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Issues Paper on a First Nations Voice Referendum

First Nations Portfolio

Australian National University

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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 at the Garma Festival, 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 Government has moved carefully and deliberately since the Prime Minister also proposed a Referendum question and a draft amendment to Australia’s Constitution at Garma. It considers that the full involvement of First Nations representatives in the decision-making for the referendum arrangements is crucial to success. Accordingly, in September 2022, two working groups were announced by the Commonwealth’s Minister for Indigenous Affairs, the Hon Linda Burney MP. Known as the Referendum Working Group and the Referendum Engagement Group, both comprise a cross-section of experienced First Nations leaders representing communities and organisations across Australia. Co-chaired by Minister Linda Burney and Senator Patrick Dodson, the first meetings of the Referendum Working Group and Referendum Engagement Group were held on 29 September 2022. The Referendum Working Group will focus on the timing of the referendum, the wording of the amendment and referendum question, and what information is needed to ensure a successful referendum. The Referendum Engagement Group will consider how to build community understanding, awareness, and support for the referendum. A third group, the Constitutional Expert Group, held its first meeting in October 2022. It will provide advice to the Referendum Working Group on the wording of the amendment.

On 25 October 2022, the Commonwealth Government also handed down its 2022-2023 Budget to implement its Election commitments. The Budget allocated \$75.2 million in funding to progress the referendum. It provides \$52.6 million over two years to the National Indigenous Australians Agency (NIAA), the Attorney-General’s Department, and the Australian Electoral Commission (AEC) to begin preparatory work for the referendum. A further \$16.1 million will be provided to the AEC to increase enrolment rates of First Nations people, and \$6.5 million to the NIAA to develop a governance structure that supports the Referendum Working Group and Referendum Engagement Group. A campaign group,

¹ Uluru Statement from the Heart, 26 May 2017.

² Prime Minister Anthony Albanese, ‘Address to Garma Festival’ (30 July 2022).

‘Australians for Indigenous Constitutional Recognition’ will also be listed as a deductible gift recipient. This will allow donors to claim an income tax deduction for donations over \$2 made between July 2022 and June 2025. It is important to note that this funding is in addition to the \$160 million set aside for the referendum itself in the government’s contingency reserve. A further \$5.8 million will be provided to NIAA to commence work on establishing a Makarrata Commission.

The Parliament will need to amend the *Referendum (Machinery Provisions) Act 1984 (Cth)* prior to holding a referendum. Professor George Williams, a member of the Constitutional Expert Group, has described the Act as ‘not fit for purpose’, given that many of its elements have not been updated since 1912. In early November 2022, Minister Burney confirmed that legislation will be introduced into Parliament before the end of 2022 to ‘modernise’ the Act.³

Meanwhile, a number of organisations have begun to provide education resources to support a referendum campaign. On 9 September 2022, the *UNSW Indigenous Law Centre* released three issues papers, addressing these critical matters in the lead up to the referendum to constitutionally enshrine a First Nations Voice:

1. Issues Paper 1: The Constitutional Amendment
2. Issues Paper 2: The Referendum Question
3. Issues Paper 3: Finalisation of the Voice Design

The Uluru Dialogues has also set up an education page. This includes a section of FAQs that answers common issues raised about the Uluru Statement from the Heart and the Voice referendum.⁴ The *From the Heart* campaign also has published materials on why a constitutionally enshrined Voice matters including FAQs. Another organisation, *Uphold & Recognise*, founded by Julian Leeser and Damien Freeman, seeks to bring together a range of liberals and conservatives supporting the Voice and has published relevant reports, papers and declarations.

This Issues Paper, prepared by the First Nations Portfolio (FNP) at the Australian National University (ANU) complements the ILC Issues Papers, the Uluru Dialogues education resources, the campaign materials of *From the Heart* and the publications of *Uphold and Recognise*. In this third version, the paper provides a background, update, and explainer on the key issues facing the Voice referendum. In doing so, it also presents the views of the FNP

³ Josh Butler, “‘Not Fit For Purpose’: Government Looks to Amend “Antiquated” Referendum Laws Ahead of Voice Vote”, *Guardian Australia*, 9 November 2022 <<https://www.theguardian.com/australia-news/2022/nov/09/not-fit-for-purpose-government-looks-to-amend-antiquated-referendum-laws-ahead-of-voice-vote>>.

⁴ Uluru Dialogues, ‘FAQS’ <<https://ulurustatement.org/education/faqs/>>.

on how these issues might be addressed. This is consistent with ANU's original purpose of promoting national unity and its tradition of contributing to the nation's relationship with its First Nations peoples. ANU considers it should play a constructive and educative role with respect to the Voice referendum in achieving the best outcome for the nation and it envisages conducting a series of dialogues that canvass different viewpoints in the coming months.

The paper is divided into five sections.

- Section 1 provides a brief background to the Uluru Statement from the Heart and the referendum. It explains why Aboriginal and Torres Strait Islander peoples have called for a First Nations Voice.
- Section 2 addresses key practical and strategic questions that will need to be considered prior to holding a referendum on the Voice. Among other issues, it considers whether the Voice should be legislated prior to a referendum, the critical matter of the wording of the proposed constitutional amendment, and how much detail on the Voice should accompany a referendum. It also examines the mechanics of a referendum. It notes that key elements of the legislation governing the conduct of referendums should be revised and updated before a referendum is held.
- Section 3 examines the design of the First Nations Voice in detail. Several major public processes have added important detail to the proposed Voice, but key design questions remain. This section explores major issues to be considered prior to establishing the Voice in legislation.
- 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. Section 4 notes that, consistent with the United Nations *Declaration on the Rights of Indigenous Peoples* and the National Agreement on Closing the Gap, these questions and the overall approach should be developed in partnership with national Indigenous leaders involved in this space. The Referendum Working Group and Referendum Engagement Group should work to reach a consensus on these issues and agreement with Government. This will give the referendum the best chance of success.
- Australia has experienced over a decade of debate on constitutional recognition of Aboriginal and Torres Strait Islander peoples. However, questions and concerns have been expressed publicly about the proposed First Nations Voice. Section 5 responds to common concerns raised about the Voice to educate and inform all Australians before they vote in a referendum.

1. The Uluru Statement from the Heart and a First Nations Voice

The Constitution is the blueprint for Australian governance. It establishes and distributes power among the three arms of the federal government: the executive, the legislature, and the judiciary. It also divides legislative power and outlines the relationship between the Commonwealth government in Canberra and the six States. It does not mention Aboriginal and Torres Strait Islander peoples. It does not mention their continuing connection to the lands and waters they and their ancestors have occupied and cared for over some 60,000 years. The Constitution ignores the distinct rights and interests of Aboriginal and Torres Strait Islander peoples. In comparison, the Constitution of Canada, also an English setter state like Australia that is a member of the Commonwealth, has recognised and protected the rights of its First Nations peoples since 1982.

The Constitution also provides the Australian Parliament with a suite of powers. Section 51(xxvi) of the Constitution gives the Parliament the power to make laws with respect to ‘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.⁵ The Parliament has been able to act in this way because it is difficult for Aboriginal and Torres Strait Islander peoples to ensure their voices are heard and their interests are considered in the political process. As a marginalised community comprising only about three per cent of Australia’s population, the ‘majoritarian arithmetic of electoral politics’ leaves Aboriginal and Torres Strait Islander peoples ‘with little leverage over government decision-making’.⁶ The result is that First Nations peoples are often left vulnerable to the ‘wavering sympathies of the Australian community’.⁷

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.⁸ 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

⁵ *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.

⁶ 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.

⁷ Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia’s Future* (Federation Press, 2003)

⁸ 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.

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'.⁹

A First Nations Voice is intended to recognise Aboriginal and Torres Strait Islander peoples in Australia's Constitution. Its objective is to ensure that they can always have a significant say in the development of law and policy that affects them. Whether it achieve this 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.

⁹ Uluru Statement from the Heart, 26 May 2017 (emphasis in original).

2. The Referendum

The Government has committed to pursuing a referendum to put a First Nations Voice in the Constitution. However, a range of important strategic and practical questions will need to be considered before the referendum is held. This section explores some of the more significant issues that will need to be resolved to give the referendum the best chance of success.

