



CONSTITUTIONAL ENSHRINEMENT OF A FIRST NATIONS VOICE

ISSUES PAPER FOR PUBLIC DISCUSSION

Issues Paper 1: The Constitutional Amendment

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Executive Summary

This is one of a set of three issues papers released by the Indigenous Law Centre in September 2022, addressing three critical matters in the lead up to the referendum to constitutionally enshrine a First Nations Voice:

1. **Issues Paper 1: The Constitutional Amendment**
2. **Issues Paper 2: The Referendum Question**
3. **Issues Paper 3: Finalisation of the Voice Design**

In each issues paper, we set out the background to the issues covered in the paper, the principles by which these issues should be resolved, and some proposals for further discussion that seek to satisfy those principles. These issues papers have been designed to develop public discussion at an important moment prior to these matters being finalised by government in the lead up to the referendum.

In this issues paper, we address issues that must be resolved prior to settling the constitutional amendment to be put to voters at a referendum. To do that, we identify a set of principles. These include that the provision must be drafted with its purpose in mind, and use clear and simple words to give effect to that purpose. The purpose of the provision is to constitutionally recognise First Nations people, in the manner sought in the Uluru Statement from the Heart. The provision must also be drafted with constitutional prudence and coherency in mind. Using these principles, we respond to the issues identified and set out a draft constitutional amendment for further consideration that builds upon the draft amendment released by the Prime Minister on 30 July 2022.

Behind these papers sits more than five years of work. That work was initially led by the Indigenous Steering Committee of the Referendum Council, and since May 2017 and the delivery of the Uluru Statement to the Australian people, by the Uluru Dialogues, a group of First Nations people and non-Indigenous supporters who are committed to pursuing the reforms of the Uluru Statement from the Heart. This work has been undertaken out of the Indigenous Law Centre, at the University of New South Wales, and has also engaged constitutional, public law and Indigenous experts from across Australia and the world, as well as leading practitioners. It has also reckoned with public contributions from former Chief Justices of the High Court, parliamentary committee submissions and reports, and other aspects of the public debate on constitutional reform.

1. Context

1.1 *Constitutional context*

The Australian Constitution currently contains no reference to Aboriginal and Torres Strait Islander peoples. Prior to 1967, one provision actively excluded Aboriginal people in the States from the scope of the Commonwealth power to make special laws for a particular race (in section 51(xxvi)). A second provision said that in reckoning the people of the Commonwealth for various constitutional purposes, ‘aboriginal natives shall not be counted’ (section 127). In the most successful constitutional referendum in Australia’s history, both mentions were deleted in 1967, with more than 90% of Australian voters voting Yes to their removal.

In practice, since 1967, the races power has only ever been used to make special laws for Aboriginal and Torres Strait Islander people, including native title and cultural heritage protection laws. However, in 1998, the High Court indicated that, despite the positive intentions of 1967, the provision might also support negatively discriminatory laws against Aboriginal and Torres Strait Islander people.¹ Aboriginal and Torres Strait Islander people living in the territories are also subject to the almost unlimited legislative power of the Commonwealth over territories in section 122, that has been used to support, for instance, the controversial Northern Territory Emergency Response.

Since the landmark High Court decision in *Mabo v Queensland (No 2)*,² Australian law has recognised that Aboriginal and Torres Strait Islander peoples occupied their territories for thousands of years before 1788, in accordance with recognisable legal systems that governed their communities. The Australian common law recognises these pre-existing – and ongoing – legal systems, which may, in particular circumstances, lead to the recognition of a group’s native title. But in *Mabo (No 2)* the Court made no finding about the legitimacy of the acquisition of British sovereignty based in 1788, though it did say the fiction of *terra nullius* by which the rights of indigenous inhabitants were disregarded ‘had no place in the contemporary law of this country’.³

1.2 *The constitutional recognition and reform debate*

This constitutional background has given rise to three decades of inquiries into the constitutional position of Aboriginal and Torres Strait Islander peoples. They include the

¹ *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

² (1992) 175 CLR 1.

³ *Mabo (No 2) v Queensland* (1992) 175 CLR 1, 31.

unimplemented social justice report following the *Mabo* decision, *Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures* (1995), the Council for Aboriginal Reconciliation's final report: *Reconciliation: Australia's Challenge: Final Report of the Council for Aboriginal Reconciliation* (2000), the 2012 report of the Expert Panel on Constitutional Recognition of Indigenous Australians, and three reports published by a 2015 parliamentary joint select committee on constitutional recognition of Aboriginal and Torres Strait Islander peoples.

