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Institute of Public Affairs Research Note regarding the legal risks of the Voice

The following research note was prepared by the Institute of Public Affairs (the IPA) regarding the potential legal risks associated with the federal government's proposal to insert into the Australian Constitution the Aboriginal and Torres Strait Islander Voice (the Voice).

At the National Press Club on 5 July 2023, the Minister for Indigenous Australians Linda Burney MP asserted that the Voice would operate by making representations to the government in only a few select policy areas: health, education, jobs, and housing. The assertion that the Commonwealth parliament would possess the power to limit the scope of the Voice has been expressed in the Attorney-General's second reading speech and explanatory memorandum to the Constitution Alteration Bill.

The IPA has undertaken research on the Voice and had the opportunity to participate in briefings with community and political leaders across the country. In one briefing with a senior politician the question of constitutional and legal risk was raised, including whether the intentions expressed in the Attorney-General's second reading speech or the explanatory memorandum would effectively reduce the risk or scope of the Voice.

This IPA Research Note considers the potential role of documents such as the explanatory memorandum or the Attorney-General's second reading speech in guiding the High Court's interpretation of the proposed new constitutional text. IPA research finds:

- Due to the vague and uncertain nature of the proposed alteration, the High Court is likely to rely on other material as aids to interpret the scope and powers of the Voice.
- The High Court will not be limited to considering the explanatory memorandum or assurances by the Attorney-General but will also be able to consider other material that form the history, context and background to the Voice such as parliamentary reports, the Voice Co-design process, and the Uluru Statement from the Heart.
- The comments made in documents such as the Uluru Statement from the Heart would give license to the High Court to give broad and expansive meaning to the words proposed to be added to the Constitution.

A careful analysis of constitutional interpretative principles suggests there will be substantial constitutional and legal risk arising from a constitutionally enshrined Voice.

Research Note

Executive Summary

1. Although the actual words of any constitutional provision take primacy when interpreting its meaning and application, the High Court can look beyond those words at extraneous material when the words are vague or to establish the correct context in which they appear. Indeed, in this case there are ambiguities in the wording used in the proposed new Chapter IX of the Constitution that would likely enliven exactly such an exercise.

2. The extraneous material that the High Court may have regard to would include the EM, but would also include other documents that form the background to this constitutional change (background documents), in particular the Uluru Statement from the Heart. In the future, when weight is to be given to these documents as aids in interpreting this constitutional change, the historic and political significance that has been attached to the Uluru Statement in particular means that statements within it are likely to have more sway than the EM.

3. The background documents contain statements that, if used by the High Court as an aid to interpret proposed Chapter IX of the Constitution, would likely give license to the broadest possible scope that the words would allow. The statements emphasise that this constitutional change must not be seen as 'tokenistic', and that it must be 'substantive' and 'empower' Indigenous Australians.

4. The Uluru Statement from the Heart contains numerous comments that, if used as an aid in the interpretation of the scope and power of the Voice, or proposed new Chapter IX generally, can only lead to giving those provisions an expansive interpretation. Such comments include that the constitutional change will:

    a. express Indigenous sovereignty: 'With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia's nationhood';

    b. allow Indigenous people to take control over their destiny: 'We seek constitutional reforms to empower our people and take a rightful place in our own country. When we have power over our destiny our children will flourish.'

    c. That the constitutional change will allow Indigenous people to be heard: 'In 1967 we were counted, in 2017 we seek to be heard.'

5. None of these comments suggest that the scope of Chapter IX should be narrowly interpreted, that the scope and power of the Voice should be read down, that the Voice can be ignored or not consulted, or that laws passed by Parliament or decisions of the Executive Government were beyond challenge in all circumstances. On the contrary, in the future if recourse is had to extraneous material to provide context or to aid in the interpretation of the purpose of Chapter IX, judges will have license to take an expansive approach. If they do, there will be no way to correct any unintended consequences other than the implausible step of a future referendum to reverse the change made in the current proposal.

Introduction and Background

6. Any constitutional change by referendum brings with it the potential risk of unintended consequences. This risk is inherent in a system of government in which the Constitution is interpreted by an independent judiciary, as is the case under Australia's separation of powers. Judges are guided by precedent, convention, and the judicial common law method in how they interpret the Constitution, but as any split High Court decision highlights, there is no certainty as to how judges will rule, and there have been genuinely surprising outcomes, even to seasoned legal experts. In short, how judges interpret the Constitution cannot be controlled by those drafting constitutional changes.

7. Such risks are exacerbated if the constitutional change in question is extensive or novel. They are further exacerbated if the wording of the constitutional change does not address foreseeable risks that are known in advance.