1. Should the Voice be established in legislation before a referendum is held?

The Government has committed to pursuing a referendum, but 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. The idea is that Australians will be more likely to support the Voice in a referendum after they have seen it work over several years. The FNP disagrees. There are four reasons why the Government is right to pursue a referendum first.

- **It is unnecessary.** Many Australians will want to know what the Voice will look like and how it will work before they decide to vote. This is understandable and sensible. However, it does not require establishing a Voice in legislation prior to a referendum. A detailed model that outlines key design principles (discussed below) should be sufficient to give all Australians the confidence needed before they vote.
- **Legislating first reduces the likelihood that a referendum will be held.** There is no guarantee that legislating first will enhance the likelihood of a successful referendum. In fact, the opposite is more likely. Holding a referendum requires a lot of political effort. If the Voice is legislated and begins to operate, many Australians may not understand why it would be necessary to go to the extra effort to put the Voice in the Constitution.
- **Constitutional entrenchment is key to the success of the Voice.** Several Indigenous representative bodies have existed over the years, such as the Aboriginal and Torres Strait Islander Commission and the National Congress of Australia's First Peoples. However, after several years each body was abolished by the Commonwealth. The Uluru Statement from the Heart calls for a constitutionally enshrined Voice to ensure its independence and durability. A legislated Voice will lack these features and be less likely to secure the support of First Nations peoples.

- **There is no mandate for a legislated Voice.** The Voice was only endorsed by Aboriginal and Torres Strait Islander peoples on the basis that it would be put in the Constitution.

FNP Perspective: The FNP believes the Voice should not be established in legislation before a referendum is held.

2. How much detail should accompany the referendum?

There are practical and principled reasons for providing detail about the First Nations Voice prior to the referendum. In practice, a No case will be able to exploit a lack of detail to derail a referendum. In earlier referendums, No cases have ‘characterised the proposals as threatening Australian traditions and have urged voters to stick with the less risky course, the status quo’.¹⁰ In principle, Australians are entitled to know what the Voice will look like and how it will operate before they vote in a referendum. There are two broad options available for Government.

Option 1 – Provide a Draft Bill. The Government could release a draft Bill clearly setting out the composition, functions, and powers of the Voice. Several members of the Federal Opposition and key Indigenous leaders prominent in the debate on constitutional recognition have called on the government to release a draft Bill so all Australians can see exactly what the Voice would entail.

Option 2 – Outline Design Principles. Alternatively, the Government could release a document that outlines key elements and principles that explain how the Voice will look and how it will operate but does not amount to a draft Bill. This document would likely also include detail about the process of designing and securing agreement of Indigenous leaders to the final model.

The Government is leaning towards Option 2. 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.¹¹ After Garma, Prime Minister Albanese noted that releasing every possible detail about the Voice is ‘not the recipe for

¹⁰ George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010) 80.

¹¹ Paige Taylor, ‘Labor to Lay Out Key Elements of its Indigenous Voice by Christmas’, *The Australian*, 24 July 2022.

success'.¹² At its first meeting on 29 September 2022, the Referendum Working Group discussed common principles for the Voice drawn from existing work. Those principles released in its communique may form the basis for an exposure document: those principles identify the Voice as a body that:

- *provides independent advice to the Parliament and Government*
- *is chosen by First Nations people based on the wishes of local communities*
- *is representative of Aboriginal and Torres Strait Islander communities*
- *is empowering, community led, inclusive, respectful, culturally informed and gender balanced, and includes youth*
- *is accountable and transparent*
- *works alongside existing organisations and traditional structures.*

The Voice would:

- *not have a program delivery function*
- *not have a veto power.*¹³

There are risks with both options, but the FNP believes Option 2 is the preferable approach for the reasons below:

- **Consistent with Key Principles.** Option 2 is consistent with the Guiding Principles drawn from the Referendum Council Regional Dialogues.¹⁴ Option 2 also respects Parliament's authority to ultimately determine the design of the Voice. If a legislative model is identified, a future Parliament may be wary of amending that model, even when it is necessary, because it was, effectively, endorsed by the Australian people in a referendum. It also maintains focus on the principle of constitutional change. Australians are voting on the principle of putting a First Nations Voice in the Constitution, not on a particular legislative model.
- **More Time to Resolve Key Issues.** While a broad consensus on the key elements of the Voice already exists, some design issues remain. Option 2 allows more time for Indigenous leaders and the Government to resolve these details and reach consensus on a final legislative model.
- **Political Advantages.** Option 2 also has political strengths. While Australians are entitled to understand how the Voice will work, it is likely that a draft Bill will provoke opposition. Some people will be unhappy about details of the proposed legislation and may choose to vote No on that basis.

¹² Ellen Ransley and Courtney Gould, "It Will Fail": Lambie's Message to Albo', *The Australian*, 1 August 2022.

¹³ Linda Burney, 'Communique for the Referendum Working Group' (Communique, 29 September 2022) <<https://ministers.pmc.gov.au/burney/2022/communique-referendum-working-group>>.

¹⁴ Referendum Council, *Final Report of the Referendum Council* (30 June 2017) 22.

Notwithstanding these advantages, Option 2 carries some political risk.

- **Risks Bipartisanship.** The absence of a complete model may lead to the Federal Opposition refusing to support the referendum. Without bipartisanship the referendum may fail. It should be noted, however, that there is no guarantee the Federal Opposition will support a referendum in any case.
- **Risks a Strong No Case.** A strong No case will argue that without a full understanding of everything about what the Voice will look like (which they could argue requires draft legislation), Australians should reject the referendum.

FNP Perspective: The FNP believes the Government should release a document containing Design Principles (Option 2). There is no need nor is it appropriate to release a Draft Bill prior to a referendum.

What does this mean for the design of the Voice?

Assuming the Government adopts this approach, the design process needs to be considered. There are two broad options available for the Government.

Option 1 – An Indigenous-led Consultation Process. The UNSW Indigenous Law Centre (ILC) has proposed a national Indigenous-led deliberative consultation process following the referendum to design the Voice. This process would look ‘something like that which produced the Uluru Statement from the Heart itself’.¹⁵ 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, there has already been a comprehensive and national consultation process initiated by former Minister Ken Wyatt as part of the Indigenous Voice Co-design process which resulted in a public report in December 2021. While some Indigenous people and their organisations have expressed concern about this process, another large-scale consultation process risks re-opening the debate about whether there should be an Indigenous Voice to Parliament and may not result

¹⁵ 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.

in consensus on key issues. It will also take significant time (at least 18 months) which means that a Voice may not be established before the 2025 election.

Option 2 – Reaching a consensus between the Government and the national Indigenous leadership. 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 build on key elements from the final report of the Indigenous Voice Co-design process (the Calma and Langton report). The FNP believes this approach is appropriate.

The Referendum Working Group and Referendum Engagement Group are also appropriate forums for this consultation. However, the Government should be transparent if it chooses to adopt this method. This method, particularly discussions between the Working and Engagement Groups and the Government, 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 Parliamentary Committee, such as the newly established Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs (consistent with the usual way legislation is dealt with in the Parliament), to allow all Australians to have their input. This process might take 6 months.

Ultimately, whatever option is adopted needs to be done in a transparent manner and have the support of Aboriginal and Torres Strait Islander leaders. 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.

FNP Perspective: The FNP does not believe another comprehensive consultation process is necessary to design the Voice. The FNP supports Option 2. The Government should commit to undertake further targeted consultations and draw on the Referendum Working Group and Referendum Engagement Group to reach consensus on design issues and develop draft legislation.

3. The wording of the constitutional amendment

It is important to get the wording of the constitutional amendment right. Previous public inquiries have agreed that the form of constitutional recognition should meet several key principles.¹⁶ The wording should be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples, be capable of being supported by an overwhelming majority of Australians, contribute to a more unified nation, and be technically and legally sound. In addition, the wording should give effect to the rationale and purpose of the Voice. At the Garma Festival, Prime Minister Albanese offered a starting point for discussion. His 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’.¹⁷ As noted above, the Referendum Working Group is considering this issue. The Working Group is supported by a Constitutional Expert Group, which will provide advice to the Working Group in January 2023.

There are several points to note about the Government’s initial wording.

- **Name of the Body:** 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 legal definition of Aboriginality. There is no similar legal definition of ‘First Nations’ person.

