

The role of a First Nations Voice for delegated legislation

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Abstract

This article explores the role of a proposed Indigenous Voice in relation to Australia's largest source of new law: delegated legislation. It argues that in order for the Voice to have a meaningful role in the federal lawmaking process and fulfil its purpose, it must engage closely with the delegated lawmaking process. In particular, Parliament should provide the Voice with robust consultation and scrutiny functions for relevant delegated legislation, including the power to recommend its disallowance to both Houses of the Parliament.

Keywords

Indigenous legal issues, constitutional amendment, legislation, regulation, parliament

In July 2022, Australia's Prime Minister put forward the first textual formulation of a proposed amendment to the *Australian Constitution*, which would create a First Nations consultative body called the Aboriginal and Torres Strait Islander Voice.¹ Revised text was later published in March 2023.² Under the proposed amendment, the Voice would 'make representations to Parliament and the Executive government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples'.³ The constitutional entrenchment of the Voice would be an historic step toward recalibrating the relationship between the Australian state and Australia's First Peoples.⁴ But the proposal also raises important unresolved questions about

how this body might work in practice, especially because Parliament would be broadly empowered to 'make laws with respect to [the Voice's] ... composition, functions, powers and procedures'.⁵

In its final report,⁶ the National Indigenous Australians Agency ('NIAA') wrote that Australia's First Peoples should have a 'greater say on the laws, policies and programs that affect our lives' and have their 'voices heard ... in policy and law making'.⁷ The report proposed a detailed model for the Voice in which it would 'provide advice to both the Australian Parliament and Government ... to engage fully with laws and policies at different stages of development'.⁸ In relation to the making of delegated laws, however, the

¹Prime Minister Anthony Albanese, 'Address to the Garma Festival' (30 July 2022) <https://www.pm.gov.au/media/address-garma-festival>.

²Prime Minister of Australia, 'Next Step Towards Voice Referendum: Constitutional Alteration Bill' (Media Release, 23 March 2023) <https://www.pm.gov.au/media/next-step-towards-voice-referendum-constitutional-alteration-bill>.

³Ibid. The Voice is not intended to have a veto power over the making of new laws.

⁴See Megan Davis and Marcia Langton (eds), *It's Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne University Press, 2016) for a collection of essays exploring constitutional reform to recognise Australia's First Peoples. In relation to the Voice, see Gabrielle Appleby, Sean Brennan and Megan Davis, 'A First Nations Voice and the Exercise of Constitutional Drafting' (2023) *Public Law Review* (forthcoming). In relation to parliamentary scrutiny, see Shireen Morris, 'Parliamentary Scrutiny and Insights for a First Nations Voice to Parliament' in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights* (Thomson Reuters, 2020) 703.

⁵See Next Steps Towards Voice Referendum: Constitutional Alteration Bill (n 2).

⁶National Indigenous Australians Agency, *Indigenous Voice Co-design Process Final Report to the Australian Government* (July 2021) https://voice.niaa.gov.au/sites/default/files/2021-12/indigenous-voice-co-design-process-final-report_1.pdf ('Final Report to the Australian Government on an Indigenous Voice'). The membership of the Indigenous Voice National Co-Design Group was announced by the government on 15 January 2020 and was co-chaired by Donna Odegaard and Ray Griggs.

⁷Ibid 6.

⁸The report does note, however, that it is 'critical' for the government to consult with the Voice (ibid 151).

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report recommends only an expectation, and not a formal obligation, for the government to consult with the Voice.⁹

I argue that the Voice must go further than what is recommended by the NIAA. In order for it to have a meaningful role in federal lawmaking, it must engage more closely with the development of relevant delegated legislation. Parliament should provide the Voice with robust consultation and scrutiny functions for relevant delegated legislation, including the power to recommend its disallowance to both Houses of Parliament. While the constitutional entrenchment of the Voice would carry symbolic value, its lack of genuine involvement in making delegated legislation would risk it becoming a body of more form than substance.¹⁰ For the Voice to be effective in bringing about change to the way in which decisions affecting First Peoples are made, it cannot be sidelined in the delegated lawmaking process.