8. The legal risks of a constitutional change need to be weighed against the perceived benefit of the change. Further, whether a degree of legal risk in changing the constitution should be accepted needs to be considered in the light of any alternative actions that might be taken that could achieve a comparable outcome but without the same risks. In the case of the proposal to enshrine an Aboriginal and Torres Strait Islander Voice into the Australian Constitution, the benefits are far from clear and highly contested, and an alternative, in the form of a legislated advisory body, readily available.

9. This briefing note will not go into all the potential legal risks raised by this proposal, nor provide detailed reasoning assessing the extent of each risk. However, it is worth noting in simple terms some of the most common concerns raised about this proposal:

    a. The Voice's ability to make 'representations' might be interpreted by the High Court as a right to be consulted or a right to be heard. Therefore, the Parliament or Executive Government may be obligated to consult the Voice, obligated to take its representation into account, or at least obligated to do so in certain circumstances or in respect to certain matters;

    b. Complying with such High Court mandated obligations might slow the operations of government decision making and parliamentary lawmaking;

    c. Government decisions or laws passed by the Parliament might be held invalid if they fall short of High Court mandated processes for consultation or for failing to take into account the representations made by the Voice;

    d. Due to its role as a constitutional body enshrined in a separate Chapter of the Constitution, various constitutional rights and powers might be granted to the Voice that were not initially intended. This might include a right to a budget that will allow the Voice to perform its functions, and the power to conduct investigations, hold inquiries, and call witnesses in order to inform itself before making representations;

e. The inclusion of an acknowledgement of Aboriginal and Torres Strait Islander peoples as the 'First Peoples of Australia' in the operative part of the Constitution might result in unintended consequences. This might involve the preservation of Indigenous laws or legal customs, even if inconsistent with Australian law, as the basis for legal claims whether in respect to land rights or reparations, or creating special duties owed to Indigenous Australians by virtue of their status as 'First Peoples'.

10. These concerns are exacerbated in two respects. The first is the willingness of the High Court over recent decades to go beyond the words of the Constitution and hold that there are rights that can be implied from the system of government the Constitution establishes. Whatever the merits of this approach, it does mean that anticipating how constitutional provisions will be interpreted, and cases decided, can be more uncertain.

11. The second is the choice of words adopted for this constitutional change. The main concerns are as follows:

a. The use of the term 'representations'. Although often referred to as an advisory body, the Voice is not granted the power to 'advise' or make 'recommendations' which are clearly non-binding concepts. Instead, the Voice may make 'representations'. That word means to be 'made present', to make something or someone present who is not actually present. In the context of representations to Parliament and Executive Government, such a concept has all sorts of potential implications that go well beyond what would ordinarily be considered a mere right to 'advise'. Scholars have described the word 'representation' as 'vague or ambiguous', that it 'may sometimes mean one thing, sometimes the other,' that the term is used 'in various senses in different connections,' that 'theories of representation are something of a morass' and even that we abandon the word representation and 'stop using it because of its complexity.'[1]

b. The inclusion of both 'Parliament' and the 'Executive Government' to whom the Voice may make its representations. The Executive Government is a far broader institution than Parliament. The right to make representations to the Executive Government has the potential to be more disruptive and to increase the risk of legal challenges under the principles of administrative law.

c. Proposed sub-section 129(iii) of the Constitution, which will grant Parliament the power to make laws in respect to the Voice, which in theory might encompass laws limiting the legal consequences of representations made by the Voice, is made 'subject to this Constitution'. This means Parliament's law-making power is subject to sub-sections 129(i) and (ii) which establish the Voice and grant it the power to make representations. Thus, Parliament cannot override such powers or implications that these clauses are seen to create as determined by the High Court.

[1] Hanna Fenichel Pitkin, *The Concept of Representation* (University of California Press, 1972) at 5-6.

12. These concerns could likely be substantially ameliorated with drafting refinements, which have not been adopted by the government. The failure to do so itself raises a case for various implications to be drawn. If the true intention of this change was for the Voice to be purely advisory, or the legal effect of its representations to be solely within the control of Parliament, then the drafters could have said so. The failure to do so could lead to an inference that such omissions were deliberate.

13. Finally, this proposed constitutional change is in effect permanent. This means the full legal risks may not materialise for years or decades. Practically, the first major test of the Voice's powers might be after the election of a right-of-centre Coalition government that acts contrary to the views or opinions of the Voice in respect to passing some law or making some administrative decision on some controversial policy matter. At that time, the assurances made by pro-Voice activists and the current government about the limited powers of this body may readily be forgotten when a new government is actively defying the wishes of such activists and when the current government has returned to opposition.