¹⁶ Parliament of Australia, Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Interim Report* (July 2018) 114 [7.10]; Commonwealth, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (January 2012) 4.

¹⁷ Prime Minister Anthony Albanese, ‘Address to Garma Festival’ (30 July 2022).

- **Primary Function:** The proposal empowers the Voice to ‘make representations’ to the Parliament and Executive Government. This form of words makes clear that the Voice is not limited to responding to issues that arise in Parliament or that are proposed by the Government. Rather, it enables the Voice to be a pro-active institution, capable of developing its own positions and carrying them to Government and the Parliament. This is consistent with the views of Aboriginal and Torres Strait Islander peoples as expressed during the Regional Dialogues.
- **On What Issues?** The Voice is permitted to make representations on matters ‘relating’ to Aboriginal and Torres Strait Islander peoples. This is a broad mandate that accords with Indigenous peoples’ right to self-determination. It is also consistent with the views of Aboriginal and Torres Strait Islander peoples as expressed during the Regional Dialogues. However, it has been the subject of criticism. Some commentators have argued that the mandate is too broad and that the Voice should only be permitted to make representations on matters ‘directly affecting’ Aboriginal and Torres Strait Islander peoples. It is not certain, but this may narrow the Voice’s mandate to legislation supported by the race power in section 51(xxvi) and the territories power in section 122 of the Constitution. The FNP does not support a narrower mandate (see below).
- **Will Consultation with the Voice be required?** The amendment proposed by the Prime Minister does not oblige the Government or Parliament to consult with the Voice, let alone amend its proposals in line with the representations made by the Voice. Parliament and the Government can choose to simply ignore the Voice. This is consistent with the principle of parliamentary supremacy. It does mean, however, that further thought is required at the legislative design stage to increase the likelihood that consultation will occur.
- **Can the Parliament provide the Voice with other Functions?** Yes. Clause 3 of the amendment provides that the Parliament can make laws about the Voice’s ‘functions’. Clause 2 states the Voice’s function is to ‘make representations’. On one reading, Clause 3 would limit the Parliament’s authority to pass legislation only about the method of how representations are made. The amendment 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. Parliament has significant authority in developing – and amending – the design of the Voice. This will allow the body to evolve in line with the views and wishes of Aboriginal and Torres Strait Islander peoples.
- **Is the Body intended to be representative?** The Voice is intended to be a representative body, but the Government’s amendment does not provide 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 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.

FNP Perspective: The Commonwealth Government’s proposal is a clear and simple amendment which achieves the purpose of constitutionally enshrining a Voice sought in the Uluru Statement from the Heart. The FNP recognises that the wording, however, may change because of legal and other considerations but they should be minimal to avoid confusion. The FNP believes it is also critical that the wording should be finalised in partnership with Aboriginal and Torres Strait Islander representatives through the Referendum Working Group.

4. The referendum question

The *Referendum Act* sets out the required format for the referendum question. At present, the Act requires the ballot paper to include the long title of the proposed law. The long title of an Act is often wordy and technical, which may confuse voters. Some commentators have recommended the Act is amended to include the short title, alongside a short factual description of the proposed reform.¹⁸

The Government may choose to amend the *Referendum Act* to change the format of the question. However, the Constitution requires that the question include the title of the proposed law and requires that votes are asked to ‘approve’ the proposed law. Nevertheless, there are several ways that the question could be worded, consistent with constitutional requirements. Previous referendum questions suggest several options:

- **Option 1** (based on the models in 1906 – 1973)
Do you approve of the proposed law for the alteration of the Constitution entitled ‘Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023?’
- **Option 2** (based on the model in 1974)
Proposed law entitled ‘An Act to alter the Constitution to establish an Aboriginal and Torres Strait Islander Voice’. Do you approve the proposed law?
- **Option 3** (based on the model in 1977)
It is proposed to alter the Constitution to establish an Aboriginal and Torres Strait Islander Voice. Do you approve the proposed law?

¹⁸ 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]

- **Option 4** (based on the model in 1984)
An Act to alter the Constitution to establish an Aboriginal and Torres Strait Islander Voice. Do you approve this proposed alteration?
- **Option 5** (based on the model in 1988 and 1999)
A Proposed Law: To alter the Constitution to establish an Aboriginal and Torres Strait Islander Voice. Do you approve this proposed alteration?

Additional options not based on precedent can also be considered.

FNP Perspective: The question should be worded in a way that voters understand what they are asked to vote on. The FNP considers, at this stage, that the 1984 model (Option 4) is the clearest and simplest approach.

5. Official Yes/No pamphlets

Parliamentarians who vote for or against the proposed amendment may prepare a 2,000-word summary of their argument. The *Referendum Act* requires the Australian Electoral Commission distribute these as Yes and No pamphlets to each address on the electoral roll no later than 14 days prior to the referendum. 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. There is also no provision to ensure that information in the campaign must be accurate.

There is a case for amending the *Referendum Act* so that no official pamphlets are made or distributed. This will require an amendment to the *Referendum Act*.

- **Not appropriate to fund a No case.** Given the nature of this referendum, it would not be appropriate for the Commonwealth to fund a campaign that argues against constitutional recognition of First Nations peoples. There is no provision in the *Referendum Act* which requires information to be accurate. As such, there is a real risk that government funding could be used to amplify a position that attacks or denigrates First Nations peoples.
- **Political strategy suggests the Government should not fund a Yes case.** The Federal Opposition has recently announced that the Government should provide equal

funding to Yes and No campaigns.¹⁹ Given that the FNP believes that an official ‘No’ pamphlet should not be provided, it is sensible that no official Yes/No pamphlets should be funded.

The Government may, nevertheless, decide that it is important to fund Yes/No pamphlets. If no official pamphlets are prepared and distributed by the AEC, opponents of the Voice may claim that the Government has attempted to “rig” the referendum in favour of the Yes side. These claims may gain political and media traction. If the Government does allow the AEC to distribute pamphlets, it is important that the information is responsible and balanced. The FNP reiterates that it does not believe the AEC should distribute pamphlets that contain inaccurate and inflammatory material that could be very damaging to the referendum and to Aboriginal and Torres Strait Islander people more generally.

FNP Perspective: The FNP considers that no official Yes/No pamphlets should be distributed. If the Government allows the AEC to distribute pamphlets, it is important that the risk of misleading or inflammatory material is minimised.

6. A community education campaign must be run prior to the referendum

Dispensing with official pamphlets does not mean the Government should not fund a community education campaign. While polling appears to indicate that a majority of Australians support putting a First Nations Voice in the Constitution,²⁰ surveys also suggest that many Australians know little about our Constitution.²¹ 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. It is, therefore, vital that the referendum is preceded by a well-resourced community education and awareness campaign.

Time is running out for this campaign. If the Government intends to hold a referendum in 2023 a community education campaign must be developed as a matter of urgency. It

¹⁹ Miriah Davis, ‘Voice to Parliament: Peter Dutton Says Federal Government Should Provide Equal Funding to “Yes” and “No” Campaigns’, *Sky News*, 14 October 2022 <<https://www.skynews.com.au/australia-news/voice-to-parliament-peter-dutton-says-federal-government-should-provide-equal-funding-to-yes-and-no-campaigns/news-story/0501b149748ecf58a272d1a985210795>>.

²⁰ 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.

²¹ Commonwealth, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (January 2012) 222; George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010) 205.

appears that the Government has started to move on this issue. In September 2022, the Referendum Engagement Group, tasked with considering how to build community understanding, awareness, and support for the referendum, held its first meeting.

The Referendum Engagement Group could consider lessons from previous constitutional education campaigns. For example, between 1991 and 2000 the Constitutional Centenary Foundation developed methods to inform Australians about their Constitutions and systems of government. In their 2000 report they reflected on a decade of experience. Among other conclusions, they found that:

- Information must be comprehensive and targeted to audience, current issues, and contemporary themes.
- Information must be interesting and accessible in design and content.
- Information must be accurate and impartial.
- Information must reach and involve as wide a range of different people as possible.
- People must be able to be actively involved if they wish.²²

The Voice referendum could also build on and adapt several large-scale community education campaigns concerning Indigenous Australians.

