The First Nations Voice and the Parliament: A New Constitutional Relationship

Gabrielle Appleby[1]

Professor in Law, University of New South Wales

Abstract: A key part of the proposed constitutional amendment to establish a First Nations Voice is creating a new relationship between the Voice and the Parliament. This article explores a number of dimensions of that relationship. The amendment proposes that the Voice will have a constitutionally guaranteed role to make representations – that is, to speak – to the Parliament, to improve its work, most particularly in relation to the passage of legislation and the oversight of delegated legislation. The mechanics of this relationship will be worked out in legislation, policies and practice. The Parliament is also given a constitutional power to make laws on matters relating to the Voice. This gives the Parliament a significant constitutional responsibility in two areas. First, in determining the design of the Voice itself, and importantly the legitimacy and authority of its composition. Second, in determining the dynamics of the relationship between the Voice and the Executive, the other key constitutional relationship that the amendment creates. In both of these areas, the Parliament's legislative power should be informed by the overarching objectives of the Voice, and the principle of Indigenous self-determination of political status and representation that sits behind the Voice.

[1] A version of this paper was delivered as a seminar to the Department of the House of Representatives as part of my role as Constitutional Consultant to the Clerk of the House of Representatives. In 2016-2017 I was a pro bono constitutional adviser to the Regional Dialogues and First Nations Constitutional Convention that delivered the Uluru Statement from the Heart, and continue to work in that capacity for the Uluru Dialogues.

INTRODUCTION

If successful later this year, a referendum to establish a First Nations Voice (referred to in the constitutional amendment as an boriginal and Torres Strait Islander Voice'[2]) will herald a new constitutional relationship between this institution and the Parliament. The Voice is designed to inform and improve parliamentary decision-making, particularly in relation to law-making (as well as Executive decision-making, and policy and law development, but the focus of this article is the relationship with the Parliament). The Voice also raises questions about the responsibility of Parliament to design the detail of the Voice following a referendum, both initially, and in terms of its adaptation and evolution over time, and the relationship between this process and the Voice itself.

The establishment of the Voice enshrined in the Constitution will create a new institution within our constitutional system of government that I have described previously as modest and congruent, as well as radically transformative.[3] It is modest and congruent, in that it has been carefully designed to work within – that is, be coherent with – the existing structures and principles of the Australian constitutional system.[4] This starts with the assertions of sovereignty in the Uluru Statement from the Heart from which the proposal is drawn. They are expressed as a spiritual notion, connected to country, that are consistent with, in that they sit alongside the legal claim of British sovereignty that the High Court has persistently indicated is not subject to judicial questioning.[5]

---

[2] The Uluru Statement from the Heart (May 2017) called for a constitutionally enshrined 'First Nations Voice'. The Constitution Amendment (Aboriginal and Torres Strait Islander Voice) 2023 introduced into the Parliament in March 2023 refers to that body as an "Aboriginal and Torres Strait Islander Voice". I will use the terms interchangeably in this article.

[3] Gabrielle Appleby, 'The First Nations Voice: A modest and congruent, yet radically transformative constitutional proposal'. *AUSPUBLAW*, 11 June 2021.

[4] See e.g. Murray Gleeson, 'Recognition in keeping with the Constitution: A worthwhile project', *Uphold & Recognise*, 2019. Accessed 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.

[5] See the Uluru Statement from the Heart: 'Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under our own laws and customs. This our ancestors did, according to the reckoning of our culture, from the Creation, according to the common law from 'time immemorial', and according to science more than 60,000 years ago. This sovereignty is a spiritual notion: the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander

But the Voice is also constitutionally transformative, in that, for the first time, we have an attempt at the constitutional level to reconstruct and reset the relationship between the State and First Nations and provide an ongoing mechanism through which their self-determination can be expressed. The modest, congruent, as well as the transformative, dimensions of the Voice proposal provide us with a conceptual way to think of the relationship between the Voice and the Parliament.

