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Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum
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Dear Chair and Deputy-Chair,

Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023

1. Almost ten years ago, I sat down with a small group of constitutional conservatives and Indigenous leaders and worked on a proposal for constitutional recognition. The idea we developed was consistent with our constitutional heritage. It was a uniquely Australian idea designed for Australian conditions. The proposal was called the Voice. It was a voice for Indigenous communities and a voice to our nation's leadership.
2. My support for the concept of the Voice has not changed since that time. I continue to see the Voice as a way of achieving recognition of Aboriginal and Torres Strait Islander Australians in our nation's constitution, but also as a proposal that has a practical aspect. As a Liberal, I support the idea of a Voice because I believe in the dignity of the individual. I believe better policy is made when people affected by it are consulted on that policy. As a conservative I believe in the principle of subsidiarity. I believe that through empowering people, building institutions that shift responsibility and decision making closer to people and local communities, we are more likely we are more likely to shift the dial on Indigenous health, education, housing, safety and economic opportunity.
3. The drafting of the current proposal raises issues which may impede the success of the referendum.
4. Specifically, I believe that the issues raised by the current drafting will make it more difficult for some Australians support the Voice. A failure to address these concerns could lead to a failure at a referendum.
5. I urge the Committee to adopt each of the recommendations below.

RECOGNITION

6. The current proposal recognises Aboriginal and Torres Strait Islander peoples in three ways.
7. First, recognition is expressly mentioned in the long title of the Bill which will form the question on the ballot paper. That long title provides as follows:

A Proposed Law: to alter the Constitution to recognise the First Peoples of Australia by establishing an Aboriginal and Torres Strait Islander Voice.

8. The long title makes clear, by voting yes in the referendum and enacting the Constitution Alteration Bill, Australians are explicitly recognising Aboriginal and Torres Strait Islander peoples in our constitution.

9. Second, recognition is achieved through the heading of Chapter IX itself. That heading reads:

Chapter IX—Recognition of Aboriginal and Torres Strait Islander Peoples

10. These first two forms of recognition do not raise legal issues. Indeed, the Chapter heading makes clear that every word in s 129 recognises Aboriginal and Torres Strait Islander Australians in the Constitution.
11. The third significant way that the Government's proposal recognises Indigenous Australians is through the preambular statement. This is the preambular statement to proposed clause 129, which reads as follows:

In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia:

12. It is a symbolic statement that sets out an incontrovertible fact – that Aboriginal and Torres Strait Islander peoples are the first peoples of Australia. It doubles up on the recognition already achieved through the long title and the Chapter heading.
13. However, more importantly, the inclusion of that chapeau can frame the interpretation of provisions that sit underneath it. In interpreting the Constitution, the High Court will try to give meaning to every word, and the symbolic statement in the chapeau to s 129 may have an uncertain legal effect.
14. The chapeau raises significant questions that would ultimately be determined by the High Court. For instance—what rights, privileges and obligations are implied by 'recognition ... as the First Peoples of Australia'? How is the term 'First Peoples of Australia' defined? What developments in international law around the meaning of 'First Peoples' would a High Court take into account in attempting to flesh out the term?
15. In his evidence to this Committee, the former Chief Justice of Australia, the Hon Robert French AC, has already noted that recognition of Indigenous Australians as 'First Peoples' provides a 'welcome departure' from the recognition on the basis of race:

...the Voice provision provides for the recognition of Aboriginal and Torres Strait Islander peoples, not as a race but as the First Peoples of Australia. That is to their particular historical part, their particular part in the history of this continent, which goes back up to 65,000 years before the enactment of our Constitution.

So the criterion of recognition and the basis for the creation of the Voice is their status as First Peoples. Not their status as Aboriginal people or as Torres Strait Islander peoples, but that particular historical role.

And that provides a significant shift away from the existing race-based legislative power that the Commonwealth has with respect to Aboriginal and Torres Strait Islander peoples, although that power is still there.

What the 1967 amendment did was to take out the exclusion from Commonwealth power to make laws with respect to races, Aboriginal and Torres Strait Islander people, and just drop the Aboriginal and Torres Strait Islander people back into what I call the 'bucket of races' covered by s 51(xxvi), so that when the Commonwealth makes a law about Aboriginal and Torres Strait Islander peoples under that section it is making a law about them as a race. And the concept

of race is really a cultural construct and obviously it's there in the Constitution and has to be given some effect. But this is a welcome departure from that framing.

