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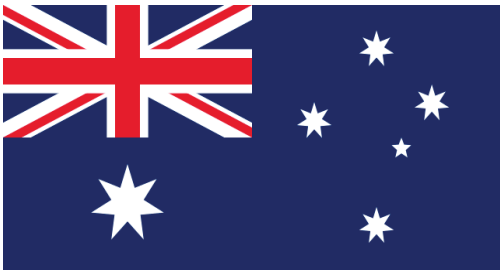

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I. INTRODUCTION

Constitutional reform issues rarely reached the front pages in Australia in 2020, which is no surprise given the global COVID-19 pandemic. Debates about constitutional change nonetheless continued in the background, and there was progress—although no emerging consensus—on an issue that has dominated reform discussions for the past decade: the constitutional recognition of Aboriginal and Torres Strait Islander peoples.

This report identifies and explains the main constitutional reform proposals put forward in 2020 (Part II). It then offers context and analysis, focusing on the scope of the reforms, questions of constitutional control and the immense difficulty of amending the text of the *Commonwealth Constitution* (hereafter 'Constitution') (Part III). The latter is a prominent theme in Australian constitutional scholarship,[1] which is to be expected given the high threshold set by the Constitution's amendment procedure: a proposed alteration must be approved by absolute majorities of both Houses of the federal (that is, national) Parliament, and then put to a referendum where it must be ratified by a national majority of voters, and a majority of voters in a majority of States (the 'double majority' requirement).[2] But, as will be explored, the nation's constitutional politics intensifies the challenges of achieving constitutional change. The report concludes by considering the challenges that lie ahead for constitutional reform in Australia.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

1. CONSTITUTIONAL RECOGNITION AND A FIRST NATIONS VOICE

The constitutional reform issue that attracted most attention in 2020 was a proposal to recognize Aboriginal and Torres Strait Islander peoples—also known as First Nations—in the Constitution. Constitutional recognition has been debated in Australia for over a decade, a timeframe punctuated by periodic government commitments to hold a referendum on the issue. However, no such vote has taken place. Most recently, in January 2020, the Minister for Indigenous Affairs, Ken Wyatt, announced a commitment to hold a vote on constitutional recognition by mid-2021 but this was subsequently withdrawn. There are no firm referendum plans on the horizon.

The meaning of 'constitutional recognition' is contested.[3] In the minds of some it indicates minimalist, symbolic change of the kind that might be achieved by the insertion of a constitutional preamble or statement of recognition. The purpose of this would be to address the Constitution's 'silence' on First Nations peoples (the last remaining references were excised at a 1967 referendum) and to provide textual recognition of their history, culture, and status as the first occupants of Australia. For others, recognition denotes reform of a more substantive nature. In the early 2010s, advocates of more robust change focused on proposals to amend or repeal constitutional provisions that give the Commonwealth and States the capacity to enact racially discriminatory laws (sections 51(xxvi) and 25) and to insert a constitutional protection against racial discrimination.[4] The establishment of dedicated seats in Parliament was also contemplated.

Over time, focus shifted to the idea of amending the Constitution to entrench an Indigenous advisory body—or, as it has come to be known, a First Nations Voice.[5] This body's primary function, as initially envisaged, would be to offer advice to Parliament on laws affecting First Nations peoples. It would serve as an institutional response to the 'longstanding problem of Indigenous constitutional powerlessness'; its purpose would be to acknowledge Indigenous voices and make sure that they are heard in the political process.[6] Unlike other proposals for substantive recognition, a Voice would ensure that Indigenous peoples have an opportunity to give input at the 'front end' of the law-making process rather than relying on 'back end' mechanisms like judicial review. And it would have constitutional status: to imbue it with authority and legitimacy, and to help protect

