

3.48 Additionally, Dr Elisa Arcioni and Associate Professor Andrew Edgar argued that the Constitution Alteration’s sections relating to consultation clearly indicate that they are not enforceable by the courts. Further, other legislative requirements on Commonwealth regulations explicitly state that ‘the form of consultation is a matter for the discretion of executive government officials and that the failure to consult does not affect the validity or enforceability of a regulation’.<sup>54</sup> They suggested that, given subsection 129(iii) empowers the Parliament to determine matters such as the process in which representations are received, the legal impact of representations would be better addressed after a successful referendum when the Parliament considers the scope and processes of the Voice.<sup>55</sup> On the issue of legal effect of representations made by the Voice, the Honourable Kenneth Hayne AC stated:

The construction of 129(ii) would have to be a construction that takes account of 129(iii), and 129(iii) plainly allows parliament, subject to the Constitution, to make a law with respect to a matter relating to the Voice. The legal effect of representations made by the Voice is, I would have thought, plainly a matter relating to the Voice.<sup>56</sup>

## Race and the Constitution

3.49 The Constitution includes a ‘race power’ which has, for decades, been used to make laws about Aboriginal and Torres Strait Islander peoples (and only Aboriginal and Torres Strait Islander peoples).

3.50 The majority of evidence indicated that the proposed Constitution Alteration would not create inequality nor encourage discrimination; Rather, it could be a means of facilitating the right to equality for Indigenous Australians.<sup>57</sup>

3.51 Despite some submitters asserting that the proposed amendment would insert race – or recognise Aboriginal and Torres Strait Islander peoples on the basis of race – in the Constitution, the overwhelming majority of submitters repudiated that evidence. The Honourable Robert French AC stated that the proposed amendment moves away from the issue of race:

Put shortly, the Voice provision provides for the recognition of Aboriginal and Torres Strait Islander peoples not as a race but as the First Peoples of Australia—that is, their particular part in the history of this continent, which goes back up to 65,000 years before the enactment of our Constitution. So the criterion of recognition and the basis for the creation of the Voice is their status as First Peoples, not their status as Aboriginal people or as Torres Strait Islander peoples, but that particular historical role. That provides a significant shift away from the existing race based legislative power that the Commonwealth has with

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<sup>54</sup> Dr Elisa Arcioni and Dr Andrew Edgar, Submission 19, p. 3.

<sup>55</sup> Dr Elisa Arcioni and Dr Andrew Edgar, Submission 19, p. 5.

<sup>56</sup> Committee Hansard, Friday 14 April 2023, p. 39.

<sup>57</sup> Professor Ben Saul, Submission 191, p. 2.

respect to Aboriginal and Torres Strait Islander people, although that power is still there.<sup>58</sup>

3.52 Professor George Williams AO agreed in relation to race:

... and I think the whole race issue is a complete misnomer. Race is a 19th-century concept that has no longer any scientific credibility attached to it. A group has been identified because they're a unique group within our community. They are rightly identified because of their current and prior connections to land, and our nation is built upon their ancestral lands.<sup>59</sup>

3.53 Professor Anne Twomey AO argued that the proposal of a Voice is not to favour one race of people over other races, but in recognition of Aboriginal and Torres Strait Islander peoples as the first Australians and their holding a distinctive place in Australia's cultural history.<sup>60</sup> This recognition also asserts Indigenous Australians' status in international human rights law, affording them protections and rights on this basis. Dr Elisa Arcioni and Associate Professor Andrew Edgar further noted that:

To enshrine a Voice is not to import an illegitimate racial element into the Constitution. It is simply to recognise the distinct place of First Nations peoples in the Australian polity, consistent with the ongoing development of the constitutional identity of 'the people'.<sup>61</sup>

3.54 The Honourable Ken Wyatt AM stated that the backlash to the Voice is based on race and that Indigenous Australians 'don't see ourselves as a race. We are nations of people and we are Australians. We retain our identity'.<sup>62</sup> He also observed that there are already race provisions in the Constitution which have been used in respect to Indigenous Australians.<sup>63</sup>

3.55 The Honourable Fred Chaney AO, former Minister for Aboriginal Affairs, similarly asserted that the Constitution Alteration 'is not an affront to our equal citizenship'. He explained further:

I believe equal citizenship is an important principle. That's what motivated all of us in the early days in setting up Aboriginal legal and medical services, trying to get a better deal for Aboriginal people. But this important principle has to live with the facts. In Australia's democracy, like the democracies of Canada, the United States, New Zealand and the Scandinavian countries, it has to deal with the particular and distinct legal rights of the original peoples. In addition, it permits inequality between the states in terms of the voting powers of individual citizens.

