VOICE VERSUS RIGHTS: THE FIRST NATIONS VOICE AND THE AUSTRALIAN CONSTITUTIONAL LEGITIMACY CRISIS

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For almost three decades, Australia has been locked in a public and political debate about whether and how to 'recognise' Aboriginal and Torres Strait Islander peoples in the Australian Constitution. Omnipresent in these debates is the question of sovereignty, over which there is ongoing disagreement, leading to a chronic crisis of legitimacy. In this article, we compare the two substantive recognition reform options that have dominated the contemporary debate: rights and Voice. Recognition through a First Nations Voice is a proposal that, unlike rights, relies on both deliberative and democratic characteristics to address Australia's legitimacy problems. We identify this as a key reason animating calls for a Voice from First Nations themselves. The Voice, operating as a vehicle through which First Nations can speak directly to the Parliament, has the potential to set up a deliberative and democratic process for the gradual working through of competing legitimacy claims.

I INTRODUCTION

For decades, Australia has been locked in a public and political debate about whether and how to 'recognise'[1] Aboriginal and Torres Strait Islander peoples in

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1 This article uses the terminology of 'recognition', while acknowledging its multiple and contested definitions and uses. To some, the language of 'recognition' implies a unilateral, settler-led act of toleration or 'seeing' of Indigenous people: see, eg, Duncan Ivison, *Can Liberal States Accommodate Indigenous Peoples?* (Polity Press, 2020) 42–4, 85–6; Shireen Morris, *A First Nations Voice in the Australian Constitution* (Hart Publishing, 2020) 10, 30, 69 <https://doi.org/10.5040/9781509928958> ('*A First Nations Voice*'); Alison Vivian et al, 'Indigenous Self-Government in the Australian Federation' (2017) 20 *Australian Indigenous Law Review* 215, 227. We adopt the term as it is explained by Cobble Cobble woman and constitutional scholar Professor Megan Davis – a term that defies simple definition, and can refer to constitutional inclusion across a spectrum, from minimalist symbolism to more substantive structural recognition that encompasses recognition of sovereign identity: Megan Davis, 'Competing Notions of Constitutional "Recognition": Megan Davis, 'Competing Notions of

the *Australian Constitution*, and for what end. This debate has been characterised by strong divisions over a number of issues. In this article, we look at the divisions between those advocating for substantive equality rights to be inserted into the *Constitution* to protect against racially discriminatory laws, and those seeking structural reform giving First Nations a political voice in the constitutional system. Our focus is on understanding the different purposes, natures, and possibilities of these two different sets of recognition reforms in resolving constitutional questions relating to sovereignty, constitutional legitimacy, and the ongoing relationship between the state and First Nations.

We focus on these constitutional reform proposals as they were key recommendations of the two most recent governmental recognition processes. A substantive anti-discrimination ('rights') clause was part of a larger suite of reforms suggested by the Expert Panel on Constitutional Recognition of Indigenous Australians ('Expert Panel') in 2012.[2] Recognition through rights is predominantly a legal attempt to redress the historical discrimination against Aboriginal and Torres Strait Islander people and to prevent its future occurrence – or at least to provide an avenue of legal redress for that potential. Yet it does not speak directly to sovereignty or the ongoing state–First Nations relationship.

By contrast, recognition through a First Nations Voice takes key steps in this direction. A First Nations Voice was recommended as a structural constitutional change by the Referendum Council in 2017, endorsing the calls for this reform in the First Nations-issued Uluru Statement from the Heart ('Uluru Statement').[3]

Constitutional "Recognition": Truth and Justice or Living "Off the Crumbs that Fall Off the White Australian Tables"?' in Paula Waring (ed) *Papers on Parliament No 62: Lectures in the Senate Occasional Lecture Series, and Other Papers* (Department of the Senate, 2014) 113 ('Competing Notions'); Megan Davis, 'The Long Road to Uluru: Walking Together' (2018) (60) *Griffith Review* 13, 17, 23, 27 ('The Long Road to Uluru'). See also Dani Larkin and Kate Galloway, 'Uluru Statement from the Heart: Australian Public Law Pluralism' (2018) 30(2) *Bond Law Review* 335, 344 <https://doi.org/10.53300/001c.6796>. In Australia, the language of recognition has been adopted by First Nations Peoples themselves in pursuit of their political objectives, asking for recognition as Indigenous peoples from the settler state, and for recognition of their sovereignty and what flows from that: Davis, 'Competing Notions' (n 1) 117, 119. It also appears to be used as part of a request for the Australian state to engage in truth-telling, which comprises recognition of the existence, occupancy and legal systems of First Nations before colonisation: see, eg, submissions made to the Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *Two Hundred Years Later: Report on the Feasibility of a Compact, or 'Makarrata' between the Commonwealth and Aboriginal People* (Parliamentary Paper No 107, 1983) ch 2. Lawyer and activist Noel Pearson from the Bagaarrmugu clan and the Guugu Yalandji peoples has referred to recognition as 'mutual recognition', or as 'a mirror': Noel Pearson, 'Recognition Will Make This Nation Whole', *The Australian* (Sydney, 18 March 2021). This terminology of 'mutual recognition' is used to describe a similar relationship to the terms mutual 'accommodation' or mutual 'justification' in some literature on inter-group relations: see, eg, Ivison (n 1). See especially James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, 1995) 205 <https://doi.org/10.1017/CBO9781139170888>.

2 Expert Panel on Constitutional Recognition of Indigenous Australians, Parliament of Australia, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (Final Report, January 2012) ch 6 ('*Report of the Expert Panel*').

3 Referendum Council, Parliament of Australia, *Final Report of the Referendum Council* (Report, 30 June 2017) 2.

Following a number of parliamentary and government processes,[4] the Federal Labor Government elected in May 2022 committed to seeking parliamentary consensus for a referendum on a proposal for the Voice. The Voice, operating as a vehicle through which First Nations can speak directly to the Parliament as well as to the executive government, has the potential to reverse, at least in part, Indigenous disempowerment and exclusion from mainstream avenues of public decision-making. Indeed, by reference to the records of the Regional Dialogues that led to the Uluru Statement, we identify this as a key strand of reasoning that animated calls from First Nations themselves for an institutional, political Voice.

In the course of our comparison, however, we describe a dilemma – or 'crisis' – presented by the move to adopt reforms premised on sovereignty and self-determination, and consider the capacity of each reform to address this. As we explain in Part II, to many First Nations Peoples, sovereignty is at the core of the recognition they seek; it is thus omnipresent in debates about constitutional recognition of First Nations.[5] Yet such aspirations appear to clash with assumptions of many non-Indigenous people that the Australian state's sovereignty is ultimate and exclusive. Such constitutional disagreements set up chronic crises of constitutional legitimacy. In these crises, the normative foundations of public governance are unsettled. In particular, there may be no widely agreed source of 'social legitimacy': no common perception, among the people or peoples in a jurisdiction, as to which foundational laws and institutions are legitimate and authoritative, and why.[6]

Crises of this kind are far from unique to Australia. Globally, they arise frequently in response to the competing sovereignty claims of multiple peoples

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4 See, eg, Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Final Report* (Report, November 2018); National Indigenous Australians Agency, Parliament of Australia, *Indigenous Voice Co-design Process: Final Report to the Australian Government* (Report, July 2021) ('*Co-design Final Report*'). We do not examine those reforms rejected as 'minimalist' in the Kirribilli Statement in 2015: ibid app G ('Kirribilli Statement'). Although they formed part of the suite of reforms recommended by the Expert Panel in 2012, they were rejected as priorities in the process that led to the Uluru Statement from the Heart: Referendum Council, 'Uluru Statement from the Heart' (Statement, First Nations National Constitutional Convention, 26 May 2017) ('Uluru Statement'). Neither do we focus on the forms of reform and recognition called for in the Uluru Statement alongside Voice, and in particular Treaty and Truth. These reforms, as part of the final stages of recognition envisioned by the Uluru Statement, are also directed at the crisis of constitutional legitimacy and speak directly to sovereignty. Indeed, they are framed in the Uluru Statement as part of Makarrata ('the coming together after a struggle'); but, in the unique Australian context in which modern treaty-making must be attempted, and in the Uluru Statement, they are preceded by the establishment of a constitutionally enshrined political Voice. On sequencing: see Sana Nakata, 'On Voice, and Finding a Place to Start', *Indigenous Constitutional Law* (Blog Post, 3 March 2021) <https://www.indigconlaw.org/sana-nakata-on-voice-and-finding-a-place-to-start>.

5 For an excellent introductory discussion of the complicated issue of sovereignty in the Australian context: see Sean Brennan et al, *Treaty* (Federation Press, 2005).

6 These concepts appear, for example, in Joseph HH Weiler, *The Constitution of Europe* (Cambridge University Press, 1999) 80. Cognate terms include 'political legitimacy' and public or political 'trust'. On the role of social legitimacy or trust in legal obedience: see, eg, Tom R Tyler, *Why People Obey the Law* (Princeton University Press, 2006) <https://doi.org/10.1515/9781400828609>. See also Max Weber, *Wirtschaft und Gesellschaft: Grundriss der Verstehenden Soziologie* [Economy and Society: An Outline of Interpretive Psychology], ed Johannes Winckelmann (JCB Mohr, 5th rev ed, 1972) 29–30.

living and asserting political authority within shared geographic spaces. We will see that constitutional legitimacy crises may generate instability, in that they leave open basic questions about the normative and legal foundations of public governance.

In Part III, we argue that an effective form of First Nations recognition would seek to resolve, or at least substantially address, this constitutional legitimacy crisis. The crisis calls for reforms capable of creating a process of dialogue between peoples, as opposed to reforms such as rights designed to function solely from within the existing settler state authority and its legal 'technology'.[7] Any process chosen should be capable of being seen as legitimate by every party to the dispute. The Voice model may, we argue, set up a process for working through, and perhaps settling, competing legitimacy claims, via a deliberative and democratic process that all sides may acknowledge as legitimate. Past deliberative democratic bodies, when they were inclusive, reflexive and informed, and when they met a host of other criteria for democracy and deliberation, were able in practice to promote social legitimacy – including across lines of marked inter-group division.[8]

We thus consider how the Voice can be understood according to the literature and practice of deliberative democracy – although we do not claim that it ought to be considered *exclusively* in this way. The most effective past examples of deliberative democratic bodies have been – and also have been widely *seen* as – trustworthy sites for groups in tension to reach practical accommodations between their competing interests and assertions of power. We review key characteristics of deliberative democratic bodies that enable this, as well as certain risks of the approach. Of course, we cannot rehearse the whole of deliberative democracy's large institutional, empirical and critical literature, which has developed mostly over the past three decades. We aim to evaluate, more specifically, the possibility that deliberative democratic principles (among others) informing Voice design may help to manage, and even begin to settle, outstanding constitutional legitimacy tensions in Australia.