16. Pragmatically, and as a question of constitutional interpretation—how does the preambular statement interact with the subsections that sit underneath it? It is not uncommon for a chapeau of this type to frame the interpretation of provisions below it. The effect of any such framing is unclear. For instance, is there room for an argument that the functions of the Voice, or the matters on which it can make representations, are in some way limited by the recognition of Aboriginal and Torres Strait Islander peoples ‘as First Peoples’? Would ‘recognition ... as First Peoples’ interact with other parts of the Constitution to limit or confine powers conferred on the Parliament or the Executive (similar to the way that the decision in *Love v Commonwealth* (2020) 270 CLR 153 confined the scope of the power conferred by s 51(xix) of the Constitution)?
17. The issue is that the uncertainty created by the chapeau to s 129 will be a drag on the referendum debate. It leaves room for legitimate questions about the effect of the provision, and the scope for judicial interpretation.
18. The practical risk is that there will be a reduction in the number of Australians who feel comfortable voting for the proposal. At best, this diminishes the recognition and reconciliation sought to be achieved by the Referendum; at worst it may lead to referendum failure.
19. I recommend the Committee reduce those risks as much as possible by removing the chapeau from the Constitution Alteration, effectively taking the issue off the table in the ensuing referendum campaign.

Recommendation 1: Remove the preambular chapeau from proposed section 129.

REPRESENTATIONS

20. Proposed s 129(ii) currently reads as follows:

The Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples.

21. As a matter of principle, I believe the Voice at a local, regional and national level should be engaging with decision makers. It should be contributing to policy development, warning of problems emerging, and providing input.
22. In that sense, it should be engaging with the executive government.
23. It is common sense that if you want to improve outcomes, you should have a hand in developing the policies that produce those outcomes. What is the point of such a Voice if it is not about delivering better outcomes for Aboriginal and Torres Strait Islander Australians?
24. However, that is not the issue here. Rather, the issue question is what implications are to be drawn from the inclusion of s 129(ii) in the Constitution?
25. There are three key issues raised by the inclusion of that clause.

26. First, who can the Voice talk to? Which agencies, organs and instrumentalities are included in 'the Executive Government of the Commonwealth', as that term is used in Chapter IX of the Constitution?
27. Other witnesses to this Committee have made the point that the term is essentially unlimited in its scope.
28. Second, what is covered by the phrase 'matters relating to Aboriginal and Torres Strait Islander peoples'?
29. The explanatory memorandum defines this term inclusively. It specifically mentions two limbs that would fall within the terms 'matters relating to Aboriginal and Torres Strait Islander Peoples':
 - a. matters specific to Aboriginal and Torres Strait Islander peoples; and
 - b. matters relevant to the Australian community, including general laws or measures, but which affect Aboriginal and Torres Strait Islander peoples differently to other members of the Australian community.
30. In other words, the scope of matters on which the Voice may make representations is essentially unlimited (except, perhaps, by reference to the chapeau to s 129). There will almost always be an arguable basis on which to assert that general laws and measures affect Indigenous peoples differently when compared with other members of the Australian community.
31. This is because of the different cultural, economic and social circumstances that affect Aboriginal and Torres Strait Islander Australians. So, for instance, interest rate changes—which are neutral on their face—may affect Indigenous Australians differently because of different rates of home ownership and household or credit card debt among Indigenous communities (when compared with other members of the Australian community).
32. The fact is just about every issue touches Aboriginal and Torres Strait Islander people in some way. Read together, these first two drafting issues mean that s 129(ii) confers a constitutional function of making representations to almost any organ of Government on almost any matter. The implication is that any subsequent law which sought to specify or define the matters on which the Voice could make representations would likely be invalid. Indeed, this view is supported by the advice from the Solicitor-General dated 19 April 2023, which has been provided to this committee: at [30].
33. In short, the current proposal is a long way removed from the recommendation in the Final Report of the Referendum Council in 2017:

The Council recommends:

1. *That a referendum be held to provide in the Australian Constitution for a representative body that gives Aboriginal and Torres Strait Islander First Nations a Voice to the Commonwealth Parliament. One of the specific functions of such a body, to be set out in legislation outside the Constitution, should include the function of monitoring the use of the heads of power in section 51 (xxvi) and section 122. The body will recognise the status of Aboriginal and Torres Strait Islander peoples as the first peoples of Australia.*

34. The third issue raised by section 129(ii) is the uncertainty created by the term 'making representations'.
35. The implications of that phrase are unclear. What does it mean to 'make representations'? Does it imply or leave room for any reciprocal constitutional obligation on the Parliament or the Executive?
36. The explanatory materials released by the Government make clear that the Voice is intended to improve the lives of the Aboriginal and Torres Strait Islander Australians. But a future court might well determine that, in order to have that effect, the Voice must be in a position to fulfil its constitutional function of making representations. This could conceivably include:
 - a. a requirement to notify the Voice of a proposed decision (because how could the Voice provide timely and effective input into policies and programs that affect Indigenous Australians if it did not know about the proposed decision);
 - b. a requirement to provide the Voice with information relevant to a proposed decision (because, again, how is the Voice meaningfully to fulfil its constitutional function if it does not have sufficient information to make effective representations); and
 - c. a requirement for the relevant part of the Executive to at least consider a representation made by the Voice, in line with ordinary principles of administrative decision-making.
37. Critically, including section 129(ii) in the constitutional amendment supports arguments from Voice opponents that the constitutional provision may slow down government decision-making, and expose officials to litigation where they do not comply with implied constitutional requirements.
38. Even the advice of the Solicitor-General that was provided to this committee acknowledges that the drafting creates 'room for argument' about whether executive decision-makers are compelled to consider Voice representations: at [19].
39. The advice suggests that the Government could validly pass legislation to "fix" that issue relying on the power conferred by proposed s 129(iii)—by, for example, specifying whether executive decision-makers are required to consider Voice representations). However, why ask Australians to pass a constitutional amendment that immediately requires a legislative fix?
40. All of these issues can be avoided by simply omitting s 129(ii).
41. Importantly, the Voice can be just as effective without 'constitutionalising' the function of making representations to the Executive Government. In the absence of proposed s 129(ii), legislation enacted pursuant to proposed s 129(iii) (and/or potentially other heads of power in the Constitution) could nevertheless confer the power to make representations to the executive. It could allow the Parliament to specify which agencies the Voice could make representations to, and clearly delineate matters on which representations could be made (if desired). Such legislation could specify the legal effect of any representations made (including whether such a representation must be considered by a decision-maker, or was amenable to litigation).

