— Opinion

Voice is low risk but high return

Indigenous recognition in the Constitution will allow the country to acknowledge, address and move forward from its legacy of colliding histories.

Robert French and Geoffrey Lindell

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The Voice is a big idea but not a complicated one. It is low risk for a high return. The high return is found in the act of recognition, historical fairness and practical benefit to lawmakers, governments, the Australian people and Australia's First peoples.

It rests on the historical status of Aboriginal and Torres Strait Islanders as Australia's Indigenous people. It does not rest on race. It accords with the United Nations Declaration on the Rights of Indigenous Peoples, for which Australia voted in 2009. It is consistent with the convention against the elimination of all forms of racial discrimination. Suggestions that it would contravene that convention are wrong.

Prime Minister Anthony Albanese at the referendum working group for the Voice to parliament.

The proposed draft amendment to the Constitution to establish the Voice provides:

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.

Those words set out the basic constitutional elements of the Voice but leave it to the parliament to make laws on the detail – and to change those laws from time to time.

Democratic, not legal, obligation

The first constitutional element of the Voice is that it will be a "body". The relevant ordinary meaning of that word is a group of people who work or act together. The only constitutional requirement in relation to the body is that it be called the Aboriginal and Torres Strait Islander Voice.

The function of the Voice is set out in the second part of the amendment. To "make representations" is to make official statements to the parliament and the executive. Those words cover submissions or advice about existing or proposed laws and administrative policies and practices. There is no constitutional legal obligation to accept or be bound by such submissions or advice. There would, however, be a high democratic obligation to respect them and take them into account.

The Voice may make representations about "matters relating to Aboriginal and Torres Strait Islander people". The term "relating to" can cover a broad range of matters. Its limits are likely to be defined by common sense and political realities. Laws, policies and practices relating education and training, family and social welfare, health, remote community services, community policing, Indigenous art, cultural and heritage protection, traditional ownership of land and waters are well within that range.

The third part of the amendment confers power on the parliament to make laws to give effect to the Voice. It does not impose a legal obligation on parliament to do so. Nor does the amendment require that the parliament adopt a particular composition or confer particular functions, powers or procedures on the Voice. That is left to its discretion.

Any laws made by the parliament would support the leading function of the Voice, which is "to make representations". Parliament could not confer on the Voice a legal right to veto a proposed law. Parliament could not make a law limiting its own lawmaking powers by legally requiring prior consultation with the Voice.

The Voice is not a third chamber. The constitutional amendment would, however, support the adoption by parliament of internal procedures to provide for the Voice to be heard. The parliament could also make a law requiring the executive to have regard to representations by the Voice to the executive when adopting or changing policies and practices relating to Aboriginal and Torres Strait Islander peoples.

The Voice proposal is a once-in-a-lifetime opportunity for Australia to fill a gaping hole in our Constitution

The Voice will present First Nations' views at a national level. The parliament, in determining its membership and the mode of election, will necessarily want to ensure that representations made by the Voice reflect a distillation of the views of First Peoples across Australia.

That is not a constitutional legal obligation. The composition of the Voice is left to the parliament. It is, again, a powerful democratic expectation given the functions of the Voice. There would be nothing to prevent the submission of different views of those who disagreed with a particular representation made by the Voice.

There is little or no scope for constitutional litigation arising from the words of the proposed amendment. The amendment is facilitative and empowering. Parliament cannot legally be compelled to make laws for the Voice. It cannot be compelled to make a particular kind of law. Nor can it be prevented from repealing or amending the laws it makes.

Two key questions

This leads to two important questions. The first is: Why not leave the Voice out of the Constitution and just make a law using the races power to create the Voice?

The first answer is that the Voice is not about race. It is about our First Peoples as the indigenous people of Australia.

