



20 April 2023

Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum
PO Box 6201
Canberra ACT 2600

By email: jscvr@aph.gov.au

Dear Secretary

Re: Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023

Thank you for the opportunity to make a submission to the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum. We are members of the Gilbert + Tobin Centre of Public Law at the Faculty of Law & Justice, University of New South Wales. We are solely responsible for the views and content in this submission.

The Gilbert + Tobin Centre has over twenty years' experience in leading public debate based on the research of its members on issues of public law significance in Australia and internationally. The Gilbert + Tobin Centre has supported both the deliberative process of the Regional Dialogues in 2016-2017 leading to the Uluru Statement from the Heart, and subsequent work on the proposal for constitutional recognition of Aboriginal and Torres Strait Islander people through a representative Voice.

As members of the Gilbert + Tobin Centre, we strongly endorse the current proposal for Chapter IX, s 129 of the Constitution, that is before the Committee in the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023.

In this submission, we outline how this proposal represents:

1. **Respectful and dignified recognition**
2. **A legally sound proposal**
3. **Human rights advancements**

1. Respectful and dignified recognition

The proposal before the Committee represents an opportunity for the Australian nation to recognise Aboriginal and Torres Strait Islander peoples as First Peoples in the *Constitution*, in a way that accords respect and dignity to First Nations people. Aboriginal and Torres Strait Islander people rejected purely symbolic constitutional recognition in 2015 in the Kirribilli Statement.¹ The Voice is the form of recognition requested by Aboriginal and Torres Strait Islander peoples themselves, through their call for structural change in the Uluru Statement from the Heart.

The First Nations Constitutional Convention at Uluru, and the Regional Dialogues process that preceded it, were convened by the Referendum Council across the course of 2016-2017. The Council was jointly appointed in a bipartisan manner by then Prime Minister Malcolm Turnbull and then Leader of the Opposition Bill Shorten on 7 December 2015 to advise them on the ‘next steps towards a successful referendum to recognise Aboriginal and Torres Strait Islander peoples in the Constitution’. The Terms of Reference for the Council specifically required that it run a process for national consultations, including a ‘series of Indigenous-designed and led consultations’.² The recommendations in the Kirribilli Statement were a key motivation in the creation of the Referendum Council.³

The Aboriginal and Torres Strait Islander Voice is the proposal that was endorsed at the First Nations Constitutional Convention following a rigorous deliberative process across Australia through the Regional Dialogues.

2. A legally sound proposal

The proposed drafting provides appropriately robust minimum constitutional guarantees for the existence and primary function of the Voice, while also providing inbuilt flexibility for the evolution and improvement of the Voice. In particular, the provision delivers the following:

- a) The establishment of a new constitutional institution, with a new constitutional chapter (Chapter IX). This demonstrates its distinct constitutional character, distinguished from the existing institutions and their specific constitutional functions: the Voice is not legislative, executive or judicial, but a new type of representative institution that will improve the work of Parliament and Government.
- b) The ability to make representations to the two key arms of government that make decisions and develop policies and laws that affect Aboriginal and Torres Strait Islander people: the Parliament and the Executive. This minimum relationship is legally sound for the following reasons:
 - The Voice is able to ‘make representations’, and the provision says nothing as to how those representations must be received, or considered by Parliament or members of the Executive. These subsequent aspects of the relationship will be determined through future legislation, policy and practice, to allow the relationship to evolve into one that is beneficial for the Voice, the Parliament and the Executive, and allows the Voice to fulfil its

¹ *Final Report of the Referendum Council* (30 June 2017) Appendix G.

² The Terms of Reference can be found in Appendix B of the *Final Report of the Referendum Council* (30 June 2017).

³ *Final Report of the Referendum Council* (30 June 2017) [1.2].

promise of delivering better outcomes for Aboriginal and Torres Strait Islander people.

- As constitutional law academics, we view it as highly unlikely that the High Court would imply a constitutional obligation to go beyond this minimum guarantee, as has been suggested in some public commentary. There is nothing in the text of section 129 that indicates an implication that the Parliament or Executive Government must consider, or give effect to, a representation from the Voice. Further, it is clear from the Explanatory Memorandum and other supporting materials that the intention is not to impose any obligations on the Parliament or Executive Government. Attempted analogies with language in statutory schemes fail to appreciate two key points. First is the broad function bestowed on the Voice by this constitutional provision, and the multitude of possible decisions and policies it might apply to; this renders analogy to the obligations upon parties in more specific relationships and dealings under statutory schemes inapt in the current context. Second, the analogy assumes an equivalence in the likely appetite of the High Court to constitutionally imply such an obligation on par with the making of an implication in an ordinary statute; this ignores the Court's traditional reluctance to draw constitutional implications given the effective lack of legislative correction that is available in the case of statutory implications.

