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The 2023 Australian Referendum: a proposal for an Indigenous Voice to Parliament and Government

Elisa Arcioni and Andrew Edgar

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Il 14 ottobre 2023, gli elettori australiani hanno votato al referendum sulla proposta di modificare la Costituzione riconoscendo esplicitamente gli Aborigeni e gli Isolani dello Stretto di Torres attraverso l'inserimento di una Voce al Parlamento ed al Governo. La maggioranza degli elettori di ogni Stato ha votato contro il cambiamento, così come la maggioranza degli elettori a livello nazionale. Pertanto, il referendum è fallito. Questo articolo spiega la proposta dal punto di vista del diritto pubblico e include brevi riflessioni sul dibattito pubblico che circonda il referendum.

On October 14, 2023, Australian electors voted in a referendum regarding a proposal to change the Constitution by explicitly recognizing Aboriginal and Torres Strait Islander people through the insertion of a Voice to Parliament and Government. A majority of electors in each State voted against the change, as did a majority of electors nationally. Therefore, the referendum failed. This article explains the proposal from a public law perspective and includes brief reflections regarding the public debate surrounding the referendum.

1. Introduction

The Australian Constitution is an old and very stable document, presiding over a federal democratic state. It was enacted in 1901, as a statute passed by the UK Parliament in London but drafted in Australia and accepted at referenda by electors in Australia. The Australian Constitution is notoriously difficult to amend, requiring the passage of a proposal in the form of a Bill by the Parliament and then a double majority of electors voting in favour of the change – a majority of electors in a majority of the six sub-national States, as well as a national majority[1]. Amendment has only occurred on 8 occasions since the Constitution was enacted in 1901, despite 45 attempts to change the document. The proposal put to the Australian electors on 14 October 2023 was to recognise Aboriginal and Torres Strait Islander peoples through a Voice to Parliament and Government.

Australia's First Peoples are the oldest living cultures in the world, having been in Australia for at least 60,000 years. British colonisation in the late 1700s occurred without a treaty or consent, and the Australian state which developed out of the six British colonies established on the Australian landmass has not yet reckoned with that history. Rather, the colonial and then State and national legal systems operated to exclude, discriminate against and marginalise Aboriginal and Torres Strait Islander people. Although recognised as having the same formal legal status as non-Indigenous Australians (namely British subject or Australian citizenship status), Aboriginal and Torres Strait Islander people were historically denied the legal rights and freedoms that usually attach to that status. The Constitution is silent as to the existence and status of Australia's First Nations, and any law-making relating to Indigenous peoples is piecemeal. While Australian law is now formally neutral in its terms, Indigenous disadvantage continues as an inter-generational consequence of Australia's legal history.

Australia does not have express human rights provisions included in the Constitution, but it does have racial anti-discrimination legislation, as well as laws providing for parliamentary scrutiny of bills and regulations for their impact on human rights. There is also legislation providing for land rights for Aboriginal and Torres Strait Islander peoples and some protection of their heritage. The change that would have been made by the addition to the Constitution of the

Voice to Parliament and the Government was intended to guarantee a facility for the views of Aboriginal and Torres Strait Islander peoples to be made known to those public authorities with the power to make law and policy, so as to influence the making of those public decisions and exercise some measure of self-determination.
The proposal would have meant a new s 129 would have been inserted into the Constitution, with the following words:
«*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*».

Section 129(3) was included to make it clear that the composition of the Voice to Parliament and the Government and its method of electing its members was to be subsequently established by parliamentary legislation, rather than included in the Constitution itself. This is a common feature of the Australian Constitution. For example, elections for members of the Australian Parliament are referred to in the Constitution but the details are provided for in the Commonwealth Electoral Act 1918. The Australian Government provided design principles to inform public discussion for the referendum that explained that members of the body would be selected by Aboriginal and Torres Strait Islander people, which would help to ensure that its representations to the Parliament and Government were based on the experience of local First Nation's communities.
The Voice proposal was part of the consensus position of First Nations people who met at the 2015 National First Nations Constitutional Convention at Uluru. That was the culmination of dialogues held across Australia over 2016-17 to determine what First Nations wanted in terms of constitutional recognition

