



Law Council
OF AUSTRALIA

Office of the President

5 May 2023

Senator Nita Green
Chair
Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: jscvr@aph.gov.au

Dear Senator Green

Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum

The Law Council of Australia was grateful for the opportunity to appear on 1 May 2023 before the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum on its 'Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum'.

On 4 May 2023, the Law Council was asked by email to take on notice two questions from Senator Andrew Bragg.

Question 1

The question

1. Senator Bragg asked the following Question 1:

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 [**alternative 1**].
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*" [**alternative 2**].
3. Amending subsection (ii) by replacing the words "*Executive Government*" with the words "*Ministers of State*" [**alternative 3**].

The response

Alternative 1

2. The Law Council does not support this amendment.
3. As emphasised in the Law Council's submission,¹ section 129(ii) provides for the core function of the Voice—namely to 'make representations' to the Parliament and Executive 'on matters relating to Aboriginal and Torres Strait Islander peoples'. It identifies and provides for a constitutional guarantee for the core function of the Voice. Without section 129(ii), the Voice's purpose would be less certain and the power in section 129(iii) significantly less bounded.
4. Without section 129(ii), the power in section 129(iii) would be vast, enabling the constitutional body established under section 129(i) to be empowered in any way Parliament determines.² Parliament may, for example, provide the Voice with functions which go well beyond 'making representations'. On the other hand, it may provide the Voice with minimal functions at all, rendering it insignificant. The ability to make representations to Parliament and the Executive Government of the Commonwealth would not be assured by the Constitution as an enduring core function, and the Voice's functions would be left at the whim of Parliament.
5. This approach would not be consistent with the Uluru Statement, which seeks constitutional empowerment of Aboriginal and Torres Strait Islander peoples. It would also be at odds with the intention of creating a lasting and authoritative body that, because of its core ability to make representations to Parliament and the Executive Government of the Commonwealth, will have a substantive impact on reforms relating to Aboriginal and Torres Strait Islander peoples. It would also undermine the function of the Voice as a means of substantive recognition and as a means to give effect to the right to self-determination.

Alternative 3

6. It is simpler to deal with alternative 3 first, as it is a more straight-forward amendment than alternative 2.
7. Alternative 3 would amend section 129(ii) so that it instead provides (changes made to current section 129(ii) of the Constitution Alteration in red):

*the Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the ~~Executive Government of the Commonwealth~~ **Ministers of State** on matters relating to Aboriginal and Torres Strait Islander peoples*
8. Under this proposal, the Voice would retain the constitutionally enshrined function of providing representations to Parliament; however, it would only also guarantee its ability to make representations to 'Ministers of State', a subset of the 'Executive Government of the Commonwealth'.
9. The Law Council does not support this amendment.

¹ Law Council of Australia, Submission 19 to the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, *Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum*, (21 April 2023),[32]

² Subject to express (eg, 'subject to this Constitution') and implied limitations.

10. As noted in its submission, Law Council considers that to be most effective, the Voice must be able to make representations across the breadth of the Executive Government of the Commonwealth, given the different roles that various parts of the Executive play in developing and reviewing policy, performing powers and functions and proposing laws.³ The Voice can make a difference not only in terms of substantive policy and legislation development but in the way in which things are done, by fostering and building collaborative and productive relationships with the Executive.
11. Enabling representations to be made to the 'Executive Government of the Commonwealth' would include officials within Commonwealth Departments of State, who are responsible for developing policies which directly affect Aboriginal and Torres Strait Islander peoples and communities. The Law Council considers that the Voice must be able to reach and influence the bureaucracy if Aboriginal and Torres Strait Islander people are to inform policy development at an early stage. The importance of this has been described eloquently to this Committee in evidence given at hearings.⁴
12. Limiting the power to make representations to Ministers of State would hamper the flexibility required to reach key Executive officials in leadership roles who are responsible for the development of policies, programs and services with acute relevance to Aboriginal and Torres Strait Islander persons. It may also generate unnecessary inefficiency and delay, by requiring the Minister to handle all representations and then distribute them as relevant.
13. Retaining the words 'Executive Government of the Commonwealth' would also enable representations to be made directly to entities with responsibility for performing statutory functions and powers which affect Aboriginal and Torres Strait Islander peoples. Such entities may wish to seek a representation from the Voice to assist them in carrying out their functions fairly and effectively. These include the:
 - Australian Electoral Commission, which manages an Indigenous Electoral Participation Program, the stated objectives of which 'are to increase enrolment, voter turnout, formality and employment of Aboriginal and Torres Strait Islander people in Australian election';⁵
 - Productivity Commission, which reviews progress on Closing the Gap;⁶ and
 - Australian Law Reform Commission, which undertook an inquiry in 2016 about the incarceration rates of Aboriginal and Torres Strait Islander peoples.⁷
14. Further, and in any event, Parliament has power under section 129(iii) to regulate the manner in which representations may or must be made to the Executive Government of the Commonwealth, as necessary to ensure clarity and efficiency, without removing the flexibility that the current wording provides. This includes the power to direct that

