

THE HON TONY ABBOTT AC

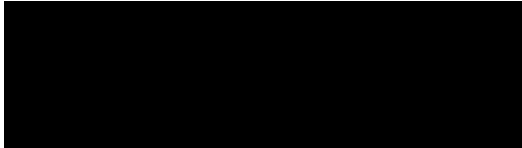
21 APR 2023

The Secretary
Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum
Parliament House
CANBERRA ACT 2600

Dear Sir/Madame

Please find attached my submission to the enquiry into the proposed constitutionally entrenched indigenous Voice. I'd be happy to attend a public hearing if the committee wishes me to elaborate.

Yours faithfully



TONY ABBOTT

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“In Australia, there is no hierarchy of descent; there must be no privilege of origin”
Bob Hawke, Australia Day 1988

The change the committee is considering is a very substantial one that injects new concepts into our polity and has far-reaching ramifications for the business of government. Its heart is the proposed new section 129(2) of the constitution to give this as yet undefined indigenous Voice the right to make “representations”, both to “the parliament” and to “the executive government” on all matters “relating” to indigenous people. Because indigenous people are also citizens, in the absence of further definition, this right to make representations would apply to everything government does.

The whole point of this proposed change is to give the indigenous Voice an ability to influence all-of- government in a way that individual citizens cannot and that indigenous people supposedly never could. In other words, it’s to give indigenous people a collective right to influence government over and above that of everyone else who’d be operating through existing democratic mechanisms. If it were not so, what is the point of the proposed constitutional change?

Consider the mechanics most likely to be entailed by this right to make representations to the parliament and to the executive government. Should this change be implemented, for all significant acts of government – that’s not just new laws, but cabinet submissions, budget proposals, and policy changes at the very least – the relevant governmental decision-maker would need: first, to give the Voice adequate notice; second, to give the Voice adequate information; third, to give the Voice adequate time to respond prior to the decision being made; and fourth, to give the Voice adequate staffing and resources to respond meaningfully. Then, once the Voice’s representation is lodged, should it choose to make one, the decision-maker would need carefully to consider it, and quite possibly to give the Voice a chance to appeal, should its initial representation be rejected in whole or in part.

Any such process would impact massively on the time, complexity, difficulty and confidentiality of governmental decision-making. As currently proposed, this Voice has been described as a “third chamber of the parliament” or a “fourth arm of government”. Although these descriptions have been disputed, there’s no doubt that it would change very substantially the way we’re governed. Indeed, it’s designed to do that. It can’t be “shut up”, as its backers say, and shouldn’t be by-passed. Only a “brave” government, the Prime Minister himself has said, could ignore it.

Sometimes, a right to be consulted amounts to a right to veto. At least to some Voice backers, that’s precisely what’s intended: a kind of co-government in which nothing important can happen except by leave of the original inhabitants. And if that’s not the government’s intention, the proposal should be changed to ensure that it can’t happen.

It’s been said that the proposed section 129(2) could not possibly entail an exhaustive consultative process because that would make the ordinary business of government impossible; and that the High Court would never find that it did. But if not this, what lesser (but still significant) means of making representations would it entail?

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Voice proponents contend that proposed section 129(3) means that the representation mechanism would be a matter for parliament to decide. But parliament's powers under this section are expressed to be "subject to this constitution" which means that it would ultimately be up to the High Court to decide whether any rules contained in an act of parliament were sufficiently expansive to satisfy the over-riding constitutional right. And any contention that the court would not find a much more expansive right for indigenous representations to be made post-referendum than pre-referendum is simply not credible.

It would be possible for the proposed change to be amended to specify exactly to whom, and on what, the Voice might make representations; and what is expected of the entity to which representations are made. That would avoid the issue of having questions of such importance left to the court. But it wouldn't avoid the fundamental problem of giving some citizens, depending on their ancestry, a greater right to influence government than everyone else.

Contrary to Bob Hawke's declaration that "there must be no privilege of origin", the Voice introduces into our polity a power distinction based on ancestry. It's creating something akin to a house of lords: an entity within the institutionalised power structure of the country to which only people with some indigenous ancestry can be admitted.

Because it would introduce a "privilege of origin" and a "hierarchy of descent" any separate, institutionalised indigenous Voice, to the whole of government or to the parliament only; in legislation or in the constitution; local or national; is wrong in principle, as well as most likely deeply problematic in practice.

The parliament itself is the national voice and it's where the voices of Australian citizens in all their diversity should be heard. If ever there might have been a need for a substantial and separate entity to make known to everyone else indigenous perspectives, it's well and truly passed, now that the parliament itself includes eleven individual indigenous voices.

It's said that the Voice is needed if intractable problems like "closing the gap" are ever finally to be fixed. As anyone who has spent significant time in remote Australia would know, there is no lack of consultation with indigenous leaders. What's missing are some of the key features of ordinary Australian life: kids going to school; adults going to work; and communities being policed. This stems from a misguided view of the role of "culture", arising from assumptions about indigenous "difference" and separate-ness, that any Voice would serve to reinforce rather than diminish. That's why the Voice would be doubling down on failure rather than the fresh start claimed.

Of course, any right to make representations would include the right to initiate matters as well as to respond to them. Again, the Voice would need to be adequately resourced to ensure that this right could meaningfully be exercised.

As flagged in the Uluru statement that the Prime Minister says the government is committed to "in full", it could be expected that the Voice would make representations about treaties between the Commonwealth and groups of its indigenous citizens; about "truth-telling"; and about reparations, given that, according to the Uluru statement, sovereignty was never ceded to the Crown.

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Because there's so much uncertainty about the Voice and because it's such a big change to the way we're governed, there's every likelihood that the coming referendum will fail, despite all the individuals and entities barracking for it and despite a tax-payer funded "education" campaign. Win or lose, it's likely to leave our country embittered and divided. Yet constitutional change should be unifying and bi-partisan.

Hence my plea to the committee: not that it should recommend changing the proposal but that it should urge the government to reconsider its commitment to a Voice and to restart the whole process of indigenous constitutional recognition that ran off the rails some years back; indeed, as soon as it became more than recognition; and instead, a bid to address, through the constitution, problems that would better be tackled through the normal action of government.

Constitutions should be owned by everyone. If the flaw in our otherwise very serviceable constitution is that it excluded indigenous people when it was drafted in the 1890s, that's not going to be solved by a contemporary recognition process that excludes everyone else.

What should have happened after mid-2015 is a community engagement process involving all Australians, not one largely confined to the indigenous leadership. And then different options should have been presented to at least one constitutional convention for sustained debate and scrutiny. Instead, it was largely indigenous meetings that preceded the Uluru gathering in 2017. And since then, it's been assumed that recognition means the activist Voice, that many indigenous leaders want, rather than the simple recognition that the whole country would support.

At least, though, prior to May last year, the processes for considering the Voice were fully bi-partisan. Since then, it's been a maximalist Voice or nothing. Everyone who dissents, however respectfully, has been placed under suspicion of closet racism towards indigenous people. This is no way to make our country more united and to put behind us the errors and the prejudices of the past. That's why this whole process should be started afresh before any more damage is done.