and reform. The resulting Uluru Statement from the Heart identified three desired outcomes, known as: Voice, Treaty and Truth. Voice is the Voice proposal put to referendum. Treaty is a coming together of First Nations peoples and the Australian state, a process of agreement making. The Statement uses the term "Makarrata" which is a Yolgnu term[2] that can be translated as a process of coming together after a struggle. Truth is a telling of the history of Australia so that there is a better understanding of the reality of what has happened since the British arrived in the late 1700s[3].

The Voice was designed to be a mechanism through which the views of Aboriginal and Torres Strait Islander peoples could be received by Parliament and the Executive Government of the Commonwealth. It was the form of constitutional recognition which received consensus support at the 2015 National First Nations Constitutional Convention, as contained in the Uluru Statement from the Heart. As that Statement outlines, it was intended to be a response to the political powerlessness of First Nations throughout Australian history. The Voice was intended to give independent advice to the Parliament and government about matters that affect First Nations, with the Parliament to determine the consequences of that advice. The Voice was designed not to have legal power, not to have a program delivery function and not have a veto power[4].

2. International law and human rights

The Voice was designed as a structure to guarantee representation of First Nations peoples within Australian political and governmental processes[5]. It was designed as a manifestation of self-determination of First Nations peoples, understood as «*self-determination achieved within the State, and focussed on restructuring the relationship between Indigenous Peoples and the State*»[6]. The principles of self-determination and political participation are both elements of international law in relation to Indigenous peoples, as seen in the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP). UNDRIP has been described as: «*a non-binding declaration of the General Assembly. It reflects international consensus on the rights of indigenous peoples. It is an aspirational framework although several states have implemented it into domestic legislation, giving rise to binding obligations. It is a framework that sits within the structures of*

the existing state»[7].

Australia initially voted against the adoption of UNDRIP in the UN General Assembly[8] but in 2009 agreed to support it. However, it has not yet been put into domestic effect within Australia. The Voice would have been one way to implement elements of international law relevant to First Nations.

The operation of international law within the Australian legal system is indirect. International law does not apply directly until it is incorporated into Australian law. While international law is used to assess policy and law within Australia[9], any inconsistency does not cause problems of invalidity. The Voice proposal had been assessed against international law by the Parliamentary Joint Committee on Human Rights concluding that it «*engages the rights to take part in public affairs, self-determination and equality and non-discrimination*»[10]. The Committee concluded that the Voice proposal was consistent with human rights, by promoting the «*right of all citizens to take part in public affairs*» through the referendum process, that it was «*designed to promote the permanent rights of Aboriginal and Torres Strait Islander peoples as recognised in the international treaties including participation in public affairs, the right to self-determination*' and that it «*is compatible with the right to equality and non-discrimination*».

As Synot notes: «*Regardless of the Australian Government's continuing reluctance to embrace international standards of human rights, those standards still are potent mechanisms for Indigenous peoples to speak from and be heard. UNDRIP especially provides recognition of the foundation of self-determination being key to all Indigenous rights and that Indigenous claims exist beyond the narrow understanding of Indigeneity aimed at the alleviation of socio-economic disadvantage. Perhaps most importantly, UNDRIP provides a principled road map to effect self-determination beyond abstraction*»[11].

The Voice proposal, being the outcome of a self-determining process of dialogues amongst First Nations, embodied the processes of self-determination. The way in which it would have existed within the Australian constitutional structure also would have allowed for a manifestation of self-determination and participation within the nation state. The Advisory Report on the referendum proposal noted that evidence to that Inquiry supported the conclusion that the proposal was «*consistent with international human rights and in some cases advance[s] human rights, particularly the human rights of Aboriginal and Torres Strait Islander*

peoples»[12].