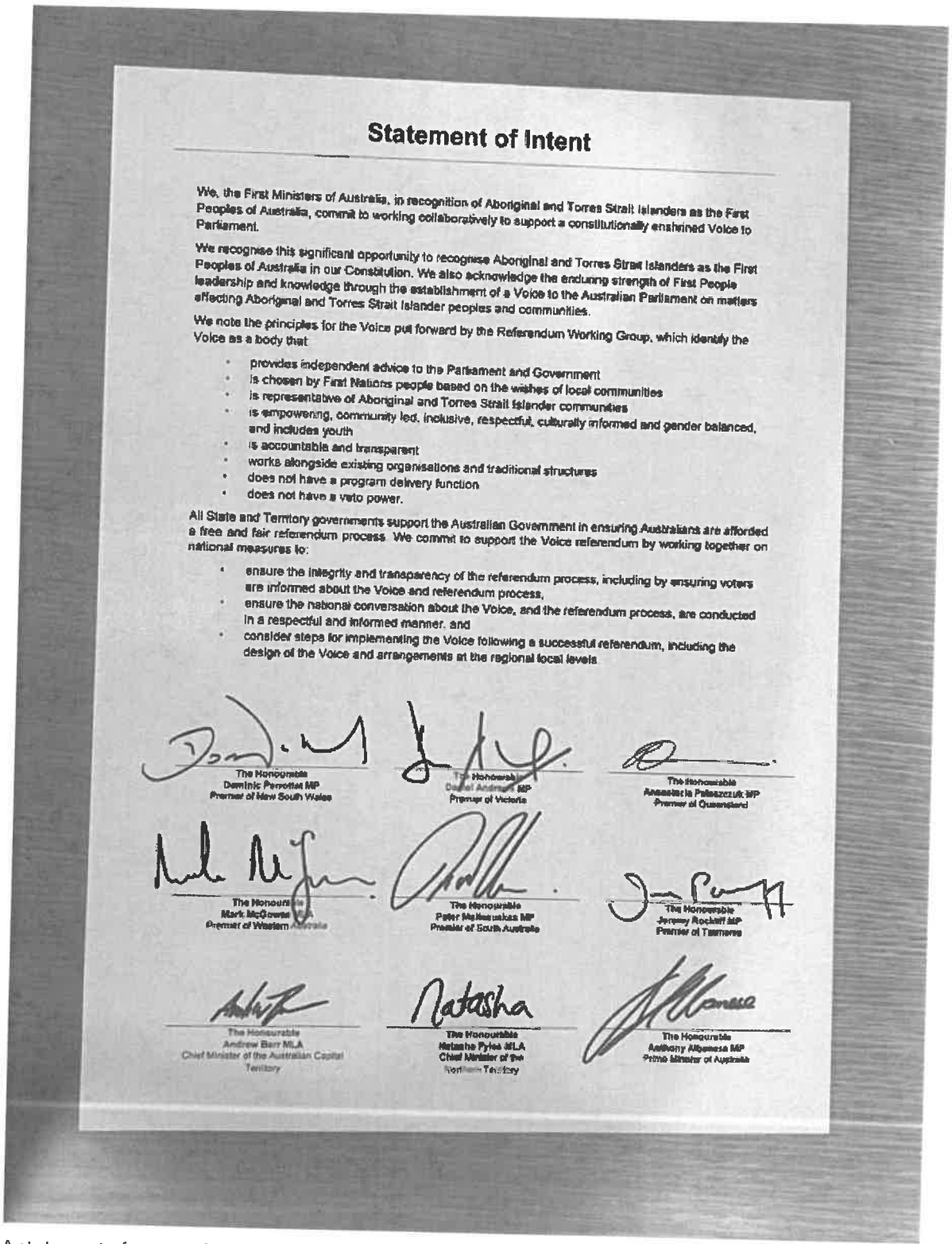
The second answer is that by providing for the Voice in the Constitution, the Australian people perform an act of recognition and acknowledgement of First Peoples as the bearers of the first history of our continent. That is a history which stretches across tens of millennia.

The third answer is that the constitutional provision creates a democratic mandate for the parliament to create and continue the Voice as a significant institution in our representative democracy. It would be a democratic mandate because it is approved by a majority of electors in a majority of states as required by section 128 of the Constitution.

The second question is: Why not spell out the detail of the Voice now [https://www.afr.com/politics/federal/don-t-politicise-voice-indigenous-leaders-urge-dutton-20230202-p5chb5], beyond what is set out in the proposed amendment?

The most that government can sensibly do is to indicate in broad terms the model it favours and which it would submit to the parliament after a successful referendum. In the end, it will be a matter for the parliament, the elected representatives of all Australian people, to decide.