Why delegated legislation matters

Australia's legal system relies on delegated legislation. Important details of statutory schemes are often not found in the primary legislation enacted by Parliament. Such details are instead set out in delegated legislation: laws made directly by the government outside the ordinary parliamentary process, using lawmaking powers delegated to it by Parliament. The government enjoys broad powers to make delegated laws. Most new Bills introduced in Parliament authorise the government to make delegated legislation that can alter the meaning or operation of primary legislation.¹¹

There are only limited controls on delegated legislation. While courts will review the validity of delegated laws when challenged, there are few practical restrictions on Parliament's capacity to loan its legislative power to others, despite that power being vested in it exclusively by the first section of the *Constitution*.¹² Parliament is therefore able to confer sweeping lawmaking powers on the government, including authorising the making of delegated laws that can be used to override statutory provisions: a democratically

problematic reversal of the rule that delegated legislation yields to the substantive provisions of primary legislation that are introduced, debated and enacted by elected representatives.¹³ In the context of litigation, courts tend to give enabling provisions an overly generous reading that favours executive lawmaking discretion.¹⁴ And because delegated laws do not need to go through the cumbersome parliamentary process, delegated legislation tends to change quickly and more frequently than primary legislation, which can lead to the problem where delegated laws lack the stability, certainty and predictability expected of law in a rule of law society. A further risk of delegated legislation is the case where a new government uses delegated powers to implement different policy goals from its predecessor in the absence of introducing primary legislation in Parliament.

A snapshot of federal lawmaking activity underscores the significance of delegated legislation. In 2021, for instance, 1914 legislative instruments were registered as compared to 320 statutes: a ratio approaching 6 to 1.¹⁵ While many legislative instruments are short in length, others are as complex and lengthy as primary legislation.¹⁶ It is worth recalling that delegated legislation is no lesser kind of law in terms of its effect: it is legally binding like primary legislation and directly impacts the rights and interests of individuals and communities. In 2021, dozens of legislative instruments were made to regulate the environment, for example, a number related specifically to fisheries management rules for the Torres Strait.¹⁷

In its report, the NIAA concluded that legislative amendments to certain statutes should trigger a formal obligation for consultation with the Voice.¹⁸ Notably, all of the Acts mentioned by the NIAA also authorise the government to make delegated laws that affect their operation. For instance, the *Aboriginal Land Rights (Northern Territory) Act 1976* enables delegated legislation to be made relating to Land Councils,¹⁹ including defining their functions,²⁰ and authorises delegated laws to control the use of Aboriginal land in the Northern Territory.²¹ The *Aboriginal and Torres Strait Islander Act 2005* provides for the meaning of

⁹Ibid 165. The report instead notes that Voice should 'provide guidance' in relation to expectations around consultation so that expectations are 'informed by what Aboriginal and Torres Strait Islander peoples view as significant'.

¹⁰See Shireen Morris and Noel Pearson, 'Indigenous Constitutional Recognition: Paths to Failure and Possible Paths to Success' (2017) 91(5) *Australian Law Journal* 350.

¹¹Except for supply and technical amendment Bills, nearly all new Bills delegate legislative power. In its 2021 report, the Senate Standing Committee for the Scrutiny of Bills observed that it 'routinely' draws attention to 'bills which authorise a significant delegation of legislative power': https://www.aph.gov.au/-/media/Committees/Senate/committee/scrutiny/annual-reports/2021/Annual_report_2021.pdf 6.

¹²See, eg, Gabrielle Appleby, 'Challenging the Orthodoxy: Giving the Court a Role in Scrutiny of Delegated Legislation' (2016) 69(2) *Parliamentary Affairs* 269.