In 2015, the *Kirribilli Statement* was issued by senior Aboriginal and Torres Strait Islander leaders to the Prime Minister and Opposition Leader. The Kirribilli Statement called for constructive engagement with First Nations people by the government on the question of constitutional recognition and insisted that 'any referendum must involve substantive changes' not constitutional minimalism.⁴ Soon after, the government established the Referendum Council, to advise the Prime Minister and the Opposition Leader on options for constitutional recognition.

The Indigenous Steering Committee of the Referendum Council conducted the First Nations Regional Dialogues in 2016-17, as an Indigenous-designed and Indigenous-led deliberative process. Twelve Dialogues were held across the country, in which delegates contemplated and assessed options for constitutional recognition. The Dialogue-process culminated in Regional delegates from each Dialogue gathering at the First Nations Constitutional Convention in May 2017, which issued the Uluru Statement from the Heart to the Australian people. The Uluru Statement said that constitutional recognition should involve the enshrinement of a representative body into the constitution: a First Nations Voice.

The position of the Regional Dialogues is explained in the Referendum Council Final Report:

Voice to the Parliament

The proposal for the enhanced participation of Aboriginal and Torres Strait Islander peoples in the democratic life of the Australian state, especially the federal Parliament, is not a new one. It is as equally prominent in Aboriginal political advocacy as a racial non-discrimination clause. The Voice was the most endorsed singular option for constitutional alteration. A constitutionally entrenched Voice appealed to Aboriginal and Torres Strait Islander communities because of the history of poor or nonexistent consultation with communities by the Commonwealth. Consultation is either very superficial or it is more meaningful, but then wholly ignored.

For Dialogue participants, the logic of a constitutionally enshrined Voice – rather than a legislative body alone – is that it provides reassurance and recognition that

⁴ A minimalist approach that provides preambular recognition, removes section 25 and moderates the races power (section 51(xxvi)) does not go far enough and would not be acceptable to Aboriginal and Torres Strait Islander peoples': Kirribilli Statement available at austlii.edu.au/au/journals/ILB/2015/37.pdf

this new norm of participation and consultation would be different to the practices of the past.

The Dialogues recommended that one of the functions of the Voice would be ‘monitoring’ the Commonwealth’s use of the race power (section 51 (xxvi)) and Territories power (section 122). This means that discriminatory legislation like the Northern Territory Emergency Response would be contested before it originates.

Even though the Voice was not a foolproof way to prevent the Parliament passing discriminatory laws because of parliamentary sovereignty, the potential for the Voice to have additional functions that provided Aboriginal and Torres Strait Islander people with an active and participatory role in the democratic life of the state was viewed as more empowering than a non-discrimination clause (section 116A) or a qualified head of power.⁵

The National Constitutional Convention assessed each proposed option for reform against an agreed set of 10 Guiding Principles:

The principles governing the assessment by the Convention of reform proposals were that an option should only proceed if it:

1. Does not diminish Aboriginal sovereignty and Torres Strait Islander sovereignty.
2. Involves substantive, structural reform.
3. Advances self-determination and the standards established under the United Nations Declaration on the Rights of Indigenous Peoples.
4. Recognises the status and rights of First Nations.
5. Tells the truth of history.
6. Does not foreclose on future advancement.
7. Does not waste the opportunity of reform.
8. Provides a mechanism for First Nations agreement-making.
9. Has the support of First Nations.
10. Does not interfere with positive legal arrangements.⁶

The summary of the Regional Dialogues’ views on the Voice, that was agreed by the Constitutional Convention, emphasised that any such body ‘must have authority from, be representative of, and have legitimacy in Aboriginal and Torres Strait Islander communities across Australia. It must represent communities in remote, rural and urban areas, and not

⁵ Referendum Council, *Final Report* (2017) 14.

⁶ *Ibid* 22.

be comprised of handpicked leaders. The body must be structured in a way that respects culture.⁷

1.3 Drafting Context and the Prime Minister's Proposed Amendment

The Indigenous Law Centre has been working on a draft constitutional amendment since the delivery of the Uluru Statement in 2017.

During the Regional Dialogues and at the First Nations Constitutional Convention that delivered the Uluru Statement from the Heart, proposed drafting from 2015 by Professor Anne Twomey (University of Sydney) was included in discussions about a Voice to Parliament, as an 'example' of a possible constitutional amendment.⁸ This proposed amendment was follows:

60A(1) There shall be an Aboriginal and Torres Strait Islander body, to be called the [insert appropriate name, perhaps drawn from an Aboriginal or Torres Strait Islander language], which shall have the function of providing advice to the Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander peoples.