³ Ibid [45]-[46].

⁴ Evidence to the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, Parliament of Australia, Canberra, 14 April 2023, 6-7 (Ms Pat Anderson), 7-8 (Professor Megan Davis), 16-17 (Professor Tom Calma), 17 (Professor Marcis Langton) and 1 May 2023, 40 (Mr Noel Pearson).

⁵ Australian Electoral Commission, 'Indigenous Electoral Participation Program' (webpage, <https://www.aec.gov.au/indigenous/iepp.htm>) accessed on 4 May 2023.

⁶ Productivity Commission, 'Closing the Gap Review – Terms of Reference' (7 April 2022) <https://www.pc.gov.au/inquiries/current/closing-the-gap-review/terms-of-reference>.

⁷ Australian Law Reform Commission, 'Incarceration rates of Aboriginal and Torres Strait Islander peoples' (1 December 2016) <https://www.alrc.gov.au/inquiry/incarceration-rates-of-aboriginal-and-torres-strait-islander-peoples/>.

the Voice's representations be sent to particular entities within the Executive Government of the Commonwealth, such as Ministers, as is appropriate. In certain circumstances, it may, however, consider that representations could be more efficiently made to eg, Productivity Commissioners, the President of the Australian Law Reform Commission, as flagged above, or Departmental Secretaries..

Alternative 2

15. Alternative 2 would amend section 129(ii) so that it instead provides (changes made to current section 129(ii) of the Constitution Alteration in red):

*the Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the ~~Executive Government of the Commonwealth~~ **Ministers of State for the Commonwealth on proposed laws and matters relating 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.***

16. Alternative 2, in effect, would provide for two functions, being:
- (a) a constitutionally guaranteed function 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*'; and
 - (b) a legislatively defined function to make representations '*to the Parliament and the Executive Government of the Commonwealth on such other matters as the Parliament provides*'.
17. Function (a) is very similar to alternative 3. The only differences are:
- the addition of the express power to make representations on 'proposed laws' as well as 'matters'; and
 - the use of the phrase '*with respect to* Aboriginal and Torres Strait Islander peoples' [emphasis added] instead of 'relating to'.
18. Neither of these changes are of consequence.
19. The Law Council considers that a 'matter' relating or with respect to Aboriginal and Torres Strait Islander peoples, particularly as part of a function of making representations to Parliament, would include 'proposed laws' which affect Aboriginal and Torres Strait Islander peoples in a different or unique way.⁸

⁸ Law Council of Australia, Submission 19 to the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, *Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum*, (21 April 2023) [47]. See also The Hon Robert French AC, *The Voice — A Step Forward for Australian Nationhood* Exchanging Ideas Symposium, Judicial Commission of New South Wales New South Wales Bar Association and New South Wales Law Society (4 February 2023), https://www.judcom.nsw.gov.au/wpcontent/uploads/2023/02/French_R_Exchanging-Ideas-Syposium-4-February-2023-3.pdf (Hon Robert French AC February 2023 Symposium Address) [45].