What, then, are the key dynamics of this constitutional relationship? In this article, I explore three: the creation of the Voice through an exercise of popular sovereignty; its nature as a representative institution; and finally, the constitutional definition of the parameters of the relationship.

A NEW CONSTITUTIONAL INSTITUTION CREATED THROUGH AN EXERCISE OF POPULAR SOVEREIGNTY

The First Nations Voice is established to act in what has been referred to in shorthand as an 'advisory' capacity, that is, to use the language of the proposed amendment, to 'make representations' to the Parliament. It is not given a formal role in the legislative process. It does not possess a veto power. It is not a 'third chamber of Parliament'. This will mean that the success of the Voice in advocating for the needs and desires of First Nations will turn on its political power: how seriously Parliament engages with its representations.

An important dimension of the relationship between Parliament and the Voice then will rest on its legitimacy. Institutional legitimacy is a complex idea on which there is much written.[6] Here, it is sufficient to note that there will be many different inputs into the Voice's legitimacy, including the following three: the exercise of popular sovereignty that established it, giving it popular legitimacy; its constitutional status;

peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.' Referendum Council, 'Uluru Statement from the Heart'. First Nations National Constitutional Convention, 26 May 2017.

[6] See e.g. Richard H. Fallon, Jr., 'Legitimacy and the Constitution'. *Harvard Law Review* 118, 2005, pp 1789; Tom R Tyler, *Why People Obey the Law.* Princeton University Press, 2006.

and finally, whether it is seen as genuinely representative and accountable of First Nations people, which I will return to below.

The referendum, if successful, will provide a platform of public awareness of, knowledge of, and endorsement of the proposal.[7] This brings with it a public expectation that the Parliament will engage seriously with this new body, as well as engage seriously in its responsibility for designing the body, an aspect of the relationship discussed below.

The status of the body is also important. Chapters 1, 2 and 3 of the Constitution establish the core institutions of government in our constitutional system as the parliament, the executive and the judiciary. It is intended that the Voice be established also in its own, new, constitutional chapter, giving it the status of a foundational institution of Australian government. This is about establishing its status now and into the future, as well as about ensuring its operational stability and certainty, which will also be key to its success.

THE ESTABLISHMENT OF A REPRESENTATIVE INSTITUTION

The second part of the constitutional relationship between the Voice and the Parliament is the establishment of the body as a *representative* institution. The draft amendment indicates that the Voice is to be an 'Aboriginal and Torres Strait Islander Voice'. The Uluru Statement from the Heart describes it as a 'First Nations Voice'. These labels do not expressly, but rather implicitly, tell us that the institution is to be a representative one, that is, representative of Aboriginal and Torres Strait Islander people. How that representation is achieved, as canvassed below, will be determined under the current draft wording by Parliament, in consultation with First Nations people. But to focus first on two aspects of the importance of the general principle of representation for the Voice.

As Torres Strait Islander political scientist Associate Professor Sana Nakata has written, the Voice is a structural, practically orientated change that is addressed to remedying the systemic injustices that result in the low socio-economic outcomes for Aboriginal

[7] Submission to the *Interim Report to the Australian Government on Indigenous Voice Co-Design Process by 40 public lawyers, October 2020.* Accessed at: https://www.indigconlaw.org/home/submission-the-imperative-of-constitutional-enshrinement.

and Torres Strait Islander people.[8] It is directed at remedying 'the failure of a representative democracy to represent the very peoples who were dispossessed and disempowered by its establishment'. It does not do this through compulsion or veto, but rather, through 'representation'. Nakata explains:

> *The power of political representation lies not in a direct line to political decision-making or even in its aggregative effect to elect a Member of Parliament, but in the ability to sustain a set of political claims, both to a compelled audience – in this case the Parliament – but also a broader public.*[9]

Representation is also important, as Professor John Williams and I have written, because it provides a constituency, which it represents and is accountable to, who will also advocate for its ongoing position and authority. This stands in contrast to, for instance, the Inter-State Commission, a constitutional body established in section 101, but that no longer continues in existence. However, it was one that had:

> *no independent constituency base, little public support and no constitutional imperative, was seen as a threat to the position and authority of the Parliament that needed to be removed [as well as] undermining the judicial function exercised by the High Court.*[10]

The Voice does not share these characteristics, undermining attempts to draw analogies between the two institutions, and their likely continued existence and success.