(2) The Parliament shall, subject to this Constitution, have power to make laws with respect to the composition, roles, powers and procedures of the [body].

(3) The Prime Minister [or the Speaker/President of the Senate] shall cause a copy of the [body's] advice to be tabled in each House of Parliament as soon as practicable after receiving it.

(4) The House of Representatives and the Senate shall give consideration to the tabled advice of the [body] in debating proposed laws with respect to Aboriginal and Torres Strait Islander peoples.

The use of the Twomey (2015) drafting during the Dialogue process made it a logical point from which to commence the ILC's consideration of constitutional drafting. The ILC has also paid close regard to the analysis and commentary of former Chief Justices of the High Court Murray Gleeson and Robert French, particularly around coherence of the proposed amendment with the Australian constitutional order, the position of Parliament, and the presence of the races power (s 51(xxvi)) in the Constitution.⁹

⁷ Ibid 30-31.

⁸ 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>>

⁹ 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).

The Indigenous Law Centre developed an early version of an amendment (Section 129, in a new Chapter 9 of the Constitution) in a joint submission to the 2018 Joint Select Committee on Constitutional Recognition, 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.¹⁰ It was a proposal founded in and drawing directly from the aspirations expressed during the Regional Dialogues and at the First Nations Convention at Uluru.

In the Final Report from the 2018 Joint Select Committee inquiry,¹¹ concern was expressed about the receipt of multiple different versions of a constitutional amendment (although the Committee had itself requested further drafting during public consultations), and that this could be a roadblock for moving forward to a referendum. While there was significant overlap among those drafts, the Committee’s comment highlighted the need for more work to develop consensus on the proposed amendment. Since that report, the Indigenous Law Centre, partnering with the Gilbert + Tobin Centre of Public Law at UNSW, has conducted workshops with constitutional experts – academics and practitioners – from across the country through 2019-2021. Advice has also been sought from eminent legal counsel. The ILC continues this work, co-hosting with the Law Council of Australia and the Australian Association of Constitutional Law a series of workshops across Australia seeking input from public law practitioners from across the country on the issues set out in this paper, and reporting to government.

On 30 July 2022, the Prime Minister released the following amendment, indicating it was not final and further consultation would be undertaken:

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 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.

¹⁰ Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Submission 479*.

¹¹ Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Final Report* (2018) ix.

2. The Issues

How can an amendment to the Australian Constitution give effect to the aspirations for reform and constitutional recognition expressed by the delegates in the Regional Dialogues, in a clear and constitutionally robust way? There is now a well-established consensus among constitutional law experts on the core matters that must be addressed in a constitutional amendment to enshrine a First Nations Voice. They essentially agree on the following aims for the constitutional amendment:

- It constitutionally enshrines the body.
- It constitutionally enshrines the primary function of the body to make representations to the Commonwealth Parliament and the Executive in the development of laws and policies that affect Aboriginal and Torres Strait Islander people.
- It leaves the further detail of the design of the Voice, including its composition, additional functions, powers and procedures, to be determined in the future by the Parliament.

There are also some legitimate concerns about the operation of the Voice proposal that the provision should address. The provision should not:

- create a constitutional limit on parliamentary power in the form of a veto (that is, having the Voice act as a so-called ‘third chamber’).
- create a shift of power from the political process to the courts, particularly regarding the relationship between the Voice and the Parliament and Executive (the justiciability issue).
- leave it entirely to Parliament to determine how Aboriginal and Torres Strait Islander people are to be ‘heard’ by the Parliament and the Executive Government. Proposals that would omit the guaranteed establishment of an institution,¹² for example, would not alter the status quo in the way that is required.

However, a number of issues remain:

1. **The placement of the amendment.**
2. **Guaranteeing the body’s existence:** Whether the language establishing the body must – or even can – guarantee its existence.
3. **The name of the body.** Whether it will be the ‘First Nations Voice’, the ‘Aboriginal

¹² Anne Twomey ‘There are many ways to achieve Indigenous recognition in the constitution – we must find one we can agree on’ 8 July 2020 <<https://theconversation.com/there-are-many-ways-to-achieve-indigenous-recognition-in-the-constitution-we-must-find-one-we-can-agree-on-142163>>.

and Torres Strait Islander Voice’, or whether the name of the body should itself be left to Parliament.