3. The nature of the reform and institutional design

The Voice proposal was different in nature to other proposals for constitutional change which have been made regarding Aboriginal and Torres Strait Islander peoples. Earlier suggestions have focused on responding to the existing text of the Constitution, by amending existing legislative powers or introducing new sections to clearly establish legislative power in relation to beneficial legislation to respond to Aboriginal and Torres Strait Islander-related issues. By contrast, this proposal was a different type of constitutional reform by proposing a new institution which would exercise political rather than legal authority.

The Voice was designed to be a new institution placed within the Constitution and which would have interacted with the existing political arms of government in Australia – the Parliament and the Executive government of the Commonwealth. The reference to the Commonwealth is to indicate that the Voice would have interacted with the national institutions. Australia is a federal nation and the Constitution guarantees the existence of the sub-national State governments and Parliaments. Those entities were already engaged in developing institutions like the Voice or advancing towards treaty, although some of those developments have stalled as a consequence of the outcome of the national referendum. The Voice proposal which is the subject of this article is one which would have operated at the national level, although there would undoubtedly have been links between that institution and sub-national equivalents[13].

The Voice was designed to fit within the Australian constitutional and legal system by being structured consistently with the way in which other institutions are established by the Constitution[14]. The proposed s 129 would have established the institution – there «*shall be a Voice*» – and its core function – that of making representations. The other details were then to be left for Parliament through the conferral of legislation power in s 129(3). This design is similar to the way in which the existing institutions were established by the constitutional text, whereby details are deferred to legislation[15]. It is common constitutional practice to guarantee core components and then leave the details for ongoing negotiation over time with the Parliament and the people to allow

for change[16]. This approach was particularly appropriate for the Voice – because it would have allowed, for example, for First Nations to negotiate with the Parliament about how they were to be represented by the Voice, and for that to change as is necessary.

4. Constitutional law and the Voice

Changing the Constitution is a rare occurrence in Australia and this proposed change was the source of much debate in the media and through a parliamentary inquiry process[17]. Several constitutional law issues emerged throughout the debate. This section addresses the issues of: enshrinement, constitutional recognition, the evolving constitutional identity of 'the people', institutional design and the limited impact of the text of s 129 on the legislative power of the Parliament. It does not address the broad concerns raised throughout the public debate regarding misinformation and disinformation. Much has been made about those concerns, and we agree that they had a significant impact. Here we focus on the key issues relating to public law that had been raised in public debate, and at the end of this article we make some reflections regarding the broader context.

Enshrinement of the Voice in the Constitution rather than legislation was argued to be necessary for several reasons. First, to guarantee the existence of the institution of the Voice. A legislated Voice would be amenable to repeal by legislation. In order to ensure a guaranteed and durable institution, the Voice had to be enshrined in the Constitution. Second, enshrinement confers legitimacy on the Voice. 'The people' in the Constitution exercise their sovereignty through involvement in elections and in constitutional referenda. The highest form of legitimacy comes from the representative Parliament proposing a change to the Constitution and 'the people' – through the electors – voting to adopt that change. Third, enshrinement is the form of recognition sought by First Nations peoples through the consensus position outlined in the Uluru Statement from the Heart.

Constitutional recognition through inserting s 129 would have rectified a constitutional silence. Since the 1967 referendum, there has been no reference to Aboriginal and Torres Strait Islander people in the Constitution. Inserting s 129

would also have continued the trajectory of the development of the constitutional identity of 'the people' in the Constitution. The constitutional identity of 'the people' has developed since federation – from an expectation of a White Australia to an understanding of a diverse and plural people. For example, we have seen a change in who constitutes 'the people' in the sense of being electors – from a colonial era where women were excluded in a majority of colonies from voting to adopt the Constitution Bill, to the modern era where the High Court has assumed that all adult citizens should have the right to vote. To enshrine a Voice would not have been to import an illegitimate racial element into the Constitution. It would have been to recognise the distinct place of First Nations peoples in the Australian polity, consistent with the ongoing development of the constitutional identity of 'the people'. One interpretation of the rejection of this proposal can therefore be understood to be a rejection of that recognition.