Our view on this point accords with a substantial weight of expert opinion, including that of former Chief Justice of the High Court of Australia Robert French,⁴ former High Court Justice Kenneth Hayne,⁵ leading barrister Bret Walker SC,⁶ Professor Anne Twomey,⁷ and other constitutional law academics.⁸

- c) An appropriate relationship between the Voice and the Executive Government of the Commonwealth in subsection 129(ii). The Voice's capacity to make

⁴ See eg, Robert French, 'The Voice – A Step Forward for Australian Nationhood' on *AUSPUBLAW* (20 February 2023) <https://www.auspublaw.org/first-nations-voice/the-voice-a-step-forward-for-australian-nationhood/>; Robert French, 'The Voice: Facts and Issues' (Speech, Piddington Society, 23 March 2023) <https://www.youtube.com/watch?v=o5JObBZJ2BE>; Robert French, 'Commentary on Climate Change Litigation and Voice Presentations' (Commentary on Conference Papers, Gilbert + Tobin Centre of Public Law 2023 Constitutional Law Conference, 10 February 2023) [5], [11]-[13] - available at [https://academyoflaw.org.au/resources/Publications/Gilbert%20Tobin%20Constitutional%20Law%20Conference%20Climate%20Change%20Litigation%20and%20The%20Voice%201022023%20\(002\).pdf](https://academyoflaw.org.au/resources/Publications/Gilbert%20Tobin%20Constitutional%20Law%20Conference%20Climate%20Change%20Litigation%20and%20The%20Voice%201022023%20(002).pdf)

⁵ See eg, Mick Baker and Damien Carrick, 'Former High Court justice Kenneth Hayne backs Voice to Parliament details', *ABC* (online, 29 March 2023) <https://www.abc.net.au/news/2023-03-29/kenneth-hayne-backs-voice-to-parliament-details/102153848>. See also evidence of Kenneth Hayne to the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, *Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum* (14 April 2023).

⁶ See evidence of Bret Walker SC to the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, *Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum* (14 April 2023).

⁷ See eg, Anne Twomey, Submission No 17 to the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, *Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum* (13 April 2023) 5-8.

⁸ See eg, Scott Stephenson, 'Justiciability and the Voice' (2023) *Public Law Review* (forthcoming), available now at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4347586;

representations to the Executive Government of the Commonwealth ensures that it will be able to have input into the development of laws and policies, rather than having to wait until a proposal is put to Parliament.

A range of concerns have been raised in particular about the potential relationship between the Voice and the Executive Government under (ii). Many of these concerns are ill-founded, as we explain above. Others pertain to the *practical* operation of the Voice in engaging with organs of the Executive. The answer to these concerns lies in the power of the Parliament to make laws governing these questions, as set out in (iii) of the proposed constitutional amendment. For example, Parliament will need to legislate so that the Voice interacts with government departments and public servants in a manner compatible with the constitutionally prescribed system of representative and responsible government. Parliament will also need to consider how the Voice makes representations to independent agencies consistent with their statutory function and independence.

Under (iii), the relationship between the Voice and the Executive, and the process through which the Executive will receive the representations of the Voice, remains a matter for Parliament to determine. This view of the interpretation of (iii) is consistent with the prominent constitutional lawyers and academics we cite above. This interpretation is also confirmed in the Explanatory Memorandum.⁹ As part of its processes, and given the constitutional role that Parliament plays under s 128 of the Constitution, the Committee can also state in its report that this is the intended operation of (ii) and (iii) read together, thereby lending further support to the position that this is the proper construction of the two proposed sub-clauses, in ways that effectively address any legitimate concerns about this issue. We reiterate, the very broad power of Parliament under (iii) in the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 is the answer to these concerns.

Finally, while the potential scope of the Executive in (ii) is broad, the Voice will have to prioritise to whom it speaks – within the limits of resources, as well as the political realities it operates within. It will be responsible for these choices politically, and in particular to its constituencies of Aboriginal and Torres Strait Islander people across the country.