[8] Sana Nakata, 'On Voice and the political power of representation'. *AUSPUBLAW*, 20 February 2023. Accessed at: https://www.auspublaw.org/first-nations-voice/on-voice-and-the-political-power-of-representation/.

[9] Nakata, On Voice.

[10] Gabrielle Appleby and John Williams, 'The First Nations Voice: An Informed and Aspirational Constitutional Innovation'. *IndigConLaw Blog,* 25 March 2023. Accessed at: https://www.indigconlaw.org/home/the-first-nations-voice-an-informed-and-aspirational-constitutional-innovation.

CONSTITUTIONAL PARAMETERS OF THE RELATIONSHIP BETWEEN PARLIAMENT AND THE VOICE

The constitutional text provides us with an understanding of some of the constitutional parameters of the relationship between Parliament and the Voice, as well as telling us about what will be required into the future: that is, it confers on Parliament responsibility for determining the detail of the Voice including defining the relationship between the Voice and the Executive – the other key constitutional relationship created by the amendment.

The Parliament's responsibility for passing legislation that provides the 'detail' of the Voice

Under the current proposed wording, the amendment provides in (iii) that:

> *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.*

First, it is important to note the tension that exists here between the proposed amendment and the proposed powers of Parliament, and Article 18 of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), which states:

> *Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.*[11]

[11] *United Nations Declaration on the Rights of Indigenous Peoples*, adopted by the General Assembly on Thursday, 13 September 2007, Article 18 (emphasis added).

The Uluru Statement from the Heart was driven by a desire to implement this right to self-determined political participation.[12] The success of the Voice will draw on its legitimacy and authority that will draw from its ongoing representative nature. So, there is a tension. The tension is most apparent in relation to membership, which I will discuss in more detail here. But it is also apparent in relation to the Parliament determining the processes of the body, and the powers which will determine its effectiveness and success. The Parliament is also given power to determine how the Voice's functions are to be carried out, as well as any future additional functions of the Voice. I return to the Parliament's role in setting out the relationship between Parliament and the Voice and the Executive and the Voice, below.

Here, I focus on the Parliament's power to make laws with respect to composition, that is, membership. Dr Dani Larkin a Bundjalung/Kungarakany public lawyer specialising in First Nations electoral participation, has written that membership and giving effect to the principle of representation is complicated in the First Nations setting:

> *The Voice should reflect our traditional governance structures as much as possible and in doing so, it should place the cultural authority and voices of our Elders and Traditional Owners at the centre of decision-making processes.*
>
> *The Voice should also be as inclusive of all First Nation people and experiences as possible, so that all of our voices are heard, particularly those of us who experience significant powerlessness and political exclusion in mainstream Australian elections - through the over incarceration statistics we comprise, and other issues that limit our access to support services which provide us with the ability to vote and politically engage, but also ensure our votes actually count.*[13]

[12] See Referendum Council *Final Report*. 2017, pp. 30-31. Guiding Principle 3, adopted at the National Convention to guide the outcomes that were adopted, stated: 'Advances self-determination and the standards established under the United Nations Declaration on the Rights of Indigenous Peoples.'

[13] Dani Larkin, 'Membership models for an Indigenous Voice: What does Representation Mean for First Nations?'. *IndigConLaw Blog,* 11 March 2021. Accessed at: https://www.indigconlaw.org/home/membership-models-for-an-indigenous-voice-what-does-representation-mean-for-first-nations.