¹³Aptly referred to as a 'Henry VIII clause'. See Michelle Sanson, *Statutory Interpretation* (Oxford University Press, 2nd ed, 2016) 319. Concerns have been raised about the accountability and transparency of delegated lawmaking: eg, Appleby, *ibid*; Andrew Elgar, 'Administrative Regulation-Making: Contrasting Parliamentary and Deliberative Legitimacy' (2017) 40(3) *Melbourne University Law Review* 738. Parliamentary committees have also sounded the alarm: see recent inquiry reports of the Senate Standing Committee for the Scrutiny of Delegated Legislation https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Completed_inquiries and the New South Wales Legislative Council Regulation Committee <https://www.parliament.nsw.gov.au/committees/listofcommittees/Pages/committee-details.aspx?pk=252#tab-inquiries>.

¹⁴See, eg, *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 (few constitutional limits) and *Gibson v Mitchell* (1928) 41 CLR 275 (generous interpretive approach).

¹⁵These figures include both principal and amending instruments as recorded by the Federal Register of Legislation.

¹⁶For example, the *Work Health and Safety Regulations 2011* (Cth) are more than twice the length of the *Work Health and Safety Act 2011* (Cth).

¹⁷*Torres Strait Fisheries Tropical Rock Lobster (Total Allowable Catch) Determination 2021* (Cth) and *Torres Strait Fisheries Tropical Rock Lobster (Total Allowable Catch) Amendment Determination (No 1) 2021* (Cth).

¹⁸*Final Report to the Australian Government on an Indigenous Voice* (n 6) 162.

¹⁹See, eg, *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 21A(2)(g), 29AA (3).

²⁰*Ibid* s 23(1)(i).

²¹*Ibid* ss 70B(6), 70C (7), 70D (7), 70E (7), 70F (4), 70F (20), 70G (3) and 72 (1).

'misbehaviour' to be set out in delegated laws,²² which are also authorised to create offences.²³ The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* declares that delegated legislation takes priority over conflicting territory laws.²⁴ It also authorises delegated laws to establish requirements for ministerial reports²⁵ and control the use of land²⁶ and objects.²⁷ The *Corporations (Aboriginal and Torres Strait Islander) Act 2006* delegates broad lawmaking powers, including delegated laws to 'modify any of the provisions of this Act ... as they relate to a registered native title body corporate.'²⁸ Finally, the *Native Title Act 1993* delegates a wide variety of lawmaking powers to the government in relation to native title. Important delegated laws have been made under the Act, including the *Native Title (Prescribed Bodies Corporate) Regulations 1999*.

History demonstrates that the Australian federal government has used its delegated lawmaking powers as a tool to regulate the interests of First Peoples in ways that have been criticised for lacking adequate consultation with affected communities. Examples include the introduction of a cashless debit card trial,²⁹ laws made under the *Northern Territory National Emergency Response Act 2007*,³⁰ the Community Development Program,³¹ and powers delegated to the government to regulate traditional lands under the *Stronger Futures in the Northern Territory Act 2012* (Cth).

It is clear that delegated legislation matters to Australia's First Peoples. To bring First Nations perspectives into all aspects of federal lawmaking, the Voice must be closely engaged with the development of relevant delegated laws. Its engagement in this sphere of lawmaking is necessary to accord respect to and recognise the inherent dignity of First Peoples in relation to federal laws that affect them.

An obligation to consult with the Voice

In its report, the NIAA wrote that a formal obligation for the government to consult with the Voice in making delegated legislation would 'create an unnecessary burden on all parties' because of the high volume of newly made delegated legislation. An obligation, they argue, should only apply 'to a limited number' of primary laws.³² Instead of an obligation, the NIAA called for an *expectation* for the Voice

to be consulted by the government in the making of delegated legislation.³³

On the contrary, I propose that the high volume of new delegated laws is a reason that points in favour of a formal obligation to consult because it reveals the extent to which governments rely on this form of lawmaking and its importance to the legal system. A non-binding expectation to consult with the Voice for delegated legislation could paradoxically weaken consultation with First Peoples to the extent that it may incentivise governments to make more policy decisions behind closed doors through delegated laws to avoid an obligation to consult for primary legislation.

