

## The Voice by Joshua Creamer

Like most things in Indigenous Affairs, it has not taken long for the debate surrounding the Voice to descend into positions based on political ideologies and us poor Indigenous folk once again become the political football booted about the park in an endless pursuit of ideals. It may not feel like that to you, but it certainly does to me and many other First Nations people, who once again see the prospects of our children's future played out in the political pages of the Australian, the ABC and Sky News. Hence my hesitancy in adding another voice to the debate.

For my own sake hopefully my contribution is nothing more than a soft breeze on a cool winter's day.

### Contemporary political history of constitutional recognition

Constitutional recognition of First Nations people in Australia is not new. In fact, the current debate is older than the combined age of my three children. Some commentators note the genesis on the current political commitment to constitutional referendum lies in an election commitment made by former Prime Minister John Howard AC made in 2007, to if re-elected to 'immediately working in consultation with Indigenous leaders on referendum within 18 months to formally recognise Indigenous Australians in our Constitution'.<sup>1</sup>

Since that time there has been almost a constant stream of analysis of the issue. In 2012, there was the Expert Panel on Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution. In 2015, a Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples. In 2017, The Referendum Council.

In 2017, the Uluru Statement from the Heart, National Constitutional Convention called for the establishment of a First Nations Voice enshrined in the Constitution and a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history.

In 2018, there was another Joint Select Committee on Constitutional Recognition.

At Garma in July 2022, Prime Minister Albanese proposed a number of questions for the referendum, those questions were recently considered by a 2023 Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum (**Committee**).

### Proposed model

The Bill proposed by the Government and considered by the Committee is the *Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023* Bill. The Bill proposes the following:

Item 1 of Schedule 1 would amend the table of contents which appears at the beginning of the Constitution to insert a reference to a new 'Chapter IX' named 'Recognition of Aboriginal and Torres Strait Islander Peoples'.

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<sup>1</sup> The right time: constitutional recognition for Indigenous Australians: address to the Sydney Institute, Sydney 11 October 2007 at p5  
<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FL41P6%22;src1=sm1>

Item 2 would insert a new Chapter IX titled ‘Recognition of Aboriginal and Torres Strait Islander Peoples’ in the Constitution. It would also insert a new s 129 titled ‘Aboriginal and Torres Strait Islander Voice’, as the only section in Chapter IX of the Constitution.

A new s129, Aboriginal and Torres Strait Islander Voice

In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia:

- i. there shall be a body, to be called the Aboriginal and Torres Strait Islander Voice;
- ii. 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;
- iii. 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.

### **Committee submissions**

The Committee received 270 submissions, which contain a broad range of views, I don’t propose to consider the breadth of those views here but encourage those that are interested to access the submissions. I will briefly mention four submissions that I have found useful in preparing this paper.

Professor Emerita Anne Twomey’s submission to the Committee notes:<sup>2</sup>

- a) The power to give the Voice substance is conferred on Parliament in s 129(iii), which gives Parliament power to make laws with respect to matters relating to the Voice, including its composition, functions, powers and procedures
- b) Parliament’s power in s 129(iii) is ‘subject to the Constitution’, as are most other legislative powers conferred by the Constitution, including those in s 51. It would therefore be subject to express constitutional provisions and existing constitutional implications, such as the separation of powers, federalism and the implied freedom of political communication
- c) the only power of the Voice will be to make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples.”

Professor Twomey’s submits that the Voice will not interfere in any way with the existing jurisprudence on the separation of powers nor will it give rise to an obligation on Parliament and the Executive Government:

- a) to advise the Voice in advance before making any law or policy on a matter relating to Aboriginal and Torres Strait Islander peoples,
- b) to consult the Voice in advance before making any law or policy on a matter relating to Aboriginal and Torres Strait Islander peoples;
- c) not to make any law or policy on a matter relating to Aboriginal and Torres Strait Islander peoples until it has received a representation from the Voice
- d) to consider any representation made by the Voice on a matter relating to Aboriginal and Torres Strait Islander peoples before making a law, policy or administrative decision; or

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<sup>2</sup> Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum  
Submission 17

- e) to give effect to representations made by the Voice when making any law or policy on a matter relating to Aboriginal and Torres Strait Islander peoples.

The Commonwealth Attorney-General's submission attached the advice from the Solicitor-General on the proposed amendments. The Solicitor-General was asked to consider whether the proposed s129 was compatible with Australia's system of representative and responsible government established under the Constitution? And whether the power to legislate "with respect to matters relating to the Aboriginal and Torres Strait Islander Voice" in proposed s 129(iii) of the Constitution empower the Parliament to specify whether, and if so, how, Executive Government decision-makers are legally required to consider relevant representations of the Voice?

Both questions were answered in the affirmative. The link to the Attorney-General's submission, and the Solicitor-General's opinion attached thereto is here: <https://qldbar.asn.au/baq/v1/viewDocument?documentId=2313>

The NSW Bar Association responded to two questions on notice.<sup>3</sup> In its response the Association submitted that "enabling the Voice to make representations to inform policy development at an early stage is critical. A core function of the Voice is to inform decision-makers of the potential impacts of policy proposals on First Nations communities".

The Law Council of Australia<sup>4</sup> (**LCA**) submitted the proposed amendment was "legally sound" and "just". The LCA supported the Voice on the basis it will provide:

- (a) on their own terms, for constitutional recognition of Aboriginal and Torres Strait Islander peoples as the first peoples of Australia, through a Voice specifically enshrined within the Constitution;
- (b) a vehicle for substantive change for Aboriginal and Torres Strait Islander peoples; and
- (c) a means to give effect to the right to self-determination for Aboriginal and Torres Strait Islander peoples.

*Editor - Following receipt of this article by Hearsay the parliamentary committee reported in late May and the link to submissions thereto was deleted. A link to the parliamentary report is here:*

[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Former\\_Committees/Aboriginal\\_and\\_Torres\\_Strait\\_Islander\\_Voice\\_Referendum/VoiceReferendum/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Aboriginal_and_Torres_Strait_Islander_Voice_Referendum/VoiceReferendum/Report)

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<sup>3</sup> Submission 257.

<sup>4</sup> Submission 91.