Associate Professor Elisa Arcioni, an expert on membership and 'the people' under the Australian Constitution, writes:

> *The identity and cultural traditions of First Nations across Australia are complex and diverse, and their composition and laws are not static. First Nations peoples are heterogeneous, with distinct internal rules for membership and structures of representation.*[14]

Arcioni's comments takes us to the exceptional work of Dr Janine Gertz, a Gugu Badhun and Ngadjon-ji woman from North Queensland. Her work has focused on the cultural identity and membership being recognised and determined by an Indigenous Nation in accordance with their traditional laws and customs, and the importance of authority to determine cultural identity and membership being vested in the decision-making policies and procedures of an autonomous self-determining Indigenous Nations. This has made her:

> *uneasy about the constituted order of the Australian state – in this case, the High Court, but in other instances, the Government itself – externally determining and applying the criteria of Aboriginal people's cultural identities and ongoing connection to our lands.*[15]

There is a tension, then, between the legitimacy of composition as being sourced from the internal rules of membership and structure of First Nations themselves, and the power given to Parliament to make laws for the composition of the Voice. Arcioni resolves this as follows:

> *… the best way to ensure that First Nations determine the membership of the Voice is to have the rules of its membership contained in legislation, the drafting of which is informed by, and*

[14] Elisa Arcioni, 'Membership of the Voice' *Public Law Review,* March, 2023 (forthcoming). Accessed at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4344248.

[15] Janine Gertz, 'Determining the Self in Self-Determination'. *IndigConLaw Blog,* 31 March 2021. Accessed at: https://www.indigconlaw.org/home/determining-the-self-in-self-determination .

> *amenable to refinement and change in collaboration with, First Nations people.*[16]

That is a significant caveat: 'the drafting of which is informed by, and amenable to refinement and change in collaboration with, First Nations people'. Many First Nations hold genuine concerns that this will be the case, which seriously threatens the viability of the Voice. The Government has yet to release full details of how it intends to collaborate with First Nations to determine the composition of the body, should the Voice be passed. This collaboration will be vital to the legitimacy of Parliament's exercise of its powers in establishing the detail, including membership, of the Voice.

PARLIAMENTARY LAW-MAKING AND THE VOICE

Turning then to the Parliament's relationship with the Voice in relation to law-making, and other parliamentary decision-making, such as scrutiny of delegated legislation and disallowance, which, given what we know of the volume of law-making that is done through this process,[17] will be an important part of the Voice's function of making representations to Parliament.

A minimum dimension of this relationship is constitutionalised in (ii) of the proposed amendment: the Voice must be able to make representations to the Parliament. In practice, the relationship will largely be determined by legislation, standing orders, resolutions, and practice, including, for instance, ad hoc requests to address parliament.

Here, I want to look briefly at two proposals: one from the Indigenous Voice co-design process, undertaken by the Morrison government, led by Professors Marcia Langton and Tom Calma,[18] and the South Australian First Nations Voice model.[19]

[16] Arcioni, 'Membership of the Voice'.

[17] See e.g. Senate Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of Delegated Legislation.* 6 June 2019, p. 6. There were approximately 1700 instruments tabled annually at that time.

[18] Marcia Langton and Tom Calma, *Indigenous Voice Co-design Process Final Report to the Australian Government*. July 2021.

[19] *First Nations Voice Act 2023* (SA).

The 2021 co-design process report recommended a relationship between the Voice and Parliament that was largely modelled on the Parliamentary Joint Committee on Human Rights, established under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), and the non-justiciable obligation of the government to consult when making delegated legislative instruments under section 17 of the *Legislation Act 2003* (Cth).[20] Under the model that was recommended by the co-design process, the relationship would operate through what it refers to as 'transparency mechanisms'. In brief, they are:

- *Statement on bills:* An explanatory statement explaining whether consultation and engagement has occurred, and what advice was provided.
- *Tabling of advice:* The Voice would be able to table formal advice in Parliament through three channels:
  - Where formal advice is requested and provided, the advice will be tabled with the Bill
  - If the Voice advised on any other Bill, this would be tabled.
  - A formal statement annually to advise on government programs or raise other policy issues for consideration.
- *Parliamentary committee:* A Committee established to scrutinise the tabled advice, and engagement with the Voice as stated by Government, and hear directly from the Voice, and make recommendations to Parliament and the Government.[21]