The co-design model, proposed in the report by Professor Marcia Langton and Professor Tom Calma [https://voice.niaa.gov.au/sites/default/files/2021-01/indigenous-voice-discussion-paper_1.pdf], sets out likely elements of a body and how that model would work. But even if the government were to commit to a detailed model now, its commitment would not have any constitutional legal effect.



Statement of Intent

We, the First Ministers of Australia, in recognition of Aboriginal and Torres Strait Islanders as the First Peoples of Australia, commit to working collaboratively to support a constitutionally enshrined Voice to Parliament.

We recognise this significant opportunity to recognise Aboriginal and Torres Strait Islanders as the First Peoples of Australia in our Constitution. We also acknowledge the enduring strength of First People leadership and knowledge through the establishment of a Voice to the Australian Parliament on matters affecting Aboriginal and Torres Strait Islander peoples and communities.

We note the principles for the Voice put forward by the Referendum Working Group, which identify the Voice as a body that

- provides independent advice to the Parliament and Government
- is chosen by First Nations people based on the wishes of local communities
- is representative of Aboriginal and Torres Strait Islander communities
- is empowering, community led, inclusive, respectful, culturally informed and gender balanced, and includes youth
- is accountable and transparent
- works alongside existing organisations and traditional structures
- does not have a program delivery function
- does not have a veto power.

All State and Territory governments support the Australian Government in ensuring Australians are afforded a free and fair referendum process. We commit to support the Voice referendum by working together on national measures to:

- ensure the integrity and transparency of the referendum process, including by ensuring voters are informed about the Voice and referendum process,
- ensure the national conversation about the Voice, and the referendum process, are conducted in a respectful and informed manner, and
- consider steps for implementing the Voice following a successful referendum, including the design of the Voice and arrangements at the regional local levels.

The Honourable Dominic Perrottet MP Premier of New South Wales

The Honourable Daniel Andrews MP Premier of Victoria

The Honourable Annastacia Palaszczuk MP Premier of Queensland

The Honourable Mark McGowan MLA Premier of Western Australia

The Honourable Peter Malinauskas MP Premier of South Australia

The Honourable Jeremy Rockliff MP Premier of Tasmania

The Honourable Andrew Barr MLA Chief Minister of the Australian Capital Territory

The Honourable Natasha Fyles MLA Chief Minister of the Northern Territory

The Honourable Anthony Albanese MP Prime Minister of Australia

A statement of support for the Voice from premiers and chief ministers.

There are numerous examples of powers conferred on the parliament by the Constitution in 1901 when the way in which those powers would be exercised was left to the parliament. The 1967 referendum gave power to make laws for Aboriginal and Torres Strait Islander people. The government of the day was not required to spell out how it would exercise them.

As to litigation, there is always the possibility that someone, someday will want to litigate matters relating to the Voice. That flows from the fact that Australia is governed by the rule of law, which provides access to the courts for claims that public officials have exceeded their power.

That said, there is little or no scope for any court to find constitutional legal obligations in the amendment. And if parliament made a law which created unintended opportunities for challenges to executive action, the law could be adjusted. There are many examples of that.

A law providing that the executive was required to take into account representations from the Voice as a condition of the exercise of executive power would, in all probability, be justiciable. If parliament imposed such a requirement, the executive must be held to account if it does not comply with it. But in providing for representations to be made to the executive, the law does not have to impose such a requirement. That is a matter for the parliament.

The Voice proposal is a once-in-a-lifetime opportunity [https://www.afr.com/politics/federal/indigenous-support-for-voice-at-80pc-despite-protests-by-noisy-few-20230127-p5cfwj] for Australia to fill a gaping hole in our Constitution – to recognise our first history and the first peoples who bear it and the painful legacy of its collision with the second history of colonisation.

The high return against low risk is that the Voice will provide a practical opportunity for First Peoples to give informed and coherent and reliable advice to the Parliament and the government to assist them in law and policymaking in one of the most difficult areas of contemporary government.

It empowers First Peoples and the Australian people as a whole to acknowledge, address and move forward from the legacy of their colliding histories.

Robert French AC was chief justice of Australia from 2008-2017. Geoffrey Lindell is Emeritus Professor of Law at the University of Adelaide.

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