The Explanatory Memorandum

14. Regarding the question of whether these risks might be managed or contained by comments made in the EM to the Alteration Bill, the EM contains the following assurances:

> The constitutional amendment confers no power on the Voice to prevent, delay or veto decisions of the Parliament or the Executive Government.
>
> The constitutional amendment would not oblige the Parliament or the Executive Government to consult the Voice prior to enacting, amending or repealing any law, making a decision, or taking any other action.[2]

15. These assurances are less than compelling. First, if these limitations were indeed the intention of the drafters of this proposed constitutional change, these words or similar could be included in the actual change to be put to referendum.

16. Second, if the High Court were to look beyond the actual wording of the proposed new Chapter IX of the Constitution, and were willing to look at extraneous material that might shed light on the meaning of the words of that Chapter and the intention of its drafters, the Court would unlikely limit their review to only the EM. There is other material that forms the background and context of this proposed change, and comments and statements made in those documents might give license to a future Court to provide an expansive interpretation of Chapter IX, not a limited one contemplated by these brief comments in the EM.

[2] Explanatory Memorandum, Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 (Cth) page 4.

Legal Analysis

17. It is of course the actual words of the Constitution from which its meaning and intent must be discerned. However, Courts have been willing to look at extraneous material to aid in statutory and constitutional interpretation.

18. Section 15AB of the *Act Interpretation Act 1901* (Cth), states that courts can consider 'any material not forming part of the Act' if the relevant provision is 'ambiguous or obscure' or if the ordinary meaning of the provision results in a 'manifestly unreasonable' outcome. This would include an Act to amend the Constitution such as the Alteration Bill if passed. This is also an established principle at common law. In *CIC Insurance Limited v Bankstown Football Club Ltd* the Court stated:

> It is well settled that at common law, apart from any reliance upon s 15AB of the Acts Interpretation Act 1901 (Cth), the court may have regard to the reports of law reform bodies to ascertain the mischief which a statute is intended to cure ... Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which … one may discern the statute was intended to remedy.[3]

19. The 'context' in which a proposed change takes place is not limited only to explanatory memoranda. It includes, as the above passage suggests, law reform reports as well as parliamentary committees[4] and constitutional convention reports and debates.[5].

20. The EM lists five reports that have examined the option of constitutional Indigenous recognition leading up to the introduction of the Alteration Bill:

> The Final Report of the Expert Panel on Constitutional Recognition of Indigenous Australians in 2012.
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> The Final Report of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples in 2015.
>
> The Final Report of the Referendum Council in 2017.
>
> The Final Report of the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples in 2018.
>
> The Indigenous Voice Co-design Process Final Report in 2021.

21. Thus, each of these Reports is likely to also form part of the context and background to the proposed constitutional change (background documents), in addition to the EM itself.

22. However, by far the most influential background document is likely to be the Uluru Statement from the Heart, which came out of the 2017 Referendum Council Final Report.[6]

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[3] (1997) 187 CLR 384, 408.
[4] *Acts Interpretation Act 1901* (Cth) s 2(b).
[5] *Cole v. Whitfield* (1988) 165 CLR 306.
[6] *Final Report of the Referendum Council* (30 June 2017) page i.

The Uluru Statement includes the passage 'We call for the establishment of a First Nations Voice enshrined in the Constitution.' When the first version of the proposed constitutional change was announced by the Prime Minister at the Garma Festival in July 2022, the Prime Minister made reference to the Uluru Statement from the Heart.[7] The EM reproduces the Uluru Statement in full. Schools are now teaching the Uluru Statement as part of their curriculum. If the referendum is successful, the Uluru Statement is likely to be seen as forming part of the historical record of Indigenous reconciliation, forming part of the chain of events along with the 1967 Referendum and the 2007 Apology to the Stolen Generations.

23. As a matter of law, any future High Court would be entitled to take the Uluru Statement from the Heart into account as representing part of the 'First Nations National Constitutional Convention' at Uluru in May 2017, which the Final Report of the Referendum Council records. Indeed, it is inconceivable that it would not feature prominently in any such legal analysis of the meaning of Chapter IX. The weight given to such a prominent document by the Courts is likely to far outweigh the brief assurances in the EM, particularly when the same document includes a copy of the Uluru Statement.

Analysis of other Extraneous Material

24. The *Final Report of the Expert Panel on Constitutional Recognition of Indigenous Australians* in 2012 noted that any Indigenous recognition must not be an 'empty gesture' or 'tokenistic'.[8] The Report stated: 'The Panel does not consider that it would be appropriate to include some form of recognition of Aboriginal and Torres Strait Islander peoples in the Constitution, and simultaneously to state that such recognition has no legal effect.'[9] The Panel welcomed moves 'to autonomous Aboriginal and Torres Strait Islander representative structures and institutions.'[10] A conclusion that the representations of the Voice have no legal effect, as alluded to in the EM, would seem to contrast with the sentiment that any constitutional recognition not be 'tokenistic' and that an Indigenous body be 'autonomous'.

