

THE VOICE, WHERE TO NOW?

Professor Kevin Williams

When what has become known as The Voice (the Voice to parliament) first started to get traction in the media after the Albanese Labor government was elected on 21 May 2022, I couldn't get out of my head John Farnham's iconic anthem The Voice, "you're the voice, try and understand it." Sometimes complex matters such as constitutional law issues need to be simplified so that people can understand important issues that form part of the fabric of Australian society. So, as I write this opinion piece, I keep in mind Farnham's seven words, "you're the voice, try and understand it."

The referendum on what is now known as the Voice is still several months away from being held; the main issues around the debate have been settled.

After much ado the Prime Minister Anthony Albanese released on 23 March 2023 the exact wording of the referendum question.

"a Proposed Law: to alter the Constitution to recognise the First Peoples of Australia by establishing an Aboriginal and Torres Strait voice."

The question must be brief as is required by the Referendum (Machinery Provisions Act) Act 1984, which provides the framework for the conduct of referendums.

Following the non-support of the National Party in November 2022, the Liberal Party's leader Peter Dutton in a press conference 5 April 2023 followed suite by stating his party will not support the Voice to Parliament to recognise Indigenous Australians in the Constitution, instead he supports constitutional recognition of Indigenous Australians and an Indigenous voice at local and regional levels.

The Commonwealth Solicitor-General Stephen Donaghue said on 21 April 2023 that,

the wording of the amendment to the constitution poses no threat to Australia's democratic system of government.

The Voice is legally sound.

Donaghue went on to say the proposed model for the Voice,

"will not fetter or impede the exercise of existing powers of Parliament", adding the proposal "is not just compatible with the system of representative or responsible government prescribed by the constitution, but an enhancement of that system."

As Harry Hobbs an Associate Professor at the University of Technology Sydney points out,

"in our system of government, proposed laws are developed within the executive, which includes the cabinet and government departments. Then they're presented to parliament. This means if an Aboriginal and Torres Strait Islander Voice is to be able to inform law and policy, it needs to speak to both parliament and the executive."

The proposed constitutional amendment recognises this. Section 129(2) provides that the Aboriginal and Torres Strait Voice “*may make representations*” to the parliament and executive government on matters relating to Aboriginal and Torres Strait Islander people.

Think of the separation of power which underpins the constitution.

The separation of powers is a doctrine of constitutional law that divides the three functions of government (legislature, executive and judicial) amongst separate and independent branches.

This doctrine aims to limit the possibility of arbitrary and oppressive government action by requiring the sanction of all three branches for the making, executing and administering of laws.

In the Australian Constitution the doctrine of the separation of powers is reflected in

Chapter 1 The Parliament (which makes the laws)

Chapter 11 The Executive [government] (administers or enforces the law)

Chapter 111 The Judicature [judiciary] (adjudicates disputes about the law)

It’s about checks and balances!

The Section 129(2) constitutional amendment states “*may make representations*” the emphasis being on “may”!

As former Chief Justice of the High Court Robert French observed,

“there is little or no scope for constitutional litigation arising from the words of the proposed amendment. The amendment is facilitative and empowering.”

Section 51 of the Constitution provides that “*Parliament shall, subject to this constitution, have power to make laws...with respect to...*” This wording is very similar to the wording of the amending Section 129(2)

It is the role of Parliament to make laws. Thus, giving it the power enact and amend legislation establishing the Voice is entirely consistent with how our democracy has operated since Federation in 1901.

As Paula Gerber and Katie O’Byrne from the faculty of law Monash University said

“this referendum gives all Australians an opportunity to make a real difference in the lives of Indigenous Australians. The Voice will help Indigenous people be heard in matters that affect them specifically.”

On reflection whilst writing this piece it became obvious to me that in order to cover the Voice in a manner that does it justice, I will need to continue to pen more explanatory articles, so expect more from me over the next several months encapsulating the history of the impact of the constitution on Indigenous Australians. Why more than a pre-ambule in the constitution is necessary, the machinations of the Yes and No campaigns, the historical aspects of the Uluru Statement from the Heart et al.

I'll finish this piece by asking what will blackfellas have if this referendum fails? And past referendums point to it failing because of the forty-four referendums since the constitution came into force only eight of them have succeeded and they all had bipartisan government support. I take solace in the Aston by-election result where for the first time in a hundred years an incumbent government has won a seat from the opposition party which held the seat. Maybe, just maybe people won't vote on party lines and change will come.

If it fails, after the celebrations and the back slapping the blackfellas who voted no can wake up and in the cold light of day and go, oops we still have nothing and we're going to have nothing for a bloody long time!

Adjunct Professor Kevin Williams BA (CQU) LLB (UNSW) LLM (SCU) is a Wakka Wakka/Gunggari man, the son of a mother who was a domestic servant and a stockman/fencer father. He grew up in the 1950/60's a time when as he says "the only thing we got from the government was grief."

He taught black letter law at universities until he retired to the Sunshine Coast (Gubbi Gubbi country) several years ago.

NOTES for FURTHER ARTICLES

The recommendations for constitutional recognition and a Voice to Parliament has been the result of a carefully thought through process.

The Calma/Langton Report was handed to the former Liberal government was the result of 18 months of consultation with 9,478 people and organisations, including 115 community consultations in 67 locations, 2,978 submissions, 1,127 surveys, 124 stakeholder meetings and 13 webinars.

We are the punching bag for conservative politics

1973 National Aboriginal Consultative Committee (NACC) established

1977 formation of the National Aboriginal Conference (NAC)

1989 ATSIC established

1999 Constitutional Referendum on a Republic and a New Preamble (whether to adopt a new preamble to the Constitution which acknowledges Aboriginal and Torres Strait Islander People)

2005 Abolition of ATSIC

2007 PM John Howard announces the government's intention to hold a referendum to symbolically recognise Aboriginal and Torres Strait Islander people