While the administrative burden of reviewing new draft delegated legislation is an important consideration, the challenge could be addressed through a combination of a relevancy threshold to trigger the obligation for consultation together with appropriate resourcing.

First, an obligation for consultation would apply only to new delegated legislation that is relevant to First Peoples. While there are likely to be different views on what constitutes a relevant delegated law, and a risk of litigation on this point, a common-sense approach should prevail. In defining relevancy for primary legislation, the NIAA adopted the wording of '[l]aws that overwhelmingly relate to Aboriginal and Torres Strait Islander people' as a 'simple, common-sense standard that is easy to understand and apply ... without requiring legal advice'.³⁴ In the realm of delegated legislation, a similar relevancy test should be applied: laws overwhelmingly affecting the rights or interests of First Peoples in a distinct way as compared to the general population.

Second, the Voice should be appropriately resourced so that it can fulfil its consultation and scrutiny functions for delegated legislation. In relation to consultation, members of the Voice should be assisted by legally trained staff, who would carry out an initial review of relevant draft delegated legislation and draw attention to potential concerns. The staff would also assist the Voice in carrying out consultation work in collaboration with First Nations individuals and communities.³⁵ As a starting point, the appropriate number of staff can be benchmarked against scrutiny bodies: the Senate Standing Committee for the Scrutiny of Delegated

²²*Aboriginal and Torres Strait Islander Act 2005* (Cth) s 4A.

²³*Ibid* s 199(9).

²⁴*Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s 7(2).

²⁵*Ibid* s 10(4)(h).

²⁶*Ibid* ss 9(1), 10(1).

²⁷*Ibid* s 12(1)(d).

²⁸*Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) s 633-5(1) with limits relating to increasing penalties or broadening offences or inconsistency with Native Title legislation: ss 633-5(8)-(9).

²⁹The *Social Security Legislation Amendment (Debit Card Trial) Act 2015* amended the *Social Security (Administration) Act 1999* to introduce the scheme and, among other things, empowered the minister to determine trial participants.

³⁰The Act delegated significant lawmaking powers to the government to regulate Aboriginal communities in the Northern Territory.

³¹The *Social Security Legislation Amendment (Community Development Program) Act 2018* amended the *Social Security (Administration) Act 1999* to introduce the scheme and, among other things, empowered the secretary to determine subsidised employment.

³²*Final Report to the Australian Government on an Indigenous Voice* (n 6) 165.

³³*Ibid*.

³⁴*Ibid* 162. See, generally, *ibid* 150, 159-165.

³⁵To assist the Voice in its consultation function, an explanatory statement should be included with the draft instrument.

Legislation, for example, is assisted by a secretariat that varies depending on workload but generally includes at least five research officers.³⁶

Consulting on draft delegated legislation

Governments are more receptive to changing draft laws as opposed to laws already made. The Voice should therefore be consulted by the government on relevant delegated legislation while it is in draft form – before it has been finalised. Ex post facto scrutiny, while also important, is insufficient. Scrutiny bodies that review delegated legislation after it is made report challenges in having governments address (or, at times, take seriously) their concerns.

In its 2019 inquiry report, for example, the Senate Committee noted its ‘longstanding interest in being able to consider draft delegated legislation’, to further ‘its ongoing commitment to improving its scrutiny functions’.³⁷ The Committee called upon departments to publish draft instruments of ‘significant legislative developments’ so that it would have the opportunity to identify concerns that could be addressed earlier in the lawmaking process.³⁸ Following the report, Senate’s standing orders were amended to authorise the Committee to review draft delegated legislation, although there is currently no obligation for the executive to provide draft instruments to the Committee.³⁹

In Canada, the Standing Joint Committee for the Scrutiny of Regulations examines delegated laws after they are made. It has adopted a questionable practice in an attempt to encourage government responsiveness to its concerns. The Committee seeks to avoid naming and shaming lawmakers. Instead, when it has concerns, the Committee raises them with relevant government departments informally and privately. Only where ‘this process does not yield a satisfactory solution will the Committee consider making a report’.⁴⁰ This approach appears problematic for its lack of transparency, which makes it challenging to work out the nature and extent of its scrutiny concerns and how the Committee interprets and applies its scrutiny criteria. Examining draft delegated laws would help alleviate this problem as governments could conceptualise early consultation as *part* of the delegated lawmaking process.