The co-design model excluded the making of legislative instruments – subordinate legislation – from its obligatory consultation requirement, leaving it with an 'expectation' to consult, governed by what the report describes as 'common-sense principles that set standards to inform Parliament and Government about when they should consult'.[22] It said:

> *The proposal of the National Co-design Group is that the obligation to consult would apply only to primary legislation, not legislative*

[20] Langton and Calma, Co-design Process Final Report, p. 170.

[21] Langton and Calma, Co-design Process Final Report, p.168.

[22] Langton and Calma, Co-design Process Final Report, p.165.

> *instruments or other policies. The reason for this is to ensure the obligation to consult would apply to a limited number of reforms significant to Aboriginal and Torres Strait Islander peoples. The number of legislative instruments, regulations and notifiable instruments is many more times than the number of bills for primary legislation. Around 1,500 legislative instruments are made every year. The obligation does not capture these items to ensure it does not create an unnecessary administrative burden on all parties.*[23]

The experience of the Parliamentary Joint Committee on Human Rights (PJCHR) has been extensively analysed by others.[24] A number of criticisms of the PJCHR, its practice and experience, raise concerns for the proposed Committee model for the Voice, including timeliness of engagement by the Committee, workload and resourcing of both the Committee and the Voice. Finally, the experience of the Senate Committee on Scrutiny of Delegated Legislation in monitoring the consultation requirements of section 17 of the *Legislation Act 2003* (Cth) raises even further concerns for the proposal. In 2007, the Committee raised concerns about:

- an apparent lack of agency familiarity with the consultation requirements, leading to inconsistency between agencies in relation to levels of compliance;
- the provision of 'cursory, generic and unhelpful' information in explanatory statements [to the Committee]; and
- over-reliance on exceptions to the consultation requirements in the *Legislation Act*.[25]

In its 2019 inquiry into scrutiny of delegated legislation, the Committee also noted concerns that 'it must rely on the views of the executive as to the appropriateness and

[23] Langton and Calma, Co-design Process Final Report, p.165.

[24] See e.g. Sarah Moulds, *Committees of Influence: Parliamentary Rights Scrutiny and Counter-Terrorism Lawmaking in Australia.* Springer, 2020; Laura Grenfell and Sarah Moulds, 'The Role of Committees in Rights Protection in Federal and State Parliaments in Australia'. *UNSW Law Journal* 41 2018 p. 40.

[25] Senate Standing Committee on Regulations and Ordinances, *Consultation under the Legislative Instruments Act 2003: Interim Report*. June 2007 pp. 5-7. This summary is taken from the Senate Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of Delegated Legislation*, 3 June 2019, p. 44.

adequacy of any consultation that has occurred.'[26] The Co-design Final Report rejected a suggestion that the Voice itself should be given responsibility for reviewing Bills and Statements of Consultation provided by the Government, and advising the Houses whether it believes it has been properly consulted in the development of policies and laws.[27]

The second model I want to consider is that set out in the First Nations Voice Act 2023, passed by the South Australian Parliament in early 2023. This model sets out a number of different facets of the relationship between the proposed State-level Voice and the State Parliament. These are:

- Section 38: present to a joint sitting an annual report and address that sets out a summary of its operations, other matters of interest to First Nations People, as well as the operations of the local voices that the legislation establishes.
- Section 39: the Voice is to be notified by the Clerks of each Chamber of the introduction of each Bill in that Chamber. It explicitly states however that failure to notify does not affect validity.
- Section 40: the Voice is entitled to address, through one of its presiding members, either House of Parliament. This is facilitated by giving 7 days written notice to the presiding officer of the House, but that requirement is waived when a Bill is passed urgently through the House. Nothing in the section affects the ability of the Voice to appear before the Houses with the Houses permission. Nothing in the section prevents the House from conducting its business, including to avoid doubt, considering and passing the Bill that the Voice wishes to address the House on, prior to such an address.
- Section 41: The Voice is given the power to provide to the Parliament a report on any matter that is, in the opinion of the State First Nations Voice, a matter of interest to First Nations people. The report is to be provided to the Presiding Officer of the Houses, which must lay it before the House. The Minister is required to respond to the report as soon as is reasonably practicable after receiving the report (but in any

[26] Senate Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of Delegated Legislation*, 3 June 2019, p. 46.

