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A First Nations Voice and the exercise of constitutional drafting

Gabrielle Appleby,[*] Sean Brennan[**] and Megan Davis[***]

Introduction

In May 2017, after twelve months of consultation and design and six months of hard work and deliberation through a series of First Nations designed and led dialogues,[1] First Nations people delivered the Uluru Statement from the Heart to the Australian people.[2] The Uluru Statement represents an historic First Nations consensus position on the *why* and *how* of constitutional recognition. The rationale for recognition is the ancient and unique connection between First Nations people and the land that is now Australia, and the urgent need to address political and structural disempowerment. The form of recognition is a First Nations Voice enshrined in the Constitution, and then through Voice, Makarrata: the coming together of Australian people through agreement-making and truth-telling.[3] On election night in May 2022, the Prime Minister-elect Anthony Albanese opened his acceptance speech with a promise to deliver the Uluru Statement in full,[4] and a Voice referendum is due to be held before the end of 2023.[5] It will seek the support of Australian voters for a representative body in the Constitution that enables First Nations people to speak directly to the national Parliament and Government about the laws, policies and decisions that affect them in their daily lives.

Attention has now turned to the drafting of a constitutional amendment, choosing the legal form of words that will be put to the Australian people at a referendum.[6] This involves translating the request in the Uluru Statement for a "First Nations Voice" into a set of words that will speak to the past, the present and the future in ways that meet the aspirations of First Nations as well as the Australian people. The exercise must be approached with clarity, respect, prudence, knowledge and experience. In this opening piece to a special issue of the *Public Law Review* comments, we will set out objectives and guiding principles for this exercise and its history, before turning to the key points relating to the amendment that

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1 Referendum Council, *Final Report* (2017), 9-13.

2 'Uluru Statement From The Heart' [2017] *Indigenous Law Bulletin* 15; https://ulurustatement.org/the-statement/

3 Sana Nakata, 'On Voice, and finding a place to start' *INDIGCONLAW Blog* (3 March 2021), https://www.indigconlaw.org/home/on-voice-and-finding-a-place-to-start.

4 Anthony Albanese, *Acceptance Speech* (21 May 2021) available at https://www.abc.net.au/news/2022-05-22/anthony-albanese-acceptance-speech-full-transcript/101088736

5 Dana Morse and Jessica Ross, 'Anthony Albanese promises to deliver Voice referendum by December 2023' ABC News, 28 December 2022, available at https://www.abc.net.au/news/2022-12-28/anthony-albanese-promises-voice-referendum-by-december-2023/101813422

6 Section 128 of the Constitution.

remain to be resolved. The comment pieces that follow address three of these in greater detail: Scott Stephenson considers the different aspects of justiciability within the provision, Elisa Arcioni looks at the constitutional dimensions of membership of the Voice, and Stephen McDonald explains the ways in which the Voice is intended to operate as a federal institution.

Principles for drafting the Voice constitutional amendment

The drafting of words that will be put to the Australian people as the Voice amendment is at once an exercise in historical reflection on the treatment of First Nations, improvement to their present position, and a nation-building narrative for the future of First Nations and all Australians. It is also a political exercise involving pragmatic compromise, performed in a highly technical, legal arena. The drafting decisions that are made today will influence how Australians think and talk about the past and imagine their future. They will also affect the legal, political and social position of First Nations in the near term and for decades to come.

The Voice reform is a modest and congruent proposal but also a transformative one.[7] The proposal respects the traditions of constitutional democracy in Australia which give the elected Parliament a central role in governance.[8] But it also offers a new constitutional settlement, aimed at including the First Nations in Australia's foundational text, and having their voices recognised. If the amendment is successful, what was an historical settlement by predominantly wealthy, white males in the 1890s,[9] who drafted a constitution for people in their own image ('with a common history, religion and language'), can become a constitution that recognises the plurality of the foundation of the Australian state and the ongoing cultural and societal traditions of its first peoples.[10] The amendment will mark the inclusion of previously unheard voices within the State,[11] through a new constitutional institution that will herald new constitutional relationships.

Constitutional drafting is the translation of purpose and intention into legal form.[12] The purpose of the Voice reform must be captured in the language and structure of the

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7 Gabrielle Appleby, 'The First Nations Voice: A modest and congruent, yet radically transformative constitutional proposal' on AUSPUBLAW (11 June 2021) https://www.auspublaw.org/blog/2021/06/the-first-nations-voice-a-modest-and-congruent-yet-radically-transformative-constitutional-proposal

8 See further on this congruence, Murray Gleeson, 'Recognition in keeping with the Constitution: A worthwhile project', (Uphold & Recognise, 2019) available at <https://static1.squarespace.com/static/57e8c98bbebafba4113308f7/t/5d30695b337e720001822490/1563453788941/Recognition_folio+A5_Jul18.pdf. Robert French, 'Voice of reason not beyond us' *The Australian* (31 July 2019).