Before we commence our analysis, we are conscious that we write as non-Indigenous academics, with combined expertise in constitutional law and political theory. Yet we are seeking to explain the parallels that we observe between, on the one hand, the objectives of the delegates at the Regional Dialogues and the First Nations Constitutional Convention ('Convention') as expressed in the processes leading to the Uluru Statement,[9] and, on the other hand, the work of

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7 Paul Gowder, *The Rule of Law in the Real World* (Cambridge University Press, 2016) 27 <https://doi.org/10.1017/CBO9781316480182>.

8 See below n 87 and accompanying text.

9 Note that one of the authors, Appleby, was a technical adviser to the Regional Dialogues. We draw in this article on publicly available sources, including the Submission from the Technical Advisers at the Regional Dialogues and Uluru First Nations Constitutional Convention, made to the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, which draws directly from the Records of Meeting and working group notes of the Regional Dialogues: Gabrielle Appleby et al, Submission No 206 to the Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, Parliament of Australia (11 June 2018) ('Technical Advisers Submission'). Since the writing of this paper, the full records have been made available through the National Indigenous Australians Agency: National Indigenous Australians Agency,

political theorists whose works shed light on why rights approaches fail to address the constitutional crisis of legitimacy in settler–Indigenous state relationships. Our intention is not to diminish the Indigenous methodology that sits behind the Uluru Statement, but to further highlight it. It is only through the Indigenous-designed and -led Regional Dialogues that a new and more complete understanding of the objectives of constitutional recognition, taking into account the lived experiences of Aboriginal and Torres Strait Islander people across the country, has been gained in Australia. In this article we seek to engage reciprocally: to explore just some of the depth and sophistication of the Regional Dialogues that led to the Uluru Statement, and to draw out the alignment of their conclusions with the increasingly influential approach of deliberative democratic theory.

II CONSTITUTIONAL LEGITIMACY CRISIS

A Constitutional Legitimacy Crises in Australia and Abroad

In a constitutional legitimacy crisis, there is a constitutional disagreement but no clear apex decision-maker, standing above the parties, who can bring the disagreement to an accepted end.[10] Absent such an authoritative decision-maker, the parties themselves must raise normative propositions to persuade each other to see things their way.[11] This is often exceedingly difficult to do (assuming the parties care to try).

Common to any constitutional legitimacy crisis is its significance; such a crisis involves disagreements between groups having sharply divergent views about foundational constitutional questions. But beyond this, constitutional legitimacy crises come in many forms. One key type sees disagreements over which political faction should enjoy control over the shared instruments of political power. For example, the increasing rancour between the two main parties in the United States has led to disputes over constitutional governance on a number of fronts, from gerrymandering to impeachment.[12] Yet in such cases, despite their foundational disagreements, the parties may still (for now) acknowledge themselves as part of the same constitutional order.

Another type of legitimacy crisis, and the one that concerns us in this article, is characterised by disagreement about the authority of the constitutional order

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'FOI/2223/016' (Freedom of Information Request, 10 March 2023) <https://www.niaa.gov.au/sites/default/files/foi-log/foi-2223-016.pdf>.

10 Though we coin and define the term 'constitutional legitimacy crisis' in this article, a similar notion appears in other sources: see eg, Ron Levy, Ian O'Flynn and Hoi L Kong, *Deliberative Peace Referendums* (Oxford University Press, 2021) 98 <https://doi.org/10.1093/oso/9780198867036.001.0001>.

11 Richard H Fallon, 'Legitimacy and the *Constitution*' (2005) 118(6) *Harvard Law Review* 1787.

12 Carlos Algara and Savannah Johnston, 'The Rising Electoral Role of Polarization and Implications for Policymaking in the United States Senate: Assessing the Consequences of Polarization in the Senate from 1914–2020' (2021) 19(4) *Forum* 549 <https://doi.org/10.1515/for-2021-2034>.

itself.[13] Such crises are typically drawn out and seemingly intractable. They stem from the presence of competing constitutional orders in the same geographic space, a situation that we tend to see in deeply divided societies.[14] In the context of a settler state, such as Australia, constitutional competition specifically arises out of the settler community's claims of ultimate and exclusive legal and political sovereignty, which notionally sits over and trumps any claims of First Nations sovereignty or self-determination.[15]

In the sense in which it is often understood (although we look more specifically at the claims in Australia later in this article), sovereignty entails a political community having a degree of political unity and possessing ultimate authority over its own affairs; sovereignty is subject therefore to no other authority (at least within a range of substantive areas).[16] Contrasting with this, the terminology of 'self-determination' in the *United Nations Declaration on the Rights of Indigenous Peoples* provides that 'Indigenous peoples have the right to … freely determine their political status and freely pursue their economic, social and cultural development', and that they have 'the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions'.[17] Thus, self-determination denotes a community's self-governance, but does not necessarily imply a claim to ultimate authority.[18]

While many in the settler state view the state's sovereignty as ultimate and exclusive, the ongoing political relevance of alternative Indigenous claims to sovereignty challenges this position. Apparently incompatible sovereignty claims form the core of the constitutional legitimacy crisis. Distinct legal and political systems struggle for political pre-eminence, casting doubt about the legitimacy of each. This kind of crisis may involve specific substantive legal differences (eg, some Indigenous groups possess distinct epistemic systems for reaching collective

13 See NP Adams, 'Institutional Legitimacy' (2018) 26(1) *Journal of Political Philosophy* 84, 87 <https://doi.org/10.1111/jopp.12122>, citing Allen Buchanan, *The Heart of Human Rights* (Oxford University Press, 2013) ch 5 <https://doi.org/10.1093/acprof:oso/9780199325382.001.0001>.

14 Robert C Luskin et al, 'Deliberating across Deep Divides' (2014) 62(1) *Political Studies* 116.

15 Ivison (n 1) ch 2.

16 See Jeremy Webber, 'We Are Still in the Age of Encounter: Section 35 and a Canada beyond Sovereignty' in Patrick Macklem and Douglas Sanderson (eds), *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (University of Toronto Press, 2016) 63, 77–80; Martin Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (Hart Publishing, 2000) 125; Patrick Macklem, *The Sovereignty of Human Rights* (Oxford University Press, 2015) 31–2; Stephen D Krasner, *Power, the State, and Sovereignty: Essays on International Relations* (Routledge, 2009) 179–80 <https://doi.org/10.4324/9780203882139>; Dylan Lino, 'Towards Indigenous–Settler Federalism' (2017) 28(2) *Public Law Review* 118; Michael G Breen, 'Federalism, Constitutional Recognition and Indigenous Peoples: How a New Identity-Based State Can Be Established in Australia' (2020) 55(3) *Australian Journal of Political Science* 311, 314, 318 <https://doi.org/10.1080/10361146.2020.1766416>.

17 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) annex arts 3–4.

18 See further analysis in Avishai Margalit and Joseph Raz, 'National Self-Determination' in Will Kymlicka (ed), *The Rights of Minority Cultures* (Oxford University Press, 1995) 79. See also Vivian et al (n 1) 225–7; Morris, *A First Nations Voice* (n 1) 29–30, 90. Cf Lino, 'Towards Indigenous-Settler Federalism' (n 16) 125.

agreements about truth).[19] But the crisis is distinguished most of all by widespread normative fracture: a 'lack of shared support for a single authoritative set of norms'.[20]

As one of us has previously written of deeply-divided societies facing constitutional legitimacy crises, two

> mutually exclusive constitutional projects … [run] alongside each other, without a recognised way of bridging the normative expectations of each – nor therefore of managing the inevitable conflicts that [arise] on the ground as a consequence of maintaining both at once.[21]

Despite the reality of the settler state's power to coerce First Nations in Australia, there remains significant constitutional disagreement about the state's legitimacy.[22] The observation that Indigenous sovereignty existed in law and fact at the time of settlement, and was neither ceded nor extinguished, is a settled assumption among many people (both Indigenous and non-Indigenous) in Australia.[23]

In many societies, deep normative fractures give rise to widespread and concerted campaigns of inter-group violence.[24] Yet disputes over sovereignty or self-determination need not rise to overt ongoing violence to concern us. Chronic legitimacy disputes matter in concrete ways even in Australia. An unresolved dispute about the constitutional place of a significant minority may be an ongoing factor affecting the social legitimacy of a constitution, following from decades-long failures of inter-group accommodation. Contradictory constitutional claims can leave groups unable to cooperate and coordinate their political behaviours across a wide range of matters.

To take just one example in the Australian context, in the 2007 Northern Territory Intervention ('the Intervention'), the Commonwealth pressed ahead with a social policy project that reflected the ideological position that the Australian public are an essentially undifferentiated people, within which Aboriginal communities were positioned as failed societies economically and socially. But questions of group distinctiveness, and in this case self-determination and sovereignty, are not easily

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19 Jorge M Valadez, 'Deliberation, Cultural Difference, and Indigenous Self-Governance' (2010) 19(2) *Good Society* 60, 63 <https://doi.org/10.1353/gso.2010.0011>.

20 Levy, O'Flynn and Kong (n 10) 98. See also David Easton, 'A Re-assessment of the Concept of Political Support' (1975) 5(4) *British Journal of Political Science* 435, 444–7 <https://doi.org/10.1017/S0007123400008309>; Kent Greenawalt, 'The Rule of Recognition and the *Constitution*' (1987) 85(4) *Michigan Law Review* 621, 624–30 <https://doi.org/10.2307/1288727>.

21 Levy, O'Flynn and Kong (n 10) 98.

22 See, eg, Sean Brennan and Megan Davis, 'First Peoples' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 27, 32–3 <https://doi.org/10.1093/law/9780198738435.003.0002>; Lino, 'Towards Indigenous–Settler Federalism' (n 16) 123.

23 See Mark McKenna, 'Tokenism or Belated Recognition? Welcome to Country and the Emergence of Indigenous Protocol in Australia, 1991–2014' (2014) 38(4) *Journal of Australian Studies* 476, 477–8 <https://doi.org/10.1080/14443058.2014.952765>. Cf Kristina Everett, 'Welcome to Country … Not' (2009) 79(1) *Oceania* 53 <https://doi.org/10.1002/j.1834-4461.2009.tb00050.x>.

24 See, eg, Arend Lijphart, *The Politics of Accommodation: Pluralism and Democracy in the Netherlands* (University of California Press, 2nd ed, 1975). Some authors, of course, argue that the imposition of the settler legal order, and its social consequences, are also forms of violence, albeit of a less overt kind: Aaron Mills, 'The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today' (2016) 61(4) *McGill Law Journal* 847, 852–3, 865 <https://doi.org/10.7202/1038490ar>.

swept away. The Intervention inspired substantial pushback from the communities affected – based in part on frustration over blunt, paternalistic, and even martial forces imposed from outside.[25] Failures to read such political dynamics may only hobble the effectiveness of policy.[26]

Doubts about constitutional legitimacy arise in Australia in a system in which the settler state's sovereignty is exercised against First Nations Peoples, and the force of that sovereignty is continuously felt. If we are interested in how constitutional reform can be effective in practice, we must give due attention to how legitimacy is perceived by both the larger and the smaller party in a constitutional arrangement. This should provide the context for, and inform any attempt at resolving, the constitutional legitimacy crisis. An effective resolution is not likely to be one that merely reinforces the dominance of settler state sovereignty.