The issue of the impact of the Voice on the powers and operation of federal Parliament and Executive government received significant attention throughout the process of the Voice Inquiry. In particular, concerns were raised regarding what a future High Court may imply from the text of s 129. It seems clear that the text would have restricted the Parliament in two ways. First, that once a Voice is established through legislation after a successful referendum it may not be removed – in order to comply with s 129(1) – «*there shall be a body … called the … Voice*». Second, that the core function of the Voice – that of making representations – would not be able to be removed. So much follows logically from the text of s 129. However, implications beyond these basic requirements were highly unlikely[18]. That is, only the existence of the Voice and its function of making representations is guaranteed by the proposal. As we address in the next section, the government and Parliament could then have determined what to do with those representations and whether or not the representations would have had legal rather than political effect.

5. Representations to the Executive, and administrative law

Particular concerns were raised in the Voice referendum debates regarding the function of making representations to the Executive. The Liberal Members of

the Parliamentary Committee Inquiry into the proposed change to the Constitution were concerned about courts implying a judicially enforceable duty to consult and a duty to consider representations from the Voice.[19] There are several reasons to think that courts would not have recognised in s 129(2) an implied mandatory obligation to consult with and consider the Voice's representations.

The words in s 129(2) did not expressly require it and its immediate context did not suggest such an implication. Contextual information for the constitutional alteration bill indicated that s 129 was deliberately intended not to include such obligations. The Explanatory Memorandum for the constitutional change stated that the Voice's representations would be advisory and the constitutional alteration would not establish consultation obligations[20]. The Explanatory Memorandum went on to say that the Executive Government's obligations in regard to the Voice's representations would be established by legislation made under s 129(3)[21]. This was repeated in the Attorney-General's speech in Parliament[22].

To the extent that concerns expressed about the Voice's representations to the Executive Government disrupting administrative decision-making may be regarded as a risk, it was one that could be managed by the Parliament through legislation. That is, the Parliament would be able to control what, if any, legal impact the representations may have had. Australian courts determine whether there are implied obligations to consider particular matters by interpreting the Act that provides the administrator with decision-making power. It is that Act that is the source of any implied mandatory consideration rather than implications in the Constitution. The drafting of those Acts is within the power of the Parliament who can decide either to make the representations mandatory considerations or not, or to establish a mechanism devised in relation to particular decisions to manage how the government would interact with any representations made by the Voice.

Any consideration of the impact of Voice representations on government was premature at the referendum stage. The appropriate context for managing any such risk would have been in the development of legislation to be made under s 129(3) or under other existing legislative powers. That would most likely have involved an assessment of existing consultation provisions in Commonwealth

legislation, choosing an appropriate form of consultation, and then adapting it for the relationship between the Voice and the Executive Government. The development of such legislation would also have most likely involved considering the appropriate accountability mechanisms; such as, whether the consultation with the Voice would be reviewable exclusively by Parliament, or exclusively by the courts, or maybe by both Parliament and potentially the courts.

Debates about such issues arise in the design of legislation and parliamentary scrutiny of bills and regulations; and then subsequently by courts in judicial review proceedings and administrative law institutions such as merits review tribunals and ombudsmen. The administrative law issues in the context of constitutional debates about the Voice were abstracted from the relevant statutory context – the exercise of statutory powers to make regulations and decisions regarding licences, approvals etc.

It is also important to recognise that existing law and practice allows for challenges regarding judicial review of administrative decisions involving Aboriginal and Torres Strait Islanders. There has been no flood of litigation by Aboriginal and Torres Strait Islanders or their representative groups. In fact, landmark Australian cases involving Aboriginal and Torres Strait Islanders go the other way: businesses challenging executive decisions protecting Aboriginal and Torres Strait Islander heritage and land rights. The existence of the Voice would have made no difference to the underlying legal position – any challenges depend on the details of the legislation in question, which is within the control of the Parliament.