1 Eg, George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010).
2 *Commonwealth Constitution* (hereafter 'Constitution'), section 128.
3 Dylan Lino, 'What is Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples?' (2016) 8(24) *Indigenous Law Bulletin* 3.
4 Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (January 2012); Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Final Report* (June 2015).
5 Eg, Noel Pearson, 'A Rightful Place: Race, Recognition and a More Complete Commonwealth', *Quarterly Essay No 55* (2014) 66-67; Paul Karp, 'Labor's Patrick Dodson says Indigenous treaty should be an option', The Guardian, 9 May 2016 <https://www.theguardian.com/australia-news/2016/may/09/labors-patrick-dodson-says-indigenous-treaty-should-be-an-option>.
6 Shireen Morris, '"The Torment of Our Powerlessness": Addressing Indigenous Constitutional Vulnerability Through the Uluru Statement's Call for a First Nations Voice in Their Affairs' (2018) 41 *UNSW Law Journal* 629, 646.

it from being ignored or abolished.[7] Under most proposals, only the existence and core functions of the body would be entrenched; all other details (such as composition, powers, and procedures) would be determined by Parliament and included in legislation. In the words of former Chief Justice of Australia, Murray Gleeson, the Voice would be 'constitutionally entrenched, but legislatively controlled'.[8]

The proposal to establish a First Nations voice in the Constitution is the only constitutional reform option that has achieved anything approaching consensus among Aboriginal and Torres Strait Islander peoples. In May 2017, a national constitutional convention comprising more than 250 Indigenous delegates met to debate the different reform possibilities, and to build on the work of 13 First Nations regional dialogues that had been held in the preceding months.[9] The convention issued the *Uluru Statement from the Heart* which, among other things, acknowledged that First Nations peoples had possessed the Australian continent under their laws and customs for more than 60,000 years, and had never ceded or extinguished their sovereignty. The Statement called for two reforms: 'the establishment of a First Nations Voice enshrined in the Constitution' and the creation of a Makarrata Commission 'to supervise a process of agreement-making between governments and First Nations and truth-telling about our history'.[10]

The Uluru Statement seemed to mark a turning point in the debate over constitutional recognition. But, in the years since, attempts to give effect to it have become 'bogged down in dispute and bureaucratic malaise'.[11] Both a government-appointed Referendum Council and a parliamentary inquiry recognised the Voice as the leading reform proposal and recommended that steps be taken towards achieving it.[12] The federal government, though, initially dismissed the idea out of hand: it characterised the Voice as a 'third chamber of Parliament' and argued that it was incapable of winning acceptance at a referendum.[13] Since then, the government, under Prime Minister Scott Morrison, has signalled that it is more open to the idea, although its position remains opaque. Minister Wyatt surprised many in late 2019 when he signalled his preference for the Voice to be established in legislation rather than in the Constitution, and for it to provide advice to government rather than the Parliament. He also indicated that he favoured holding a referendum on symbolic constitutional recognition despite its rejection at Uluru.[14] The main Opposition party, the Australian Labor Party, remains committed to holding a referendum on a constitutionalised Voice. Public opinion polls indicate that a majority of Australians support both constitutional recognition generally, and the Voice proposal in particular. Polling undertaken since 2017 shows that '70–75% of Australian voters with a committed position on the matter support a First Nations Voice to Parliament'.[15]

Throughout 2020, First Nations leaders, politicians and academics continued work on the design of the Voice. Important questions include whether its membership should be elected or appointed, what laws and policies it could advise on, and whether it would be optional or mandatory for the Parliament (or government) to consult the Voice and/or respond to its advice. A bipartisan 'co-design' process involving both parliamentarians and Indigenous leadership is considering these matters. In January 2021 that process published an interim report which set out a range of detailed options for a *statutory* Voice (constitutional entrenchment being outside its terms of reference). Those options were to be the subject of a brief, 11-week consultation period, at which point a final report would be prepared and delivered to the government.[16]

2. OTHER CONSTITUTIONAL REFORM PROPOSALS

The Joint Standing Committee on Electoral Matters (JSCEM), a standing committee within the federal Parliament, canvassed three constitutional reform proposals as part of its report on the conduct of the 2019 federal election.[17] Significantly, the report showed that there is cross-party support for renewed public discussion on these issues.