B Introducing the Reform Proposals in Australia

We turn next to analyse the two most recent sets of proposed reforms to achieve constitutional recognition for Aboriginal and Torres Strait Islander peoples – a constitutional anti-discrimination clause and a constitutionally enshrined political Voice. Granted, in part we create an artificial binary: both reforms are ultimately directed to the protection of Indigenous rights. However, while the Voice functions in the political realm to advocate for, promote and protect Indigenous rights, it also speaks to broader recognition objectives.

The contemporary history of the constitutional recognition debate in Australia[27] illustrates how rights as fixes to social policy challenges can emerge as preferred methods of lawyers (and others) who advocate for constitutional reform.[28] This is seen most prominently in the work of the 2010–12 Expert Panel, established by the Gillard Labor Government. The Panel's package of reforms included a racial non-discrimination clause that explicitly allowed (but did not require) the passage of laws and measures directed to overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group; the package also included a new languages clause.[29] The allowance for positively discriminatory measures in the proposed clause, particularly with respect to protecting culture, language and heritage, spoke to the possibility of legislation that might recognise permanent differences between peoples; but the main intention of the change, as expressed by Noel Pearson and quoted in the Panel's final report, was to redress and prevent a repeat of the adverse racial

25 Irene Watson, 'In the Northern Territory Intervention: What Is Saved or Rescued and at What Cost?' (2009) 15(2) *Cultural Studies Review* 45 <https://doi.org/10.5130/csr.v15i2.2037>. The Australian military was charged with implementing parts of the intervention: at 46.

26 JC Altman, 'The Howard Government's Northern Territory Intervention: Are Neo-Paternalism and Indigenous Development Compatible?' (Topical Issue No 16, Centre for Aboriginal Economic Policy Research, 2007).

27 The history of this debate is told at length elsewhere: see, eg, Megan Davis and George Williams, *Everything You Need to Know about the Uluru Statement from the Heart* (NewSouth Publishing, 2021).

28 See Davis, 'The Long Road to Uluru' (n 1) 17.

29 *Report of the Expert Panel* (n 2) 133, 173.

discrimination directed at Aboriginal people in the past.[30] The 2012 proposals never received a formal response from the government.

The next process was the 2016–17 Referendum Council process. This commenced with a request from Aboriginal and Torres Strait Islander leaders in 2015 for a new path to progress the debate about constitutional reform.[31] The Referendum Council established from its members an Indigenous Steering Committee. The Committee oversaw a series of Indigenous-designed and -led Regional Dialogues across the country, culminating in the Convention at Uluru in May 2017. This process remains the most extensive consultation with First Nations on the question of constitutional recognition to date, as well as being the only Indigenous-led and locally executed process on the issue. The consensus position that emerged from the process is one that retains significant support among First Nations Peoples, although understandably – given the nature of the questions involved – support is not universal.[32]

The Regional Dialogues were centred around, but not limited by, a series of constitutional reform options, including those recommended by the Expert Panel, and each Dialogue recorded its views and deliberations in a Record of Meeting that was then taken to the Convention. From a synthesis of the combined Records of Meeting, the Convention started its deliberations by agreeing on a set of ten Guiding Principles that must be met by any agreed option for reform. These were distilled from the Regional Dialogues, as well as from historical calls for reform by First Nations, and from international standards.[33] The Guiding Principles provided that the reform chosen should be one that:

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;

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30 Noel Pearson, Submission No 3619 to Expert Panel on Constitutional Recognition of Indigenous Australians, Parliament of Australia (January 2012), quoted in ibid 167.

31 '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 (n 4) 89.

32 See also Ipsos, 'First Nations Voice Sentiment: Jan 2023' (Disclosure Statement, 27 January 2023) <https:// www.ipsos.com/sites/default/files/2023-01/Ipsos%20-%20TAPC%20Methodology%20 Disclosure%20 Statement_First%20Nations%20Voice%20Sentiment.pdf>. The poll conducted by Ipsos found 80% of First Nations Peoples support the Voice proposal: 'Anthony Albanese Says Surveys Show between 80 and 90 Per Cent of Indigenous Australians Support the Voice. Is That Correct?', *ABC News* (online, 2 August 2023) <https://www.abc.net.au/news/2023-08-02/fact-check-indigenous-australians-support-for-the- voice/102673042>. A 2020 study conducted by Reconciliation Australia found that 91% of Aboriginal and Torres Strait Islander people believe it is important to establish a representative Indigenous body, and 88% of Aboriginal and Torres Strait Islander people believe it is important to protect it in the *Constitution*: Reconciliation Australia, *2020 Australian Reconciliation Barometer: Summary Report* (Report, 25 November 2020) 7 <https://www.reconciliation.org.au/wp-content/uploads/2021/02/Australian_Reconciliation_Barometer_-2020_Summary-Report_web_spread.pdf>.

33 *Final Report of the Referendum Council* (n 3) 22.

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; and
10. Does not interfere with positive legal arrangements.[34]

Starting with the Guiding Principles is pivotal for understanding the calls in the Uluru Statement for constitutional recognition through the establishment of an enshrined First Nations Voice.[35] They reveal a shift in the objectives behind the type of constitutional recognition called for in the Uluru Statement. A First Nations Voice, while it is focused on the rights of First Nations, is also a structural mechanism through which First Nations can exercise their sovereignty and self-determination.

One of the incidents of this empowerment approach may be more informed, and potentially improved, law and policymaking. But the Regional Dialogues[36] saw, more broadly, the concept of a constitutional First Nations Voice as the continuation of the long struggle (since invasion/settlement) for political representation and a guaranteed expression of the right to self-determination. It would constitutionalise a different relationship between the settler state and First Nations peoples. For example, one delegate at the Ross River Dialogue in the Northern Territory said, reflecting on the Commonwealth Government's 2007 the Intervention: 'Since the demise of [the Aboriginal and Torres Strait Islander Commission], we've had no say … If there was a voice to Parliament when they designed the intervention, we would have had a say'.[37]

In this statement the delegate considers that a First Nations Voice would not have guaranteed a different outcome, but that it would have given political power to First Nations Peoples in the design of the programs. What is apparent is that the delegate feels the absence of political power more strongly than the lack of an avenue in the courts to seek redress after the Intervention was implemented. While the possibility of judicially-enforced redress might have a prophylactic effect on the creation of adverse policies, it is not one that is directed by First Nations. It is not giving First Nations a 'say'. The delegates at the Regional Dialogues realised that they were asking for limited reform: not a constitutionally guaranteed veto power over government and parliamentary decision-making, but rather a seat at

34 Ibid.

35 As noted above, the call in the Uluru Statement for Makarrata (Yolngu for 'the coming together after a struggle') through treaty and truth was not a call to change the *Constitution* itself, and is sequenced as the culmination of the reform agenda, that is, to follow the constitutional establishment of a Voice: 'Uluru Statement' (n 4). Our focus on the first dimension of the reforms should not be interpreted as our undervaluing the importance of these subsequent reforms.

36 Our reference to what was said by delegates in the Regional Dialogues is taken from the 'Technical Advisers Submission' (n 9), which draws and quotes from the working group notes in the Regional Dialogues, and the final Records of Meeting that were approved at the Regional Dialogues. There is also reference to statements of delegates in the *Final Report of the Referendum Council* (n 3) 9–15.

37 'Technical Advisers Submission' (n 9) 7. In the 2007 Northern Territory Intervention, the Federal Government imposed a unilateral series of restrictive measures in the Territory directed at Indigenous people, with the stated aim of combating endemic violence against Indigenous women and children. For background and analysis: see, eg, Watson (n 25).

the table of political power that would be constitutionally guaranteed. This would give it stability, independence and status. But it would ultimately be for the First Nations representatives to use this political presence to shape policies and laws. As a Technical Advisers Submission put it, '[i]n the Torres Strait Dialogue, delegates referred to the Voice as creating an "*engine room*" for change that would facilitate self-determination, safeguard against discriminatory laws and support future agreement-making.'[38]

A strong theme in the Regional Dialogues was the need for the body to have authority from, be representative of, and have legitimacy in Aboriginal and Torres Strait Islander communities across Australia.[39] It was only in this way that it could be an expression of First Nations identity and a vehicle of self-determination. Moreover, only in this way would it have the legitimacy needed to engage with the Parliament and Government. As one delegate put it, the 'body needs to capture and strengthen our identity and diversity'.[40]

The view of the First Nations Voice proposal as a proactive and forward-looking proposal can be contrasted with the objectives that First Nations saw in the proposal to insert a racial non-discrimination clause in the *Constitution*. There was support for this latter reform in the Regional Dialogues. Its purpose was, in the words of one delegate, to 'fence in' Commonwealth legislative power, with the aim of prohibiting discrimination.[41] However, amending the *Constitution* to add a prohibition on racial discrimination was, in contrast with a Voice to Parliament or treaty, less important. Regional Dialogues delegates tended to think that a Voice would better address discriminatory laws. As one delegate explained this:

> Today, we still have the intervention. Being on that land, being told that our rights were taken away, that we were nothing, that we were, and we are still today … Let's not forget the intervention, because we cannot move forward until we do something about the intervention. The only way we can empower ourselves is to go and get a voice.[42]

As a Technical Advisers Submission recalled:

> [s]everal Regional Dialogues also acknowledged that the effectiveness of a constitutional prohibition on racial discrimination would depend on how it was interpreted, and that there was no guarantee that the Australian judges would meet First Nations' aspirations.[43]

According to the Brisbane working group, for example: 'there's a risk that the High Court might not listen to Aboriginal and Torres Strait Islander people when deciding what amounts to racial discrimination but instead just listen to the government.'[44]

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38 'Technical Advisers Submission' (n 9) 7 (emphasis in original).

39 See also Davis, 'The Long Road to Uluru' (n 1) 27.

40 'Technical Advisers Submission' (n 9) 7.

41 Ibid 5.

42 Ibid.

43 Ibid.

44 Ibid. See also Dylan Lino, *Constitutional Recognition: First Peoples and the Australian Settler State* (Federation Press, 2018) 261–6; Morris, *A First Nations Voice* (n 1) 78.

The Regional Dialogues generally reveal that First Nations Peoples were sceptical of the ability of legal rights to yield the useful real-world outcomes they were seeking, and, more specifically, to address their objectives for constitutional recognition. In the next section of this part, we contrast rights reforms with the Voice model, only the latter of which potentially fulfils these key objectives.

