

Responding to Common Concerns about an Aboriginal and Torres Strait Islander Voice



Australian
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Image:

Michael Nelson Jagamara (c. 1945-2020) (artist), Warlpiri people, with William McIntosh (stone consultant), Aldo Rossi (1919-1991) (stonemason), Franco Colussi (born 1938) (stonemason), Forecourt mosaic pavement, 1986-1987, Art/Craft Program, Parliament House Art Collection. Copyright estate of the artist licensed by Aboriginal Artists Agency Ltd.



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Background

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 is pursuing a referendum, as its first priority, to enshrine an Aboriginal and Torres Strait Islander Voice in the Australian Constitution.

The referendum is expected to be held between October and December 2023. It will be an important moment for the country. There has been significant work done to settle various important matters related to the referendum. After much deliberation, on 23 March the Prime Minister announced the words the government wants inserted into the Constitution, as well as the referendum question it plans to put to the Australian people.

The proposed amendment reads:

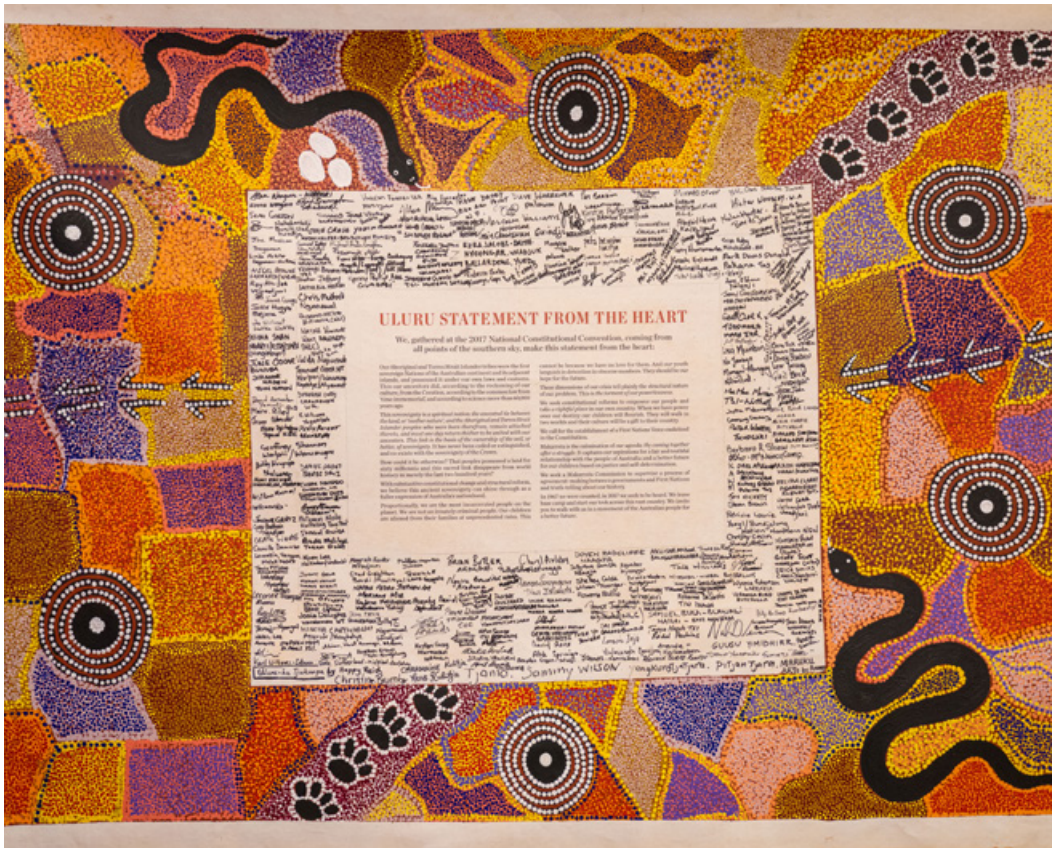
*Chapter IX – Recognition of Aboriginal and Torres Strait Islander Peoples
129. Aboriginal and Torres Strait Islander Voice*

In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia:

- 1. There shall be a body, to be called the Aboriginal and Torres Strait Islander Voice.*
- 2. The Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples.*
- 3. The Parliament shall, subject to this Constitution, have power to make laws with respect to matters relating to the Aboriginal and Torres Strait Islander Voice, including its composition, functions, powers and procedures.*

¹ Uluru Statement from the Heart, 26 May 2017.