- **The Recognise Campaign.** Prime Minister Julia Gillard's government established the 'Recognise' campaign in 2012 to promote public awareness about constitutional recognition. Between 2012 and 2017 Recognise held 365 events attended by 27,240 people in 273 communities and some 300,000 Australians and many corporate and other bodies pledged their support for constitutional recognition.²³ Surveys suggest that the campaign succeeded in building support for the principle of 'recognising' Aboriginal and Torres Strait Islander peoples in the Constitution. However, without a clear model to advocate for, the campaign stalled. It was closed down in 2017.
- **The Victorian Treaty Process.** In 2016 and 2017, an Aboriginal Treaty Working Group conducted sixteen meetings across two rounds of consultations with Aboriginal Victorians to gauge views on the design and functions of an Aboriginal representative body. The second round of consultations were accompanied by a series of Treaty Circles. Aimed at empowering the community 'to drive the next steps in the Treaty process',²⁴ Treaty Circles were community-run conversations coordinated and supervised by self-nominated individuals. Individuals held discussions in their local

²² Constitutional Centenary Foundation, *Report on a Decade of Experience* (2000).

²³ See George Williams and Harry Hobbs, *Treaty* (Federation Press, 2nd ed, 2020) 49.

²⁴ Aboriginal Treaty Interim Working Group, *Treaty Circle Facilitators Handbook: Building a Pathway to Treaty* (2017) 27.

area with the aim of ‘ensuring maximum participation by as many members of the Victorian Aboriginal community as possible’.²⁵

A similar process that empowers individuals to lead conversations within their community might be appropriate for the Voice referendum. The Inner West Council in Sydney has established a community awareness campaign led by 1000 volunteers. Volunteers receive training about the Uluru Statement and the upcoming referendum and agree to share their knowledge and educate others. This model could be repeated across the country.

- **Uluru Dialogues and From the Heart.** Replicating the Uluru Statement from the Heart’s origins in community deliberations, proponents have worked hard to build nationwide community support. The Uluru Dialogues and From the Heart campaigns have travelled widely across the country to educate the Australian public and build support for a constitutionally enshrined Voice. As noted, surveys suggest that support for a Voice is strong. However, more is now needed to build on this work to give all Australians the information necessary so that they can make an informed decision.

FNP Perspective: A community education campaign is vital. The FNP encourages the Referendum Engagement Group and government to develop and implement a comprehensive campaign as a matter of urgency.

7. The role of the Federal Opposition

The support of the Federal Opposition is very important and preferable. The most significant study of Australian referendums has concluded that bipartisan support ‘has proven essential to referendum success’. George Williams and David Hume argue that ‘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’.²⁶

The Federal Opposition has not yet made its position clear, arguing it is too early to arrive at a position because there is insufficient definition and detail around the proposal. Nonetheless, there are firm supporters and opponents of the Voice within the Coalition party room. Journalists have recently suggested that the Federal Opposition is unlikely to

²⁵ Ibid.

²⁶ George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010) 244.

reach a unified position on the Voice to Parliament.²⁷ If this is the case, it is likely that members of the Opposition will be allowed to campaign for or against the Voice but encouraged to do so without fighting each other in public. This was the approach the Coalition took in relation to the same-sex marriage plebiscite in 2017, and the republic referendum in 1999. It means that bipartisan support will not be forthcoming, but it avoids a damaging official No campaign run by the Federal Opposition.

Proponents of the Uluru Statement have challenged the need for bipartisanship. 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 1999.²⁸ 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. This is sensible.

FNP Perspective: Bipartisan support is very important and preferable to the success of the referendum. The FNP supports the Government’s efforts to build partnerships with all Australians, including the Federal Opposition, with the aim of giving the referendum the greatest chance of success.

8. When should the referendum be held?

The referendum should be held when it has the best chance of success. This requires Indigenous leaders and government reaching consensus on strategy and detail surrounding the referendum process, question, and design of the First Nations Voice. It also requires evidence of clear public and community support for the Voice. It may also require the formal support of the Federal Opposition, or at least the vocal support of prominent members.

²⁷ ‘Indigenous Voice Plan Set to Tear Liberal Party Apart’, *The Daily Telegraph*, 16 October 2022; Phillip Coorey, ‘It’s a Political Risk, but Anthony Albanese Goes All in on the Voice’, *Australian Financial Review*, 13 October 2022 <<https://www.afr.com/politics/federal/it-s-a-political-risk-but-albanese-goes-all-in-on-the-voice-20221012-p5bp2s>>.

²⁸ 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>>.

Given that the Prime Minister made a commitment on the night of his election victory to implement the Uluru Statement from the Heart in full, it is important also that the referendum be held with sufficient time to ensure that legislation can be passed to establishing the Voice before the next election in 2025. This means it should be held prior to the next federal election.

The Government has not yet announced when it intends to hold the referendum. 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 Statement), or 27 January 2024 (the day after Invasion Day).²⁹ September 2023 has also been raised.

There is not enough time to hold a referendum in May 2023 so this date can be discarded. Given electoral timetables, it is likely that a referendum could be held in the second-half of 2023, or the first half of 2024. This appears to be the government's plan. The Prime Minister has declared that while he has not settled on a date, the referendum will be held sometime in the 2023-2024 financial year. That is, between July 2023 and June 2024.³⁰

Given these considerations, the FNP believes that it is preferable a referendum is held in the second half of 2023 rather than the first half of 2024. This does not discount the challenges involved in holding a referendum in 2023 but recognises that 2024 may not be feasible.

- **If the Referendum is held in the first half of 2024, there may not be time to ensure the Voice is established prior to the 2025 election.** The Government has not yet announced its plan to establish the Voice following a referendum but if it chooses to undertake the UNSW ILC's proposal for a national Indigenous-led deliberative consultation process following the referendum, it is likely to run out of time.
- **Nevertheless, the second half of 2023 has disadvantages.** It will leave less time for a community education campaign to educate all Australians, potentially leading to a larger proportion of voters not understanding the proposal and voting No.

²⁹ Yarrabah Affirmation, 10 April 2022.

³⁰ Carly Williams and Kirstie Wellauer, 'Push for an Indigenous Voice to Parliament Ramps Up, as PM Promises Referendum Next Financial Year', *ABC News*, 30 September 2022
<<https://www.abc.net.au/news/2022-09-30/indigenous-voice-referendum-next-financial-year/101458608>>.

FNP Perspective: The FNP believes a referendum should be held in the second half of 2023. An earlier referendum places pressure on the community education campaign. This campaign should be developed and implemented as a matter of urgency.

9. Will the Parliament establish the Voice following a referendum?

A referendum to insert provisions concerning a First Nations Voice in the Constitution will not guarantee that Parliament will act to establish a Voice. 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 the Parliament will not pass legislation. Nonetheless, Parliament may fail to establish a Voice if there is not sufficient time following a referendum to develop legislation and bring it before the Parliament before the next election. This factor suggests that a referendum should be held earlier in the parliamentary term, rather than later.

It is important to note that even if the Parliament establishes a Voice, it may not be permanent. Consistent with Australia's constitutional system, a future Parliament will retain the authority to amend or even abolish the Voice. The Voice will only succeed with political and moral pressure.

FNP Perspective: If the Australian people endorse the Voice in a referendum, it is very likely that the Government will legislate to establish the Voice. It is important a referendum is held with sufficient time to finalise the design of the Voice, develop legislation, and introduce and pass that legislation in the Parliament.

10. Should other proposals for constitutional amendment be included?

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. For example, section 25 of the Constitution anticipates that a State may disqualify the people of a particular race from voting, while section 51(xxvi) allows the Commonwealth to make special laws for people of any race, which can discriminate adversely against Aboriginal and Torres Strait Islander peoples. Over the last 15 years, several major public inquiries have recommended these provisions be deleted or amended. Other provisions could be inserted, including clauses recognising Indigenous languages and protecting any rights negotiated through treaty.

Nonetheless, 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. Popular proposals can be dragged down when opposition marshals together to vote No on the entire package.³¹ 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.

If the Government adopts this approach, 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 a Labor government. Assuming that a First Nations Voice referendum is successful in 2023, there may be an opportunity to pursue more constitutional change after 2025.

FNP Perspective: The Voice referendum should be a standalone referendum. No other proposals should be included.

³¹ See George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010).