4. **The description of primary function:** Whether this function should be described as providing advice, presenting views or making representations.
5. **Scope of primary function:** How broad should the mandate of the primary function be, and who should determine that mandate: the Parliament and Executive, or the Voice, or the Courts?
6. **Additional functions:** Should the provision explicitly indicate that additional functions may be conferred on the Voice, to avoid any constitutional uncertainty as to whether these may be conferred in the future.
7. **Description of the relationship between the Voice, and Parliament and the Executive:** Whether the constitutional provision should articulate the interaction between the Voice and the Parliament and the Executive, or leave this to be developed in legislation and practice.
8. **Membership of the Voice:** Whether the constitutional provision should indicate that the membership of the Voice must be selected by Aboriginal and Torres Strait Islander people themselves, or leave this matter to Parliament.
9. **How the Voice may interact in future with State and Territory Parliaments and Governments:** Whether the constitutional provision should expressly articulate any possible future role for the Voice with State and Territory Parliaments and Governments, to avoid any constitutional limits that might prevent this.
10. **Incidental power:** Whether there needs to be included an explicit incidental legislative power (as is seen in s 51 of the Constitution).

3. Principles

The Indigenous Law Centre proposed that the resolution of each of the remaining issues set out above should be informed by the following principles:

- **Clarity of purpose:** As with all legal drafting, it is important that the constitutional amendment have a well-defined purpose, and use clear and simple words to give effect to that purpose.
- **Mutual Recognition:** The resolution of these questions must be informed by the fact that this constitutional amendment is qualitatively different from others in the past. This amendment is about recognition of First Nations. Constitutional recognition must be mutual,¹³ if it is to move away from the imposition of legal status on

¹³ See further Noel Pearson, ‘Constitutional Recognition Will Make this Nation Whole’, *The Australian*, March 18, 2021.

Aboriginal and Torres Strait Islander people that has dominated our constitutional past. First Nations people have asked for recognition in the terms set out in the Uluru Statement from the Heart.

- **Respecting the Regional Dialogues:** The resolution of these questions should be informed by the stated aspirations of the delegates at the Regional Dialogues as expressed in the Uluru Statement from the Heart. This should include meeting the Guiding Principles adopted at the First Nations Constitutional Convention.
- **Constitutional prudence:** If there are simple ways to head off future constitutional challenges, these should be taken.
- **Constitutional coherency:** The constitutional amendment should be drafted so as to respect foundational constitutional principles, including the role of the Parliament in our democracy (sometimes expressed as parliamentary sovereignty), the rule of law, the separation of powers and federalism.

4. Proposal

In this part, we provide an analysis of each of the identified issues against the principles we have identified, to develop a proposal that builds upon the draft amendment for discussion released by the Prime Minister on 30 July 2022.

1. The placement of the amendment

While the government has not indicated where the proposed amendment will be inserted into the Constitution, there are a number of possibilities that have been mentioned in recent years.

One is the insertion of a new section 127 (in place of the provision removed by the 1967 referendum). The Indigenous Law Centre has concerns with this proposal. It would be using a provision that was – for more than 60 years – used to actively exclude Aboriginal people from the reckoning of the people of the Commonwealth. To use section 127 for constitutional recognition risks papering over our constitutional history. Leaving section 127 on the face of the Constitution, as a repealed section, is part of our history as a nation.

Another proposal is to include it within Chapter I (the Parliament). This, however, doesn't capture the full extent of the Voice's function as a Voice to Parliament and the Executive, as well as possibly other functions. It might unintentionally limit the role of the Voice.

A further proposal is that it should be included as a new Chapter IA. This, however, disrupts the important and symmetrical structure of the Constitution in Chapters I, II and III, establishing in turn the three branches of government (Legislature, Executive, Judiciary). The High Court has drawn important inferences from that structure and

displacing it may have unintended consequences.

We propose that the amendment is included as a new **section 129**, placed in a new **Chapter 9** at the conclusion of the Constitution. This recognises there has been a history of constitutional exclusion for First Nations people, and also opens a new chapter in the relationship between the state and First Nations people.

2. **Guaranteeing the body's existence**

The Prime Minister's proposed amendment establishes the First Nations Voice in (1), using language that mirrors the creation of the High Court of Australia in s 71. The ILC, in its work to date, has also adopted that approach.