6. Reflections from two public lawyers

The repercussions of the failed referendum are yet to be fully understood. Some of the reflections by Indigenous Australians who supported the Voice proposal have been shared through open public letters.[23] As two non-Indigenous public lawyers, here we reflect on our respective areas of expertise and experience.

The administrative law issues that were raised in the Voice referendum debates were unusual for Australian political debate. Administrative law deals with technical regulations, and decision-making in regard to licences and permits which are usually relevant only for specific industries or particular individuals.

Administrative law rarely raises to the level of national debate, as it did in the Voice referendum debates. In our view, the concerns expressed about risks of administrative law litigation overwhelming government if the Voice proposal succeeded were not plausible. Yet, the concerns were raised by politicians opposed to the Voice proposal to claim that the proposal raised major uncertainties and risks. Our contribution to the debate highlighted that while administrative law has a degree of uncertainty that could possibly result in litigation regarding the Voice's actions and related responses by the government or Parliament, the risk was no greater than the current laws regarding Aboriginal and Torres Strait Islander peoples, and could be managed by careful drafting of legislation implementing the constitutional provisions for the Voice if the referendum had succeeded.

From a constitutional law perspective, the dangers and risks regarding the Voice proposal raised in the public debate were also without strong legal foundation. Despite this being the view shared amongst legal experts, the public debate occurred through channels that did not emphasise expertise, carefully considered discussion or analysis of the veracity of claims being made. The debate surrounding this referendum highlighted the power of language and the dangers of misinformation. The discussion preceding the referendum made very clear the ongoing need to improve public knowledge and understanding not only of our legal and constitutional system – including the administrative or constitutional law elements addressed above, but also our legal and constitutional history and its impact on Aboriginal and Torres Strait Islander peoples. This links with one of the elements called for in the Uluru Statement from the Heart.

The Voice referendum was never to be an end in itself. It was intended to be a step along the way to - in the words of the Uluru Statement from the Heart - Indigenous and non-Indigenous Australians walking together for a better future. That Statement, as noted above, called for Voice, Treaty and Truth. The outcome of the referendum means that the Voice is not to be enshrined in the Constitution. Alternative structures may be developed to provide for a proxy for what the Voice would have been – such that Aboriginal and Torres Strait Islander voices contribute to the development of law and policy at the national level.[24] The process of treaty-making is continuing at the sub-national level, albeit with a reduced emphasis as a result of the political reaction to the

referendum result. The last of the elements of the Uluru Statement is truth-telling.

Truth-telling comes in many forms. One form is the truth-telling of Australian legal and constitutional history and its interaction with Aboriginal and Torres Strait Islander people over time, including in the present. Public lawyers and public law academics in particular are uniquely placed to be involved in this component of Truth-telling by assisting law students and the broader community develop a better understanding of this history.

As we in Australia reflect further on the consequences of this failed attempt at structural constitutional reform to redress the political powerlessness of Australia's First Peoples, it is a moment to consider the role of the law and how we all participate in the ongoing development of the legal system which exists in the place we now call Australia.

1. See the text of Australian Constitution, s 128: «*This Constitution shall not be altered except in the following manner: The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and ... the proposed law shall be submitted in each State and Territory to the electors qualified to vote ... if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent. ...* ».
2. The Yolgnu are the people of the northeastern part of the Northern Territory, known as Arnhem Land. For an outline of approximate names and country of First Nations across Australia, see the AIATSIS map outlined at https://aiatsis.gov.au/explore/map-indigenous-australia.
3. For an overview see M. Davis, G. Williams, *Everything You Need to Know About the Uluru Statement from the Heart*, NewSouth Publishing, Australia, 2021, and see www.ulurustatement.org.
4. See https://voice.gov.au/about-voice/voice-principles. For a video version of the background to the Voice proposal see https://youtu.be/pS1O2zsvEAQ.
5. *Final Report of the Referendum Council* (30 June 2017), Commonwealth of Australia, National Indigenous Australian Agency, *Indigenous Voice Co-Design Process Final Report to the Australian Government*, Canberra (Australia), 2021.
6. Indigenous Law Centre Submission to the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Inquiry into Application of the UNDRIP in Australia*, 31 October 2022 at p 8, available athttps://www.aph.gov.au/DocumentStore.ashx?id=183fda15-decf-447b-9e39-1809f0af8547&subId=724519 ("ILC submission"). See also *Final Report of the Referendum Council*

(30 June 2017) at 22, 29, 30.

