



6 April 2023

Committee Secretary
Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum

Dear Secretary

Inquiry into Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023

Thank you for the opportunity to make a submission. I do so in a personal capacity, while noting I was a member of the government's Constitutional Expert Group.

The proposed wording of the change to the Constitution is a safe and sound means of achieving the Voice. I make the following further points:

1. The amendment comprising three simple and direct sentences is written in a style and at a level appropriate for the Australian Constitution. The wording strikes an appropriate balance between establishing the constitutional parameters of the body, while leaving key design features to Parliament. It is not appropriate to insert greater detail about the Voice into the Constitution as such matters should be left to Parliament to determine from time to time based upon experience and the expectations of future generations.
2. The Voice will be prefaced by words stating that the change is: 'In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia'. This is an important addition that makes clear why the Constitution is being changed. The Voice is an act of recognition to ensure that Indigenous peoples are included in the nation's founding document while affirming their status as the first peoples of Australia. These words tie the referendum proposal to the concept of recognition, which has been an animating idea in the reconciliation and constitutional change movement for more than two decades.
3. The change is well-drafted to create an advisory body of Indigenous peoples able to make representations to Parliament and government, without introducing problematic and unintended consequences. The limited scope of the body is made clear by the use of the word 'representations'. It conveys the fact that the body will provide advice, and does not have a veto, nor can it mandate outcomes. No obligations, reciprocal or otherwise, are placed on other bodies to, for example, wait for the Voice to make a representation.
4. The wording is respectful of Australia's federal arrangements. The Voice is only guaranteed the capacity to make representations to Parliament and the executive government 'of the Commonwealth'. This limits the work of the Voice to these national institutions, while leaving Parliament able in the future to increase the remit of the Voice to other bodies and tiers of government. Any extension would be a matter for the people's elected representatives and is not something the Voice itself could initiate.

5. Parliament has the key role of determining how the Voice will operate, including as to its composition, functions, powers and procedures. It has been given a general power to legislate about the Voice, including to determine the legal effect of its representations. This power is subject to the other provisions of the Constitution and clauses 1 and 2. For example, Parliament could not abolish the Voice nor deny it the power to make representations to the institutions and as to the subject matter set out in clause 2.
6. The Voice is established as a political institution, and its success will depend on the quality of its representations and ability to influence Parliament and government. As with any other provision establishing such institution, the High Court will interpret and apply the words inserted into the Constitution. This means:
 - The High Court may be asked to ensure the Voice operates within its remit, for example, to call it to account if it makes representations about matters not related to Indigenous peoples or if it makes representations to other bodies such as the United Nations (unless this has been authorised by Parliament).
 - In the case of Parliament, there is little or no prospect of a successful High Court challenge. The Court has said repeatedly that it will not intervene in the internal workings of Parliament. This is a key aspect of the separation of powers in Australia, and is not something the Voice would change.
 - Courts are more likely to scrutinise the work of ministers and public officials. We expect people who exercise public power will make fair decisions following a sound process. This includes taking into account information relevant to making the decision. If a public official fails to consider this information, courts routinely direct that person to go back and make the decision again, taking into account the information that was missed. The court does not direct what the decision should be, only that it is properly made. Hence, Ministers and public officials who receive a representation from the Voice may need to read and consider that representation when they make a decision. For example, if a minister is considering whether to impose an alcohol ban affecting an Indigenous community, and the Voice had made representations about whether this was a sound idea and the impact on the community, the minister should take this into account. If the minister refused to read advice from the Voice, a court might direct the minister to remake the decision with the benefit of all the relevant information.
 - This is our system of government working as it should. The High Court interpreting the Constitution and ensuring it is obeyed is a fundamental aspect of the rule of law and separation of powers in Australia. The High Court should operate as a check and balance when it comes to the Voice, as it does for other constitutional matters. Judicial oversight provides the community with confidence that the Voice will operate as set out in the Constitution.

Yours sincerely

Professor George Williams AO