C Rights, Voice and Crises of Legitimacy

Rights are generally are unable to resolve, and instead may recap and entrench, the crises of legitimacy that we have observed. Rights, like many other mooted solutions to the constitutional legitimacy crisis, are intended to operate exclusively from within the settler state's constitutional order, using the well-known and established legal technology of that order.[45] This includes solutions involving the creation of new rights to support Indigenous peoples – whether they be generally applicable equality-based rights, or Indigenous-specific rights (we address both options in this discussion). The difficulty of any of these rights-based solutions is that while they create an umpire ostensibly available to address the legitimacy crisis (in the case of rights, the judiciary), the umpire plays 'for one of the teams'.[46] The umpire's legitimacy, established within the state order, is thus chronically in doubt.

Much as if there were no umpire at all, a compromised umpire may fail to resolve a dispute after issuing an apparently final decision. A decision's capacity to persuade and bind parties is substantially a function of its social legitimacy.[47] A constitution that the dominant law determines is legitimate, but that key parties purportedly bound by the law do not perceive this way, may be unable to fulfil a principal constitutional function: establishing 'coordination' and 'stable mutual expectations' among different groups.[48] The sense that the umpire's authority is in doubt can give rise to a perception that the umpire does not represent all those who are under their authority.[49] Some constituents indeed may not understand their own group as having consented to the umpire's authority in the first place.[50]

Indigenous peoples often see their distinctive interests and preferences consistently overlooked in an umpire's decisions because the underlying framework from which the umpire operates is that of the settler state. This sense of distrust of an umpire was apparent in the excerpts above from the Regional

45 Gowder (n 7) 10.

46 Daniel P Tokaji, 'Lowenstein contra Lowenstein: Conflicts of Interest in Election Administration' (2010) 9(4) *Election Law Journal* 421, 433 <https://doi.org/10.1089/elj.2010.9407>.

47 Paul Blokker, 'A Political-Sociological Analysis of Constitutional Pluralism in Europe' in Jiří Přibáň (ed), *Self-Constitution of European Society: Beyond EU Politics, Law and Governance* (Routledge, 2016) 66, 80–1; David Beetham, 'Max Weber and the Legitimacy of the Modern State' (1991) 13(1) *Analyse and Kritik* 34 <https://doi.org/10.1515/auk-1991-0102>. See similarly Jon Elster, 'Forces and Mechanisms in the Constitution-Making Process' (1995) 45(2) *Duke Law Journal* 364, 366–7.

48 John M Carey, 'Does It Matter How a Constitution Is Created?' in Zoltan Barany and Robert G Moser (eds), *Is Democracy Exportable?* (Cambridge University Press, 2009) 155, 158 <https://doi.org/10.1017/CBO9780511809262.008>.

49 Tokaji (n 46) 432–3.

50 For global examples and analysis of this position: see Charles W Mills, *The Racial Contract* (Cornell University Press, 1997).

Dialogues, particularly where delegates considered whether to seek constitutional protection through a racial non-discrimination provision framed as a general anti-discrimination clause. Many were experienced and informed litigants in the settler courts, and there was a deep awareness of the shortcomings of judicial understanding of First Nations and of the general inability of the legal method to respond to the contemporary needs of First Nations. This was reflected in the proceedings of the Brisbane Working Group, above, acknowledging the risk that the courts will not necessarily preference the views of Aboriginal and Torres Strait Islander people, particularly when they contest the claims of governments.[51]

The problem thus raised is that solutions to the crisis from within the settler constitutional order presuppose the settler state's ultimate sovereignty, and therefore generally fail to address the core of the legitimacy crisis. Many constitutional reform proposals call for new laws or institutions meant to draw on established settler state authority and legal technology. Yet a situation in which a settler state asserts exclusive and ultimate sovereignty, and in which judicial authority formally flows from that principle, has a significant disability as an independent umpire.

Enacted rights making no mention of the distinctive Indigenous place in Australia, but which apply instead equally to all those within the polity (eg, equality rights of general application, such as those recommended in the form of a racial non-discrimination clause by the 2012 Expert Panel process), risk recapping the very legitimacy crisis they mean to solve. While there may be value in rights that protect against discrimination, this model does not suffice as a form of *recognition* insofar as it rejects the distinctiveness of the history and sovereignty of Indigenous Australians. This would still be so with the inclusion of an explicit legislative power to 'protect cultures, languages and heritage'[52] in general terms. As the assessment of a racial non-discrimination clause revealed at the Regional Dialogues, this type of model does not speak to the recognition of the status and rights of First Nations.[53] Rights of general application may also struggle to foreground Indigenous matters and give them due weight in the contest of interests in Australian society.[54] A superior option might be constitutional enactment of a right specific to Indigenous people. However, Indigenous interests may still then be subsumed within wider sets of competing considerations. International experience suggests that constitutional rights for Indigenous peoples tend to fall short when they rely on the good intentions of the settler legal system.[55]

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51 'Technical Advisers Submission' (n 9).

52 *Report of the Expert Panel* (n 2) 172.

53 Neither does it engage in the types of historical truth-telling called for in the Uluru Statement, which other settler states such as Canada have adopted: Ronald Niezen, *Truth and Indignation: Canada's Truth and Reconciliation Commission on Indian Residential Schools* (University of Toronto Press, 2013).

54 See, eg, *Kruger v Commonwealth* (1997) 190 CLR 1. The Court held that the removal of Stolen Generations children from their cultural and religious milieus did not breach section 116 of the *Constitution* (freedom of religion) because, inter alia, only the effect of the removal, but not the intention behind it, was to impede religious practice.

55 See critique of constitutional rights that do not recognise sovereignty rights in, for instance, Haunai-Kay Trask, *From a Native Daughter: Colonialism and Sovereignty in Hawai'i* (Latitude 20, rev ed, 1999).

More specifically, such rights raise both epistemic and legitimacy concerns. The epistemic concerns stem from the observation, echoed in the common law and liberal traditions, that one person cannot necessarily rely on another to understand and express one's own interests or preferences.[56] These epistemic worries reflect the classic rationales for adversarial legal processes, which leave to the parties themselves the job of identifying and pursuing their own interests.[57] Such worries have clear application in the Indigenous rights context. It may be unrealistic to expect a rights regime formed from within the settler legal system to reflect, and adequately act upon, Indigenous interests and points of view.[58] In Canada, where the *Constitution* includes rights specific to Indigenous peoples, it has often been observed that the settler legal system fails to give due attention to Indigenous interests or preferences.[59] We see an awareness of this risk reflected in the Regional Dialogues' understandings of the rights-based option, leading to its rejection as a reform priority. Delegates, with long experiences of engaging with the settler state in its executive, legislative and judicial arms, appeared not to trust that these branches would bring interpretations of rights that reflected their needs and interests.

Yet our main concern remains that constitutional rights intended to benefit Indigenous people, if laid down in and by the settler legal system and invoked within institutions such as standard courts, simply recap the crisis of legitimacy. It matters not only if actual social, economic, or political bias may emerge, but also that reasonable appearances of bias may erode perceptions of the legitimacy of the office. If a public decision is persuasive and binding largely as a function of its social legitimacy, then rights may not be especially effective against the backdrop of a constitutional legitimacy crisis. The enactment of rights alone may not assure some groups involved in the crisis that their interests will be addressed, nor more fundamentally that their sovereignty claims will be given due recognition and room to develop.

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56 John Stuart Mill, *Considerations on Representative Government* (Parker, Son, and Bourn, 1861) 4, 27–34, 133–6. For a useful review and development of Mill's perspective, see, eg, Donald Bello Hutt, 'Rule of Law and Political Representation' (2022) 14(1) *Hague Journal on the Rule of Law* 1 <https://doi.org/10.1007/s40803-021-00163-5>.

57 See, eg, Jerome Frank, *Courts on Trial*: *Myth and Reality in American Justice* (Princeton University Press, 3rd ed, 1973) 80–102.

58 See Morris, *A First Nations Voice* (n 1) 56.

59 Even as The courts increasingly acknowledge the full breadth of Indigenous rights: see, eg, *Newfoundland and Labrador (A-G) v Uashaunnuat* [2020] 1 SCR 15, 47–8 [25]–[27], 49–50 [30]–[31], 52 [36] (Wagner CJ, Abella and Karakatsanis JJ) ('*Newfoundland and Labrador*'). However, the constitutional emphasis has been on the scope of governments' duties to allow for Indigenous peoples' interests in public decisions rather than on vindicating a voice for Indigenous peoples to express such interests: see, eg, *British Columbia (Minister of Forests) v Haida Nation* [2004] 3 SCR 511, 522 [16], 532–4 [42]–[45] (McLachlin CJ); *Newfoundland and Labrador* (n 59) 46 [22] (Wagner CJ, Abella and Karakatsanis JJ); *Manitoba Metis Federation Inc v Canada (A-G)* [2013] 1 SCR 623, 663 [74] (McLachlin CJ and Karakatsanis J). Further, the system of rights has been critiqued as focusing narrowly on proprietary rights: see, eg, Webber (n 16) 64–5; PG McHugh, 'A Common Law Biography of Section 35' in Patrick Macklem and Douglas Sanderson (eds), *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (University of Toronto Press, 2016) 137, 150–3.

Under such circumstances, ostensibly final decisions by ostensibly authoritative decision-makers, such as apex courts, may be neither final nor authoritative. Focusing not only on abstract legitimacy, but on social legitimacy, is a pragmatic choice. Social legitimacy is required for effective settlement of constitutional legitimacy crises; it reflects the acceptance – by members of all groups involved – of a constitutional solution that respects their interests and statuses. Many rights of course do gain social legitimacy simply by being formally authorised by a state,[60] and many people may be content to defer to them. But this cannot be taken for granted in the circumstances of a constitutional legitimacy crisis such as the Indigenous-settler division in Australia. Here rights may only exacerbate the legitimacy crisis, particularly if they do too little to address the roots of disempowerment and Indigenous aspirations for sovereignty or self-determination.

In our view, addressing the legitimacy crisis in Australia requires novel constitutional models that, at a minimum, must facilitate a degree of autonomous self-determination of Indigenous peoples' places in the wider community. Writing on similar cases around the world, Apache and Purépecha human rights lawyer, and former Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, puts the point this way:

> [S]ubstantive self-determination consists of two normative strains: First, in what may be called its *constitutive* aspect, self-determination requires that the governing institutional order be substantially the creation of processes guided by the will of the people, or peoples, governed. Second, in what may be called its *ongoing* aspect, self-determination requires that the governing institutional order, independently of the processes leading to its creation or alteration, be one under which people may live and develop freely on a continuous basis.[61]

Only models addressing these two aspects of self-determination are likely to begin to address legitimacy crises, as only they contemplate Indigenous peoples determining the terms of their own constitutional recognition from a position equal to that of settler populations.

