

5 May 2023

Senator Nita Green,
Chair,
Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum
Parliament House,
Canberra, ACT 2600

Dear Senator Green,

I was informed yesterday by the Secretariat that Senator Bragg has placed the following question on notice for me to answer by 4pm today:

Proposed section 129(ii) reads: “*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*”.

Please provide your view on the following alternative approaches to subsection (ii).

1. Removing subsection (ii) to allow the matters around the Voice’s representations to the Parliament and the Executive Government to be addressed by legislation.
2. Replacing subsection (ii) with “*The Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the Ministers of State for the Commonwealth on proposed laws and matters with respect to Aboriginal and Torres Strait Islander peoples and to the Parliament and the Executive Government of the Commonwealth on such other matters as the Parliament provides*”.
3. Amending subsection (ii) by replacing the words “*Executive Government*” with the words “*Ministers of State*”.

To give a sensible answer to these questions, the following first needs to be understood:

- Any legal person can make representations to the Executive Government.
- The ability to make such representations, assuming they are political communications, is constitutionally protected by the implied freedom of political communication.
- The Voice, as a body, will be a legal person and therefore have the capacity to make representations to the Executive Government regardless of whether ‘Executive Government’ is mentioned in s 129(ii).
- Parliament could not legislate to prohibit the Voice from making representations to the Executive Government, because this would breach the implied freedom of political communication.
- Parliament could, however, regulate the way such representations are made, if it does so for a legitimate purpose and in a proportionate manner.
- In addition, if the guaranteed capacity to make representations to Parliament in s 129(ii) remains, this would include making representations to Parliament about Executive matters, because (a) Ministers sit in Parliament; (b) the Executive Government is accountable to Parliament; and (c) the Executive Government is subject to laws made by Parliament, so Parliament can make laws to direct or constrain the way that executive power is exercised.

I will first explain and substantiate these points, and then draw on that explanation to provide an answer to the questions that have been specifically asked.

The capacity of the Voice, as a legal person, to make representations to the Executive Government

Every legal person – which includes human beings, corporations and other bodies – has the capacity to do a range of things, such as own property, spend money, and enter into legal relations. They can also make representations to the Executive Government. This falls within the common law freedom of speech and the freedom under a system of representative democracy to communicate with parliamentary and government representatives. Such communications happen daily when people write letters to ministers or when peak bodies or corporations lobby ministers and government decision-makers.

If the referendum is passed, the Voice will be recognised as a ‘body’ which is capable of exercising powers and fulfilling functions. It will therefore be a legal person. Even if the Voice is not given an express function of making representations to the Executive Government in proposed s 129(ii) of the Constitution and is not given express power to do so by legislation enacted under proposed s 129(iii), it would still be able to make representations to the Executive Government.¹

The Voice could make such representations, just as I could, or the Minerals Council of Australia could, or the Ethnic Communities Council of Victoria could. The attention paid to those representations would depend upon their relevance, quality and the community standing of the Voice.

But if that function is not included in s 129(ii), couldn’t it be taken away by legislation?

If there was no guaranteed capacity to make such representations in proposed s 129(ii) of the Constitution, there would still be constitutional protection provided by the implied freedom of political communication. Representations by the Voice to the Executive Government about matters relating to Aboriginal and Torres Strait Islander peoples would amount to political communications, as they would be seeking changes to government policies or the preservation of existing policies or raising issues that need to be addressed by the Executive Government.

If Parliament were to enact a law prohibiting the Voice from making representations to the Executive Government, this would amount to a ‘burden’ on the implied freedom. The law could therefore only be enacted if it was for a ‘legitimate purpose’, being a purpose that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.² Given that the purpose of the Voice is to allow Indigenous experience and perspectives to be heard in order to influence laws and policies, I cannot conceive of a legitimate purpose that could support a law that prohibited the Voice from making representations to the Executive Government. Without such a purpose, the law would be invalid.³

¹ This would be so unless there were something included in the proposed amendment that limited the powers of the Voice to make representations and overrode the implied freedom of political communication. Any such limitation would have to be very clearly expressed – see the principle of legality. I do not see any such limitation in the current proposed s 129.

² See the test set out in *Brown v Tasmania* (2017) 261 CLR 328, [104].

³ *Unions NSW v New South Wales (No 2)* (2019) 264 CLR 595.

If such a purpose did exist, however, the law would only be valid if it was reasonably appropriate and adapted to advance that legitimate purpose in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. This requires the law to meet a proportionality test – i.e. that it be justified as suitable, necessary and adequate in its balance. It is hard to see how a prohibition on making representations to the Executive could meet this test.

Could Parliament legislate to regulate how representations to the Executive Government are made?

