums* (December 2021) 51 [4.11]
[212] Parliament of Australia, House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into Constitutional Reform and Referendums* (December 2021) 53, [4.24]
[213] Parliament of Australia, House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into Constitutional Reform and Referendums* (December 2021) 53-54 [4.25], [4.26]

- The Commonwealth is only able to provide information via the mailed Yes and No pamphlets. It is not able to provide information on the referendum via social media, or television and radio.
- Limitations on the Commonwealth government from advertising do not apply to State and Territory governments, political parties, or interest groups.
- There is no provision to ensure that information in the campaign must be accurate.
- There are no limits on the amount that individuals can spend on a campaign.
- There are no disclosure requirements, nor any limits on foreign donations to referendum campaigns.

In 1999, the Parliament enacted temporary legislation to establish and fund official YES and NO committees. The committees were charged with overseeing the campaigns, and each received $7.5 million in public funding. The committees were prohibited from accepting donations or raising other funds. A neutral campaign committee was also established and provided with $4.5 million to distribute a balanced pamphlet.[214]

Considering these issues, the House of Representatives inquiry concluded that provisions within the *Referendum Act* are 'outdated and not suitable for a referendum in contemporary Australia'.[215] The committee made three recommendations to:

1. Enable the AEC to distribute the Yes/No pamphlet to all electors using any additional methods considered appropriate
2. Relax limitations on government funding to allow the Australian government to fund referendum education and promotion of the arguments for and against
3. Limit foreign donations to $100 and require campaigns to disclose donations about a certain threshold.[216]

The committee also recommended that an Independent Expert Panel be established to provide advice to a Joint Select Committee in the lead up to a referendum. The Panel would be expected to consider the form of wording of the question, and the inclusion of neutral information in the official pamphlets, among other elements.[217] Recognising that the inquiry was conducted relatively quickly, the committee made a further recommendation that the government modernise the *Referendum Act* 'well in advance of any referendum on the question of constitutional recognition of Indigenous Australians'.[218]

3. Voting

Voting at a referendum is compulsory. However, some electoral law scholars have suggested that voting should made voluntary. In a submission to the House committee inquiry, Graeme Orr outlined three reasons in favour of voluntary voting at a referendum:

[214] See also George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010) 64-69.
[215] Parliament of Australia, House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into Constitutional Reform and Referendums* (December 2021) 78 [4.146]
[216] Parliament of Australia, House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into Constitutional Reform and Referendums* (December 2021) Recommendations 6, 7, 8.
[217] Parliament of Australia, House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into Constitutional Reform and Referendums* (December 2021) Recommendation 9
[218] Parliament of Australia, House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into Constitutional Reform and Referendums* (December 2021) Recommendation 10.

- the Constitution mainly concerns procedural issues about government institutions rather than fundamental social values
- compulsion invites 'if in doubt, throw it out' campaigns and/or purely partisan campaigns
- voluntary plebiscites have had high turnout by international standards, suggesting that where people understand the issue and its salience, they will vote in numbers to legitimate the outcome.[219]

Between 1906 and 1919, 13 referendums were held under conditions of voluntary voting.

FNP Perspective: The *Referendum Act* is outdated. As the House of Representatives committee recommended, several key reforms contemplated by the inquiry should be addressed prior to holding a referendum on constitutional recognition of Indigenous Australians. This is a significant issue that must be dealt with. Given the government's evident desire to hold a referendum on a First Nations Voice, the simplest approach is to amend the *Referendum Act* for the Voice referendum only and defer more substantive change. This could be done relatively easily, given that the House of Representatives Committee mentioned above had a Coalition majority.