25. Similarly, the *Final Report of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples* in 2015 rejected mere recognition in the Preamble: 'Recognition of Aboriginal and Torres Strait Islander peoples in a preamble, without substantive reform, would be seen as tokenistic, not only by Aboriginal and Torres Strait Islander peoples, but also by the wider community.'[11]

[7] Anthony Albanese, 'Address to the Garma Festival' (Media release, 30 July 2022) <https://www.pm.gov.au/media/address-garma-festival>.
[8] Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognition of Aboriginal and Torres Strait Islanders* (Final Report, 2012) page 115.
[9] Ibid.
[10] Ibid page 187.
[11] Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Commonwealth, *Final Report* (June 2015) page 32.

26. The *Final Report of the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples* in 2018 emphasised how the Voice must 'empower' Indigenous Australians. Comments in the Report included:

    a. 'The Committee appreciates that an appropriately designed First Nations Voice will empower Aboriginal and Torres Strait Islander peoples to shape the policies and laws affecting them.'[12]
    b. 'The Committee notes that The Voice is intended to empower Aboriginal and Torres Strait Islander peoples to have a greater say in the policy and legislation which governs their affairs and, in so doing, improve their autonomy and prosperity.'[13]
    c. 'Aboriginal and Torres Strait Islander peoples are demanding to be self-determining, to have a primary role in decision making processes, and not merely be the subjects of any decisions made by others.'[14]

27. It is difficult to conceive how a Court, if guided by such sentiments to interpret the legal effect of a representation by the Voice or the effect of Chapter IX more generally could conclude the intention was that such representations had no legal effect whatsoever and could be simply ignored, or the Voice never consulted.

28. The *Indigenous Voice Co-design Process Final Report* in 2021 takes up the theme of 'empowerment' insisting that Indigenous communities 'have a genuine say on local priorities, programs and service delivery.'[15] Indigenous Australians must have 'greater control and voice in their own affairs: a self-determination approach'.[16]

29. However, as mentioned above, it is the Uluru Statement from the Heart, forming part of the *Final Report of the Referendum Council* in 2017 that is likely to have the most sway. The Uluru Statement includes the comment:

> With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia's nationhood.

30. So 'sovereignty' will 'shine through' with 'constitutional change'. Thus, the purpose of this proposed constitutional change may be interpreted as a form of recognition of a degree of continuing Indigenous sovereignty. It is unlikely that any future High Court that uses the Uluru Statement as an aid to establishing the purpose, context, or intent of the proposed new Chapter IX of the Constitution is likely to read down its terms or adopt a narrow interpretation given these sentiments. The Uluru Statement goes on:

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[12] Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, Commonwealth, *Final Report* (November 2018) page 79.
[13] Ibid page 115.
[14] Ibid page 116.
[15] National Indigenous Australians Agency, *Indigenous Voice Co-design Process Final Report to the Australian Government* (July 2021) page 32.
[16] Ibid page 47.

> We seek constitutional reforms to empower our people and take a rightful place in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.

31. Again, the 'constitutional change' is intended to be 'empower[ing]', to provide Indigenous Australians 'power over their own destiny'. In a dispute between a future government and the Voice, it is difficult to conceive that any Court that uses the Uluru Statement as a guide to interpretation would be inclined to limit the powers of the Voice or read down the implications of Indigenous recognition in Chapter IX. The Uluru Statement goes on:

> In 1967 we were counted, in 2017 we seek to be heard.

32. The expectation of being 'heard' is wholly at odds with the concept that the Voice can be simply ignored or never consulted.

Conclusion

33. In 2006 former High Court justice Michael Kirby wrote that judges should rise to the 'big challenges' of difficult cases, endorsing judicial activism over 'formulae that deny the judiciary's creative role'. How might future High Court judges rise to the 'big challenges' of a future case to interpret the role and power of the Voice or the rights bestowed by Chapter IX? If such a judge had recourse to the extraneous material forming the context of this referendum proposal, then it is possible such a judge might be guided by the few brief comments in the EM that seeks to limit the scope of the Voice to challenge government and parliamentary decisions. But in other material, there is ample scope for judges to play a 'creative role' and interpret these matters broadly. It seems likely that, over time, the weight given to a brief reassurance in an EM is unlikely to hold as much moral and legal sway as the Uluru Statement from the Heart. If that document is used as a guide to constitutional interpretation, we can expect the broadest possible scope to be given to Chapter IX consistent with the words to be adopted in the referendum.

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