3. Designing a Voice

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 recommended the Australian Government initiate a process of co-design with Aboriginal and Torres Strait Islander peoples to determine the design of the Voice.³² On 30 October 2019, the former Minister for Indigenous Australians, the Hon Ken Wyatt AM MP, announced an Indigenous Voice co-design process. 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 was released in 2021. It recommended a federal structure with 35 Local and Regional Voices and a National Voice. The report did not outline how each local Voice would look. Rather, adopting a flexible approach consistent with Indigenous peoples' right to self-determination, it envisioned that communities across the country would establish their own distinct models. However, each Voice would have the same functions. They would provide advice to governments, the non-government sector, and the National Voice about community aspirations, priorities, and challenges. Once a Voice is formed it would be formally recognised by government in a process set out under legislation.

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). 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.

The Langton and Calma report added substance and detail to the proposed Voice. After several years of consultation and debate, a broad consensus now exists over key elements of the shape and role of the First Nations Voice. However, despite broad consensus on key elements of the Voice, several issues remain uncertain and contested. This section explores key design questions surrounding the First Nations Voice. It should be read alongside the following section, which notes that, consistent with the United Nations *Declaration on the Rights of Indigenous Peoples* (UNDRIP), Indigenous Australians should guide the development of the Voice and the Voice legislation.

³² Parliament of Australia, Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Final Report* (November 2018) Recommendation 1

1. On what matters should the Voice be able to present its views?

Already discussed in this paper, the primary function of the Voice is to provide a First Nations perspective when laws are debated and passed that affect Aboriginal and Torres Strait Islander people. A key issue to be decided is what ‘affect’ means.

Some commentators have argued that the Voice should only be able to make representations on matters *directly* affecting Aboriginal and Torres Strait Islander peoples. It is not always clear what they mean by this, but it would likely mean the Voice would be limited to providing advice when the Parliament is debating laws that would be supported by the races power in section 51(xxvi) or the territories power in section 122 of the Constitution. In short, these are laws that specifically concern Aboriginal and Torres Strait Islander peoples, such as the *Native Title Act 1993* (Cth). 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. For example, the Cashless Debit Card program, abolished by the Albanese Government because it stigmatises and often makes participants’ lives more difficult, was enabled under general legislation but had a disproportionate effect on First Nations peoples; the Australian Council of Social Services noted in 2018 that 78 per cent of participants identify as Indigenous.³³ Recognising this, the Government’s initial proposal unveiled at the Garma Festival adopts a broader approach. It provides that the Voice may make representations on *matters relating to* Aboriginal and Torres Strait Islander peoples. To take our example, while legislation establishing a Cashless Debit Card may not be supported by either section 51(xxvi) or section 122 of the Constitution, in practice it clearly is a matter relating to First Nations peoples.

The FNP favours the broader mandate. 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

³³ ACOSS, ‘Cashless Debit Card Briefing Note’ (February 2018) <https://www.acoss.org.au/wp-content/uploads/2018/02/010218-Cashless-Debit-Card-Briefing-Note_ACOSS.pdf>.

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.

FNP Perspective: The Voice should be able to make representations to the Parliament on matters relating to Aboriginal and Torres Strait Islander peoples.

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

The Uluru Statement from the Heart is clear: Aboriginal and Torres Strait Islander peoples do not feel they are heard in the development of law and policy that affects them. In Australia, proposed laws are developed within the government and then presented to Parliament. This means that if the Voice is to be able to influence law and policy, it needs to speak to both the Parliament and the government. The Government’s initial proposal accepts this and would allow the Voice to make representations to both institutions. At Garma, Prime Minister Albanese explained 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’.³⁴ The FNP endorses this approach with one caveat.

There are already many existing Indigenous organisations across Australia with a direct relationship to the Federal Government on important policy and service delivery issues for Indigenous peoples. There is some anxiety among these organisations that the First Nations Voice may usurp their role and function. The Langton and Calma report recognised this tension. The report made clear that the Voice is not intended to ‘displace or undermine bodies with existing statutory roles or specific functions but provide links for involvement’.³⁵ Developing these links is important and requires early policy consideration.

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.

³⁴ Prime Minister Anthony Albanese, ‘Address to Garma Festival’ (30 July 2022).

³⁵ National Indigenous Australians Agency, *Indigenous Voice Co-design Process: Final Report to the Australian Government* (July 2021) 23, 156.

FNP Perspective: The Voice should be able to make representations to the government. Early policy consideration, however, needs to be given to how the Voice will exist and co-operate with existing Aboriginal and Torres Strait Islander organisations.

3. What is the 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. The Coalition is an alliance with over 80 members from every state and territory in Australia. The National Agreement, a positive and important reform, was agreed 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 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’.³⁶ This should include the development of the Voice.

The new Labor Government has confirmed its support for the National Agreement on Closing the Gap. Meanwhile, the Coalition of Peaks publicly support the Voice and have stated that the National Agreement on Closing the Gap ought to continue alongside. Some members of the Coalition of Peaks, however, have raised concerns that a First Nations Voice might undermine or weaken this new relationship.

The FNP understands this concern. However, the FNP believes that a constitutionally entrenched First Nations Voice would play a distinct function to the existing community-controlled sector. 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. This political relationship can support the work done by the Coalition of Peaks.

³⁶ Closing the Gap, *National Agreement on Closing the Gap* (July 2020) 4 [18].

FNP Perspective: The FNP recognises the concerns that some Indigenous organisations have expressed. However, the FNP believes there is no reason the Coalition of Peaks and the National Agreement on Closing the Gap should not be able to co-exist with a First Nations Voice. Nevertheless, how this is achieved will require serious consideration at an early stage.

4. Should the Voice have veto powers?

There is no prospect that the First Nations Voice will be empowered with a veto. This is consistent with existing Australian constitutional traditions and has been confirmed in the communique issued after the first meeting of the Referendum Working Group on 29 September 2022.³⁷ However, while the Voice would not have the power to compel government or Parliament to act, Prime Minister Albanese has explained that ‘it would be a very brave government’ that ignored representations on law and policy made by the Voice.³⁸ This reflects the fact that if endorsed in a referendum by the Australian people, the Voice would 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.

Opponents of the Voice have tried to confuse and inflame this issue. Tony Abbott, Peta Credlin, and Janet Albrechtsen have all described the Voice as holding ‘something approaching a veto’,³⁹ ‘an effective veto over any policy or legislation that affects Indigenous Australians’,⁴⁰ and ‘in effect...a veto power over government policy’.⁴¹ 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, while likely to listen to the Voice, will be under no obligation to amend policy or legislation. Arguments claiming the Voice is a ‘political veto’ or equivalent are incorrect.

FNP Perspective: The Voice should not have veto powers.

5. Should the Voice deliver government programs?

The First Nations Voice will not deliver government programs. In fact, the communique issued after the first meeting of the Referendum Working Group on 29 September 2022

³⁷ Linda Burney, ‘Communique for the Referendum Working Group’ (Communique, 29 September 2022) <<https://ministers.pmc.gov.au/burney/2022/communique-referendum-working-group>>.

³⁸ Interview with Prime Minister Anthony Albanese (David Speers, ABC Insiders, 31 July 2022).

³⁹ Tony Abbott, ‘Entrenching Race in Constitution Drives Us Further Apart’, *The Australian*, 3 August 2022.

⁴⁰ Peta Credlin, ‘Dutton’s Libs Must Have Guts to Speak Out Against Voice’, *The Australian*, 4 August 2022.

⁴¹ Janet Albrechtsen, ‘Libs Left Limp as Voice Poses Legal Nightmare’, *The Australian*, 31 July 2022.

states that the Voice would not have a program delivery function.⁴² The experience of the Aboriginal and Torres Strait Islander Commission 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. In that regard, the implementation of the common principles for the Voice also discussed at the first meeting of the Referendum Working Group (and listed in the communique), particularly for the Voice to be chosen by First Nations people based on the wishes of local communities, and that it works alongside existing organisations, will be important to building and sustaining community support.

FNP Perspective: The Voice should not deliver government programs.

6. Should the Voice undertake a broader scrutiny role?

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 the Voice may require the power to compel documents and information from the government.

FNP Perspective: The Voice should undertake a broader scrutiny role.