First, the JSCEM recommended that the Australian government consider asking it to inquire into the size of the House of Representatives (the lower house in the federal Parliament). The House currently comprises 151 members, leaving each member to represent an average of 108,770 electors. The number of electors for each member has increased by more than 50% since 1984, and far exceeds the averages in other Westminster parliaments such as the United Kingdom (72,423) and Canada (76,745). The Committee noted concerns that Australia's growing population increases the workload of parliamentarians and makes it more difficult for them to service their electorates.

The size of the House of Representatives can be increased without a constitutional amendment. However, any increase must comply with the so-called 'nexus' provision in the Constitution, which mandates that the number of members of the House 'shall be, as nearly as practicable, twice the number of senators'.[18] In other words, any move to significantly expand the House would require a proportional increase in Senate membership. Some view this as undesirable, arguing that there is no compelling reason to expand the upper house and that doing so would bolster minor party representation and make compromise on legislation more difficult. The JSCEM accordingly recommended that consideration be given to a future referendum on breaking the nexus

7 Gabrielle Appleby, 'An Indigenous "Voice" must be enshrined in our Constitution. Here's why', *The Conversation*, 22 January 2021 <https://theconversation.com/an-indigenous-voice-must-be-enshrined-in-our-constitution-heres-why-153635>.

8 Murray Gleeson, *Recognition in Keeping with the Constitution: A Worthwhile Project* (Uphold & Recognise, 2019).

9 Megan Davis, 'The Long Road to Uluru' (2018) 60 *Griffith Review* 13.

10 *Uluru Statement of the Heart* (2017) <https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart_0.PDF>.

11 Anne Twomey, 'There are many ways to achieve Indigenous recognition in the constitution—we must find one we can agree on' *The Conversation*, 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>.

12 Referendum Council, *Final Report of the Referendum Council* (2017) 2; Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Final Report* (Parliament of Australia, November 2018) [3.152].

13 'Response to Referendum Council's Report on Constitutional Recognition' (26 October 2017) <https://ministers.pmc.gov.au/scullion/2017/response-referendum-councils-report-constitutional-recognition>.

14 Patricia Karvelas, 'Minister for Indigenous Australians Ken Wyatt calls for constitutional referendum before federal election', *ABC News*, 17 October 2019 <https://www.abc.net.au/news/2019-10-17/ken-wyatt-calls-for-constitutional-referendum-indigenous-voice/11613672>.

15 Francis Markham and Will Sanders, *Support for a Constitutionally Enshrined First Nations Voice to Parliament: Evidence From Opinion Research Since 2017* (Working Paper no. 138/2020, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra).

16 Indigenous Voice Co-Design Process, *Interim Report to the Australian Government* (October 2020).

17 The discussion in this section draws on Joint Standing Committee on Electoral Matters (JSCEM), *Report on the Conduct of the 2019 Federal Election and Matters Related Thereto* (December 2020) [8.54]-[8.66].

18 Constitution, section 24.

between the House and the Senate. It would be the second such referendum on this topic: Australians rejected the same measure in 1967, with just 40 per cent of electors voting in favor.

The JSCEM further recommended that it conduct an inquiry on the length of parliamentary terms. Currently, House terms run up to three years and Senate terms are six years in duration. The suggested inquiry would consider 'introducing non-fixed four-year terms' for the House and eight-year terms for the Senate. This would bring the duration of federal parliamentary terms into line with those of the States, although most State terms are fixed and so commence and expire at prescribed times. Any such change would require a constitutional amendment and therefore a referendum. Proposals to increase the length of federal parliamentary terms are a mainstay of Australian constitutional debate but the issue has proceeded to a referendum only once: in 1988, voters rejected the idea of four-year terms for both houses by a margin of 2:1.