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



A lot of work has also been done to outline what the Voice will look like and how it will work. Despite this, many Australians still have questions about what the proposed change means. A poll in February 2023, for example, found that only 31 per cent of respondents felt ‘well informed about what the change means’, while 37 per cent said ‘they don’t feel informed’.³ It is vital that Australians understand the proposal and understand why Aboriginal and Torres Strait Islander peoples have called for a Voice to be put in the Constitution.

This document has been prepared by the First Nations Portfolio (FNP) at The Australian National University (ANU). It provides responses to common concerns currently being raised about the Voice. It is intended to help people better understand some of the complex issues and confusing commentary that has surrounded the Voice proposal so they can make an informed decision when they vote at the referendum later this year.

³ Katherine Murphy, ‘Guardian Essential Poll: Majority of Australians Continue to Support Indigenous Voice’, *Guardian Australia* (online, 7 February 2023) <<https://www.theguardian.com/australia-news/2023/feb/07/guardian-essential-poll-majority-of-australians-continue-to-support-indigenous-voice>>.

1. Do we need an Aboriginal and Torres Strait Islander 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 eleven Indigenous Australians are serving in the current 47th Parliament.⁴ This means that 4.8 per cent of the Parliament is Indigenous (11 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 an Aboriginal and Torres Strait Islander 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 of Australian parliamentary democracy means that it is not accurate. There are four reasons why Indigenous Members of Parliament play a different role from an Aboriginal and Torres Strait Islander 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 support those interests.
- **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'.⁵ An Aboriginal and Torres Strait Islander Voice, therefore, serves a distinct and complementary function.

⁴ Pat Dodson, Linda Burney, Malarndirri McCarthy, Lidia Thorpe, Dorinda Cox, Jana Stewart, Jacinta Price, Gordon Reid, Marion Scrymgour, Kerryne Liddle and Jacqui Lambie.

⁵ 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.

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 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 Community-Controlled Peak Organisations (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 an Aboriginal and Torres Strait Islander 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 an Aboriginal and Torres Strait Islander Voice. The community-controlled sector needs funding, usually from the Commonwealth, to survive and influence policy and programs. A Voice, however, 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 or give Aboriginal and Torres Strait Islander people special rights?

An Aboriginal and Torres Strait Islander 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 more rights than other groups. Are they correct? The answer is no.

- **The Voice does not confer ‘special’ rights on anyone.** A group of leading constitutional lawyers, including a former High Court Judge, has considered this question. They found that the Voice does not confer rights, let alone ‘special’ rights on anyone. Instead, the Voice would give Aboriginal and Torres Strait Islander peoples an opportunity to make representations to the Parliament and the government. All Australians have the same opportunity. The Voice would not change this; it ‘would not change or take away any right, power or privilege of anyone who is not Indigenous’.⁶
- **The Voice recognises Aboriginal and Torres Strait Islander peoples as the First Australians.** The Voice would constitutionally recognise the unique status and position that Aboriginal and Torres Strait Islander peoples hold in Australia as the original occupiers of the Australian continent. This status is not based on race. It is based on the fact that Aboriginal and Torres Strait Islander peoples are Indigenous to this continent. They were here long before British colonisation and are the only group of Australians with a 60,000-year connection to this continent.
- **The Parliament can make laws that only affect Aboriginal and Torres Strait Islander peoples.** 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 is reasonable that they should be able to speak to the Parliament and government about those laws.
- **The Voice is not about ‘race’.** To even speak of the notion of race is misguided. There is no scientific or biological foundation for the idea of race.⁷ 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 Aboriginal and Torres Strait Islander 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.