4. Cost

Referendums are expensive. In 2019, the Morrison government set aside $160 million to hold a referendum on constitutional recognition.[220] Costs can be reduced if a referendum is held on the same day as a general election. In 2015, the AEC told a parliamentary inquiry that holding a standalone referendum would cost $158.4 million but holding a referendum on the same day as a general election would cost $44 million.[221]

Referendums held on election day may attract criticism from opponents arguing that the government is attempting to politicise the issue or sneak the amendment through without proper interrogation. This does not appear to damage the likelihood of success. The record shows that half of the successful referendums have been held on the same day as a general election, and half on a different date. The last successful constitutional amendment held on an election day occurred in 1946.[222]

FNP Perspective: Referendums are expensive, including because of compulsory voting, but changing the Constitution to recognise Indigenous Australians is very important to the nation's unity and identity. The cost may encourage governments to put multiple questions to the Australian people on the same day. As noted above, this carries significant risks. Costs can be substantially reduced by holding a referendum on the same day as a general election. It appears that the government is planning on holding a referendum earlier (in 2023) and to only put a question on the Voice. The circumstances justify this this plan.

[219] Parliament of Australia, House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into Constitutional Reform and Referendums* (December 2021) 71 [4.110].
[220] Liberal Party of Australia, 'Our Plan to Support Indigenous Australians' (15 May 2019).
[221] Australian Electoral Commissioner, Submission No 26 to the Senate Legal and Constitutional Affairs Committee, Inquiry into the Matter of a Popular Vote, in the form of a Plebiscite or Referendum, on the Matter of Marriage in Australia (4 September 2015) 10
[222] George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010) 96.

E. A Public Education Campaign Must be Run Prior to the Referendum

Amending the *Referendum Act* to permit the Commonwealth to advertise and explain the details of the referendum is important but it is not sufficient. It is critical that a comprehensive public education campaign, informing all Australians of the rationale of the Voice and the proposed constitutional amendment to give effect to that rationale, commences well before a referendum. A concerted opposition campaign is already forming. If the government intends to hold a referendum in 2023 a community education campaign must be developed soon.

Australians are unfamiliar with their Constitution. In 2012, the Expert Panel found a 'widespread lack of education on and awareness of the Constitution among Australians'.[223] As George Williams and David Hume have noted, the situation is worse than this. It is not simply a lack of knowledge but also false knowledge: a 2006 survey found that 61 per cent of those polled think Australia has a national Bill of Rights.[224] During a referendum campaign, this lack of knowledge can be exploited, leading to people misunderstand a proposed amendment or mischaracterise its purpose. This may weaken the chance of success: 'Overall, the record shows that when voters do not understand or have no opinion on a proposal, they tend to vote No'.[225] Reflecting on this history, the Expert Panel recommended that a referendum should be preceded by a 'properly resources public education and awareness campaign'.[226]

The Gillard government did not respond to the Expert Panel's substantive recommendations, but it did establish an organisation to promote awareness about constitutional recognition. Set up under Reconciliation Australia, a non-government, not-for-profit foundation aimed at promoting reconciliation between Indigenous and non-Indigenous Australians, 'Recognise' was initially led by Torres Strait Islander woman Tanya Hosch and non-Indigenous former Australian Labor Party secretary Tim Gartrell. Recognise achieved some success. Between 2012 and 2017 it held 365 events attended by 27,240 people in 273 communities and some 300,000 Australians pledged their support for constitutional recognition. However, the campaign was quietly abandoned in August 2017.[227]

The failure of government to commit to constitutional recognition left some Aboriginal and Torres Strait Islander peoples wary of Recognise.[228] Nonetheless, it played a significant role in promoting the idea of constitutional recognition among non-Indigenous Australians. Perhaps drawing on the groundwork put in by Recognise, proponents of the Uluru Statement have continued the focus on community education in the years following its delivery in 2017. Several groups, including the Uluru Dialogues and From the Heart have travelled widely across the country to educate the Australian public and build support for a First Nations Voice. Surveys and polling suggest that they have been successful. An examination of 12 pieces of