Yes, Parliament could legislate to regulate⁴ how representations to the Executive Government are made, and this is the case regardless of whether ‘Executive Government’ is included in s 129(ii). Parliament could, for example, make a law concerning how such representations are made (eg that they be made in writing) and the procedure for making them to the Executive Government (eg that representations are made to the appropriate portfolio minister or to a particular portal, so that the Executive Government can ensure they are properly recorded, accessible and distributed to the appropriate authorities). Such legislation would fall within the power in proposed s 129(iii) to make laws ‘with respect to matters relating to the Aboriginal and Torres Strait Islander Voice, including its composition, functions, powers and procedures’. Regulation of this kind would not take away the capacity to make representations to the Executive Government or affect the subject matter of those representations.

Depending upon the nature of the regulation, it might be argued that the law imposed a burden on the implied freedom of political communication. If this was accepted by a court, a legitimate purpose for the law would need to be established. In this case the need for government efficiency, certainty as to what representations had been received, and the capacity to deal with representations in a ‘whole of government’ fashion across portfolios, would, in my view, constitute a legitimate purpose. The question would then be whether the law met the proportionality test as it was ‘suitable’ (because it had a rational connection to its purpose), ‘necessary’ (because there was no obvious and compelling alternative reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom of political communication) and ‘adequate in its balance’ (because the purpose served by the law outweighs the extent of the restriction that it imposes on the freedom). In my view, a regulatory law of this kind would meet this test and would also not be inconsistent with proposed s 129(ii) if the words ‘Executive Government’ remained in it.

Does a constitutionally guaranteed power to make representations to Parliament incorporate a capacity to make representations to Ministers as part of Parliament?

If the Voice had a constitutionally guaranteed power in proposed s 129(ii) to make representations to the Parliament, this would also entail a capacity to make representations about executive matters and effectively to make those representations to the Executive Government through Parliament. The Executive Government is formed by Ministers who are members of either the House of Representatives or the Senate.⁵ Any representation to the Parliament would therefore be heard by Ministers.

⁴ For example, there are laws that regulate lobbying. The validity of foreign influence transparency provisions that regulate political lobbying was upheld in *LibertyWorks Inc v Commonwealth* (2021) HCA 18.

⁵ Constitution, s 64 (subject to 3 months’ grace period to find a seat).

Ministers are responsible to Parliament and accountable to it. They could therefore be questioned in Parliament at Question Time, in Estimates Committees or in other parliamentary proceedings about how they have responded to representations by the Voice to Parliament or why they have failed to do so.

The Executive Government is bound by laws made by Parliament and executive power may be limited by laws made by Parliament. The Voice could therefore make a representation to Parliament that the Executive Government should or should not act in a particular way, and Parliament could choose to make a law that required the Executive Government to act or limited its powers to do so.

Accordingly, an entitlement in s 129(ii) for the Voice to make representations to Parliament, would include an entitlement for it to make representations to Parliament about executive matters, which would be heard by the Executive Government. It would, as always, be a matter for Parliament and the Executive Government to decide how or whether to respond to those representations.

Question 1 – What would be the effect of removing proposed s 129(ii)?

If proposed s 129(ii) were removed, the amendment would require there to be a body called the Aboriginal and Torres Strait Islander Voice and give Parliament power to make laws with respect to matters relating to it, including its composition, functions, powers and procedures. Parliament could then make a law conferring upon it power to make representations to the Executive Government and Parliament. But even if Parliament did not do so, once the Voice was given its composition, so that it could function as a body, it would have the same freedom as any other body to make representations to the Executive Government and the Parliament.

Assuming, for present purposes, that the referendum was passed, it is likely that the current Parliament would make a law that dealt with the composition of the Voice and specifically conferred upon it the power and function of making representations to the Executive Government and Parliament, including how such representations were to be made. What would then happen if after an election, a different Government was formed and wished to take away the capacity of the Voice to make representations to the Executive Government? It would have to legislate to do so (regardless of whether the power of the Voice to make representations was conferred by legislation or was simply a common law freedom possessed by any legal person).

Assuming, which seems unlikely, it was able to get the Senate to pass such a bill and it became law, would the law be valid? As noted above, this is where the implied freedom of political communication would come into play. If it were a blanket ban on making representations to the Executive Government, it is hard to see how such a law would be valid. What would be a legitimate purpose for such a law that was compatible with the constitutional system of representative and responsible government? If it were a more limited restriction, it might be valid, but this would depend upon its purpose and whether it met the proportionality test.

One area where it might make a difference could be the breadth of the matters upon which the Voice may make representations. The current draft of s 129(ii) provides that those

representations may be made ‘on matters relating to Aboriginal and Torres Strait Islander peoples’. It is conceivable, for example, that a future Parliament might wish to confine representations to matters directly affecting Aboriginal and Torres Strait Islander peoples (although doing so would probably be counter-productive as it would result in endless litigation about what ‘directly affects’ Aboriginal and Torres Strait Islander peoples – which is why the current wording does not take that approach). Such a law would still be a burden on the implied freedom of political communication, so it would need to have a legitimate purpose and be proportionate to it. I suppose it could be argued that the legitimate purpose is to ensure that representations are focused upon the areas of greatest impact upon Aboriginal and Torres Strait Islander peoples to ensure that the representations are more effective, but it seems pretty weak. On the whole, I think it would be difficult to justify a law that said you can make representations only on matters ‘directly affecting’ Aboriginal and Torres Strait Islander peoples, but not otherwise on matters ‘relating to’ them.