7. Should the Voice be empowered to make representations to State and Territory governments?

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

⁴² Linda Burney, 'Communique for the Referendum Working Group' (Communique, 29 September 2022) <<https://ministers.pmc.gov.au/burney/2022/communique-referendum-working-group>>.

concern will arise at the state/territory and local level, and not merely at the Commonwealth level. In principle then, the First Nations Voice should be empowered to speak to all levels of government.

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. However, some issues will need to be resolved. State and Territory Parliaments will 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.

FNP Perspective: The Voice should be able to make representations to all levels of government. This will rely on the support of the States and Territories, and they should be considered early in the design process.

8. Should the Voice represent Indigenous Australians internationally?

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 United Nations Expert Mechanism on the Rights of Indigenous Peoples. It is sensible to permit this. This can be set up in the legislation that establishes the First Nations Voice, following the referendum.

FNP Perspective: The Voice should be able to represent Indigenous Australians internationally.

9. How should the Voice be funded?

It is crucial that the First Nations Voice receives sufficient funding to satisfy its responsibilities. 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 the Government's Indigenous program expenditure, but it must be sufficient to meet several minimum requirements. 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.⁴³ Officeholders should also be remunerated appropriately to reflect the Voice's status and draw qualified and politically adept individuals to the role.

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. Instead, funding should be specified in the enabling legislation following negotiations with Indigenous representatives and cover a ten-year period at least.

A similar approach has been adopted in Victoria. As part of the state's treaty process, it recently passed legislation establishing an independent Treaty Authority. The legislation appropriates funds from the Consolidated Fund each financial year from the FY2022–2023 onwards to pay for the Treaty Authority'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 FY2025-26.⁴⁴ While no doubt politically challenging, a similar arrangement could be made in legislation establishing the Voice.

FNP Perspective: The Voice should be funded in a similar manner to the Victorian Treaty Authority.

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

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. 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 Aboriginal and Torres Strait Islander peoples support the Voice.

⁴³ Referendum Council, *Final Report of the Referendum Council* (30 June 2017) 30-31.

⁴⁴ *Treaty Authority and Other Treaty Elements Act 2022* (Vic) s 16(2).

There are two ways that consultation processes could be regulated.

Option 1 – A Justiciable Obligation. The first option imposes a justiciable duty to consult. If members of the First Nations Voice are unhappy with the standard of engagement with the government and/or Parliament, they could go to court to compel consultation. This model exists in Canada. It has previously been canvassed in the debate on constitutional recognition in Australia.⁴⁵ However, no major proposal recommends imposing a justiciable duty to consult. Delegates at the Regional Dialogues favoured an arrangement that would ‘not interfere with parliamentary supremacy’.⁴⁶ The Referendum Council, Joint Select Committee and Langton and Calma reports have endorsed this approach.⁴⁷

Option 2 – A Political Obligation. 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 that will be set up in legislation. 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. The Langton and Calma model adopted this approach. Under their model:

- 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.⁴⁸ 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

⁴⁵ 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.

⁴⁶ Referendum Council, *Final Report of the Referendum Council* (30 June 2017) 38.

⁴⁷ 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.

⁴⁸ National Indigenous Australians Agency, *Indigenous Voice Co-design Process: Final Report to the Australian Government* (July 2021) 162

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.⁴⁹

The report does not make clear how this political obligation would be enforced. However, it is clear that the Voice could not go to court to challenge the adequacy of any consultation.

Other proposals aim to impose a political cost on a Parliament and government that fails 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.⁵⁰

- All bills would be required to include a statement in the accompanying explanatory memorandum explaining whether consultation has occurred;
- The National Voice would be able to table formal advice in Parliament; and
- A new parliamentary joint committee tasked with hearing directly from the National Voice, considering whether the National Voice has been appropriately consulted, considering tabled advice of the National Voice, and making recommendations to Parliament and the Government based on its findings.

Various other options have also been raised, including:

- Empowering the Voice with the powers and privileges of a parliamentary committee,⁵¹
- 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;⁵²
- 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.

⁴⁹ National Indigenous Australians Agency, *Indigenous Voice Co-design Process: Final Report to the Australian Government* (July 2021) 160.

⁵⁰ National Indigenous Australians Agency, *Indigenous Voice Co-design Process: Final Report to the Australian Government* (July 2021) 168.

⁵¹ National Indigenous Australians Agency, *Indigenous Voice Co-design Process: Final Report to the Australian Government* (July 2021) 172.

⁵² Harry Hobbs, *Indigenous Aspirations and Structural Reform in Australia* (Hart, 2021) 220.

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.⁵³ The ILC argues that the referendum process is key. It argues that constitutional enshrinement will give the Voice the ‘legitimacy and status’ it needs to build positive political influence and political respect from Parliament and the Executive.⁵⁴ This may occur but there is no guarantee that it will.

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,⁵⁵ it is less certain how the Voice will speak to the Parliament. The Langton and Calma Report recommended the establishment of a Parliamentary Committee as a ‘mechanism for [its] advice to be heard and considered’.⁵⁶ Other 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.⁵⁷

The current Parliament has set up a Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs. This committee could provide a vehicle for engagement between the Voice and the Parliament, as suggested by the Langton and Calma report, and other commentators. Broader options can also be considered. The Voice might be empowered to speak directly in Parliament from time to time. In both cases, 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: There will not be a justiciable obligation on the Parliament and government to consult with the Voice. To enhance the likelihood that the Parliament and government engage with the Voice, transparency measures should be set up in legislation. The FNP believes that, at a minimum, the transparency measures endorsed in the Langton and Calma report should be adopted.

⁵³ 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.

⁵⁴ 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.

⁵⁵ 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.

⁵⁶ National Indigenous Australians Agency, *Indigenous Voice Co-design Process: Final Report to the Australian Government* (July 2021) 169.

⁵⁷ Parliament of Australia, Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Interim Report* (July 2018) 40, [3.98].

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

The relationship between the First Nations Voice and 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.

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.⁵⁸ A number of solutions for engaging local and regional communities in this manner have been proposed. Pat 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.⁵⁹ 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 24-member National Voice. The model provides the necessary structural linkage and accountability between the national and local bodies. Marcia Langton has recently explained the importance of this linkage and why local communities should design their own local arrangements:

The problem with the Indigenous affairs debate is that it is conducted by people who by and large are remote from the most severe problems that we seek to solve. We designed the Voice from the ground up by recognising that at its heart it must have local and regional voices ... the people who live in those areas must say what those local Voice arrangements look like, how they work, who is on them, how they want to choose their members.⁶⁰

The Langton and Calma model may form the basis of the eventual proposal, but it is not the only possible approach. Connection with Native Title Prescribed Bodies Corporate, for example, 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

⁵⁸ Referendum Council, *Final Report of the Referendum Council* (30 June 2017) 30 (Hobart, Darwin, Brisbane).

⁵⁹ Parliament of Australia, Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Interim Report* (July 2018) 33.

⁶⁰ Paige Taylor, ‘Solar Hit for Poor in Remote Regions: Langton’, *The Australian*, 2 November 2022.

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.

FNP Perspective: Local communities must feel connected to and heard by the National Voice. Connections must be set out in legislation. Given the importance of this issue, it should be the focus of detailed and early consideration.

4. 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 the wording of the constitutional amendment, the referendum question, and the design and functions of the Voice, including its legislative form, 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’.⁶¹ This includes settling policy related to a proposed referendum on a First Nations Voice.

Working with Indigenous representatives to resolve these questions is also consistent with the UNDRIP, which Australia endorsed in 2009. The UNDRIP provides that government must obtain the free, prior, and informed consent of Indigenous peoples before enacting legislation and policy that affects them. While the Declaration is formally non-binding, many of its provisions, including those relating to consultation, do impose legal obligations at international law.⁶² Even if it does not impose domestic obligations, Australia claims to be committed to the norms and principles of the Declaration.

The Government appears to be working in this direction. The establishment of the Referendum Working Group and Referendum Engagement Group is a positive step. These Working Groups should aim to reach a broad consensus on key issues. The Government should engage genuinely and seriously with the reports of the Working Groups in order that these issues can be settled by agreement between the Australian Government and Aboriginal and Torres Strait Islander representatives. This will give a referendum the greatest chance of success.

⁶¹ Closing the Gap, *National Agreement on Closing the Gap* (July 2020) 4 [18].

⁶² James Anaya, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development*, UN Doc A/HRC/12/34 (15 July 2009) 12-15 [38]-[42].