Some concerns have been expressed that such a provision does not *guarantee* the existence of the body (as desired by the Regional Dialogues), noting the reference in s 101 of the Constitution to an Inter-State Commission (which no longer exists). This analogy is, however, flawed. The constitutional nature and function of the Voice (located within the political process) do not raise difficult issues of compatibility with the separation of powers, as the Inter-State Commission and its adjudicative powers did. And the political momentum for establishment and continuation of the Voice that would flow from specific popular endorsement of the institution at a standalone referendum creates a strong contrast to the Inter-State Commission.¹⁴

3. **The name of the body**

A 'First Nations Voice' is the exact form of language called for in the Uluru Statement from the Heart. Adopting this language – and not imposing language on First Nations, such as "Aboriginal and Torres Strait Islander Voice" – respects the mutuality of the act of recognition.

4. **The description of primary function**

Under the Prime Minister's amendment, the Voice is given a proactive, self-determined function of 'making representations'. Given the principles set out above, 'making representations' captures the role of the Voice in developing genuinely representative and informed views, and also possibly presenting facts, evidence, opinions and other relevant information. Making representations is also a proactive function, rather than waiting to be 'engaged by' or 'consulted by' the Parliament or the Executive. In accordance with the views expressed in the Regional Dialogues and

¹⁴ See full analysis in Gabrielle Appleby and John Williams, 'The First Nations Voice: An Informed and Aspirational Constitutional Innovation' *IndigConLaw* (25 March 2021) <<https://www.indigconlaw.org/home/the-first-nations-voice-an-informed-and-aspirational-constitutional-innovation>>

the First Nations Constitutional Convention at Uluru, the function of the Voice is not described as ‘advisory’ or ‘consultative’ only. The language of advisory is also problematic as ‘advice’ has a distinct constitutional meaning in the relationship between the Governor-General and the Executive Council.

5. Scope of primary function

In the Prime Minister’s proposed amendment, the scope of the primary function extends to ‘*matters relating to Aboriginal and Torres Strait Islander Peoples.*’ This will, as was intended by the Regional Dialogues, capture laws that are introduced under the races power (section 51(xxvi)) and the territories power (section 122), as well as laws that might appear to be of general application but that particularly affect Aboriginal and Torres Strait Islander peoples.

The Prime Minister’s proposal is not limited to the races and territories powers, and that is appropriate for three reasons. First, such a limited function would not reflect the true gamut of legislation that particularly affects Aboriginal and Torres Strait Islander peoples. The intention of the Voice is to provide a vehicle for self-determination and so should be capable of addressing all matters of ‘economic, social and cultural development’ impacting First Nations (in accordance with article 3 of the *UN Declaration on the Rights of Indigenous Peoples*). Second, limiting the function in this way would prove constitutionally difficult in that the question of whether a law is ‘with respect to’ a head of power is not determined definitively at the time of its passage, but, rather, if and when the High Court is asked to decide that question. Third, it is not intended that the Voice will have a power of veto, or the power to delay legislative or executive decision-making. As such, the breadth of the Voice’s function to make representations does not interfere with the legislative or executive function.

However, there is currently uncertainty in the drafting as to who will determine what matters relate to Aboriginal and Torres Strait Islander peoples. There is also some uncertainty about whether the Parliament can remove the function in (2) because it says the Voice ‘may’ make representations. This wording might, however, have been included instead to counter any idea that the Voice must present its views on every single matter relating to Aboriginal and Torres Strait Islander peoples.

The Voice should be able to determine which matters affect its constituents’ interests. This should not be done by the Parliament, Government, or be left to the Courts. Of course, the Voice will itself have to determine which issues it wishes to prioritise to be properly representative of First Nations views. As a matter of political necessity, in practice, it will address issues that are of concern to its constituents, and not spend its time and resources on irrelevant matters. It will have to prioritise issues to ensure it has the greatest political effectiveness. If it fails to perform these

functions well, the penalty for the Voice will be political: members may not be reselected by their constituents, and the body will be subject to government and public criticism.

6. Additional functions

There is uncertainty in the Prime Minister's proposed amendment as to whether additional functions can be conferred on the Voice. This should be clarified. The possibility that future legislation may confer additional functions on the Voice was discussed in many of the Regional Dialogues. It sensibly acknowledges that an enduring constitutional body may need to adapt to changing circumstances over time. The constitutional amendment should enable Parliament to confer other functions on the Voice by legislation. These functions should be determined in dialogue with First Nations, and, indeed, once the Voice is operational, it would provide the vehicle for such input. A number of suggestions with respect to additional functions were made in the Regional Dialogues, although consensus was not sought and obtained because full consideration of the issue was not the objective of that process.