On the other hand, sovereignty and empowerment tools may not, on their own, resolve the constitutional legitimacy crisis. As mentioned, despite the histories of dispossession specific to First Nations peoples, many other people will continue to disfavour measures manifesting First Nations sovereignty. While many Aboriginal and Torres Strait Islander people favour models of reform that empower their own decision-making, these models may engender resistance among those political leaders and voters who see empowerment models as challenging the exclusive sovereignty of the settler state. Any solution referencing Indigenous sovereignty may be rejected by those who feel threatened by the idea that sovereignty might be shared. In Australia, governments have often echoed variations on an integrationist (or even assimilationist) conception of Indigenous Australia, and opposed measures

60 Martha Minow, 'Interpreting Rights: An Essay for Robert Cover' (1987) 96(8) *Yale Law Journal* 1860, 1866–7.

61 S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 1996) 81 (emphasis in original).

they saw as creating 'a black nation within the nation'.[62] Even in the celebrated judicial decision of *Mabo v Queensland [No 2]* ('*Mabo [No 2]*'), the leading judgment of Brennan J, while accepting the existence of the legal system of land tenure on the Mer Islanders, found that the acquisition of British sovereignty was a non-justiciable question in a municipal court.[63]

The core of the constitutional legitimacy crisis that remains, then, is the challenge of reconciling settler state sovereignty with the sovereignty and self-determination claims of First Nations. In the next section, we will see how certain deliberative democratic bodies that do not seek to settle such a crisis merely from within a single constitutional order may have the potential to be perceived, by all sides in settler–Indigenous constitutional crises, as substantially legitimate. While the Regional Dialogues focused foremost on the need for Indigenous empowerment, they also called for procedures by which Indigenous people and the state could work through their disagreement on an ongoing basis.[64] This is a less commonly recognised possibility of the Voice to Parliament reform. By setting up a deliberative and inclusive dialogue between institutions (eg, the Voice and Parliament) and between groups (Indigenous and non-Indigenous), the reform may create procedures for inter-group negotiation that can be, relatively speaking, well-trusted by the parties.

III VOICE AND DELIBERATIVE DEMOCRACY

A Voice, Parliament and Social Legitimacy

In principle, deliberative democracy provides an alternative basis to develop the social legitimacy of public decision-making – alternative, that is, to rights or other reforms that draw their legitimacy mainly from formal authorisation by the state. Deliberative democratic institutional design focuses not on creating institutions to instrumentalise formal power, but on generating decisions that owe their legitimacy to a democratically inclusive process, and equally to the deliberative rigour and fairness of that process.[65] Since deliberative democratic legitimacy is largely independent of the authority or sovereignty of either of the parties, all parties may in theory recognise the body's legitimacy – in effect sidestepping the dilemma set out in the previous part.

Part of the potential strength of the Voice model is its deferral, in the short term, of direct questions about sovereignty, and its setting up of a process by which

62 Stuart Bradfield, 'Separatism or Status-Quo? Indigenous Affairs from the Birth of Land Rights to the Death of ATSIC' (2006) 52(1) *Australian Journal of Politics and History* 80, 88 <https://doi.org/10.1111/j.1467-8497.2006.00409a.x>.

63 (1992) 175 CLR 1, 31–2 (Brennan J). Deane and Gaudron JJ reached a similar conclusion: at 81–2.

64 For example, Guiding Principles 6–8 focused on providing room for ongoing change, reform and agreement-making to occur: *Final Report of the Referendum Council* (n 3) 22, citing Pat Anderson et al, Submission No 479 to Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, Parliament of Australia (3 November 2018) 17.

65 Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, tr Thomas Burger (MIT Press, 1989) 209–10.

the relationship of settler and Indigenous sovereignties may instead be worked out over time. As we will see in this part, even though the Voice is firstly an instrument of ongoing First Nations input into public decision-making, the accumulation of decisions involving both the Voice and the federal government (including both Parliament and the Executive) can establish new forms of sovereign relations.

By calling for such deferral, we draw on a prominent approach in the literature of deeply-divided societies, since Hanna Lerner's influential study of the concept a decade ago.[66] However, the notion that what sovereignty concretely entails may be left to Indigenous peoples and their interlocutors to work out over time also has earlier origins, for instance in the well-known view of political philosopher James Tully, who suggests that multiple sovereignties, often of diverse forms, can coexist within a single geography.[67] Tully describes how, as groups within a diverse society seek some form of self-government,[68] these groups form an interrelationship and 'shared history'.[69] Multiple sovereignties are thus part of a rich sense of cultural belonging for individual citizens within the single polity that stems from the historical and contemporary interplay of cultures.[70] As such, Tully argues that assumptions that sovereignty is ultimate and exclusive – that it sets out a comprehensive theory of constitutional values – are inapt in modern societies (and is in any event a holdover from the imperial era).[71] Instead, different groups may engage in dialogue by negotiation and mediation through which multiple sovereignties may be accommodated, and aspects of each group's claims may become generally accepted and incorporated into the constitution.[72]

Dylan Lino has argued, in a similar vein, that even within the Australian settler state there is a template for flexible sovereignty approaches: '[f]ederalism offers a justification for the recognition of Indigenous peoplehood that fits well within the culture and practice of Australia's existing constitutional system',[73] and is also at least partially concordant with some Indigenous traditions.[74] Hence in many states sovereignty already has a contested nature and can be pluralistic rather than exclusionary. Indeed, the Westminster philosophic tradition itself has long recognised the variable conceptual character of sovereign claims, the most famous statement along these lines being AV Dicey's division of sovereignty between the legal and the political.[75]

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66 Hanna Lerner, *Making Constitutions in Deeply Divided Societies* (Cambridge University Press, 2011) ch 2.

67 Tully (n 1) 15–16.

68 Ibid 4.

69 Ibid 205.

70 Ibid 204–5.

71 Ibid 15–16.

72 Ibid 29, 209.

73 Lino, 'Towards Indigenous–Settler Federalism' (n 16) 134. See also Brennan and Davis (n 22) 37; Vivian et al (n 1) pt IV; Morris, *A First Nations Voice* (n 1) 20, 38–9, 71–2, 99–100; Breen (n 16). Cf Harry Hobbs, 'Aboriginal and Torres Strait Islander Peoples and Multinational Federalism in Australia' (2018) 27(3) *Griffith Law Review* 307, 314, 317 <https://doi.org/10.1080/10383441.2018.1557587>.

74 Lino, 'Towards Indigenous–Settler Federalism' (n 16) 136.

75 AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1967).

Claims to sovereignty by First Nations in Australia may also occur at different levels. There is, as we set out above, the claim to a form of political sovereignty, which clashes most directly with the legal and political claims of the settler state. At a deeper level, there is also the 'spiritual' claim of sovereignty, expressed in the Uluru Statement:

> This sovereignty is *a spiritual notion: the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty*. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.[76]

The nature of this sovereignty is such that not only is it claimed that it never has been ceded or extinguished, but also that it *cannot* be ceded. Yet all of these claims to sovereignty may coexist with the political and legal sovereignty of the Crown. It is critical that proposed recognition models allow for nuanced and manifold understandings of sovereignty, as well as for the space for such understandings of sovereignty and the Australia polity to develop over time.

Yet our assumption that the substance of sovereignty can be renegotiated raises the question of how – that is, under what institutional and other conditions – such acts of sovereign change can occur. As we will see, from empirical studies of the effects of appropriately designed and executed deliberative democratic bodies we know that, in practice, such bodies can sometimes draw their legitimacy from democratic procedures informed and improved by deliberation. To be sure, whether the Voice model can achieve this is far from guaranteed. It will depend, in large part, on the Voice's design and on customs of interaction between the Voice and federal government. In this Part we focus predominantly on the processes that could facilitate the interaction between the Voice and Parliament. We thus reach a contingent argument: that to the extent deliberative democratic processes and interactions can be established in practice – including in the specific ways to be canvassed – the parties may jointly recognise the legitimacy of the Voice.

In the context of the Indigenous–settler constitutional legitimacy crisis, broadly shared social legitimacy may be useful – not to mention a rare achievement – if it allows the Voice, in conjunction with Parliament itself, to create a process accepted by both First Nations and settler communities, even if the Parliament retains legislative supremacy. Concretely, for example, this may allow for the Voice–Parliament combination to lead a gradual (ie, years- or decades-long) process of definition of the contours of an accommodation between these communities.[77] Across myriad lawmaking subjects – such as allocations of public resources; design of civil and criminal justice systems; fairly managing resource extraction, tourism and other uses of traditional Indigenous lands and waters; and responsible environmental stewardship[78] – the Voice may help to develop workable legislated solutions to which both First Nations and other affected groups are amenable.

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76 'Uluru Statement' (n 4) (emphasis in original).

77 Ivison (n 1) 80–1; Tully (n 1) 205, 209.

78 Justin McCaul, a descendent of the Mbarbarum people of Far North Queensland, has argued that such a process already is in place in relation to native title: Justin McCaul, 'Caring for Country as Deliberative

While its establishment may see political objections to an Indigenous-only constitutional institution, the Voice's deliberative framework has the capacity to strengthen policy processes in Indigenous affairs in a way that is acceptable – and of benefit – to the wider Australian community. Its broad legitimacy may allow the Voice, working with the branches of government, to be an alternative site for decision-making about how settler and First Nations communities can manage their shared (or conflicting) resources, institutions and spaces in ways that accommodate each community to the other, rather than being characterised by conflict and continuing uncertainty. This approach is one of a gradually reinscribing these relationships such that conceptualisations of the Australian people and polity are multiple.

Our conditional claim that a deliberative democratic body can serve as a socially legitimate and effective process for working through a constitutional legitimacy crisis relies on evidence in related contexts. A mounting empirical record demonstrates social trust (a measurable proxy for social legitimacy) in deliberative democratic procedures.[79] More than majority rule per se, majority rule tempered by a *well-informed* process may enhance trust, including in the eyes of governmental and other subtypes of elites.[80] In addition, a *fair and impartial* process has been found to be strongly trust-enhancing.[81] Fairness may refer to due regard for the views of all people affected by a law reform. It requires more than simply inclusion, but for assorted groups to be fairly considered. As Mary Scudder explains, fair consideration, or 'uptake', refers not to the outcome of a process, but 'due consideration to the arguments, stories, and perspectives that particular citizens share in deliberation'.[82] In addition, as Ron Levy, Ian O'Flynn and Hoi L Kong have written, 'impartiality generally means that a process is open to any reasonable decision without excessive partisanship or bias'.[83]

One reason why deliberative democratic decision-making can be socially legitimating is that it marks an evident improvement over blunter forms of democracy. Popular sovereignty is a widely cited source of legitimacy, even a

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Policy Making' in Nikki Moody and Sarah Maddison (eds), *Public Policy and Indigenous Futures* (Springer, 2023) 51; Ivison (n 1) ch 3. In this view native title could be seen as a ground-up complement to top-down First Nations Voice–parliamentary decision-making. However, for criticism of native title processes: see, eg, Davis, 'The Long Road to Uluru' (n 1) 42.

