

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

Australian Parliament

Canberra ACT 2600

20 April 2023

Dear Chair,

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

Thank you for the opportunity to make a submission to the Committee's inquiry into the *Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023*.

I am writing in my capacity as a former Commonwealth Minister for Indigenous Affairs, and a former Commonwealth Attorney-General. I am also writing as a former State President of the New South Wales Division of the Liberal Party, and a Liberal Party member of over 60 years' standing.

Like many of my Liberal friends and colleagues, I would like to be in a position to vote for an Aboriginal and Torres Strait Islander Voice in our constitution.

However, I hold grave concerns about the constitutional amendment as currently drafted. Those concerns centre around proposed section 129(ii), which provides that the Voice:

*...may make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples;*

As presently drafted, this provision is a stumbling block which will lead many from my side of politics away from supporting the Voice, and may ultimately lead the Referendum to fail.

I suggest the issues are threefold.

**First**, proposed s 129(ii) would constitutionalise the function of making representations to 'the Executive Government of the Commonwealth'. The scope of that function is extraordinarily broad.

Much has already been said about the Voice's capacity to make representations to the Reserve Bank of Australia. The Reserve Bank is of course an independent entity established by the *Reserve Bank Act 1959*, with responsibilities for monetary and banking policy (among other things). Nevertheless, many commentators have made the point that, in a constitutional context, it is part of the Executive Government of the Commonwealth.

So too, arguably, are the Australian Secret Intelligence Service, the Australian Submarine Corporation, the National Competition Council, the Australian Nuclear Science and Technology Organisation, Airservices Australia and our uniformed military services.

**Second**, the range of matters on which the Voice may make representations is essentially unlimited. The Voice may make representations about any matter 'relating to Aboriginal and Torres Strait Islander peoples'. The explanatory materials define this term inclusively, to include:

- matters specific to Aboriginal and Torres Strait Islander peoples; and
- matters relevant to the Australian community, including general laws or measures, but which affect Aboriginal and Torres Strait Islander peoples differently to other members of the Australian community.



The overwhelming impression is that there is no limit to the matters on which the Voice may advise. It is always arguable that a general law may affect Aboriginal and Torres Strait Islander Peoples differently because of their different socio-economic or cultural circumstances. Interest rates, for instance, may affect Indigenous Australians differently because of different rates of home ownership, or different amounts of household and credit card debt, when compared with other Australians.

**Third**, there is a significant concern that conferring a constitutional function of 'making representations' implies some sort of reciprocal obligation—an obligation which could never be amended or narrowed by legislation.

As the explanatory memorandum notes, when discussing the practical and substantive effect of the Voice for Aboriginal and Torres Strait Islander peoples:

*...this proposed constitutional amendment ... provides for an institution to improve their lives.*

But how can the Voice have that effect if it does not know about a decision about a policy or program that may affect Indigenous lives, or if it does not have sufficient information to make representations? What meaningful difference can representations make if a public servant does not even have to consider them?

A future Court might very well take the view that the provision, as drafted, requires that public servant to provide notice and information about decisions, or to consider the representations made.

Together, these drafting issues leave open the possibility that the Voice may make representation to whichever agency it chooses, on whatever topic it chooses, and that in doing so there would be a corresponding burden placed on that agency.

The common thread to all of these issues is that they leave matters to be decided by the judiciary.

As presently drafted, it will be the judiciary that decides whether the constitution permits the Voice to make representations to the Reserve Bank. The High Court would be able to determine whether the Voice had a function of making representations on, say, matters of Defence policy, and whether the public servants involved were required to consider those representations.


It is appropriate for the Voice to make representations to the Executive, but that does not mean the function need be conferred in the Constitution, where it cannot be amended by Parliament.

Yet as presently drafted, that is what the amendment does. Proposed section 129(ii) transfers power away from the people and the Parliament, and into the hands of the courts.

Many Liberals like me will not support such a far-reaching transfer of responsibility, even though they might support the Voice in principle. The risk is that, in leaving the proposed section 129(ii) as presently drafted, many potential votes in support of the Voice may be lost. And in a narrow poll, those votes may ultimately be the difference between success and failure at a referendum.

I urge the Committee to omit section 129(ii) from the Constitution Alteration, and instead recommend that those functions be conferred on the Voice by subsequent legislation.

Kind regards,

  
The Hon Councillor Philip Ruddock AO