In political terms, the removal of s 129(ii) would mean the amendment would require that this body exist, but give it no purpose or function at all, leaving this to Parliament to determine. This might well leave the voting public mystified as to the point of the exercise and less inclined to vote for the amendment. It would strip away its apparent meaning and purpose – even if this could later be filled in by legislation.

Question 2 – What would be the effect of replacing s 129(ii) with “*The Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the Ministers of State for the Commonwealth on proposed laws and matters with respect to Aboriginal and Torres Strait Islander peoples and to the Parliament and the Executive Government of the Commonwealth on such other matters as the Parliament provides*”.

The effect of this would be impliedly to remove the common law freedom of the Voice as a legal person to make representations to Parliament and the Executive Government, as it would instead appear to be confined to doing so either under the constitutionally conferred power (to make representations to the Parliament and the Ministers of State for the Commonwealth on proposed laws and matters with respect to Aboriginal and Torres Strait Islander peoples) or under power conferred upon it by Parliament (‘on such other matters as the Parliament provides’). This would also likely affect the operation of the implied freedom of political communication, as it expressly and apparently exclusively deals with what representations can be made and to whom. If such a path were to be taken, it would require more comprehensive thought and analysis that I can give it in the short time available to me.

Such a provision would mean that when the Voice was making representations about Executive matters, such as policies, it would either have to make those representations to Parliament or Ministers, unless Parliament legislated to provide a capacity to make representations to other officers of the Executive Government.

It would also mean that the Voice could make representations to Ministers on matters with respect to Aboriginal and Torres Strait Islander peoples. If the concern with the existing s 129(ii) is that it might give rise to constitutional implications that require the Voice to be given advance warning and information before policy decisions are made or that representations be given consideration, then this wording would seem to give rise to the same problems in relation to policies and decisions made by Ministers.

As stated in my previous submission, I do not believe that such an implication would be drawn from s 129(ii). My point here, however, is that the proposed alteration does not seem to be effective at averting the imagined problem. At best, it would quarantine the problem to decisions made by Ministers, but if one is going to attribute extreme activism to the High Court, which involves overriding the text and intention of the provision, then presumably it could also override previous decisions about the non-justiciability of policy matters and require administrative decision-makers to take into consideration representations made to the relevant Minister about the subject-matter of the decision-maker's decision. Hence, the drafting would not solve the mischief that prompted it.

In relation to the subject matters upon which the Voice could make representations to Parliament, this is not confined to 'proposed laws' (i.e. bills before the Parliament, rather than existing laws that might need changing). It also extends to 'matters with respect to Aboriginal and Torres Strait Islander peoples', which means the Voice could effectively make representations to Parliament on anything it liked, including existing or desired laws, as long as this fell within 'matters with respect to Aboriginal and Torres Strait Islander peoples', as is already the case under the current proposed s 129(ii). It means that the words 'proposed laws' do not really achieve anything here.

Question 3 – What would be the effect of amending subsection 129(ii) by replacing the words “*Executive Government*” with the words “*Ministers of State*”?

First, in my view, Parliament has the power in s 129(iii) to regulate how submissions are made so it could require that they be made to Ministers, without breaching the current proposed s 129(ii), because such representations would still be made to the 'Executive Government'. Equally, Parliament could legislate to ensure that representations made to Ministers are communicated to public servants and that in particular cases, decision-makers are required to take them into consideration. That could occur even with respect to decisions that Ministers have no power to direct or influence. From that point of view, the change is unlikely to make much difference.

Would it avert the High Court from making the constitutional implications that seem to be the catalyst for the proposed change? I doubt it. If the High Court wants to take the extreme step of drawing an implication that is not rooted in the text and structure of the Constitution and is contrary to the clearly expressed intention of the provision, then why would it not do so if the words 'Ministers of State' were instead used? If one uses the reasoning of those concerned that such an implication would be made, the Court could just as well, as noted above, draw an implication that administrative decision-makers such as public servants and statutory office-holders are required to take into account representations made by the Voice to Ministers upon the subject-matter of the decision, even if the Minister had no power to direct that consideration be given to the representation.

I should again stress that I don't consider that the Court would draw such implications, for the reasons given in my original submission. We are fighting with phantoms here. The problem with going down the 'what if' rabbit-hole that contemplates extreme possibilities is that any action that seeks to avert one extreme possibility can be overtaken, using the same reasoning, by another extreme possibility. It simply takes us further and further away from the terra firma of orthodox legal reasoning.

Anne Twomey, 5 May 2023