79 Ron Levy, 'Breaking the Constitutional Deadlock: Lessons from Deliberative Experiments in Constitutional Change' (2010) 34(3) *Melbourne University Law Review* 805, 832–4 ('Breaking the Constitutional Deadlock'); Fred Cutler et al, 'Deliberation, Information, and Trust: The British Columbia Citizens' Assembly as Agenda Setter' in Mark E Warren and Hilary Pearse (eds), *Designing Deliberative Democracy: The British Columbia Citizens' Assembly* (Cambridge University Press, 2008) 166.

80 Levy, 'Breaking the Constitutional Deadlock' (n 79) 836–7; Ron Levy, 'Deliberative Constitutional Change in a Polarised Federation' in Paul Kildea, Andrew Lynch and George Williams (eds), *Tomorrow's Federation: Reforming Australian Government* (Federation Press, 2012) 364–6.

81 Levy, 'Breaking the Constitutional Deadlock' (n 79); Seraina Pedrini, André Bächtiger and Marco R Steenbergen, 'Deliberative Inclusion of Minorities: Patterns of Reciprocity among Linguistic Groups in Switzerland' (2013) 5(3) *European Political Science Review* 483 <https://doi.org/10.1017/S1755773912000239>.

82 Mary F Scudder, *Beyond Empathy and Inclusion: The Challenge of Listening in Democratic Deliberation* (Oxford University Press, 2020) 20 <https://doi.org/10.1093/oso/9780197535455.001.0001>.

83 Levy, O'Flynn and Kong (n 10) 117.

'[g]lobal [n]ormative [e]ntitlement'.[84] However, a distinct kind of legitimacy emerges from democratic decision-making that succeeds at both hearing from ordinary citizens on matters important to them, and channelling such citizen representations into deliberatively rigorous processes. Ordinary citizens are often thought to lack the necessary knowledge of legal and governmental affairs to make sound public decisions unaided.[85] Ordinary institutions, as well, may do little to correct for biases that unfairly benefit or empower particular (especially dominant) societal subgroups. The aggregative nature of a democracy based solely on majority rule – that is, the practice of merely tallying up majority preferences and passing laws accordingly, without also taking minority views on board – limits the appropriateness of such democracy in an unequally divided polity.

Studies of institutional design for deliberative democracy frequently focus on methods for improving on such blunt majoritarianism. Deliberative democratic processes have proliferated in literature and practice, and now range well past idealised aspirations. The most common model is the deliberative 'mini-public' (eg, the 'citizens' assembly', or smaller 'citizens' jury'),[86] which sees a sample of the broader population engage in sustained and facilitated collective deliberation and decision-making. These bodies – ranging from as few as twenty to as many as several hundred members – initially undertake lengthy courses of learning about relevant policy questions.[87] The bodies are often selected by lot in order to avoid self-selection bias among their members. Numerous studies affirm that, with adequate design, mini-publics can generate effective deliberation.[88] Some of

84 Thomas M Franck, 'The Emerging Right to Democratic Governance' (1992) 86(1) *American Journal of International Law* 46, 90 <https://doi.org/10.2307/2203138>.

85 This continuing worry is one that originated at the outset of modern democracy: see, eg, Emmanuel-Joseph Sieyès, *Vues sur les Moyens D'exécution Dont les Représentans de la France Pourront Disposer en 1789* [Views on the Means of Execution Which the Representatives of France Could Have in 1789] (1789) 31–9; Jean-Jacques Rousseau, 'Du Contrat Social' [The Social Contract] in *Oeuvres Complètes* [Complete Works] (Bibliothèque de la Pléiade [Pléiade Library], 1964) vol 3, bks 1, 3. For a more recent discussion: see, eg, Richard A Posner, *Law, Pragmatism, and Democracy* (Harvard University Press, 2003) 164, 167–9.

86 Michael K MacKenzie and Mark E Warren, 'Two Trust-Based Uses of Minipublics in Democratic Systems' in John Parkinson and Jane Mansbridge (eds), *Deliberative Systems: Deliberative Democracy at the Large Scale* (Cambridge University Press, 2012) 95.

87 See Anna Yeatman, 'Receiving the Final Report of the Referendum Council: A Challenge in Public Law' (2018) 77(S1) *Australian Journal of Public Administration* S63, S66–7 <https://doi.org/10.1111/1467-8500.12361>; Davis, 'The Long Road to Uluru' (n 1) 27–9.

88 See, eg, RS Ratner, 'British Columbia's Citizens' Assembly: The Learning Phase' (2004) 27(2) *Canadian Parliamentary Review* 20; Cutler et al (n 79) 168–70; MacKenzie and Warren (n 86) 95; Brian Tobin, 'Marriage Equality in Ireland: The Politico-Legal Context' (2016) 30(2) *International Journal of Law, Policy and the Family* 115, 123–4 <https://doi.org/10.1093/lawfam/ebw002>; Johan A Elkink et al, 'Understanding the 2015 Marriage Referendum in Ireland: Context, Campaign, and Conservative Ireland' (2017) 32(3) *Irish Political Studies* 361, 369–77 <https://doi.org/10.1080/07907184.2016.1197209>. Note that not all systems of deliberative democracy focus on mini-publics and other small-cohort institutions: see, eg, Jane Mansbridge et al, 'A Systemic Approach to Deliberative Democracy' in John Parkinson and Jane Mansbridge (eds), *Deliberative Systems: Deliberative Democracy at the Large Scale* (Cambridge University Press, 2012) 1.

these studies also notably address mini-publics held in the midst of the chronic constitutional legitimacy crises of deeply divided societies.[89]

Deliberative democratic institutional design has several subsidiary aims – some of which will become important again when we consider the deliberative attributes of the Voice–Parliament pairing. Broadly, as we saw, deliberative democracy reconceives and builds on majoritarian democratic representation. Yet, one specific aim within this broad objective is to make decision-making more *epistemically rigorous*; thus decisions should be made on the basis of a relatively complete and accurate picture of the relevant empirical (eg, scientific, sociological) and legal context.[90] A number of still more specific deliberative desiderata elaborate upon this objective: for instance, public decision-making should also be holistic, inclusive and reflective.[91]

Additionally, deliberative democracy seeks to *mediate inter-group differences* through fair, impartial and inclusive processes. More specifically, deliberative democracy (especially in its 'public reason' strand) takes a certain amount of reasonable disagreement as given, but details how groups may come to agreements based on broadly generalised values that they may still share.[92] These expectations generally require deliberative democratic procedures, whose hallmarks include mutual reason-giving,[93] open-mindedness,[94] cooperation,[95] civility,[96] lack of coercion,[97] and, again, reflection and inclusivity.

In principle, in deliberative democracy the most cogent and urgent reasons – in Jürgen Habermas's famous term, the 'unforced force of the better argument'[98]

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89 See, eg, M Lydia Khuri, 'Facilitating Arab-Jewish Intergroup Dialogue in the College Setting' (2004) 7(3) *Race Ethnicity and Education* 229, 244 <https://doi.org/10.1080/1361332042000257056>; Luskin et al (n 14); Alex J Norman, 'The Use of the Group and Group Work Techniques in Resolving Interethnic Conflict' (1992) 14(3–4) *Social Work with Groups* 175 <https://doi.org/10.1300/J009v14n03_13>; Didier Caluwaerts and Kris Deschouwer, 'Building Bridges across Political Divides: Experiments on Deliberative Democracy in Deeply Divided Belgium' (2014) 6(3) *European Political Science Review* 427 <https://doi.org/10.1017/S1755773913000179>. Cf Margarita M Orozco and Juan E Ugarriza, 'The Citizens, the Politicians and the Courts: A Preliminary Assessment of Deliberative Capacity in Colombia' in Juan E Ugarriza and Didier Caluwaerts (eds), *Democratic Deliberation in Deeply Divided Societies: From Conflict to Common Ground* (Palgrave Macmillan, 2014) 73 <https://doi.org/10.1057/9781137357816_5>.

90 See, eg, Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton University Press, 2004) 42–3 <https://doi.org/10.1515/9781400826339>.

91 See, eg, James S Fishkin, *When the People Speak: Deliberative Democracy and Public Consultation* (Oxford University Press, 2009) 33–5; James Bohman, 'Deliberative Democracy and the Epistemic Benefits of Diversity' (2006) 3(3) *Episteme* 175 <https://doi.org/10.3366/epi.2006.3.3.175>.

92 See, eg, John Rawls, *Political Liberalism* (Columbia University Press, rev ed, 2005) ch 6; Jeremy Waldron, 'Theoretical Foundations of Liberalism' in Jeremy Waldron (ed), *Liberal Rights: Collected Papers 1981–1991* (Cambridge University Press, 1993) 35, 35–62.

93 See, eg, Rawls (n 92) 136–7; Gutmann and Thompson, *Why Deliberative Democracy?* (n 90) 3–5.

94 Gutmann and Thompson, *Why Deliberative Democracy?* (n 90) 57–9, 110–119.

95 David M Estlund, *Democratic Authority: A Philosophical Framework* (Princeton University Press, 2008) 175–7 <https://doi.org/10.1515/9781400831548>.

96 John Parkinson, *Deliberating in the Real World: Problems of Legitimacy in Deliberative Democracy* (Oxford University Press, 2006) 150 <https://doi.org/10.1093/019929111X.001.0001>.

97 James Bohman, *Public Deliberation: Pluralism, Complexity, and Democracy* (MIT Press, 1996) 25–47.

98 Jürgen Habermas, *The Inclusion of the Other: Studies in Political Theory*, ed Ciaran Cronin and Pablo De Greiff (MIT Press, 1998) 37.

– influence the outcomes of decisions. This is an important intended feature of the Voice, which will exert any influence it has not through binding force, but by a combination of its constitutional status and its utility in informing and helping to generate more rigorous reasons to guide the course of public decision-making. Thus it is the inclusion of multiple perspectives, and opportunities for the people holding these perspectives to interact and learn from each other, that ideally influence decisions.

A goal of bringing multiple points of view into the crucible of the deliberative process is to expose which are the most relevant, and which best stand up to scrutiny. In many cases, minority interests strongly influence well-designed deliberative democratic proceedings. This contrasts with strictly aggregative democratic systems in which most members come pre-committed to their own group's values, interests and preferences.[99] Deliberative democratic bodies thus aim to put groups initially on an equal footing. Even the smaller party in a democracy may influence public decisions to take better account of their interests.[100]

This notion of equal footing links to debates about whether the Voice should be constitutionally enshrined, or whether it might be achieved through legislative enactment alone. As a group of forty public law experts wrote to the government consultation in the first half of 2021, the success of the Voice depends on how 'seriously' it is engaged with by Parliament and the rest of government.[101] This may turn on the perceived legitimacy of the Voice among the Australian public and political classes, which constitutional enshrinement, and a successful referendum preceding enshrinement, would enhance. The need for equality of political engagement and the importance of constitutional enshrinement also emerged in the Regional Dialogues.