7. Description of the relationship between the Voice, and Parliament and the Executive

Consistent with the understanding that the Voice should not have the power of veto or be a 'third chamber' of Parliament, the Prime Minister's draft provision gives the Voice the function of making representations, but imposes no concomitant obligation on the Parliament. The proposal leaves to legislation the extent to which, and how, the Parliament and the Executive might respond to the representations made by the Voice, and the powers of the Voice to fulfill its functions. Not constitutionally prescribing the exact procedure that is to occur between the Voice and the Parliament is also a way of allowing flexibility for the relationship to evolve. This is consistent with the approach taken in sections 49 and 50 of the Constitution, which leave the powers, privileges and immunities of the Houses to be determined by the Parliament, and allow each House to make its own rules and orders with respect to the mode in which its powers, privileges and immunities may be exercised and upheld, and the order and conduct of its business and proceedings.

It is unlikely that the High Court would consider the Prime Minister's draft provision justiciable, particularly the primary function of the Voice and its relationship with Parliament and the Executive. The function and the relationship will likely be viewed by the Court as intramural proceedings between the Voice and the Parliament and between the Voice and the Executive. With respect to the Parliament, the Voice is engaged in a pre-legislative process, and the High Court has previously expressed its

reluctance to intervene in such processes.¹⁵ With respect to the Executive, it is unlikely that the provision will be justiciable as it contains no corresponding obligation on the Executive to act.

8. Membership of the Voice

There is currently nothing in the Prime Minister's proposed amendment that allays concerns that the Voice might be established without proper consultation with First Nations Communities. Full and proper participation in design is pivotal for ensuring First Nations confidence in the amendment. While there may be challenges to including something in the Constitution to ensure this, the Executive and Parliament should be clear that the design of the Voice, particularly in relation to membership, will be the subject of further and deeper consultation with First Nations people. We address this further in **Issues Paper 3**.

9. How the Voice may interact in future with State and Territory Parliaments and Governments

The Prime Minister's proposed amendment leaves uncertain how the Voice may play a role in State and Territory policy and legislative development. Interaction with the States and Territories was an important issue in many of the Regional Dialogues.

The provision can instead provide certainty that no implied constitutional limitations would prevent this in future. It should be explicit that the Parliament can confer functions on the Voice that allow it to engage with State and Territory governments and Parliaments, with their consent. This would explicitly anticipate, and resolve, any potential legal concern based in federalism and other structural principles, about the State and Territory polities' engagement with the Voice.¹⁶

10. Incidental power

The head of power in the Prime Minister's proposed amendment, currently does not include an incidental power. It is uncertain that s 51(xxxix) is broad enough to extend to matters incidental to the Voice, and so an incidental power should be included as a matter of prudence.

¹⁵ See, for instance, the Court's approach to section 53, and the powers of the Houses with respect to 'proposed laws': *Osborne v Commonwealth* (1911) 12 CLR 321, 336 (Griffith CJ); *Western Australia v Commonwealth* (1995) 183 CLR 373, 482 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

¹⁶ Such as those that might be drawn by analogy with State engagement with the federal judiciary: *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

Proposed amendment

Based on the above analysis of issues, the Indigenous Law Centre offers a proposed amendment for further discussion that builds on the version released by the Prime Minister:

Chapter 9 FIRST NATIONS

Section 129 The First Nations Voice

(1) There shall be a body, to be called the First Nations Voice.

(2) The First Nations Voice:

(a) shall make representations to Parliament and to the Executive Government of the Commonwealth on matters it deems relevant to Aboriginal and Torres Strait Islander peoples; and

(b) may perform such additional functions as the Parliament provides, including, at the request or with the concurrence of the Parliament of a State or Territory, the function of making representations to the Parliament or government of that State or Territory.

(3) The Parliament shall, subject to this Constitution, have power to make laws with respect to the composition, functions, powers and procedures of the First Nations Voice, and matters incidental to the execution of the powers vested by this Constitution in the First Nations Voice.

Any proposed amendment must be included in a constitution alteration Bill (Referendum Bill) to be considered by Parliament. The Referendum Bill will be short, and largely formulaic. Section 25 of the *Referendum (Machinery Provision) Act 1984* (Cth) requires that the long title of the Bill is used in the referendum question. In **Issues Paper 2**, we propose an alternative process for setting the question on the ballot paper to promote a more direct ballot paper question.