[27] Langton and Calma, Co-design Process Final Report, p.172.

event not later than 6 months after receiving the report). This response must be laid before both Houses of Parliament.

- Section 42: Allows the Houses, through the presiding officers, to request the Voice to provide the House with a report in relation to a specified Bill addressing the matters specified in the notice, but cannot compel the Voice to do so.

The South Australian Act establishes a direct relationship between the Voice and Parliament, with no mediating role for a parliamentary committee. It also provides for an ongoing (not just annual) right to report to Parliament, and a mechanism for a government response to be made in the Parliament to the Voice's concerns. It does not address, at least in its establishing legislation, concerns around timeliness and resourcing. In fact, its provisions explicitly enable the House to pass bills even where the Voice has indicated it wishes to address the House. It also does not provide a mechanism through which the Voice will have a guaranteed role in reviewing the making of delegated instruments.

These two models provide us with an understanding of how the Voice-Parliament relationship might work in practice, while also sounding some notes of caution. They are not the only models.[28] In setting the relationship between the Voice and the Parliament should start from the position that in setting up an inter-institutional relationship, this must be done with an awareness of the work of, strengths, and nature of both of those institutions.[29] This requires acknowledging that Parliament must still be able to perform its work – including in passing laws and scrutinising delegated legislation. In doing so, it represents the broader Australian population. But there must be an accommodation to the new institution, its strength and nature, so that Parliament in undertaking its work is able to benefit from the Voice. This accommodation would require that the Houses set up procedures that allow for:

- The Voice to have a regular, unmediated channel to speak to the chambers of Parliament. This might be supplemented, but should not be replaced, by the work

[28] See, e.g. Geoffrey Lindell, 'The relationship between Parliament and the Voice and the importance of enshrinement'. *AUSPUBLAW,* 2 March 2021. Accessed at: https://auspublaw.org/blog/2021/03/the-relationship-between-parliament-and-the-voice-and-the-importance-of-enshrinement.

[29] Also known as 'institutional settlement' according to Legal Process Theory. See Henry M Hart and Albert M Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*. Foundation Press, 1994, p. 148 (prepared for publication from the 1958 Tentative Edition by William N Eskridge, Jr, and Phillip P Frickey).

of a Committee. In particular, if there is a Committee that analyses consultation, it should seek the views of the Voice on whether and how it has been consulted by the government in the development of proposals, not rely on assessments by government.[30]

- A mechanism for government response to any report made by the Voice to the Parliament that raises concerns relating to government actions or policy.
- According the representations of the Voice priority in considering legislative measures, according it respect as a representative, constitutional institution established by an act of popular sovereignty.
- Encouraging parliamentary engagement and response to the work of the Voice, including providing devoted time to discuss representations of the Voice when they are made, and reporting to the public and the Voice on government responses.
- Limiting when 'urgency' can be triggered to pursue the passage of legislation without consideration of representations made by the Voice.

The Voice must be involved in the different work of Parliament that affects Aboriginal and Torres Strait Islander people – including the significant work of scrutinising delegated instruments, which have an enormous impact on the lives of Aboriginal and Torres Strait Islander people. The Voice should determine the matters on which it engages, and it should report on its work with government prior to the introduction of a Bill. The Voice should be resourced, including with a secretariat, so as to respond to this breadth of matters.