We must, of course, be careful not to overestimate the prospects of deliberative processes, not least given that (as noted) whether such processes will work well depends in large part on their design. Gabrielle Appleby and Eddie Synot warn, for instance, of the dangers of pre-determined, self-perception-driven putative processes of deliberative listening. This is particularly relevant in former colonial states, in which 'consultation' and consensus have been used to perpetuate colonial power structures and continue to silence First Nations voices,[102] or, as John Borrows warns, 'domesticating' First Nations into the state order.[103] This refers to the problem of the dynamics of the relationship becoming more about the incorporation of First Nations Peoples within the Australian state, rather than the transformation of the state–First Nations relationship in a way that respects the unique status and

99 Gutmann and Thompson, *Why Deliberative Democracy?* (n 90) ch 1.

100 Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Harvard University Press, 1996) 57–9, 110–19.

101 See Rebecca Ananian-Welsh et al, 'Submission: The Imperative of Constitutional Enshrinement', *Indigenous Constitutional Law* (Blog Post, 18 March 2021) <https://www.indigconlaw.org/home/submission-the-imperative-of-constitutional-enshrinement>.

102 Gabrielle Appleby and Eddie Synot, 'A First Nations Voice: Institutionalising Political Listening' (2020) 48(4) *Federal Law Review* 529 <https://doi.org/10.1177/0067205X20955068>.

103 John Borrows, 'Domesticating Doctrines: Aboriginal Peoples after the Royal Commission' (2001) 46(3) *McGill Law Journal* 615.

claims of First Nations. Indeed, a condition for effective deliberation, according to Andrew Dobson (echoing the work of Iris Marion Young),

> is to produce difference, multiply voices, and ensure that 'closure' is not achieved at the expense of failing to question prevailing relations of power. This is the key role that 'listening out for' plays in the dialogic conception of democracy – listening out for previously unheard and unheralded voices, even if they derail the drive to consensus.[104]

Susan Bickford similarly warns of the danger of an overriding pressure for consensus.[105] She is deeply critical of models that prioritise this, particularly in settings in which previously marginalised voices are being brought into the democratic conversation. Thus overly consensus-driven models

> can … undermine the very purposes of democratic participation, for the benefits of thinking things through together are lessened when some voices are not heard. And for participants marked out in this way, participation can be deeply alienating rather than empowering.[106]

So, for Bickford, while inclusive democratic communication *might* result in persuasion, in shifting perspectives and in the development of consensus, even if it does not it may still result in an important development: 'the realization that two or more perspectives exist in the world but in a way that will not merge'.[107] This can then inform future decisions and actions.

In sum, deliberative democracy, and related lenses such as those of listening and dialogue, provide a potential route for diverse substantive influence, premised on interpersonal discussion toward policy choices that a diversity of people can endorse – even if they still possess sharp differences of view. These potentialities are extensively supported in empirical studies,[108] although empirically minded scholars seldom claim that ideal objectives can be wholly or straightforwardly fulfilled. They are generally soberminded about the prospects of any given institution. Most therefore incline to Archon Fung's view: that institutions can at best be improved through steps 'in a deliberative direction'.[109] Even such relative improvements may impact the effectiveness and social legitimacy of a democratic body that aims to accommodate the interests of disparate groups.

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104 Andrew Dobson, *Listening for Democracy: Recognition, Representation, Reconciliation* (Oxford University Press, 2014) 130 <https://doi.org/10.1093/acprof:oso/9780199682447.001.0001>. See also Iris Marion Young, 'Communication and the Other: Beyond Deliberative Democracy' in Seyla Benhabib (ed), *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press, 1996) 120 <https://doi.org/10.1515/9780691234168-007>; Iris Marion Young, *Inclusion and Democracy* (Oxford University Press, 2000).

105 Susan Bickford, *The Dissonance of Democracy: Listening, Conflict, and Citizenship* (Cornell University Press, 1996) <https://doi.org/10.7591/9781501722202>.

106 Ibid 16.

107 Ibid 165.

108 See above nn 103–4.

109 Archon Fung, 'Deliberation before the Revolution: Toward an Ethics of Deliberative Democracy in an Unjust World' (2005) 33(3) *Political Theory* 397, 403 <https://doi.org/10.1177/0090591704271990>.

B Deliberation and Sovereignty Recognition

The Voice model is chiefly centred on advising about concrete matters of policy – including areas of deep, unresolved disagreement between First Nations and settler groups. However, in principle, we argue, such a model may also provide for the development of mutual recognition and accommodation of sovereignties. Even while a deliberative democratic process allows groups to avoid direct conflict between their apparently clashing sovereignties, the process may nevertheless have implications for the creation of new sovereign arrangements. Whether a process achieves development of sovereignty arrangements will depend on its appropriate design, the practicalities of which will be discussed in the next section of this Part.

By focusing on the substantive details of policy, deliberations of the Voice – or of the Voice–government combination, described above – will likely not directly address the groups' complex and often contradictory claims to sovereignty. Here we return, then, to notions of deferral and incrementalism. The groups involved are expected to centre their deliberations on the quotidian tasks of public lawmaking around specific subjects. These deliberations need not involve direct discussions of the most contentious area of disagreement between the settler state and First Nations. However, in the course of Voice–government deliberations, questions of sovereignty or self-determination can be expected to arise as incidents to the policy questions at hand. Even fine-grained mutual deliberations may over time establish a newer and more workable *general set* of accommodations, and mutual recognition, between the parties.

This indirect approach may be relatively satisfactory to members of each community. A process that does not address sovereignty or self-determination all at once, yet focuses on the flesh and form of these concepts in practice, can be a way around what have for a long time been intractable discussions. Voice–Parliament deliberations may see the parties hash out the detailed boundaries of a relationship between peoples, rather than focusing on sovereignty or self-determination as abstractions.[110] As native title specialist Lisa Strelein and others have observed,[111] questions of sovereignty in the political and legal sense are inseparable from day-to-day questions of public policy. Sovereignty and self-determination each broadly denote political authority; yet each also relates more specifically to the powers of a group to direct its own myriad policy choices.[112] Sovereignty and self-determination can describe bundles of discrete powers to issue decisions on particular subjects.

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110 See Adrian Little, 'The Politics of Makarrata: Understanding Indigenous–Settler Relations in Australia' (2020) 48(1) *Political Theory* 30, 32, 44–5, 49 <https://doi.org/10.1177/0090591719849023>; Morris, *A First Nations Voice* (n 1) 87.

111 Lisa Strelein, 'Conceptualising Native Title' (2001) 23(1) *Sydney Law Review* 95, 123; McCaul (n 78).

112 See also Kim Rubenstein, 'Power, Control and Citizenship: The Uluru Statement from the Heart as Active Citizenship' (2018) 30(1) *Bond Law Review* 19, 20–1 <https://doi.org/10.53300/001c.5659>; Patrick McCabe, 'An Australian Indigenous Common Law Right to Participate in Decision-Making' (2020) 20(1) *Oxford University Commonwealth Law Journal* 52 <https://doi.org/10.1080/14729342.2020.1739376>; Vivian et al (n 1) 224–5; 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(3) *University of New South Wales Law Journal* 629, 651 <https://doi.org/10.53637/QKQA5656>.

Decision-making that focuses on the incidents of Indigenous and settler sovereignty or self-determination, rather than on these concepts in the abstract, is already a feature of Australian constitutional practice. Flagship decisions such as those in *Mabo [No 2]* and *Love v Commonwealth* do not formally recognise sovereignty, but in practice advance aspects of Indigenous sovereignty or self-determination.[113] However, such cases are infrequent, and of course rely on judicial authority. The Voice–government dialogue may be more broadly legitimate, comprehensive and agile if it addresses policy – and, implicitly, sovereignty or self-determination – on a continuing basis and across a wide set of subject matters.

The Voice–government combination can be conceived, with appropriate institutional design, as a deliberative democratic procedural solution to the constitutional legitimacy dilemma. Over time not a single answer to the dilemma, but many fine-grained answers, can be expected to develop. This approach is, in our view, more likely to yield a set of mutually agreeable inter-group accommodations than can a solution that leaps straight into charged final negotiations over sovereignty writ large. Anaya's two aspects of self-determination – the ongoing and the constitutive – may come together here, as day-to-day decision-making becomes a way of seeking pragmatic mutually acceptable solutions to the historic conflict between settler and First Nations peoples and their interests. In principle at least, deliberative democracy may allow for a conversation about both constitutive matters (ie, the process of creating new sovereign relations through a future treaty and truth-telling process), and ongoing matters (ie, day-to-day lawmaking decisions), in which the sovereignty of each side may be respected and pragmatic solutions for allowing each to be expressed in practice are pursued.

C Deliberative Democratic Features of Voice–Parliament Process

In this final substantive section, we move from principle to the practicalities of design, with a focus on the Voice–Parliament interaction. Despite what we have said about the prospects of a Voice, there remain commonly stated doubts about the deliberation of First Nations and other minority groups, as we saw above. A prominent line of criticism of deliberative democracy asserts that disadvantaged minorities will often falter at deliberation, or at adopting the political language needed to promote their distinct perspectives and claims.[114] Others see deliberative democracy as relying too heavily on Western liberal assumptions about deliberation.[115]

One important and prominent general response is that, in its most up-to-date iterations, deliberative democracy theory already habitually embraces a wide variety of forms of deliberation (storytelling, greeting, etc), and indeed understands

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113 *Love v Commonwealth* (2020) 270 CLR 152, 176–8 [25]–[30] (Kiefel CJ). See also Lino, 'Towards Indigenous-Settler Federalism' (n 16) 121.

114 See, eg, Lynn M Sanders, 'Against Deliberation' (1997) 25(3) *Political Theory* 347 <https://doi.org/10.1177/0090591797025003002>; Young, *Inclusion and Democracy* (n 104) ch 2.

115 See, eg, David Kahane, 'What Is Culture? Generalizing about Aboriginal and Newcomer Perspectives' in Catherine Bell and David Kahane (eds), *Intercultural Dispute Resolution in Aboriginal Contexts* (UBC Press, 2004) 28, 42.

these as influential.[116] In any event, doubts about First Nations deliberation are generally belied by experience in the Australian context. The aspirations of many First Nations Peoples to establish a deliberative body capable of speaking directly to government are realistic, in our view, given recent instances such as the Regional Dialogues themselves. The Dialogue participants demonstrated high proficiency as deliberators,[117] and the Regional Dialogues and the Uluru Statement now form the axis of public debate about constitutional recognition of First Nations, even prior to the federal government's commitment to seek parliamentary consensus on a referendum.

Nevertheless, neither First Nations nor any groups can be expected in practice to meet every theoretical benchmark for deliberation. Yet, as noted, the objective of deliberative democratic institutional design is precisely to counter such deficiencies by improving deliberation – again, at least by degrees. The final design of the Voice and its relationship with Parliament and the government will be determined by a range of influences; foremost among those must be the importance of self-determined membership and process for the Voice. Among these influences, we argue, is the importance of alignment with deliberative democratic practices. And, indeed, our analysis above shows that in many ways the aspirations of the participants in the Regional Dialogues for the Voice accord with those of deliberative democratic theory. In this section, therefore, we explore specific features of institutional design with these objectives in mind.