After being provided with an exposure draft of a delegated law, the Voice must have enough time to review the law and raise scrutiny concerns.⁴¹ In relation to primary

legislation, the NIAA write that consultation should take place ‘at the earliest opportunity’, while appreciating that flexibility is needed to ‘address the full range of possible circumstances’.⁴² A flexible approach should also apply to delegated laws, taking into account that a key feature of delegated legislation is that it can be made more expeditiously than primary legislation. While flexibility would not eliminate the obligation for consultation, it might mean short timelines in exceptional circumstances where there is a genuine need for laws to be made urgently. As noted above, conceptualising consultation with the Voice as part of the delegated lawmaking process will ensure that the Voice is involved early and throughout the development of each new delegated law that is relevant to First Peoples.

The Voice is not envisioned to hold a veto over new laws.⁴³ That said, the government should be committed to genuinely considering concerns raised by the Voice in relation to delegated laws. Authentic consultation that has the potential to bring about meaningful change requires the government to listen to concerns that have been raised and to consider changing draft laws to accommodate those concerns.⁴⁴

Different governments may adopt different approaches to consulting with the Voice. To inform an assessment of the government’s commitment to genuine consultation, the Voice should regularly publish reports that include summary-level information about concerns raised during consultation, associated outcomes and whether undertakings were provided by lawmakers to address the concerns raised.⁴⁵ The Voice should also adopt clear scrutiny principles to promote the consistency of its work and provide a measure of predictability and certainty for other actors.

Scrutiny of delegated legislation once made

In addition to an obligation for consultation in relation to relevant draft delegated legislation, the Voice should be empowered to scrutinise delegated laws after they are made. Ex post facto scrutiny complements earlier draft consultation because concerns may become apparent only after a delegated law has been applied in practice.

Because the relevancy of a delegated law to First Peoples may become clear only after it has been made, the Voice

³⁶Senate Standing Committee on Delegated Legislation, Parliament of Australia, *Annual Report 2021* (28 September 2022) iii https://www.aph.gov.au/-/media/Committees/Senate/committee/regord_ctte/annual/Annual_Report_2021.pdf.

³⁷Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Parliamentary Scrutiny of Delegated Legislation* (Report, 3 June 2019) 22 https://www.aph.gov.au/-/media/Committees/Senate/committee/regord_ctte/DelegatedLegislation/report.pdf.

³⁸Ibid.

³⁹Ibid (recommendation 4). See also Commonwealth, *General Business Notice of Motion No 84*, Senate, 27 November 2019, amending the Senate’s Standing Orders 23 and 25(2)(a).

⁴⁰About the Standing Joint Committee for the Scrutiny of Regulations, ‘Past work’ (Web Page) <https://www.parl.ca/Committees/en/REGS/About>.

⁴¹*Final Report to the Australian Government on an Indigenous Voice* (n 6) 166 discussing a ‘flexible approach based on principles and supported by dialogue’. Consultation should take place ‘as early as possible in the policy process and at multiple stages of the process’ with the available time for consultation connected to ‘the significance for Aboriginal and Torres Strait Islander peoples, whether the National Voice needs to seek input from other stakeholders, and whether the matter is time-sensitive.’

⁴²Ibid 12, 159, 166.

⁴³Ibid 159.

⁴⁴Ibid 11: ‘The relationship between the Australian Parliament and Government and the National Voice would be a two-way interaction, with each able to initiate advice or commence discussion around relevant policy matters.’

