

20 April 2023

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

Dear Secretary,

Submission on the Constitutional Alteration (Aboriginal and Torres Strait Islander Voice) 2023

We welcome the opportunity to make a submission on the Constitutional Alteration (Aboriginal and Torres Strait Islander Voice) 2023. We are legal academics with expertise in Australian constitutional and administrative law based at the University of Queensland Law School. We each make this submission in our personal capacity. Some of us will also be making separate submissions individually or jointly with other people.

Our key submission is that the new constitutional provision, s 129, proposed in the Constitutional Alteration (Aboriginal and Torres Strait Islander Voice) 2023 is appropriate and well-drafted in that it (1) meets the aspirations for constitutional recognition of Aboriginal and Torres Strait Islander peoples as expressed in the Uluru Statement from the Heart, and (2) involves very minimal risk of unintended legal consequences.

Our submission below addresses each of s 129's subsections in turn. We can be contacted for further information through Dr Dylan Lino at [REDACTED]

Sincerely,

Associate Professor Rebecca Ananian-Welsh
Professor Peter Billings
Professor Anthony Cassimatis AM
Dr Dani Larkin
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Subsection (1)

This provision imposes a constitutional requirement that an Aboriginal and Torres Strait Islander Voice shall exist. The provision is a suitable means for meeting the understandable desire of Aboriginal and Torres Strait Islander peoples, expressed through the Uluru Statement, for the Voice's existence to be protected from abolition at the sole discretion of the Parliament or the Executive Government. In this way, subsection (1) ensures that the Voice will not meet the same fate as previous national First Nations representative bodies, which could be and were abolished by either executive or legislative action. By protecting the Voice from executive or legislative abolition, subsection (1) also helps to ensure that the Voice will be independent and better able to hold both Parliament and the Executive to account. If the Voice was vulnerable to abolition by Parliament or the Executive, it would likely be less willing to hold them to account out of fear that they would abolish it in retaliation.

Subsection (2)

This provision guarantees that the Voice will have, at a minimum, power to make representations to Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander peoples. The scope of this provision is appropriate; indeed, it is necessary to meet the aspiration of Aboriginal and Torres Strait Islander peoples, as expressed in the Uluru Statement, to have a meaningful say over the government decisions that affect their lives.

One important aspect of subsection (2)'s scope is that it ensures the Voice can make representations to both Parliament and the Executive Government. Since the government decisions that affect Aboriginal and Torres Strait Islander people's lives are made by both of these institutions, it is important that both are included within the remit of the Voice's representation-making function. If Executive Government was left out of the subsection or if the range of Executive actors was narrowed down (for instance, to Commonwealth Ministers only), the Voice would fail to be an adequate vehicle for giving Aboriginal and Torres Strait Islander peoples a meaningful say over the government decisions that affect them.

A second important aspect of subsection (2)'s scope is that it ensures the Voice can make representations about 'matters relating to Aboriginal and Torres Strait Islander peoples'. The provision thus appropriately ensures that the Voice can make representations about both laws and policies that are directly targeted at Aboriginal and Torres Strait Islander peoples and about general laws and policies that impact on Aboriginal and Torres Strait Islander peoples. To restrict the Voice's representation-making function only to matters directly affecting Aboriginal and Torres Strait Islander peoples would mean that the Voice would be denied a say over a great deal of government action that impacts Aboriginal and Torres Strait Islander people's lives. It would exclude general laws and policies on many of the matters most crucial to closing the gap, such as health, education, employment and criminal justice. Excluding such matters from the Voice's remit would seriously diminish its effectiveness.

As many eminent public lawyers have already made clear, there is minimal risk that subsection (2) would result in the imposition of constitutional obligations on the Parliament or the Executive (for instance, to consult with the Voice or to consider or follow its representations). The text of the provision gives the Voice a power to make representations to the Parliament and the Executive; there is nothing in the text that expressly states or implies that the Parliament or Executive are under any obligation in relation to the Voice's representations.

A more specific version of this issue is whether representations made by the Voice would constitute mandatory relevant considerations that executive decision-makers would have to take into account when making decisions. There is very little risk that subsection (2) would impose mandatory relevant considerations on executive decision-makers regarding representations made by the Voice. The reason is simple: the courts have held that it is *the statutes under which executive decisions are made* that determine whether a consideration is mandatory or not.¹ In other words, it is entirely a matter for the Parliament to determine whether executive decision-makers need to consider representations made by the Voice. That Parliament will be able to determine the legal effects (if any) of the Voice's representations is further confirmed by the broad power given to Parliament in s 129(3) to legislate on matters relating to the Voice.

Subsection (3)

This provision provides Parliament with a sensibly wide legislative power to make laws on matters relating to the Voice. The provision strikes the right balance between constitutional entrenchment and legislative flexibility. On the side of constitutional entrenchment, the words 'subject to this Constitution' make clear that subsection (3) would not allow the Parliament to abolish the Voice (guaranteed in subsection (1)) or to narrow or remove its representation-making function (guaranteed in subsection (2)). On the side of legislative flexibility, the Parliament is given a broad power to address all other matters relating to the Voice, which expressly includes (but would not be limited to) 'its composition, functions, powers and procedures'.

This approach to the Voice – guaranteeing its existence and a minimum set of functions in the Constitution while leaving much of the detail to legislation passed by Parliament – is consistent with the approach taken to other institutions established under the Constitution, especially the High Court and the Executive. It ensures that the Voice will have both the stability it requires to be effective and the flexibility it requires to adapt to the changing needs and aspirations of First Nations peoples. Importantly, once the Voice is established through legislation, subsection (2) guarantees that the Voice will be able to make representations to the Parliament and the Executive on any future proposals to alter the Voice itself.

¹ See *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39–46 (Mason J).