THE DYNAMICS OF THE RELATIONSHIP BETWEEN THE EXECUTIVE AND THE VOICE

Turning to the third dimension of the parameters of the relationship between the Parliament and the Voice: the responsibility of the Parliament to determine the functions of the Voice, which would include the power to set out the detail of the relationship between the Voice and the Executive (as well as work out the detail of the

[30] See similar criticisms of the New Zealand Cabinet Circular regarding consultation and reporting in Dominic O'Sullivan, Helen Came, Tim McCreanor and Jacqui Kidd, 'A critical review of the Cabinet Circular on Te Teriti o Waitangi and the Treaty of Waitangi advice to ministers'. *Ethnicities* 21(6) 2021, p. 1093.

relationship between the Voice and the Parliament, which we have already discussed above). This is a relationship has been prominent in the media,[31] and there have been suggestions by some that the clause should be narrowed so as to remove the constitutional guarantee of making representations with the Executive.[32] Such a suggestion is both counter-intuitive, and unnecessary. It is counter-intuitive, because, it is proposed because it would supposedly make it the amendment more likely to pass at a referendum, as a weaker provision, but in fact the change is likely to reduce the practical authority and effectiveness of the Voice, which is likely to make it less attractive at a referendum.

Further, the idea that it needs to be narrowed down because there are constitutional concerns is a tenuous argument,[33] making the change constitutionally unjustifiable. The Court is unlikely to interpret the current amendment as forcing the Government to respond, take into account, or follow the views of the Voice. In fact, in setting up the Voice, it will be the Parliament that will enact the necessary detail about how the Voice will be informed about government decisions, and policy development, and how its views will be received.

Which returns us to the relationship of the Voice to Parliament. In creating the Voice, the Parliament will enact detail about how the Voice will be informed about government decisions, and policy development. It might include, for instance, a system that allows the Voice to be briefed in relation to Cabinet decisions and make representations, to be briefed in relation to Ministerial decisions, and make representations, and how those will be treated by those Executive bodies/officers. It will be the role of the Parliament to determine whether the Voice's representations are mandatory considerations, or how else they are to be treated by those within Government.

[31] See e.g. 'Can the Voice be Rescued': Father Frank Brennan enters the debate'. *2GB Radio* Sydney, 21 February 2022. Accessed at: https://www.2gb.com/can-the-voice-be-rescued-father-frank-brennan-enters-the-debate/.

32 See e.g. Andrew Bragg. The Indigenous Voice to Parliament: Five Reasons the Voice is Right. 2023, pp. 14-17.

33 These are arguments that have been dismissed by, for instance, by the Solicitor-General of the Commonwealth: See Solicitor-General's opinion dated 19 April 2023, annexed to the submission of the Commonwealth Attorney-General to the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Aboriginal_and_Torres_Strait_Islander_Voice_Referendum/VoiceReferendum/Submissions.

Such schemes would set the vast majority of practice between the Voice and the Executive. Although, and importantly, they could not prevent the Voice from making representations proactively to Executive officers – for instance if decisions made by other public servants arose that were of concern to Aboriginal and Torres Strait Islander people that the Voice had not been officially informed about, it could still make representations. That is the importance of the constitutional baseline. But the vast majority of the relationship between the Executive and the Voice, will be set by the Parliament.

CONCLUSION

Should the referendum to constitutionally enshrine a First Nations Voice be successful, it will alter our constitutional landscape. Part of that alteration will be nation-building, in that a significant dimension of the referendum is an act of recognising the unique place of First Nations people to the lands and waters that are now called Australia, and the history of violence, dispossession and oppression that First Nations people have endured. A significant part of that alteration will be creating new constitutional relationships. In this article, I have focussed on three dimensions of the new constitutional relationship between the Voice and the Parliament. Some of those aspects are set in the constitution itself: the status and core functions of the Voice. But many will be determined by Parliament in the exercise of its constitutionally vested powers to determine the details and practical functioning of the Voice. This vests in Parliament, in large part, the responsibility for exercising those powers in a way that establishes the Voice with the necessary legitimacy to succeed.