5. Responding to Common Concerns about the Voice

Polling suggests that many Australians need more information about the First Nations Voice. An August 2022 survey found that while 79 per cent of voters are aware of the proposal to put a Voice in the Constitution, few respondents are confident in their knowledge. Only 8 per cent of those surveyed said they knew ‘a lot’ about it, while 37 per cent knew a little, 34 per cent were aware only of its name, and 15 per cent had never heard of it.⁶³ Another survey conducted the same month found that 65 per cent of respondents had ‘heard hardly anything or nothing about the concept’ of a First Nations Voice.⁶⁴

If Australians are to vote in support of a First Nations Voice in a referendum, it is vital that clear and accessible information is made available. Australians must be confident that they understand what the Voice would mean and how it would operate. This imperative is heightened by the likelihood that a concerted No campaign will inject false and disingenuous claims to confuse Australians and defeat the proposal. There are a range of legitimate common concerns that must be alleviated.

1. Do we need a First Nations Voice when there are already elected Indigenous Parliamentarians?

In recent years, increasing numbers of Aboriginal and Torres Strait Islander people have secured election to Parliament. A record ten Indigenous Australians are serving in the current 47th Parliament.⁶⁵ This means that 4.4 per cent of the Parliament is 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, but it does not mean that there is no need for a First Nations Voice.

It is often assumed that Indigenous Members of Parliament will act as representatives for Indigenous peoples across Australia. This has a ring of truth, but the structure and function

⁶³ Phillip Coorey, ‘Voters are Very Confused Over Indigenous Voice: Survey’, *Australian Financial Review* (online, 29 August 2022) <<https://www.afr.com/politics/federal/voters-are-very-confused-over-indigenous-voice-survey-20220827-p5bd96>>.

⁶⁴ Katharine Murphy, ‘Guardian Essential Poll: Most Australians Support an Indigenous Voice – But They Don’t Know Too Much About It’, *Guardian Australia* (online, 9 August 2022) <<https://www.theguardian.com/australia-news/2022/aug/09/guardian-essential-poll-most-australians-support-an-indigenous-voice-but-they-dont-know-too-much-about-it>>.

⁶⁵ Pat Dodson, Linda Burney, Malarndirri McCarthy, Lidia Thorpe, Dorinda Cox, Jana Stewart, Jacinta Price, Gordon Reid, Marion Scrymgour and Kerryne Liddle.

of Australian parliamentary democracy means that it is not accurate. There are four reasons why Indigenous Members of Parliament play a different role from a First Nations Voice.

- **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 people 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 people.
- **Political Practice:** Australia has one of the world's highest levels of party discipline which means that representatives almost always vote along party lines. 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 national debate more broadly, individual representatives cannot usurp the authority and role of traditional owners and elders to speak for their 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. Regional 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'.⁶⁶ A First Nations Voice, therefore, serves a distinct and complementary function.

2. Why do we need a Voice if prominent Indigenous Australians and Indigenous organisations can already speak to government?

Over the last few decades, Aboriginal and Torres Strait Islander peoples and cultures have become much more prominent in Australian life. Many Indigenous Australians have built

⁶⁶ 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].

outstanding careers in sport, politics, art, culture and indeed all sectors of society. Indigenous community-controlled organisations have also emerged to protect and promote the interests of their communities. The Coalition of Peaks, for example, is an alliance with over 80 members from every State and Territory in Australia. The Coalition of Peaks was instrumental in the development of the National Agreement on Closing the Gap. If these organisations and people are so prominent, why is a First Nations Voice needed?

It is important to see so many Indigenous Australians succeeding in their chosen careers and a broad community-controlled sector thrive. But their success does not diminish the need for a First Nations Voice. A First Nations Voice would be a permanent institutional presence in the nation's Constitution. It would demonstrate Australia's commitment to recognising and protecting the rights of Aboriginal and Torres Strait Islander peoples. It would also ensure that Indigenous communities could select their own representatives to speak to the Parliament and government when debating law and policy that will affect Indigenous Australians.

3. Would a separate body for Indigenous Australians divide Australia based on race?

A First Nations Voice would be a body enshrined in the Constitution that would enable Aboriginal and Torres Strait Islander people to make representations to the Parliament and government about laws and policy that affect Indigenous Australians. Some commentators have argued that an advisory body open only to Indigenous Australians will divide the country on the basis of race or that it breaches important principles of equality, because it will give one group of people a better chance of influencing laws than other groups. Are they correct?

There are three points to make here. First, Aboriginal and Torres Strait Islander people are Australians and have the same rights that non-Indigenous Australians have. But they also have unique rights and interests as the original occupiers of the Australian continent. Their rights to land and culture are protected in special legislation passed by the Australian Parliament. These rights are based on their long history of operating as a distinct society, with a unique economic, religious, and spiritual relationship to their lands and waters. They are political rights inherent to them as Indigenous peoples, not rights based on race. No other group of Australians have these rights because no other group of Australians has a 60,000-year connection to this continent.

Second, the Australian Parliament has passed special laws that only affect Aboriginal and Torres Strait Islander people. This is the only group of people in Australia about which special

laws are made. If Aboriginal and Torres Strait Islander people are the only group that has special laws made about them, it seems reasonable that they should be able to speak to the Parliament and government about those laws.

Third, to even speak of the notion of race is misguided. There is no scientific or biological foundation for the idea of race. Scientists that have mapped the human genome have found there is no basis in the genetic code for race. Race is a social construct. This emphasises again that the First Nations Voice reflects the inherent rights Aboriginal and Torres Strait Islander peoples hold as the original inhabitants of the Australian continent. It is not based on race.

4. Is the Voice a Third Chamber? Will the Voice delay Parliament or make governing more difficult?

The First Nations Voice will make representations to the Parliament and government on laws and policy that affect Indigenous Australians. Some commentators have argued that a Voice will delay and frustrate Parliament and make government more difficult because the Parliament will have to wait to hear what the Voice says before it can pass laws. Is this correct?

This is not correct. The Voice will not be able to introduce bills into Parliament or vote on legislation. The Voice will have no ability to delay or frustrate Parliament. The Voice will be able to make representations to Parliament and the government, but there is no requirement on Parliament or the government to change its laws or policies, or even to wait for those representations to be made. Parliament retains full control over its own procedures.

5. Why should the Voice speak on things that affect all Australians?

The proposed constitutional amendment allows the Voice to make representations on matters relating to Aboriginal and Torres Strait Islander peoples. Some commentators have argued that this scope is too broad. They argue that it should only be able to make representations on Indigenous-specific legislation, or on laws and policies that directly affect Indigenous Australians. Why should the Voice be able to speak on things that affect all Australians?

There are four reasons why the Voice should be able to speak on matters relating to Aboriginal and Torres Strait Islander peoples.

- **It is not feasible to limit the Voice to Indigenous-specific legislation.** Parliament passes lots of laws every year. It is not always possible to know what constitutional provision supports the power. This is only decided if the High Court must rule on the validity of the legislation, which happens a long time after the law has been passed by Parliament – and a long time after the Voice would have made representations on the Bill.
- **Laws of general application sometimes affect Indigenous Australians differently.** Some laws that apply to all Australians affect Indigenous Australians differently. For example, because Aboriginal and Torres Strait Islander people have a lower average life expectancy compared to non-Indigenous Australians, laws dealing with the Age Pension affect Indigenous Australians disproportionately. A law restricting eligibility to 67-year-olds may not ‘directly affect’ Indigenous Australians, but the Voice should be able to make representations before it is passed.
- **The Voice should be able to choose what it focuses on.** The Voice is intended to give Aboriginal and Torres Strait Islander peoples a say over matters that affect them. It would be wrong in principle for the government or Parliament to decide what it thinks Aboriginal and Torres Strait Islander peoples should focus on. Consistent with Indigenous peoples’ right to self-determination, the Voice should decide itself. 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
- **The Voice is advisory only.** The Voice cannot make government or Parliament change its mind or delay a bill from being voted on. It can only make representations. There is no great need to limit what the Voice can speak on when it has not ability to force government to amend its proposals or the Parliament to amend its bills.