Our analysis in this Part recognises that the Voice – as conceived in the Uluru Statement, and around which there is significant consensus as a desired structural reform – has a number of accepted design characteristics. These have been identified through the deliberations of the Regional Dialogues, and subsequent parliamentary and government processes, including the governmental Indigenous Voice Co-design Process. They have been set out at length elsewhere.[118] Here, it is sufficient to sketch the key features of that consensus. The Voice is primarily conceived as being in institutional dialogue with the Parliament as the ultimate national law-making body. However, it will necessarily be engaged with government throughout the development of policies and legislative proposals that affect Aboriginal and Torres Strait Islander people. The government and Parliament will be obliged to engage with the Voice in certain defined areas, but the Voice must retain an overarching power to engage proactively with the appropriate institution. The structure and composition of the Voice must reflect the national diversity of local First Nations Communities, and Voice members must be selected by First Nations Peoples in a manner that bestows on them cultural legitimacy and authority. It should draw on

116 Jane Mansbridge et al, 'The Place of Self-Interest and the Role of Power in Deliberative Democracy' (2010) 18(1) *Journal of Political Philosophy* 64 <https://doi.org/10.1111/j.1467-9760.2009.00344.x>.

117 For accounts of these deliberations, see Davis, 'The Long Road to Uluru' (n 1). See also above Part II(B).

118 See Gabrielle Appleby et al, Submission No 2869 to National Indigenous Australians Agency, Parliament of Australia, *Indigenous Voice Co-design Process* (30 April 2021), which identifies the design characteristics of consensus across these processes. See also the Guiding Principles that have been agreed between the Referendum Working Group and the Government, to govern the design of a future Voice in the event of a successful referendum: 'Voice Principles', *Australian Government* (Web Page) <https://voice.gov.au/about-voice/voice-principles>.

the expertise and experience of pre-existing Aboriginal and Torres Strait Islander organisations, but it performs a distinct, politically representative function. The design of the Voice must be such that it has stability and certainty, independence, adequate funding, resources and support.

From this sketch of the Voice's accepted characteristics, it is apparent that there remain more detailed design questions that must be determined by First Nations through a further self-determined design process, particularly the process for selection of representatives by local First Nations communities to represent their views and interests on the national Voice. Nonetheless, the consensus as to the key features of the structure, composition and functions of the Voice provides us with sufficient information to consider how it might, as a self-determined First Nations representative political institution, engage with the Parliament in a deliberative manner. Ultimately, the transformation of the Indigenous–state relationship will depend on the authority and legitimacy of the Voice in its original design, and on the Voice maintaining control of the scope of its authority, and on the harnessing of political power of those involved.

Discussions of Voice design in the Regional Dialogues, and in governmental and academic settings, implicitly aspire to a process that is deliberative democratic. Particular design features that have been proposed, and others that we ourselves advance here, may establish a broadly deliberative democratic process of engagement between the Voice and Parliament. This process of engagement can be reviewed and improved within that structure as the interaction operates over time.[119]

(i) Information, holism and inclusion: Any model chosen should provide a comprehensive factual base for lawmaking. Indeed, the improvement in policy-making for First Nations through their participation – by drawing on fine-grained knowledge of their own situation on the ground – was a strong theme in the Regional Dialogues. The Voice thus builds on the simple majoritarianism of Parliament to ensure that a set of under-represented views are also included. This in turn requires that the Voice be prominent enough to be heard. It also requires inclusion of diverse *voices* amongst First Nations communities, with specific kinds of diversity to be determined by First Nations themselves.

The First Nations Voice may be viewed approximately as a deliberative mini-public, with an important modification: rather than represent a range of demographic groups in the broader society, the objective of the First Nations Voice is to represent only First Nations Peoples. This must be in accordance with their cultural practices and protocols, as well as reflecting their broad diversity. As one delegate said in the Darwin Dialogue: 'The body needs to capture and strengthen our identity and diversity'. Such diversity is important in part in light of the deliberative objective of recognising policy differences and engaging in holistic discussions to weigh costs and benefits, as well as contradictory values, before finalising legislation.

(ii) Reflective: Deliberation in turn requires adequate time and resources for participants to consider policy proposals. For their part, parliamentarians must

119 Indeed, regular review of the Voice was a principle of design proposed in 2018 by key members of the Indigenous Steering Committee and their technical advisers to the Joint Select Committee: Anderson et al (n 64) 18.

commit to spending the time needed to digest the positions that the Voice puts to them – to give them fair consideration and ensure, in Scudder's language, 'uptake'.[120] Formal protocols can provide a framework around which conventions of engagement might develop. The government-led Indigenous Voice Co-Design Report recommended a protocol whereby government reported to Parliament the extent to which it has engaged with the Voice in the development of legislation, and those reports are considered by a parliamentary committee, which may also make further inquiries, before the committee reports to the Houses.[121]

Geoffrey Lindell has suggested a more direct constitutional relationship between the Voice and the Parliament, which would militate against the danger that the Voice would become diluted among the many parliamentary committee hearings and reports that accompany the passage of a bill. Lindell suggests according priority to the Voice, limited use of 'urgency' in chambers (which can be invoked to avoid engaging with the Voice), and giving Voice representatives a right to speak directly to the Houses. He also proposes procedures to encourage Parliament to respond to the Voice by tabling Voice advice, and assigning a parliamentary officer to monitor parliamentary actions in relation to the Voice, request Parliament's response, and publicise any failure of the Parliament to consider the advice within a time specified in the standing order.[122]

(iii) Open-mindedness and cooperation: Deliberative democracy scholarship demonstrates how neutral facilitators can ensure, for example, that adequate time goes toward debate; that each voice in a process gets an adequate hearing; that participants adhere to requirements of appropriately professional, civil discussion (eg, eschewing ad hominem remarks); and (as discussed below) that deliberations involve the giving of reasons.[123] Lindell's suggested parliamentary officer could act as an impartial facilitator. Ideally that officer would additionally follow established deliberative practices of facilitation. In addition, some Voice–Parliament discussion can occur in camera, encouraging free-flowing discussion, rather than media grandstanding.[124] Processes that take place in part out of the public glare may help to lower the heat of public discourse.[125]

(iv) Reason-giving: A duty to give reasons is a core part of deliberation, much as it is of judicial decision-making. Any decisions to accept or reject the Voice's recommendations (or parts thereof) should be thoroughly explained in formal

120 Appleby and Synot (n 102) 533–41; Scudder (n 82) 20.

121 *Co-design Final Report* (n 4) 168.

122 Geoffrey Lindell, 'The Relationship between Parliament and the Voice and the Importance of Enshrinement', *AUSPUBLAW* (2 March 2021) <https://auspublaw.org/2021/03/the-relationship-between-parliament-and-the-voice-and-the-importance-of-enshrinement>. There has also been the development of the South Australian First Nations Voice, which has a direct relationship to the Parliament through a variety of mechanisms. See also *First Nations Voice Act 2023* (SA) ss 38–41; Gabrielle Appleby, 'The First Nations Voice and the Parliament: A New Constitutional Relationship' (2023) 38(1) *Australasian Parliamentary Review* 18, 29–30.

123 Nicole Curato et al, *Deliberative Mini-Publics: Core Design Features* (Bristol University Press, 2021) ch 4.

124 Lindell (n 122).

125 Archon Fung, 'Survey Article: Recipes for Public Spheres' (2003) 11(3) *Journal of Political Philosophy* 338, 345 <https://doi.org/10.1111/1467-9760.00181>.

written or oral remarks providing substantive and detailed reasons. These reasons should engage with the Voice's own stated reasons for its positions, rather than forcing the Voice to engage only through the vocabulary and values of the settler state.[126] As we have seen, persuasion through the presentation of cogent reasons may allow a deliberative democratic body that is formally non-binding nevertheless to exercise substantive influence.

(v) Uncoerced: Reasoned persuasion, rather than compulsion, should drive the substance of decisions and discussions between the Voice and Parliament. This goes toward ensuring an 'equal footing' (to reuse our term above), and is reflected in the Voice's lack of formal binding effect. Equally, however, Parliament should be limited in its ability to direct the Voice's substantive deliberations. The trigger for such deliberations should simply be an introduction of any bill into Parliament, followed by a threshold-level review by the Voice of whether the bill affects First Nations interests. This model would be preferable to one in which Parliament selectively refers bills to the Voice, thus determining itself whether the Voice commences deliberations. The Voice's autonomy at this threshold stage can avoid Parliament serving as a gatekeeper to avoid a bill's scrutiny.[127] Relatedly, firm guarantees for the Voice's funding may preserve stable resourcing and independence.

IV CONCLUSION

Rather than choose between reforms adopted from within the existing constitutional system – especially rights – and the formal establishment of Indigenous sovereignty or self-determination directly and immediately challenging that system, constitutional recognition through the establishment of a deliberative democratic body may facilitate an ongoing conversation between peoples. Ultimately the possibility is that a deliberative democratic Voice–government process addresses the constitutional legitimacy crisis by seeking common ground and working through substantive disagreements collectively. Deliberative democratic procedures prioritise '*voice* over *votes*' in public decision-making.[128] That is, their focus is not on the formal question of who should exercise ultimate authority, but on the nature and course of public discussion en route to a collective decision. Deliberative approaches may see diverse citizens steer the substance of the decision via participation and persuasion along the way, even if they do not enjoy a final formal vote or veto.

Naturally, much can go wrong even with the best-laid plans for reform. We have suggested that the Voice can – provided it is developed in line with deliberative democratic design principles – establish a socially legitimate process

126 Borrows (n 103).

127 It can thus avoid replicating existing issues of settler states determining when to invite Aboriginal and Torres Strait Islanders' involvement in decision-making: see McCabe (n 112) 57–9.

128 Lawrence LeDuc, 'Referendums and Deliberative Democracy' (2015) 38 *Electoral Studies* 139, 141 <https://doi.org/10.1016/j.electstud.2015.02.007> (emphasis in original).

to work out sovereignty conflicts over time. Indeed, it would take much time and detailed work to develop new views of sovereignty. For some, it will remain hard to imagine how two sovereignties can overlap. Yet we have suggested that some of this reticence may recede, via the day-to-day operations of the Voice model in deliberative dialogue with government, once we begin to see how sovereignties can indeed overlap in practice. While the call for a constitutionally enshrined First Nations Voice in the Uluru Statement from the Heart was rooted in a claim of unceded, continuing and spiritual sovereignty, the acceptance of that invitation through the establishment of a Voice is not necessarily, or explicitly, a declaration of recognised sovereignty. However, it may be an important symbol and a practical process by which communities can give content to their relations with one another. Thus, it can be a practical way of negotiating sovereignties. Voice–government deliberations may, in the ideal, see the parties reach new accommodations and mutual recognition, on a policy-by-policy and case-by-case basis.