42. The 'Press Club model' that I have proposed—omitting the chapeau and subsection 129(ii)—would preserve Parliament's power to legislate to allow the Voice to do everything it should do—including making representations to the Executive Government as appropriate.
43. As with the issues identified above, one of the critical problems created by these drafting choices is not legal but political. Fewer Australians will vote for the Voice in a referendum if there are legitimate arguments that s 129(ii) will unduly impact Government decision-making in a way that cannot be altered by a future Parliament. Fewer Australians will vote for a proposal which creates 'room for argument' that there are constitutional problems which must immediately be fixed by legislation.
44. It is crucial that these issues are addressed prior to the referendum, rather than leaving them to be addressed in legislation afterwards. You cannot out-legislate the Constitution.
45. The direct consequence of a failure to address these issues is a reduced vote for the Voice at a referendum. Again, this would diminish the recognition sought to be achieved, as well as Australia's pathway to reconciliation, and in a worst-case scenario may see the referendum fail. For those reasons, proposed s 129(ii) should be omitted from the constitutional amendment.

Recommendation 2: Omit proposed section 129(ii) from the constitutional amendment.

LOCAL & REGIONAL VOICES

46. We know all too well that movement on outcomes for Aboriginal and Torres Strait Islander peoples starts at the local level: on culturally attuned child care services; schools that are working and services to ensure children attend them; training, apprenticeship and university pathways; employment opportunities and incentives to engage in the workforce; prenatal and postnatal support services; mental health support; the availability of doctors and medical workers; housing and food security and economic investments to give communities a future.
47. Empowered local voices is where it will be done.
48. Local voices are a vital part of changing our trajectory on all these issues. That's any National Voice must be accompanied by the voices of communities in Alice Springs, Ceduna, Aurukun, Leonora, Laverton, Arnhem Land, Palm Island and in so many places these communities are dealing with complex, interconnected and very practical issues.
49. In Laverton and Leonora, a local voice means ensuring children get fed. In Alice Springs, a local voice means putting the pressure on Territory authorities so that the scourge of alcohol is tackled. In Aurukun and Ceduna, a local voice may argue for police and justice support so that the streets are safe. In Palm Island, a local voice might mean teacher and school investments so children get the schooling that will give them the best chance in life.
50. Local mayors, school principals, local MPs, local police chiefs and community leaders should hear from local Indigenous people. This is how we will identify on the ground what services are working or not, where there are gaps or cultural misunderstandings in schooling,

training or services; to empower and lift up; and as importantly, to create the spaces to find common ground.

51. The truth is a national voice that is not accountable to local and regional voices, will do little to help people at the local level.
52. My concern is that due to the focus on the constitutional amendment, the government has quietly abandoned local and regional voices. It is focused on the Voice that will have functions at the national level.
53. Any national voice must be grounded in local realities, with a breadth of varied experiences and new voices, not simply a larger platform for those already on the national stage. The Calma Langton report found:

...that local communities want their distinct voices heard by the Australian Parliament and Government... There is a large body of evidence that shows that local empowerment leads to better outcomes in all social indicators. It also provides a clear pathway for community voices to be considered in the advice that can inform decisions made at the national level.

54. I call on the government to re-embrace the principles of Calma-Langton, and allocate funding in May's budget for the establishment of local and regional voices.
55. This work will not be immediate; the Calma-Langton report said it would take three years to fully establish and bed down local and regional voices. But that is not a reason to avoid starting now, ahead of the Referendum.
56. To be clear: to fail on local and regional voices is to deny voices to indigenous Australians who live outside the major capitals - and it will ultimately mean no change on all the issues that matter. The Government must commit to local and regional Voices is its national Voice is to have credibility, and it must start the policy and design work as soon as possible.

Recommendation 3: Commit to and provide funding for the roll-out of local and regional Voices in the upcoming budget, and commence the necessary policy and design work as soon as possible.

Yours sincerely,



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