9 Helen Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution* (Cambridge University Press 1999).

10 Cheryl Saunders, 'Constitution Making in the 21st Century' (2012) 4 *International Review of Law*.

11 See Nicole Watson and Heather Douglas, *Indigenous Legal Judgments: Bringing Indigenous Voices into Judicial Decision Making* (Routledge, 2021); James Boyd White *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (University of Wisconsin Press, 1985) 32-34.

12 Saunders (n 10) 11.

amendment, supplemented by extrinsic materials that inform the referendum. Clarity of purpose is vital to drafting, implementation and interpretation, as well as key in the campaign for a successful referendum.

What then is the purpose of the First Nations Voice amendment? Here, we pull out three key strands to understanding its objective: **recognition**, **structural political empowerment**, and **self-determination**. First, at its foundation, this amendment is an exercise in recognition of the First Nations of the country that is now called Australia.[13] The Uluru Statement is requesting that recognition from the people of the Australian state.[14] The request comes from those whose tribes were the first sovereign Nations of the Australian continent and its adjoining islands, whose sovereignty was never ceded or extinguished. Acceptance of that invitation will also recognise the history that First Nations have survived since the British came in 1788 – the violence of invasion and dispossession, as well as the laws and policies imposed upon them since and up to the present day.[15] Second, the amendment is directed at structural political empowerment of First Nations. It creates a new constitutional institution that is intended to reframe the relationship that the Parliament and the Government have with First Nations. Finally, the amendment was expressly conceived in the Regional Dialogues[16] as one that would progress First Nations' right to self-determination, and specifically, the political right of Indigenous peoples to participate in decision-making in matters that would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as expressed in article 18 of the United Nations Declaration of Rights of Indigenous Peoples.[17]

How does one move from purpose to the legal form of the constitutional text? There is never a single 'drafter' of constitutional words, and, as we detail below, the history of the drafting of the Voice amendment is multi-authorial and complex. While recognition and its

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13 See further Megan Davis, 'Competing Notions of Constitutional "Recognition": Truth and Justice or Living "Off the Crumbs that Fall Off the White Australian Tables"' (Papers on Parliament No 62 October 2014); Megan Davis, 'The Long Road to Uluru: Walking Together: Truth before Justice' (2018) 60 *Griffith Review*, 27.

14 See further Elisa Arcioni 'The Core of the Australian Constitutional People – 'The People' as 'The Electors' (2016) 39(1) *UNSW Law Journal* 421.

15 This history informed the Regional Dialogues, as set out in *Our Story*, adopted from the records of meeting at the Regional Dialogues at the Uluru Convention: see further Referendum Council *Final Report* (2017) 16-21. This includes the eras of Protectionism and Assimilation as well as more recent historical treatment; the role that federal and State governments and parliaments have played in Indigenous affairs after the 1967 referendum (Dani Larkin, Harry Hobbs, Dylan Lino and Amy Ma 'Aboriginal and Torres Strait Islander Peoples, Law Reform and the Return of the States (2022) 41(1) *University of Queensland Law Journal* 35), the position of the government, parliament and the High Court with respect to the races power under s 51(xxvi) of the Constitution; the suspension of statutory protections provided in the *Racial Discrimination Act 1975* (Cth) for Aboriginal and Torres Strait Islander people; the destruction of national Indigenous political infrastructure; and limited structural power that First Nations people have been able to achieve through the status quo, leaving them with widespread socio-economic, health and justice disadvantage.

16 See the Guiding Principles that were adopted at the First Nations Constitutional Convention at Uluru as a framework for its deliberations: Referendum Council, *Final Report* (2017) 22.

17 See further on the intention of this article of the UNDRIP: UN Expert Mechanism on the Rights of Indigenous Peoples, *Free, prior and informed consent: a human rights-based approach,* 39th Session, Agenda Item 3 and 5, A/HRC/39/62 (10 August 2018) [15].

form have taken inspiration from comparative experience, this process of constitutional recognition is a distinctively Australian one. That is never more so than once we are at the stage of drafting, which must be an Australian-focussed process informed by the particularities of Australian constitutional history, practice and politics. Here, we identify four factors that have informed the drafting process to date: **narrative**, **interpretive authority**, **detail v deferral,** and **pragmatism**.