20. As noted in the Solicitor-General's advice, the phrase 'relating to' has been held to have an equivalent operation to 'with respect to' in the context that the latter term is used in section 51 of the Constitution.⁹
21. Function (b) purports to provide Parliament with the power to provide for the Voice to make representations to the Parliament and the Executive Government of the Commonwealth on 'other matters'. This appears intended to permit an expansion of the Voice's functions: that is, to enable Parliament to empower the Voice functions to a broader range of entities (Executive Government of the Commonwealth, rather than Ministers of State), on a broader range of matters ('other matters' beyond 'matters relating to Aboriginal and Torres Strait Islander peoples').
22. The Law Council does not support this amendment.
23. Firstly, the constitutionally guaranteed function to make representations is also limited to Ministers of State, which is undesirable, for the reasons set out above.
24. Secondly, it is not clear why it is necessary to provide Parliament with a power to enable the Voice to make representations on matters which could not already be characterised as 'matters relating to Aboriginal and Torres Strait Islander peoples'.
25. Finally, the drafting would create an odd outcome whereby:
 - representations on 'matters relating to Aboriginal and Torres Strait Islander peoples' could be made to Parliament and Ministers of State; and
 - Parliament could make laws permitting it to make representations on 'other matters' – that is, matters *other than* matters relating to Aboriginal and Torres Strait Islander peoples to those entities *and* other entities which make up the Executive Government of the Commonwealth.
26. That is, the Voice may be empowered to make representations to, for example, public servants and statutory entities of the kinds referred to above, on matters other than matters relating to Aboriginal and Torres Strait Islander peoples, but not on matters relating to Aboriginal and Torres Strait Islander peoples themselves. The rationale for the distinction in the breadth of Parliament's powers is unclear.
27. Further, this amendment creates unnecessary complexity and is likely to lead to confusion across the Australian population.

Question 2:

The question

28. Senator Bragg asked the following Question 2:

Proposed section 129 (iii) reads: "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 composition, functions, powers and procedures."

⁹ Stephen Donaghue KC, 'SG No. 10 of 2023, In the Matter of Proposed Section 129 of the Constitution' (19 April 2023), ('Solicitor-General's opinion') [25] (footnote 40) attached to the Hon Mark Dreyfus KC MP, Submission to the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum (21 April 2023).

- Please provide your view on including the following words at the end of section 129 (iii) as follows: “and the legal effect of its representations”.
29. The Law Council considers that amending section 129(iii) to include the words ‘and the legal effect of its representations’ adds unnecessary words into the Constitution.
 30. As stated in its submission to the Committee, the Law Council considers that section 129(iii) already allows Parliament to determine the legal effect of any representation made by the Voice.¹⁰ That is, to make laws which determine whether, and if so in which circumstances, an Executive Government decision-maker has a legal obligation to consider the Voice’s representations.
 31. This view is shared by multiple eminent constitutional law experts,¹¹ including the Solicitor-General who affirms he has ‘no doubt’ that the power conferred under section 129(iii) to Parliament would allow it to regulate the legal effect of representations made by the Voice.¹²
 32. Adding unnecessary words to the Constitutional Alteration should be avoided. In this context, the Law Council refers to Professor Twomey’s submission, which highlights that while there may be an attraction amongst lawyers to legal specificity, this can make a provision appear too complex and confronting to the general public and ultimately cause it to fail at the referendum.¹³

Contact

Please contact Ms Leonie Campbell, Director of Policy on [REDACTED] or at [REDACTED], in the first instance, should you require further information or clarification.

Yours sincerely

[REDACTED]

Mr Luke Murphy
President

¹⁰ Law Council of Australia, Submission 19 to the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, *Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum*, (21 April 2023), [58]-[59] and [86].

¹¹ See, Prof Anne Twomey, Submission 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); The Hon Robert French, Submission 98 to the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, *Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum*, (21 April 2023), [54(4)]; Evidence to the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, Parliament of Australia, Canberra, 14 April 2023, 39-40, (the Hon Kenneth Hayne).

¹² Stephen Donaghue KC, 'SG No. 10 of 2023, In the Matter of Proposed Section 129 of the Constitution' (19 April 2023), ('**Solicitor-General's opinion**') [38] attached to the Hon Mark Dreyfus KC MP, Submission to the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, *Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum* (21 April 2023), [28].

¹³ Prof Anne Twomey, Submission 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), 9-10.