Other constitutional reform ideas were discussed from time to time, including a proposal to establish a republic by replacing the Queen with an Australian head of state (the subject of a failed referendum in 1999), and the alteration or repeal of constitutional rules that render certain groups, such as dual citizens, incapable of sitting in Parliament.[19]

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. SCOPE OF PROPOSED REFORMS

Each of the reforms canvassed during 2020 are appropriately classified as 'amendments'.[20] From a procedural standpoint, their achievement would require that the Constitution's codified amendment procedure be followed. Taking a more content-based approach, the proposed reforms would alter the Constitution without disrupting or remaking it to the point of 'dismemberment'.[21] Adopting Albert's definition, they are all 'consistent with the existing design, framework, and fundamental presuppositions of the constitution'.[22]

This is not to say that the proposed reforms are unimportant. The creation of an entrenched First Nations Voice could be highly significant in legal, political, and cultural terms. Although relatively modest in its institutional design—its primary function being to offer advice to the legislature rather than to make or veto laws—it constitutes an attempt to recast the relationship between Aboriginal and Torres Strait Islander peoples and the state. Appleby and Synot have commented on its promise 'for meaningful, structural reform to the constitutional hierarchy that will fundamentally change the Indigenous—non-Indigenous relationship'.[23] And Morris views it as a 'way of meaningfully addressing Indigenous constitutional vulnerability, by empowering the First Nations with a voice in their affairs'.[24] Proponents of an entrenched Voice thus seek to initiate meaningful reform of the constitutional system, not engage in mere housekeeping.

2. CONSTITUTIONAL CONTROL

In Australia only the federal Parliament may initiate proposals for constitutional amendment. The government typically takes the lead by setting the agenda, developing a proposal, and ultimately presenting it to the Parliament in the form of a Bill, before working to shepherd that proposal through the Parliament so that it can proceed to a referendum. Objections to the form of a referendum question, or the constitutionality of an alteration Bill, can be made before the courts, but this is rare.[25] It is impossible to know whether any of the amendments discussed in 2020 could eventually find themselves the subject of a court challenge, as they have yet to reach a sufficiently advanced stage.

While the government and the Parliament have the most influence over the form and content of amendment proposals, they are by no means the only actors to contribute to their development. It has long been customary for Australian governments to appoint external bodies, such as expert panels, commissions, and constitutional conventions, to consider and report on ideas for constitutional reform.[26] Parliamentary committees also play a role, sometimes to provide a bridge between those external bodies and the people ultimately responsible for initiating constitutional change. When managed well, this approach can promote community awareness and trust, harness broad expertise, foster public deliberation and help forge consensus. When handled poorly, the use of external bodies can serve as a substitute for action, delaying rather than advancing reform, and can sharpen divisions.

The JSCEM, by recommending that proposals to expand the size of the lower House and to extend parliamentary terms be referred to a parliamentary inquiry, continued in this tradition. Proposals for constitutional recognition, meanwhile, have been considered by multiple bodies. As of February 2020, there had been 'five formal, taxpayer-funded, government-endorsed processes … and eight reports'[27]; we can now add the interim report of the co-design process. It is fair to say that these various processes, taken together, illustrate both the merits and weaknesses described above.

3. CONSTITUTIONAL RIGIDITY AND AUSTRALIA'S AMENDMENT CULTURE

The issue looming over all the amendments discussed in 2020 is the immense difficulty of achieving constitutional change in Australia. Since Federation in 1901, governments have put 44 amendment proposals to a referendum; of these just 8 have been carried. Australians last voted to alter the constitutional text in 1977 and have not voted in a referendum since 1999. The span of two decades since the republic vote is the longest stretch of time without a referendum in the nation's history. It is apparent that governments have become less inclined to invest political capital in attempting constitutional change. If recent history is any guide, the amendments canvassed in 2020 face little chance of being put to a referendum, let alone enacted.

19 Constitution, section 44.
20 See Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (OUP, 2019) 76-78.
21 Ibid 78.
22 Ibid 79.
23 Gabrielle Appleby and Eddie Synot, 'A First Nations Voice: Institutionalising Political Listening' (2020) 48 *Federal Law Review* 529, 542.
24 Morris (n 6) 631.
25 Graeme Orr, *The Law of Politics* (Federation Press, 2019) 299.
26 Anne Twomey, 'Constitutional Conventions, Commissions and other Constitutional Reform Mechanisms' (2008) 19 *Public Law Review* 308.
27 Megan Davis, 'Constitutional recognition for Indigenous Australians must involve structural change, not mere symbolism', *The Conversation*, 18 February 2020 <https://theconversation.com/constitutional-recognition-for-indigenous-australians-must-involve-structural-change-not-mere-symbolism-131751>.