⁶ Aboriginal and Torres Strait Islander Voice, *Communique for the Referendum Working Group – December 2022: Attachment – Advice from the Constitutional Expert Group* (13 December 2022) <<https://voice.niaa.gov.au/news/communique-referendum-working-group-december-2022>>.

⁷ American Society of Human Genetics, ‘ASHG Denounces Attempts to Link Genetics and Racial Supremacy’ (2018) 103(5) *ASHG Perspective* 636.



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

The proposed constitutional amendment would enable an Aboriginal and Torres Strait Islander Voice to make representations to the Parliament and the Executive 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?

The Voice is not a Third Chamber of Parliament. 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. As former High Court Judge Kenneth Hayne has said, the Voice ‘will not impede the ordinary working of government’.⁸ The Voice will simply be able to make representations to Parliament and the government. Parliament retains full control over its own procedures. This also means that Parliament can amend legislation and adjust processes if it believes the relationship between the Voice and other institutions of government is not working appropriately. For example, Parliament could enact legislation to require public officials take the advice of the Voice into account when making decisions. However, Parliament could always amend or remove such a requirement. The Voice is subservient to Parliament.

⁸ Kenneth Hayne, ‘All Australians own the Constitution. Now we have the words to prove it’, *Guardian Australia* (online, 23 March 2023) <<https://www.theguardian.com/commentisfree/2023/mar/23/all-australians-own-the-constitution-now-we-have-the-words-to-prove-it>>.

5. Should the Voice be allowed to 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. This means it will be able to speak on matters specific to Aboriginal and Torres Strait Islander peoples as well as on matters relevant to all Australians but which affect Aboriginal and Torres Strait Islander peoples differently. 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.

There are four reasons why the Voice should be able to speak on matters that directly or indirectly affect 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 in advance what constitutional provision supports each law. This is only decided if the High Court rules 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 on such laws before they are 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 may 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 no ability to force government to amend its proposals or the Parliament to amend its bills.



6. Won't the Voice just be another ATSIIC?

The Aboriginal and Torres Strait Islander Commission (ATSIIC) 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, ATSIIC faced several structural problems. In 2004, it was abolished with bipartisan support. Is the Aboriginal and Torres Strait Islander Voice going to be another ATSIIC?

No. Much has been learned from the experience of ATSIIC and so the structure of the Voice 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 ATSIIC faced.

7. 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 law making power and outlines the relationship between the Commonwealth Government in Canberra and the several States. Some commentators have argued that inserting a provision about an Aboriginal and Torres Strait Islander 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, including via the government's Constitutional Expert Group. Two former Chief Justices of the High Court of Australia, Murray Gleeson and Robert French, have both expressed public support for the Voice, as has former High Court Judge Kenneth Hayne. Leading constitutional lawyers such as Anne Twomey, George Williams, Asmi Wood, Bret Walker and Megan Davis have also expressed support for the Voice. As Murray Gleeson has explained:

A proposal that the Constitution should provide for Parliament to design, establish, and determine from time to time the make-up and operations of a body to represent Indigenous people, with a specific function of advising about the exercise of that power, hardly seems revolutionary.⁹

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. As Robert French has noted, the Voice is 'high return against low risk', because it will 'provide a practical opportunity for First Peoples to give informed and coherent and reliable advice to the Parliament and the Executive to assist them in law and policy making in one of the most difficult areas of contemporary government'.¹⁰

⁹ Murray Gleeson, *Recognition in Keeping with the Constitution: A Worthwhile Project* (Uphold and Recognise, 2019) 14.

¹⁰ Robert French and Geoffrey Lindell, 'The Voice — High Return, Low Risk' (Presented at the Judicial Commission of New South Wales Exchanging Ideas Symposium, 4 February 2013).

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

The Aboriginal and Torres Strait Islander Voice will make representations to the Parliament and the government. There will be no constitutional 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?