6. How will the Voice be different from ATSIC?

ATSIC was a national Indigenous representative body that existed between 1989 and 2004. The Commission combined representative and administrative roles. Elected Indigenous representatives could identify funding priorities, formulate, and implement policy and plans, make decisions over public expenditure, and protect cultural material and information. However, ATSIC faced several structural problems. In 2004, it was abolished with bipartisan support. Will the First Nations Voice be different from ATSIC?

Yes. The Voice has learned from the experience of ATSIC and so its structure will be different. The Voice will not deliver government programs. It will be a representative body that makes

representations to Parliament and the government on law and policy that affect Indigenous Australians. This more limited role will avoid the structural complications that ATSIC faced.

7. Will activist Judges turn the Voice into something radical?

The First Nations Voice will make representations to the Parliament and the government. There is no legal requirement on the Parliament or government to change its policies and proposed laws. However, some commentators have argued that the Voice will be turned into something radical by activist Judges. Are they correct?

This is not correct. The Voice is being designed in a careful manner to avoid any role for the High Court. The Voice will be a political institution subject to Parliament. There will be no opportunity for the Voice to go to the High Court if the Voice believes that the government is not listening to it. It will need to convince the Parliament and government to listen by providing valuable advice.

8. Will the Voice improve the lives of Aboriginal and Torres Strait Islander people?

The 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. Some commentators argue that it will only help 'elite' Indigenous Australians and those in rural and regional areas who need the greatest support will be left behind. Are they correct?

There is compelling evidence that the direct involvement of Aboriginal and Torres Strait Islander peoples in the design and implementation of laws and policies produces much better outcomes. This is agreed across political parties in the Parliament and it is the core premise of the National Agreement on Closing the Gap, developed by the Coalition Government in 2020 and now being implemented by the current Labor Government.

All major proposals for the design of the Voice recognise that the relationship between the First Nations Voice and local and regional communities is critical to its success. Proponents have envisioned the Voice acting as an interface for local and regional communities, as well as simultaneously reporting back to the community. This way, the aspirations, concerns, and priorities of local communities will be heard – and acted upon – by all levels of government. The Voice will not only be a forum for national leaders. It will be a mechanism through which

Indigenous communities across Australia can have their voices heard. In this way, the Voice will improve the lives of Aboriginal and Torres Strait Islander peoples.

9. Is the Voice a radical change that goes against the nature of our Constitution?

The Australian Constitution is a rulebook for governance. It establishes and distributes power among the three arms of the federal government: the executive, the legislature, and the judiciary. It also divides legislative power and outlines the relationship between the Commonwealth government in Canberra and the several States. Some commentators have argued that inserting a provision about a First Nations Voice would undermine the nature of our Constitution. Are they correct?

No. The Voice is not a radical change. It is a modest addition to our Constitution and to our nation. The proposal has been thoroughly tested with senior constitutional lawyers across the spectrum over the last five years. Two former Chief Justices of the High Court of Australia, Murray Gleeson and Robert French, have both expressed public support for the Voice. So too have leading constitutional lawyers such as Anne Twomey and Greg Craven. The Voice also does not cut against the nature of our Constitution. It simply provides Aboriginal and Torres Strait Islander peoples with the opportunity to speak to the Parliament and government when they are debating laws and policy that will affect Indigenous Australians.

10. Why do we need to put the Voice in the Constitution?

A First Nations Voice will allow Indigenous Australians to make representations to the Parliament and government on laws that will affect them. Many people believe the First Nations Voice is a good idea, but they do not know why it should be put in the Constitution. They wonder whether it would make more sense for Parliament to establish the Voice in legislation.

This is a good question. The Parliament could pass a law tomorrow that establishes a First Nations Voice. However, there are three good reasons why the Voice needs to be put in the Constitution.

- **The Constitution will provide the Voice with security and stability.** The Parliament has established three Indigenous representative bodies in the past. These bodies empowered Indigenous Australians to speak to government about laws and policies

that affected them. In each case, however, the body was abolished after several years. Putting a First Nations Voice in the Constitution will make it harder for government and Parliament to do away with the Voice.

- **Putting the Voice in the Constitution will make it more likely to succeed.** The Voice will not be able to force the Parliament or government to change laws or policies. Its success will rely on political and moral pressure. However, Parliament and the government are more likely to listen to the Voice if it has been endorsed by the Australian people at a referendum. Australians will have made clear that they want their political leaders to treat the Voice with the seriousness that it deserves. Without a referendum, Parliament and government will find it easier to ignore the Voice.
- **The Uluru Statement asked for the Voice to be put in the Constitution.** For over a decade Australians have debated whether and how to recognise Indigenous Australians in the Constitution. In the Uluru Statement from the Heart, Aboriginal and Torres Strait Islander people said that putting a First Nations Voice in the Constitution is the way that they would like to be recognised.

11. How can I vote for the Voice if I do not know what it will look like?

Surveys show that many Australians support the idea of a Voice but are unsure of what it might look like in practice. Some commentators have argued that you should vote No in a referendum if there is not enough detail about what the Voice will look like. Is this a sensible idea?

Australians are entitled to know what the Voice will look like before they vote in a referendum. In most cases, however, that detail already exists or will be resolved soon.

- **Key principles have already been agreed.** We already know key details about how the Voice will look. In a [Communique](#) issued by the Referendum Working Group on 29 September 2022, it was agreed that the Voice would provide independent advice to the Parliament and government; be chosen by First Nations people based on the wishes of local communities; be representative of Aboriginal and Torres Strait Islander communities; be empowering, community led, inclusive, respectful, culturally informed and gender balanced, and include youth; be accountable and transparent; and work alongside existing organisations and traditional structures. At the same time, the Voice would not have a program delivery function or a veto power.

- **Detail does not require a draft Bill.** There are still a few issues that need to be resolved, but this does not require a draft Bill. These details can be set out in an exposure document that outlines key elements and principles that explain how the Voice will look and how it will operate.
- **The referendum is about the principle.** It is also important to remember that the Uluru Statement from the Heart asks Australians to support the principle of a First Nations Voice rather than a particular legislative version. Parliament can always change what the Voice looks like, but a referendum is the opportunity for Australians to say whether they think a Voice is a good idea.

12. Will a First Nations Voice cede Aboriginal and Torres Strait Islander peoples' sovereignty?

A First Nations Voice will be an Indigenous representative body enshrined in the Australian Constitution. Because the Voice will be located within the Constitution, some Indigenous advocates and commentators have argued that it will require First Nations peoples cede sovereignty. Are they correct?

Sovereignty is inherent to First Nations peoples and communities. It is connected to and drawn from Country. It does not come from the Australian Constitution or any other settler document. It cannot be extinguished by any settler document. As the Uluru Statement from the Heart records, Indigenous sovereignty is 'a spiritual notion'. It can be expressed but it cannot be suppressed. It is demonstrated by First Nations peoples controlling their lives and destiny. For this reason, putting a First Nations Voice in the Australian Constitution will have no effect on Indigenous sovereignty. It will simply provide Aboriginal and Torres Strait Islander peoples with a greater say over the development of laws and policies that affect them.

6. Postscript

As this Issues Paper went to press, Noel Pearson, the originator of the proposal for a First Nations Voice, presented the first of his 2022 Boyer Lectures. In his lecture, Pearson explains simply and concisely what the Voice means to Indigenous Australians:

*A yes vote in the voice referendum will guarantee that Indigenous peoples will always have a say in laws and policies made about us. It will afford our people our rightful place in the constitutional compact. This constitutional partnership will empower us to work together towards better policies and practical outcomes for Indigenous communities.*⁶⁷

But constitutional recognition, Pearson continues, is not solely of benefit for Aboriginal and Torres Strait Islander peoples. It is 'not a project of identity politics, it is Australia's longest standing and unresolved project for justice, unity and inclusion'.⁶⁸ It is for this reason that Pearson implores non-Indigenous Australians to engage with Aboriginal and Torres Strait Islander peoples' modest call for a Voice. It is nothing more than a call for an institution that 'create[s] a dialogue between the old and new Australians in respect of the country's heritage and its future'.⁶⁹

⁶⁷ Noel Pearson, 'Boyer Lecture Series: Recognition', *ABC* (online, 27 October 2022) <<https://about.abc.net.au/speeches/noel-pearson-boyer-lecture-series-who-we-were-and-who-we-can-be/>>.

⁶⁸ Ibid.

⁶⁹ Ibid.