In Donald Lutz's well-known study of constitutional rigidity, Australia's amendment procedure is assessed as one of the most difficult in the world.[28] Its referendum requirement, with its 'double majority' rule, sees it ranked behind only the United States, Switzerland and Venezuela. In this light, it is perhaps not surprising that Australia's constitutional text has undergone such little change since Federation.

However, to understand the absence of constitutional alteration in recent decades we need to look beyond the challenges posed by the amendment procedure and take into consideration Australia's amendment culture. As Albert recognizes, '[t]he difficulty of amendment is a function of more than the formal amendment rules themselves'; it also comes down to the cultures of constitutional politics that 'shape how and when those rules are used, if ever at all'.[29] In some contexts the amendment culture might accelerate constitutional reform but, in others, it can slow or even incapacitate it.[30] In the most extreme cases the combination of amendment rules and constitutional politics can create a stalemate among political actors—a state of 'constructive unamendability'— whereby those who are capable of progressing reform 'have expressed their unwillingness or shown their inability to satisfy the constitution's mandated formal amendment procedures'.[31] The fact that Australians continue to debate the merits of different constitutional change proposals suggests that the point of stalemate has not yet been reached. On the other hand, given that the amendment procedure has fallen into disuse and the constitutional text has remained unchanged for two generations, one wonders whether Australia may be steadily approaching that point.

No single component of amendment culture can account for the current stasis in constitutional reform in Australia, but an important factor is a high sensitivity to referendum 'failure' among political elites. Understandably, the long string of referendum defeats has shaped how politicians view constitutional amendment. Achieving reform is viewed as next to impossible—'one of the labors of Hercules', in the words of a former Prime Minister.[32] Reform attempts are to be undertaken sparingly and handled delicately. The stakes are high, and this places pressure on all involved; indeed, a 'no' vote is viewed as intolerable, potentially derailing reform for a generation.

This sensitivity to failure has been prevalent in the long debate over constitutional recognition. In May 2020, for instance, Minister Wyatt remarked that constitutional recognition was 'too important to rush, and too important to fail'.[33] He cited the defeat of the republic referendum in 1999 and argued that 'we can't afford to have constitutional recognition defeated and off the agenda for another 20 years because we rush this process'. Here Wyatt reinforces the idea that referendums carry tremendously high stakes: a possible 'no' vote is viewed as a tragedy that will be long-lasting, with an expectation that it will be the last word on the issue for decades. Depending on one's viewpoint this cautious approach to amendment is either sensible or timid, but there can be little doubt that it has slowed progress on constitutional recognition.

The flipside of a sensitivity to failure is a conviction among political elites that constitutional amendment should only be attempted if referendum success seems certain. A view has emerged, based on a rigid reading of recent scholarship on constitutional reform,[34] that there exist 'preconditions' for a 'yes' vote.[35] Among the stated conditions are bipartisan support for the proposed reform, popular ownership, and public education. These factors are undeniably important to constitutional reform processes and, by paying heed to them, politicians may succeed in building consensus and fostering community engagement. But there has been an unfortunate tendency among some to treat such factors as immutable criteria and to put off holding a referendum until all are satisfied. Such an approach risks paralysis, delay, and the adoption of minimalist proposals over more ambitious reform.

Constitutional recognition again illustrates this phenomenon. The idea that cross-party consensus must be achieved before the public be invited to vote on the issue is echoed in many official reports. As early as 2012 the Expert Panel declared that a referendum 'should only proceed when it is likely to be supported by all major political parties'; more recently, the Referendum Council provided that 'bipartisanship, indeed multipartisanship … is necessary but not always sufficient for success'.[36] But, after multiple processes and years of debate, the major political parties remain far from a consensus position on the optimal form of recognition to be put to a referendum. This raises a question of whether the insistence on meeting preconditions—including the goal of cross-party agreement—should at some point be abandoned in favor of calling a referendum and allowing the people to have their say.