[223] Commonwealth, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (January 2012) 222.
[224] George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010) 205.
[225] George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010) 205.
[226] Commonwealth, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (January 2012) 227 Recommendation 10.6(e).
[227] See Harry Hobbs, 'The Road to Uluru: Constitutional Recognition and the UN *Declaration on the Rights of Indigenous Peoples*' (2020) 66(4) *Australian Journal of Politics and History* 613, 622.
[228] See, for example, Megan Davis and Marcia Langton, 'Introduction', in Megan Davis and Marcia Langton (eds), *It's Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne University Press, 2016) 1, 5.

opinion research between 2017 and 2020 indicate 'that 70–75% of Australian voters with a committed position on the matter support a First Nations Voice to Parliament'.[229] While it is likely that a committed No campaign will convince some supporters to change their vote, this level of support is strong. It suggests that a comprehensive public education campaign put forward by government can help secure a Yes vote.

FNP Perspective: Polling appears to indicate that a majority of Australians support putting a First Nations Voice in the Constitution. However, surveys also suggest that many Australians know little about our Constitution. An analysis of Australia's referendum history reveals that a lack of knowledge about the Constitution can lead to many people voting No. A concerted opposition is already seeking to rely on this lack of knowledge by confusing voters on key issues relating to the Voice. While there is not sufficient time to design and initiate a comprehensive public education campaign about the Constitution, it is vital that a community campaign to educate and inform all Australians about the Voice referendum is developed and rolled out. Fortunately, such a campaign can build on the work already undertaken by groups such as the Uluru Dialogues and From the Heart.

5. How Should these Questions be Resolved?

The decision to pursue a referendum is one for the Government to adopt. However, the issues identified in this paper, including inter alia the constitutional amendment, the referendum question, the design and functions of the Voice, as well as the need to update the mechanics of the referendum, should be resolved in partnership with Aboriginal and Torres Strait Islander representatives. In the National Agreement on Closing the Gap, the Government has committed to 'a future where policy making that impacts on the lives of Aboriginal and Torres Strait Islander people is done in full and genuine partnership'.[230] This includes settling policy related to a proposed referendum on a First Nations Voice. The Government should sit down with Indigenous leaders engaged in the constitutional recognition process, representatives of the community-controlled sector, and other Indigenous leaders to finalise these issues. A broad consensus among this group is needed to give a referendum the greatest chance of success.

The development of the *Native Title Act 1993* (Cth) demonstrates the value of co-design. In the development and passage of the Native Title Bill, the Keating government engaged constructively with senior Aboriginal and Torres Strait Islander representatives supported by ATSIC. A Mabo Ministerial Committee including the Prime Minister met regularly with Indigenous representatives in the Cabinet room at Parliament House to flesh out key issues. Led by ATSIC's former Chair, Lowitja O'Donoghue, Indigenous representatives including Land Council leaders collaborated to develop and negotiate key provisions with the Federal Government. Simultaneously, a second group of Indigenous leaders sought concessions from minor parties in the Senate. Ultimately, even critical Indigenous activists acknowledged that Indigenous Australians had 'extract[ed] the best deal from the government'.[231]

[229] Francis Markham and Will Sanders, 'Support for Constitutionally Enshrined First Nations Voice to Parliament: Evidence from Opinion Research since 2017' (Centre for Aboriginal Economic Policy Research, Working Paper No 138, 2020) 20.
[230] Closing the Gap, *National Agreement on Closing the Gap* (July 2020) 4 [18].
[231] Statement from the Aboriginal Provisional Government cited in Frank Brennan, *One Land, One Nation: Mabo – Towards 2001* (University of Queensland Press, 2001) 71.

FNP Perspective: This Issues Paper has demonstrated that a range of critical issues will need to be considered prior to a referendum being held. These issues should be settled by agreement between the Australian Government and Aboriginal and Torres Strait Islander representatives. A broad consensus between Indigenous leaders prominent in the national debate on constitutional recognition, the community-controlled sector, and other leaders, is needed to give the referendum the greatest chance of success.