14 April 2023

Committee Secretary
Joint Standing Committee on the Aboriginal and Torres Strait Islander Voice Referendum
PO Box 6021
Parliament House
Canberra ACT 2600

Dear Secretary,

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

Thank you for the opportunity to make a submission to this inquiry on the Aboriginal and Torres Strait Islander Voice Referendum.

I am an Associate Professor at the University Technology of Sydney Faculty of Law. My research focuses on public law and the rights of Indigenous peoples, both in Australia and internationally. I am writing in support of the language proposed in the new section 129.

My support is grounded on two elements. First, the concept of a Voice is consistent with our constitutional system of governance and the proposed text in s 129 is safe and legally sound. Second, the notion of an Aboriginal and Torres Strait Islander Voice and the development and refinement of the constitutional text to give effect to the Voice has been led by Aboriginal and Torres Strait Islander peoples.[1] This is consistent with the United Nations Declaration on the Rights of Indigenous Peoples and the National Agreement on Closing the Gap.

The proposed change is set out below:

> **129 Aboriginal and Torres Strait Islander Voice**
> In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia:
> 1. there shall be a body, to be called the Aboriginal and Torres Strait Islander Voice;
> 2. 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;
> 3. the Parliament shall, subject to this Constitution, have power to make laws with respect to matters relating to the Aboriginal and Torres Strait Islander Voice, including its the composition, functions, powers and procedures.

There are several points to note. In discussing these, I draw on the ANU First Nations Portfolio's Issues Paper on an Aboriginal and Torres Strait Islander Voice.[2]

The Voice is intended to be a representative body. However, the proposed amendment does not provide that the Voice shall 'represent' or be 'representative of' Aboriginal and Torres Strait Islander peoples. Section 129(3) provides that the Parliament has the power to make laws with respect to the composition of the Voice. There is a risk that a future Parliament may pass legislation providing that members of the Voice will be appointed by government. This would cut against the rationale and spirit of the Voice but is an option available to Parliament. This could be avoided by a change in the text of section 129 requiring that the Body's members are 'selected' by Aboriginal and Torres Strait Islander peoples.

[1] See Gabrielle Appleby, Sean Brennan and Megan Davis, 'A First Nations Voice and the Exercise of Constitutional Drafting' (2023) *Public Law Review* (forthcoming).
[2] Australian National University First Nations Portfolio, *Issues Paper on a First Nations Voice Referendum* (November 2022).

Nevertheless, given this language was not adopted by the Referendum Working Group, I support the current text.

Section 129(2) empowers the Voice to 'make representations' to the Parliament and Executive Government. This form of words clarifies the scope of the Voice:

The Voice can speak to Parliament and the Executive Government. The Regional Dialogues that preceded the Uluru Statement from the Heart demonstrated that many Aboriginal and Torres Strait Islander peoples do not feel they are heard in the development of law and policy that affects them. In our system of government, proposed laws are developed within the Executive and then presented to Parliament. This means that if the Voice is to be able to influence law and policy, it needs to speak to both the Parliament and the Executive.

Some concerns have been expressed that allowing the Voice to present its views to the Executive will mark a radical change in Australia's system of governance. Commentators have suggested that failure by a decision-maker in the Executive (such as a Minister, or Public Servant) to provide adequate time for the Voice to make representations or failure to genuinely consider those representations may trigger court action. Concerns along these lines are misplaced for at least two reasons.

1. All Australians are entitled to seek recourse in the courts when they believe the Government, Ministers or other public officials have acted beyond their power. This is not a radical proposition. As former Chief Justice Robert French has explained, the fact that someone might argue that the Government should have consulted the Voice or should have changed its decision based on that consultation 'flows from the fact that Australia is governed by the rule of law'.[3]

2. In many areas, such as native title and cultural heritage, legislation already requires that the Executive consult with Aboriginal and Torres Strait Islander peoples. How that consultation operates in practice is controlled and constrained by law. The same will be true with the Voice. The text in section 129(3) makes clear that Parliament retains the authority to determine whether and how the Executive responds to any representations. Parliament may decide that the Executive must have regard to any representations made by the Voice. However, if Parliament determines the balance is not right, the legislation can be amended. This is entirely appropriate.

The Voice will be a proactive institution. The Voice is not limited to responding to issues that arise in Parliament or that are proposed by the Executive. Rather, section 129(2) enables the Voice to make representations on issues that Aboriginal and Torres Strait Islander people believe are important to their lives and communities. This is consistent with the views of Aboriginal and Torres Strait Islander peoples as expressed during the Regional Dialogues. It also improves the likelihood that the Voice will be able to reflect the interests and wishes of its constituents, helping to ground its legitimacy within Indigenous communities. This is important if the Voice is to be effective.

A Voice is not a veto. The Voice is an advisory body that is able to raise issues with the Parliament and the Executive on matters relating to Aboriginal and Torres Strait Islander peoples. This function is consistent with both the Regional Dialogues and our system of representative government. There are no grounds for asserting that the Voice is or will be a third chamber of Parliament.

The Voice can choose what it wants to speak on. The Voice may make representations on matters 'relating' to Aboriginal and Torres Strait Islander peoples. This is mandate accords with Indigenous peoples' right to self-determination. It is also consistent with the views of Aboriginal and Torres Strait Islander peoples as expressed during the Regional Dialogues.

[3] Robert French and Geoffrey Lindell, 'The Voice—High Return, Low Risk' (Presented at the Judicial Commission of New South Wales Exchanging Ideas Symposium, 4 February 2013) 15.

This wording has also been the subject of criticism. Some commentators have argued that the mandate is too broad and that the Voice should only be permitted to make representations on matters 'directly affecting' Aboriginal and Torres Strait Islander peoples. I do not support a narrower mandate. Given the Voice is intended to give Aboriginal and Torres Strait Islander peoples a say over matters that affect them, it would be wrong in principle to limit what the Voice can consider. In any event, the constitutional text does not impose an obligation on the Executive or Parliament to respond, so there is no practical value in limiting what the Voice can make representations on.

There is no constitutional obligation on Parliament or the Executive to respond. There is nothing in the text of proposed section 129 that requires the Executive or the Parliament to consult with or act on any representations made by the Voice. Parliament retains full control over its own procedures. This means that Parliament can amend legislation and adjust processes if it believes the relationship between the Voice and other institutions of government is not working appropriately. For example, Parliament could enact legislation to require public officials take the advice of the Voice into account when making decisions. However, Parliament could always amend or remove such a requirement. The Voice is subject to Parliament.

Section 129(3) makes clear that the Parliament retains the authority to determine the design of the Voice. This is appropriate within our constitutional system. Section 129 is broad and facilitative. Parliament is the institution that should deal with the details. These details should be worked out in partnership with Aboriginal and Torres Strait Islander peoples following a successful referendum.

Yours sincerely

Harry Hobbs