7. ILC submission noted above n. 6, p. 7.
8. In 2007 – being one of only 4 member states to do so as contrasted by 144 who voted in favour.
9. See the work of the Parliamentary Joint Committee on Human Rights, *Under the Human Rights (Parliamentary Scrutiny) Act 2011 Cth*, the committee's functions are to examine bills, Acts and legislative instruments for compatibility with human rights, and report to both Houses of the Parliament.
10. Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report. Report 5 of 2023*, AUPJCHR 37, 2023.
11. E. Synot, *The Universal Declaration of Human Rights at 70: Indigenous Rights and the Uluru Statement from the Heart*, in *Australian Journal of International Affairs*, 73(4), 2019, 320, 324.
12. Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, *Advisory Report on the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023*, Canberra (Australia), May 2023, "*Voice Report*", p 33.
13. See Commonwealth of Australia, National Indigenous Australian Agency, I*ndigenous Voice Co-design Process: Final Report to the Australian Government*, cit.
14. The discussion below is developed from E. Arcioni, A. Edgar, *The Voice and the Executive*, in *AusPubLaw blog*, 21 March 2023, available at https://www.auspublaw.org/first-nations-voice/the-voice-and-the-executive; and E. Arcioni, A. Edgar, *The Voice in relation to constitutional and administrative law*, in Law Society Journal, 2023, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4454766, which we published to contribute to public debate in Australia prior to the referendum.
15. See further at E. Arcioni, *Membership of the Voice*, in *Public Law Review*, 34(1), 2023, 10.
16. R. Dixon, T. Ginsburg, *Deciding not to decide: deferral in constitutional design*, in *I•CON*, vol. 9, 3-4, 2011, p. 636.
17. Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, *Advisory Report on the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023*, cit.
18. *Voice Report* 24—27 [3.26]—[3.34]). And for discussion of risk, see S. Stephenson, *Is the Voice Too Uncertain or Risky?*, in *AusPubLaw blog*, at https://www.auspublaw.org/first-nations-voice/is-the-voice-too-uncertain-or-risky and C, Lenehan, *The Voice: imagined legal problems distract from the substance*, *ivi*, at https://www.auspublaw.org/first-nations-voice/the-voice-imagined-legal-problems-distract-from-the-substance. We also note that 70 public law teachers, including Elisa Arcioni, wrote an open letter addressing the issue of legal risks open letter: https://www.abc.net.au/news/2023-10-06/open-letter-constitutional-law-university-voice-to-parliament/102937352 and the letter is hosted at https://www.gtcentre.unsw.edu.au/news/public-law-teachers-release-open-letter-help-aus

tralians-prepare-voice-referendum.

19. *Voice Report* at 61 [1.37].
20. *Explanatory Memorandum*, Constitution Alteration (Aboriginal And Torres Strait Islander Voice) 2023 5 "*Explanatory Memorandum*".
21. *Explanatory Memorandum*, cit., at [21].
22. M. Dreyfus, *Introduction of Constitution Alteration Bill 30 March 2023*, available at https://www.markdreyfus.com/media/transcripts/introduction-of-constitution-alteration-bill-30-march-2023-mark-dreyfus-kc-mp/.
23. See Statement to our Country and People, available at https://fpdn.org.au/open-letter-statement-for-our-people-and-country/.
24. See in the Statement for our Country noted above and also see the reference in the 15th edition of the *Cabinet Handbook* (2022), which includes for the first time a reference to «*meaningful consultation*» when considering the impact of federal policy on «*Indigenous Australians*» (so *Cabinet Handbook*, 15th ed, Canberra (Australia), 2022, at p 7).