First, there is the question of whose narrative will determine choices of language. This has emerged in particular in relation to the name of the body and the name of a potential new chapter of the Constitution. The Uluru Statement from the Heart calls for recognition through a *First Nations* Voice, emphasising the Indigenous status and prior authority of the first peoples of Australia. However, the draft constitutional amendment released for discussion by Prime Minister Anthony Albanese in July 2022 (see below) proposed a body to be called the Aboriginal and Torres Strait Islander Voice, a term more commonly used by and within the Australian state. The use of the language of "Aboriginal and Torres Strait Islander" is diminishing in the First Nations community as they replace generic labels with more "country" or "nation" names such as Arrernte, Alyawarre or Cobble Cobble, Barrungam. And in a recognition exercise, the views of the to-be-recognised are important.

The second is a question of who will have interpretive authority over the constitutional provision, or the 'final word' in giving effect to it. This centres on whether the Voice will be empowered to determine the scope of its engagement with Parliament and the Executive – in particular *on what matters of law and policy* affecting First Nations people it wishes to be heard by Parliament and the government. Omnipresent in this conversation is also the question of justiciability: over what questions, if any, will the High Court have the final say in the future operation of the Voice? Questions of judicial interpretive authority raise prudential issues, that is the extent to which drafters should attempt to anticipate – and head off – interpretations that might undermine the amendment's purpose (which is focused on participation in the political process not the courts).

Questions of interpretive authority are, of course, not new. The different facets of the relationships between the existing institutions of the Australian Constitution – the Parliament, Executive and Judiciary – have been worked through over the last 120 years with different emphases and conclusions about interpretive authority, tailored to the specifics of each relationship.[18] In the course of settling how the Voice will operate and its relationships with other constitutional actors, no one can rule out litigation given that, historically, litigation has arisen in relation to every other relationship between constitutional actors. Avoiding litigation that is incessant or cuts across the purpose of the amendment and its focus on the political process is nonetheless important. Constitutional

[18] See, for example, the general disposition of the courts to regard the system of responsible government as non-justiciable, based as it is on constitutional conventions (accepted political understandings) not laws. Likewise, the general non-justiciability of the conduct by the Houses of Parliament 'of their internal affairs' (*Osborne v Commonwealth* (1911) 12 CLR 321, 336). The separation of judicial power from the political branches of government, on the other hand, has been fiercely guarded by the judiciary.

drafting should be approached with a balance between constitutional prudence and intergenerational generosity, that is, trust that these institutions will carry forward the purpose of the constitutional amendment into the future, including in the face of future litigation.[19]

Third there is the issue of what level of detail is contained in the Constitution,[20] and what matters are deferred to be determined later, particularly through ordinary legislation enacted by the Parliament.[21] The constitutional provision will necessarily be confined to enshrining high-level principles, leaving many other things about the Voice legally contingent. There can be many sound reasons for constitutional brevity. In this instance they may include decreasing the likelihood of justiciability, as well as preserving flexibility for changing circumstances and the lessons learnt from experience in the decades to come. Brevity is also relevant to the legibility of the proposal on the ballot paper. The balance between constitutional determinacy and legal contingency is an issue for all concerned: the Australian people, government institutions, and First Nations themselves. For First Nations for example, this issue is raised acutely with respect to the determination of membership of those who serve on the Voice, or the scope and exercise of its functions, and the fear that these may be unilaterally determined by a future Government that fails to act in good faith.[22]

Finally there is the pragmatism of constitutional amendment: the need to achieve a successful referendum – a political and campaigning exercise involving millions of Australian voters and a high threshold for success. Australia's modern referendum culture has been cautious, driven by the perception of the 'high bar' that s 128 of the Constitution poses, and the perceived need for certain pre-conditions for success, including bi-partisan support amongst the main federal political parties.[23] However, as referendum expert Paul Kildea has written, it is timely that this conventional wisdom is re-examined. The last time Australians voted at a referendum was in the pre-social media era in 1999 and the last successful referendum was nearly half a century ago. With significant changes to education, demographics, social attitudes and campaign environments, there needs to be a greater focus on the specific political, economic, and cultural context of a particular given referendum.[24] Kildea also notes the danger, in particular, of the political drive to negotiate bipartisanship that can 'result in minimalist proposals that fail to excite the

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19 On the arguments for constitutional drafting with 'trust', see Rosalind Dixon, 'Constitutional Drafting and Distrust' (2015) 13(4) *International Journal of Constitutional Law* 819.