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<sup>58</sup> Committee Hansard, Friday 14 April 2023, p. 55.

<sup>59</sup> Committee Hansard, Friday 14 April 2023, p. 46.

<sup>60</sup> Professor Emerita Anne Twomey, Submission 17, p. 2.

<sup>61</sup> Dr Elisa Arcioni and Dr Andrew Edgar, Submission 19, p. 2.

<sup>62</sup> Committee Hansard, Friday 28 April 2023, p. 18.

<sup>63</sup> Committee Hansard, Friday 28 April 2023, p. 18.

It has to accommodate that. It will legislate about first peoples in their particularity.<sup>64</sup>

- 3.56 Conversely, it was argued that the Bill would insert a race component into the Constitution and that a body defined by race is not consistent with the principle of equal citizenship. Stakeholders argued that the basis of democracy is that all citizens have equal rights and a constitutionally enshrined body defined by race is not consistent with this principle.<sup>65</sup> The Honourable Nicholas Hasluck AM KC stated that a Voice defined by race is ‘contrary to the democratic spirit of the constitution which is based on all citizens having equal democratic rights’.<sup>66</sup> Mr Nyunggai Warren Mundine AO is further noted that the Bill would be ‘reinstating racial segregation into the Constitution. This Bill is reinstating race-based treatment of Aboriginal and Torres Strait Islander people’.<sup>67</sup>
- 3.57 Some stakeholders also argued that Aboriginal and Torres Strait Islander Australians can and do represent their interests as parliamentarians, and that a Voice was thus unneeded. However, others responded by noting that parliamentarians are elected to represent their constituency rather than Indigenous peoples specifically.<sup>68</sup>
- 3.58 Additionally, Mr Mundine put the view that the proposed Bill further entrenches Aboriginal and Torres Strait Islander peoples as a ‘race of people’ and does not recognise their nations.<sup>69</sup> He argued that the Constitution Alteration’s premise is that Aboriginal and Torres Strait Islander peoples are a homogenous group, but that there exists hundreds of nations and communities of people who do not have homogenous views and perspectives. Mr Mundine asserted further that he did not believe the Voice can adequately represent First Nations people and will in fact undermine them.<sup>70</sup>
- 3.59 On this point, the evidence received by the Committee was consistent with the Explanatory Memorandum, with multiple legal experts concluding that the alteration is consistent with international human rights law. Mr Wyatt disagreed with Mr Mundine’s assessment while agreeing that not all Indigenous peoples share the same viewpoints. Mr Wyatt stated that the Voice would represent every Indigenous Australian and require governments to consider consulting Indigenous people on matters relating to them.<sup>71</sup>
- 3.60 Of particular relevance was the Solicitor-General’s advice that:

Insofar as the Voice serves the objective of overcoming barriers that have historically impeded effective participation by Aboriginal and Torres Strait Islander peoples in political discussions and decisions that affect them, it seeks

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<sup>64</sup> Committee Hansard, Friday 28 April 2023, p. 18.

<sup>65</sup> Institute of Public Affairs, Submission x, p. 3.

<sup>66</sup> Mr Nicholas Hasluck AM, KC, Submission 56, p. 3, p. 7.

<sup>67</sup> Mr Nyunggai Warren Mundine AO, Submission 20, pp 1-3.

<sup>68</sup> Councillor Jeffrey Whitton, Orange City Council, Committee Hansard, Monday 17 April 2023, p. 4.

<sup>69</sup> Mr Nyunggai Warren Mundine AO, Submission 20, pp 1-2

<sup>70</sup> Mr Nyunggai Warren Mundine AO, Submission 20, p. 1.