⁴⁵A practice of the Senate Standing Committee for the Scrutiny of Delegated Legislation.

should be authorised to scrutinise any delegated law after it has been made. In this way, the ex post facto scrutiny function of the Voice would provide an accountability mechanism for the initial determination of relevancy. No time limit should operate to restrict the scope of delegated laws that can be scrutinised, providing the Voice with the opportunity to raise concerns when they materialise. Similar systems of ad hoc scrutiny for delegated legislation, which is not time-limited, exist in Canada⁴⁶ and New Zealand.⁴⁷

To facilitate the collection of information about how delegated laws work in practice, the Voice should also be equipped with a public complaints mechanism. A complaint about a delegated law would prompt the Voice to review the instrument. Public complaints provide an important feedback loop about how laws are applied in practice. In New Zealand, Parliament's Standing Orders provide for an aggrieved person to complain about the 'operation of a regulation'.⁴⁸ The regulations scrutiny committee then hears the complainant at a meeting, where it may decide to investigate further and publish a report.⁴⁹ This process has drawn the committee's attention to a variety of flawed delegated laws. In 2022, the committee reported on ten public complaints. The reports provide case studies on how delegated legislation works in practice and affects individuals or communities. They have also prompted calls for reform and changes to delegated laws. In reporting on a complaint about delegated legislation regulating resource management and wetlands, for instance, the committee called on the government to improve the clarity of a defined term.⁵⁰ In response to another complaint that the committee investigated, alleging the misuse of an exemption power, the government committed to changing the delegated law.⁵¹

To ensure that its scrutiny concerns are genuinely considered, the Voice should have the power to report to both Houses of the Parliament and recommend the disallowance of delegated legislation. While the recommendation of disallowance would be a unique function for a body external to Parliament, the constitutional entrenchment of the Voice can be seen to justify this special role. This role would also respect Australia's tradition of parliamentary sovereignty.⁵² A recommendation for

disallowance would trigger a House vote, ensuring the ultimate decision remains with elected representatives. Further, the review of a delegated law by parliamentarians would serve to reinforce parliamentary sovereignty by bringing review and control over a delegated law to the constitutional source of the legislative power that has been used to make it. The current disallowance process for delegated legislation is set out in the *Legislation Act 2003*. It provides for the repeal of a legislative instrument by a simple majority of either House through a notice of motion for disallowance that is introduced within 15 sitting days after the instrument is first laid before that House.⁵³ Parliament should enact a modified process for the Voice to recommend disallowance to the Houses without a time limit to give full effect to its ex post facto scrutiny function.⁵⁴ Because of concerns raised in relation to the government excluding certain delegated laws from the definition of 'legislative instrument' under the *Legislation Act 2003*, thereby removing those laws from the risk of disallowance, it is important that relevant delegated instruments should not be excluded or exempted from the disallowance process in relation to the Voice.⁵⁵ Although this article focuses on delegated legislation, it is likely appropriate for the Voice to be empowered to consult on and scrutinise all relevant delegated instruments, whether legislative or administrative in character.

Conclusion

Delegated legislation matters to Australia's First Peoples. It is the largest source of new law in Australia and impacts the rights and interests of First Nations individuals and communities. Delegated laws are often made quickly and can be used by governments to implement policy decisions in the absence of adequate consultation. To bring about genuine change to the way in which federal laws relevant to First Peoples are made, Parliament must equip the Voice with robust consultation and scrutiny functions in relation to delegated legislation.

The Voice's engagement with delegated legislation can also act as a catalyst to help strengthen accountability and transparency in the process of making delegated legislation more generally. The attenuated process for making federal

⁴⁶*Statutory Instruments Act*, RSC 1985, c S-22, s 19.

⁴⁷Standing Orders of the House of Representatives, 2020 SO 326. While the comparison with New Zealand is instructive, it is important to consider constitutional and other contextual differences between the two jurisdictions.