20 This is distinct from the question of how much detail should be released in advance of a referendum in relation to the legislation that would follow a successful referendum to implement the Voice.

21 Rosalind Dixon and Tom Ginsburg 'Deciding not to Decide: Deferral in Constitutional Design' (2012) 9 *International Journal of Constitutional Law* 636.

22 For expression of some of these concerns, eg, Amy McQuire, 'Voting on "The Voice": Will it fight racist violence?' *Presences* (5 January 2023).

23 For instance, the five pillars of referendum success outlined in David Hume and George Williams, *People Power: The History and Future of the Referendum in Australia* (2010) 239.

24 https://www.auspublaw.org/blog/2018/12/getting-to-yes-why-our-approach-to-winning-referendums-needs-a-rethink

electorate' or 'lead to paralysis'. In the context of the First Nations Voice referendum, the politics of the referendum also hinges on continued high levels of support from First Nations people themselves for the reform, which requires a proposal that delivers on the aspirations in the Uluru Statement and can make a practical difference in people's lives.

While these four factors (narrative, interpretive authority, detail v deferral, and pragmatism) can give rise to tensions, and sometimes pull in different directions, a strong consensus has emerged over what the drafting needs to capture.[25] First, it must constitutionally enshrine the Voice. This will be an enduring form of recognition for First Nations people. It will create a constitutional and political imperative to establish the Voice and maintain its existence.[26] And it will endow the Voice with the power and legitimacy which comes from popular endorsement at a referendum, the gravitas it will need in order to shift the political dynamic in Indigenous law and policy. Second, the amendment must describe – and guarantee – the primary function of conveying the views of Aboriginal and Torres Strait Islander people to the national institutions of law-making and government. Finally, it must provide a head of power for Parliament to legislate the detailed design of the Voice and make necessary amendments over time, to adapt to changing circumstances.

In the next part, we provide a brief history of the drafting of the constitutional amendment. Much of the work that sits behind the drafting has been done outside of government and Parliament: driven by First Nations advocates and constitutional experts working towards the goals of recognition, empowerment and structural reform. More recently, however, the drafting has been directed by the Government, and the amendment will ultimately need to be passed by the Parliament. This shift is inevitable under the constitutional system that requires parliamentary passage to precede a referendum. After decades of advocacy and the hard work of achieving national consensus through the Regional Dialogues and the Uluru Statement, an amendment to the Constitution is close that will challenge the unilateral control over Indigenous affairs exercised by politicians and officials. That is exciting, but also a time for watchfulness, lest the call for referendum pragmatism be invoked to favour a drift back towards the status quo.

The history of the drafting

On 30 July 2022, the Prime Minister released a set of draft words for the constitutional amendment to form the basis of further consultation:

> 1. There shall be a body, to be called the Aboriginal and Torres Strait Islander Voice.

[25] Sean Brennan, 'The Wording is not the Problem' *IndigConLaw Blog* 6 July 2021, https://www.indigconlaw.org/home/naidoc-week-2021-the-wording-is-not-the-problem

[26] As to 'guaranteeing' its existence, and whether constitutional establishment is sufficient, see further Gabrielle Appleby and John Williams https://www.indigconlaw.org/home/the-first-nations-voice-an-informed-and-aspirational-constitutional-innovation; Anne Twomey; Shireen Morris.

> 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.

The government has not indicated where it is intended that this proposed provision will be placed in the Constitution. The government is currently assisted formally by two groups in the exercise of constitutional drafting.[27] These are a Referendum Working Group, made up of Aboriginal and Torres Strait Islander representatives,[28] and a Constitutional Experts Group of predominantly academics and a former High Court judge.[29]

The government's work of drafting the constitutional amendment draws on a rich set of historical sources that have largely occurred outside of government.[30] In particular, there were two key sets of wording that informed the released drafting. In 2015 Professor Anne Twomey published draft wording to crystallise a proposal from the Cape York Institute for an Indigenous representative body in the Constitution.[31] This drafting was included in the briefing materials provided to First Nations delegates during the Regional Dialogues on constitutional recognition, held around Australia in 2016-17. Second, a draft amendment for a proposed Section 129, in a new Chapter 9 of the Constitution was included in a submission to the 2018 parliamentary Joint Select Committee on Constitutional Recognition. It was authored by key members of the Indigenous Steering Committee of the Referendum Council – Professor Megan Davis, Pat Anderson AO, and Noel Pearson – and a group of constitutional advisers involved with the Regional Dialogues and First Nations Constitutional Convention – Professor Gabrielle Appleby, Associate Professor Sean Brennan, Dr Dylan Lino and Gemma McKinnon.[32] It was a proposal that developed Twomey's drafting, but was founded in and drew directly from the aspirations expressed during the Dialogues and at the Uluru Convention.