<sup>71</sup> Committee Hansard, Friday 28 April 2023, p. 24.

to rectify a distortion in the existing system. For that reason, in addition to the other reasons stated above, in my opinion proposed s 129 is not just compatible with the system of representative and responsible government prescribed by the Constitution, but an enhancement of that system.<sup>72</sup>

- 3.61 Further to this evidence, Mr Jamie Newman, Chief Executive Officer of the Orange Aboriginal Medical Service, expressed that the current advisory system does not adequately address the needs of Indigenous communities. He explained:

If you look across our systems right now—whether it's police, health, education or housing—we have all these liaisons with reference groups and consultation groups, and they're a mix of Aboriginal people from the same community. To me they're tokenistic. If our people don't have a single line where we are heard, then we're going to have 'divide and conquer' happening within our communities. This has happened for generations. We have too many liaison and referral groups or reference group advisory bodies that tick the box for government entities but do not meet the needs of our people. That creates division within our communities by saying, 'Well, such and such is on this committee; such and such is on that advisory committee; we have a bunch of elders here,' and then that creates division in our community.<sup>73</sup>

## Consistency with international human rights

- 3.62 Evidence to the inquiry indicated that the Bill was consistent with international human rights and in some cases advanced human rights, particularly the human rights of Aboriginal and Torres Strait Islander peoples. The Explanatory Memorandum contends that the Bill engages the following rights:

- The right to self-determination;
- The right to equality and non-discrimination; and
- The right to take part in public affairs.<sup>74</sup>

- 3.63 Professor Ben Saul argued that, under Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), Australia is required to consult with Indigenous representative bodies before implementing 'legislative or administrative measures', which would affect them. He explained that the Voice meets these standards under international human rights law, as it would enable Aboriginal and Torres Strait Islanders to have input into decisions relating to Commonwealth laws and policies which impact on Indigenous peoples. Professor Saul also asserted that it

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<sup>72</sup> The Hon Mark Dreyfus KC, MP, Attorney-General, Submission 64, p. 12.

<sup>73</sup> Committee Hansard, Monday 17 April 2023, p. 12.

<sup>74</sup> Explanatory Memorandum, Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023, pages 7-9.

is consistent with international law that the Voice have the power to make representations to the Executive Government and the Parliament.<sup>75</sup>

- 3.64 Further, Professor Saul stated that the proposed Voice to Parliament is consistent with international human rights law as it relates to Indigenous people. Article 18 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) asserts 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.<sup>76</sup>

- 3.65 The Indigenous Law Centre and the Law Council of Australia agreed with Professor Saul's interpretation, arguing that the Constitution Alteration would give Aboriginal and Torres Strait Islander peoples the right of self-determination in accordance with international human rights. The Voice was said to provide Indigenous Australians with a forum to participate in public discourse and make representations on decisions which would affect their rights and interests.<sup>77</sup> The right to self-determination is a principle of international law, which is also underlined by the UNDRIP.<sup>78</sup> It was noted by some submitters that the constitutional enshrinement of the Voice has been endorsed by multiple international human rights organisations.<sup>79</sup>
- 3.66 This point was expanded upon by Aboriginal and Torres Strait Islander stakeholders, who expressed an approach to policy that treats First Nations People as incapable of being involved in decision-making for policies that affect them. One stakeholder noted that they felt as though the Aboriginal and Torres Strait Islander people of this nation have been treated like children.<sup>80</sup>

## Potential amendments

- 3.67 A number of submitters recommended making amendments to the Constitution Amendment. The most prominent argument was the removal of 'Executive Government' in relation to the Voice's capacity to make recommendations in proposed section 129(ii). This was supported by stakeholders such as Father Brennan, Professor Greg Craven and the Institute of Public Affairs, many of which argued (as discussed in other sections of this report) that the reference to 'Executive Government' lacked clarity.<sup>81</sup>

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<sup>75</sup> Professor Ben Saul, Submission 191, pages 1-2.

<sup>76</sup> Professor Ben Saul, Submission 191, p. 1.

<sup>77</sup> Indigenous Law Centre, UNSW, Submission 44, p. 10.

<sup>78</sup> Law Council of Australia, Submission 91, p. 10.

<sup>79</sup> Professor Ben Saul, Submission 191, pages 1-2; Indigenous Law Centre, UNSW, Submission 44, pages 9-10; Law Council of Australia, Submission 91, pages 10-11, 18-19; Associate Professor Matthew Zagor and Associate Professor Ron Levy, Submission 153, p. 1.

<sup>80</sup> Ms Alisha Agland, Committee Hansard, Monday 17 April 2023, pages 21-22.

<sup>81</sup> Father Frank Brennan, Submission 18, p. 1, Professor Greg Craven, Committee Hansard, Friday 14 April 2023, pages 27-28, Institute of Public Affairs, Submission 190, pages 22-23.