The Voice is not a radical change, and it will not be turned into something radical by Judges. As Former Chief Justice Robert French has explained, ‘there is little or no scope for any court to find constitutional legal obligations’ in the proposed amendment.¹¹ This point is supported by former High Court Judge Kenneth Hayne who has explained that there are no reasons to fear what has been proposed.¹²

The Voice will be a political institution subject to Parliament. This means Parliament will retain the ability – and the responsibility – to design how the Voice looks and operates, including whether and how public officials engage with representations made by the Voice. Parliament might pass a law that requires public officials consider the views of the Voice when making decisions. If the law requires this, courts may need to scrutinise decisions to see if the law was followed. However, because the Voice is subject to Parliament, Parliament will always be able to change the law. As Kenneth Hayne has said, it will therefore ‘not affect the powers or the functions of the Parliament or the Executive Government of the Commonwealth’.¹³



¹¹ Ibid, 15.

¹² Kenneth Hayne (n 8).

¹³ Ibid.

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

The Aboriginal and Torres Strait Islander 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 Aboriginal and Torres Strait Islander 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, who have lived experiences and practical knowledge, can influence decision-making that affects them.

In this way, the Voice will lead to more informed and responsive public policy which can improve the lives of Aboriginal and Torres Strait Islander peoples. As Marcia Langton has recently said in relation to the Voice 'we know from the evidence that what improves people's lives is when they get a say. And that's what this is about'.¹⁴

¹⁴ Josh Butler, 'Emotional PM reveals question Australians will be asked for constitutional change on Indigenous recognition', *Guardian Australia* (online, 23 March 2023) <<https://www.theguardian.com/australia-news/2023/mar/23/indigenous-voice-to-parliament-referendum-question-australia-constitution-change-pm-anthony-albanese>>.

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

Many people believe the 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 an Aboriginal and Torres Strait Islander 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 national 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 an Aboriginal and Torres Strait Islander 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 take the Voice seriously. Without a referendum, Parliament and government will find it easier to ignore the Voice.
- **Putting the Voice in the Constitution is an Act of Recognition and Respect.** Aboriginal and Torres Strait Islander peoples have more than 60,000 years of connection to this continent. Putting the Voice in the Constitution would mean that the Australian people formally recognise that history and status. It is also the form of recognition asked for by Aboriginal and Torres Strait Islander peoples. 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 Voice in the Constitution is the way that they would like to be recognised.

¹¹ Ibid, 15.

¹² Kenneth Hayne (n 8).

¹³ Ibid.

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?

It is reasonable that Australians want to know what the Voice will look like before they vote in a referendum. In most cases, however, that detail already exists.

- **Key design principles have already been agreed.** We already know key details about how the Voice will look. After much deliberation, on 23 March 2023 the government released detail on key design principles of the Voice which have been agreed to by the Referendum Working Group and the government. These are:

a) The Voice will give independent advice to Parliament and Government:

- It would make representations on matters relating to Aboriginal and Torres Strait Islander peoples.
- It would be able to make representations proactively.
- It would be able to respond to requests for representations from the Parliament and the Executive Government.
- It would have its own resources to allow it to research, develop and make representations.
- The Parliament and Executive Government should seek representations in writing from the Voice early in the development of proposed laws and policies.

b) The Voice will be chosen by Aboriginal and Torres Strait Islander people based on the wishes of local communities:

- Its members would be selected by Aboriginal and Torres Strait Islander communities, not appointed by government.
- Members would serve on the Voice for a fixed period of time to ensure regular accountability to their communities.
- To ensure cultural legitimacy, the way that members of the Voice are chosen would suit the wishes of local communities and would be determined through the post-referendum process.

c) The Voice will be representative of Aboriginal and Torres Strait Islander communities, gender balanced and include youth:

- Members would be Aboriginal and/or Torres Strait Islander, according to the standard three part test and would be chosen from each of the states, territories and the Torres Strait Islands.
- The Voice would have specific remote representatives as well as representation for the mainland Torres Strait Islander population.
- It will have balanced gender representation at the national level.

d) The Voice will be empowering, community-led, inclusive, respectful and culturally informed:

- Members would be expected to connect with – and reflect the wishes of – their communities.
- The Voice would consult with grassroots communities and regional entities to ensure its representations are informed by their experience, including the experience of those who have been historically excluded from participation.