⁴⁸Ibid 2020 SO 328(1).

⁴⁹Ibid 2020 SO 328(2).

⁵⁰New Zealand House of Representatives Regulations Review Committee, *Complaint about the Resource Management (National Environmental Standards for Freshwater) Regulations 2020* (Interim Report, May 2022) https://www.parliament.nz/resource/en-NZ/SCR_123863/3084b7c293d615f5b706440cd1e45ec813b434c1.

⁵¹New Zealand House of Representatives Regulations Review Committee, *Complaint about exemption to Maritime Rule 53.4(2)(a)* (Final Report, June 2022) https://www.parliament.nz/resource/en-NZ/SCR_124089/048547781b756ecf16aac7dbc4dad805f78fd66.

⁵²For a discussion about the Voice and sovereignty see Gabrielle Appleby, Ron Levy and Helen Whalan, 'Voice versus Rights: The First Nations Voice and the Australian Constitutional Legitimacy Crisis' (2023) 46 *UNSW Law Journal* (forthcoming).

⁵³*Legislation Act 2003* (Cth) s 42.

⁵⁴I would also suggest further reforms, including the power for the House to directly amend the relevant legislative instrument: see Lorne Neudorf, Submission to the Attorney-General, *Review of the Legislation Act 2003* (23 December 2021) <https://www.ag.gov.au/sites/default/files/2022-08/33.Associate/Professor/Lorne/Neudorf.PDF>.

⁵⁵See the interim and final reports of the Senate Standing Committee for the Scrutiny of Delegated Legislation's inquiry into exemption of delegated legislation from parliamentary oversight https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Exemptfromoversight; Legislation Act Review Committee, *2021–2022 Review of the Legislation Act 2003* (June 2022) <https://www.ag.gov.au/sites/default/files/2022-08/report-2021-22-review-legislation-act-2003.pdf>.

delegated legislation is set out in the *Legislation Act 2003*. Observers have raised concerns about this form of law-making, especially when it is used by governments to implement new policies outside the parliamentary process.⁵⁶ Legislatures are institutions designed for the task of law-making, being made up of elected members forming a cross-section of the community.⁵⁷ Australia's framers had the architecture of Parliament first and foremost on their minds: the first sections of the *Constitution* build a foundation for a new national legislature.⁵⁸ While compared to sausage-making,⁵⁹ the parliamentary process supplies essential legitimacy for choices made by representatives in the exercise of legislative power that define and regulate public rights and interests.⁶⁰

The delegated lawmaking process does not benefit from the accountability and transparency mechanisms associated with parliamentary lawmaking. For instance, there is no enforceable obligation for a lawmaker to consider the views of others or to consult with those likely to be affected by a change in the law.⁶¹ There is no public debate, no recorded vote and generally no committee study of draft delegated laws. While delegated lawmaking is a reality of the modern state and can be used appropriately in certain contexts with adequate oversight, the opaque nature of how most laws are made is hard to square with notions of lawmaking in a democratic society founded on the rule of law. By engaging

with delegated legislation through complementary consultation and scrutiny functions, the Voice can act as an important agent of change by modelling good lawmaking practice.

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⁵⁶See Appleby (n 12).

⁵⁷See, eg, Jeremy Waldron, 'The Dignity of Legislation' (1995) 54 *Maryland Law Review* 633; Jeremy Waldron, 'Legislating with Integrity' (2003) 72 *Fordham Law Review* 373.

⁵⁸Considerable debate focused on the parliamentary architecture: see, eg, *Debate and Proceedings of the 1898 Australasian Federal Convention* (Third Session, 8 March 1898) https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Records_of_the_Australasian_Federal_Conventions_of_the_1890s.

⁵⁹A metaphor that is generally, but likely incorrectly, attributed to Otto von Bismarck.

⁶⁰It must be acknowledged that there are additional challenges to the integrity of the legislative process, which include the nature of the interests represented.

⁶¹*Legislation Act 2003* (Cth) s 17.