While Australia's amendment culture has put a brake on constitutional recognition, the drawn-out nature of the debate is also attributable to genuine differences of opinion about which model is preferable. There is disagreement both between and within political parties, and the high levels of public support have not been a sufficient incentive for politicians to bridge those divides and move ahead with reform. Taking a wider view, elite and public opinion is divided on several constitutional reform issues and, going forward, this could be a roadblock to change. Even on matters where elite opinion is relatively united—as might be the case on increasing the size of the House of Representatives without expanding the Senate—it could prove challenging to mobilise the public behind reform.

IV. LOOKING AHEAD

The constitutional recognition of Aboriginal and Torres Strait Islander peoples is likely to dominate constitutional reform discussions in the near term. Debate will intensify over what form the Voice should take and, following the public consultations in early 2021, the federal government will come under increasing pressure to endorse a model. An issue likely to remain at the forefront is whether the Voice should be recognized in the Constitution (as contemplated in the Uluru Statement) or merely in legislation. Supporters of a statutory Voice

28 Donald Lutz, 'Toward a Theory of Constitutional Amendment' (1994) 88 *American Political Science Review* 355.
29 Albert (n 20) 110; see also Tom Ginsburg and James Melton, 'Does the Constitutional Amendment Rule Matter at All?' (2015) 13 *I•CON* 686.
30 Albert (n 20) 110-111.
31 Ibid 158.
32 Robert Menzies, quoted in L F Crisp, *Australian National Government* (Longman Cheshire, 4th ed, 1978) 40.
33 Paul Karp, 'Ken Wyatt concedes referendum on Indigenous recognition unlikely before election', *The Guardian*, 29 May 2020 < https://www.theguardian.com/australia-news/2020/may/29/ken-wyatt-concedes-referendum-on-indigenous-recognition-unlikely-before-election>.
34 Eg, Williams and Hume (n 1) 239-240.
35 Williams and Hume (n 1) 239-240.
36 Expert Panel (n 4) xix; Referendum Council (n 12) 38.

argue that it would have value in itself and could operate as a stepping-stone to entrenchment; opponents fear that legislative action would dampen momentum for constitutional change. Should consensus on either of these matters prove elusive, it is possible that other reform ideas could be suggested as alternative means of giving effect to the Uluru Statement.[37] A separate question is whether the government will seek to hold a referendum on symbolic constitutional recognition. Such a move would be controversial given the rejection of symbolic change by the Indigenous-led regional dialogues and Uluru convention.

More generally, a question arises as to whether Australia can rejuvenate its approach to constitutional change. In recent times there has been no shortage of debate and discussion, but successive governments have shown themselves to be unwilling to prioritize reform, prosecute the case for it and pull the trigger on a referendum. The JSCEM report shows that there is cross-party interest in expanding the size of the House of Representatives and extending parliamentary terms—perhaps this will provide the impetus for a new reform process and an eventual referendum. But whether the issue at hand is constitutional recognition, reform of the Parliament or something else, governments will need to show more leadership—and a greater tolerance for uncertainty—if Australians are to be given the chance of voting in a referendum anytime soon.

V. FURTHER READING

Gabrielle Appleby and Eddie Synot, 'A First Nations Voice: Institutionalising Political Listening' (2020) 48 *Federal Law Review* 529.

Megan Davis, 'The Long Road to Uluru' (2018) 60 *Griffith Review* 13.

Indigenous Voice Co-Design Process, *Interim Report to the Australian Government* (October 2020).

Joint Standing Committee on Electoral Matters (JSCEM), *Report on the Conduct of the 2019 Federal Election and Matters Related Thereto* (December 2020).

Dylan Lino, *Constitutional Recognition: First Peoples and the Australian Settler State* (Federation Press, 2018).

37 For possibilities see Twomey (n 11).