The Indigenous Law Centre (ILC) at UNSW Sydney continued to develop that proposed wording, including partnering with the Gilbert + Tobin Centre of Public Law at UNSW in conducting workshops with constitutional experts – academics and practitioners – from across the country through 2019-2021. In September 2022, an *Issues Paper* was released on

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27 There is a third group, the Referendum Engagement Group, that is tasked with assisting the government on building community awareness and support for the referendum.

28 See further: https://voice.niaa.gov.au/who-involved

29 See further: https://voice.niaa.gov.au/who-involved

30 See further history of the amendment in Indigenous Law Centre, *Issues Paper 1: Constitutional Amendment* (2022) https://www.indigconlaw.org/s/ILC-Issues-Paper-1-The-constitutional-amendment.pdf.

31 Anne Twomey, 'Putting words to the Tune of Indigenous Constitutional Recognition' 20 May 2015 <https://theconversation.com/putting-words-to-the-tune-of-indigenous-constitutional-recognition-42038>

32 Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Submission 479.*

the amendment, and during September-December 2022, the ILC organised, with the support of the Law Council of Australia and the Australian Association of Constitutional Law, a set of national consultations with key members of the legal profession with expertise in constitutional law and Indigenous issues. That report raised a number of issues about the Prime Minister's draft amendment. In December 2022, that report was delivered to the government's Referendum Working Group, which referred the issues it raised to the Expert Group for advice. In January, the Expert Group commenced its work for 2023 by considering the suggestions of the ILC.

The key remaining points to be resolved

The process of moving towards a final version of the proposed Voice amendment to be voted on by the Australian people at a referendum has crystallised a number of issues that remain to be resolved. They include:

1. **The name of the body**: whether it should reflect the language of the consensus position reached by Aboriginal and Torres Strait Islander people in the Uluru Statement from the Heart, that is, a 'First Nations Voice', or whether it should be referred to as the 'Aboriginal and Torres Strait Islander Voice', as in the Prime Minister's drafting.
2. **The placement of the amendment**: a discrete chapter remote from existing Chapters 1, 2 and 3 will prevent interference with the body of constitutional law about the 'separation of powers' that the High Court has built up around the sequential treatment of the Legislature, Executive and Judiciary in those chapters. A new standalone section 129 at the end could be both honest and forward-looking in that Australia comes late to recognition but does so appropriately by adding a new chapter to its Constitution. Alternatives include placement at the front of the Constitution, or immediately after the three branches of government (a new Chapter IIIA), or in place of the discriminatory words removed by the 1967 Referendum from s 127, which has been left to stand since as a numbered but crossed-out provision.
3. **A recognition preamble:** a question has arisen as to whether it would be beneficial to include preambular language in the amendment, such as 'In recognition of Aboriginal and Torres Strait Islander Peoples as the First Peoples of Australia', that would clearly link the provision to constitutional recognition.
4. **The membership of the Voice**: including whether the Constitution itself speaks to how members of the Voice will be selected and whether the method of selection will be imposed by the Parliament or self-determined by Aboriginal and Torres Strait Islander people themselves.
5. **The primary function of making representations to Parliament and the government**: whether the Voice has discretion to determine whether to make representations, and the effect of representations on the government and parliamentary processes.

6. **The scope of the primary function**: whether the Voice should be able to engage with government and Parliament where it believes a law or policy will affect Aboriginal and Torres Strait Islander people, and how this would best be given legal form, or whether externally imposed limits would apply.
7. **The flexibility of the provision**, and the extent to which the amendment should anticipate possible constitutional limitations that could narrow the future operation and evolution of the Voice (for instance, an evolution to engage in future functions such as representing Aboriginal and Torres Strait Islander Peoples in international fora, or interacting with State Governments and Parliaments).

In 2023, we will see the Government's final draft wording introduced to the Parliament in a constitutional amendment Bill (conventionally titled a 'Constitution Alteration' rather than a Bill). That proposed Constitution Alteration will be subject to parliamentary scrutiny, and further public and expert input through committee scrutiny. The final legal form of the amendment will reflect a settlement on these issues that has been informed by the history, culture and politics of the current Australian constitutional moment.