e) The Voice will be accountable and transparent:

- It will be subject to standard governance and reporting requirements to ensure transparency and accountability.
- Members would fall within the scope of the National Anti-Corruption Commission.
- Members would be able to be sanctioned or removed for serious misconduct.

f) The Voice will work alongside existing organisations and traditional structures:

- It will respect the work of existing organisations.

g) The Voice will not have a program delivery function:

- It would be able to make representations about improving programs and services, but it would not manage money or deliver services.

h) The Voice will not have a veto power.

- **The referendum is about the principle.** It is important to remember that the Uluru Statement from the Heart asks Australians to support the principle of a Voice rather than a particular legislative version. The finer details of what the Voice will look like and how it will work is the responsibility of the Parliament, to be worked out after the referendum through consultation with Aboriginal and Torres Strait Islander peoples and debate in Parliament. As Kenneth Hayne has said in relation to questions about detail:

It will be the Parliament that decides the details about how the Voice is set up and how its representations are dealt with by Parliament and the Executive. And that is how it should be. The Constitution sets out the principles, not the machinery. Machinery can and should change as times change and it is the Parliament that will do that, not the referendum. Asking for details is a distraction. It asks for a prediction of what Parliament will do in the future. That is for Parliament to decide.¹⁵

This means that 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.

¹⁵ Kenneth Hayne (n 8).

12. Will an Aboriginal and Torres Strait Islander Voice cede Aboriginal and Torres Strait Islander peoples' sovereignty?

An Aboriginal and Torres Strait Islander Voice will be an Indigenous representative body enshrined in the Australian Constitution. Because the Voice will be located within the Constitution, some Indigenous activists and commentators have argued that it will require Indigenous peoples cede sovereignty. Are they correct?

An Aboriginal and Torres Strait Islander Voice cannot and will not cede Indigenous peoples' sovereignty. Leading Indigenous and non-Indigenous constitutional and international lawyers, such as Megan Davis, Asmi Wood, Hannah McGlade, George Williams and Anne Twomey have examined this issue and agree.¹⁶ There are several reasons why this is the case.

- **Indigenous sovereignty cannot be ceded except by agreement and the proposal says nothing about Indigenous sovereignty.** The proposal does not mention Indigenous sovereignty. Rather, it empowers Indigenous peoples with the opportunity to make representations to Parliament and the government. In any event, the referendum requires the support of non-Indigenous Australians. It makes little sense that non-Indigenous Australians could cede Aboriginal and Torres Strait Islander peoples' sovereignty. Only Aboriginal and Torres Strait Islander peoples can cede their sovereignty.
- **Indigenous sovereignty cannot be extinguished by the Australian Constitution.** Sovereignty is inherent to Indigenous 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 Indigenous peoples controlling their lives and destinies.
- **The Participation of Aboriginal and Torres Strait Islander peoples in Australian governance does not cede sovereignty.** No one suggests that Indigenous parliamentarians have ceded their sovereignty when they sit in Parliament and debate and vote on proposed laws. The Voice is simply an opportunity for Aboriginal and Torres Strait Islander peoples to participate in the development of law and policy that affects them.

Putting an Aboriginal and Torres Strait Islander Voice in the Australian Constitution will have no effect on Indigenous sovereignty. It will simply provide Aboriginal and Torres Strait Islander peoples with an opportunity to inform the development of laws and policies that affect Indigenous Australians.

¹⁶ Aboriginal and Torres Strait Islander Voice, *Communique for the Referendum Working Group – February 2023: Attachment – Summary of Second Tranche of Advice from the Constitutional Expert Group* (2 February 2023) <<https://voice.niaa.gov.au/news/communique-referendum-working-group-february-2023#>>; Hannah McGlade, 'Voice Will Empower Us, Not Undermine Sovereignty', *National Indigenous Times* (16 January 2023) <<https://nit.com.au/16-01-2023/4736/voice-will-empower-us-not-undermine-sovereignty>>.



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