- d) A function of making representations across a broad range of matters ‘relating to Aboriginal and Torres Strait Islander Peoples’. This broad scope is vital. Again, as we noted above in relation to choosing to whom it will speak, what the Voice chooses to speak in relation to will largely be determined by the Voice itself – it will set its priorities and be politically accountable for doing so, in particular to its constituencies. The scope of what the Voice can speak about will, appropriately, be constrained by political realities. Any attempt to further legally limit the scope would likely reduce the impact and success of the Voice – as it will be in a unique position to know what decisions, policies and laws are of acute concern to Aboriginal and Torres Strait Islander people at any point in time. Further, any attempt to limit this scope would prompt disputes over what matters were inside or outside of scope and therefore increase the potential for future litigation.

⁹ See further Explanatory Memorandum [12], [14], [15], [21], [27].

- e) A broad, flexible head of power for Parliament to make laws on matters relating to the Voice, that will ensure the Voice is able to evolve and adapt, and improve. Importantly, this will remain subject to the minimum constitutional guarantee in subsection 129(ii), but the Parliament will be able to legislate for how the Voice's representations are received, processed and considered within Parliament and the Executive. This is a constitutionally sound approach that is entirely consistent with Australia's constitutional tradition and design. The *Constitution* in 1901 similarly established the High Court of Australia, while leaving the machinery of how it would function to be legislated by the Parliament.

3. Human rights advancements

The proposal represents significant advancement for Australia towards meeting its human rights commitments. Most particularly, the proposal advances:

- a) The right to self-determination, as expressed in Article 1 of both the International Covenant on Civil and Political Rights (ICCPR) and of the International Covenant on Economic and Social Rights (ICESCR), and affirmed in Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).¹⁰ Self-determination is the cornerstone of the UNDRIP,¹¹ and is an 'ongoing process in which institutions of decision-making are devised that enable indigenous peoples to make decisions related to their internal and local affairs and to participate collectively in external decision-making processes'.¹² As outlined above, the proposal for the Aboriginal and Torres Strait Island Voice as currently drafted in the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 is the proposal endorsed by Aboriginal and Torres Strait Islander peoples themselves at the First Nations Constitutional Convention following a rigorous deliberative process. As such, accepting the proposal in its current form would itself be an appropriate and significant recognition of the right to self-determination.
- b) Relatedly, the right to political participation, which is a pillar of self-determination and is affirmed in Article 25 of the ICCPR. The establishment of the Aboriginal and Torres Strait Islander Voice in the Constitution, in its currently drafted form, will provide an enduring mechanism for the ongoing participation of Aboriginal and Torres Strait Islander peoples in legislative and policy decision-making processes on matters that affect them, in a way that advances their rights to self-determination and political

¹⁰ Relevantly, the Special Rapporteur on the situation of human rights and fundamental freedom of Indigenous Peoples has noted that the UNDRIP does not create new rights for Indigenous Peoples, 'but rather provides a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of indigenous peoples': S James Anaya, 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development: Report of the Special Rapporteur on the situation of human rights and fundamental freedom of indigenous people', UN Doc A/HRC/9/9 (11 August 2008) [86]. While the UNDRIP is a non-binding declaration of the UN General Assembly, it was formally endorsed by Australia in 2009, and the rights it affirms are contained in binding treaties, such as the ICCPR and ICESCR, which Australia has both signed and ratified.

¹¹ See, for example, discussion in Megan Davis, 'Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples' (2008) 9 *Melbourne Journal of International Law* 439.

¹² United Nations Expert Mechanism on the Rights of Indigenous Peoples, 'Efforts to Implement the United Nations Declaration on the Rights of Indigenous Peoples: indigenous peoples and the right the self-determination: United Nations Expert Mechanism on the Rights of Indigenous Peoples' UN Doc A/HRC/48/75 (4 August 2021) [19].

participation. Within the boundaries of section 129, the broad scope of matters on which the Voice may make representations, as well as the ability for the Voice to set its own priorities, further advances the right to self-determination.

- c) The rights to non-discrimination and equal protection, as set out in Article 26 of the ICCPR. The Voice progresses, and does not detract from, these rights. The Committee on the Elimination of Racial Discrimination has explicitly recognised that the rights of Indigenous peoples, affirmed in the UNDRIP, are not in breach of broader equality and anti-discrimination guarantees. Rather, they recognise the distinctive, collective identity of Indigenous Peoples.¹³

Yours sincerely

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¹³ Committee on the Elimination of Racial Discrimination, *General Recommendation No 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms Racial Discrimination*, UN Doc CERD/C/GC/32 (24 September 2009) [14], [15], [26].