

REF: PLM / APR23.

INQUIRY INTO THE ABORIGINAL AND TORRES STRAIT ISLANDER VOICE REFERENDUM

PRIVATE SUBMISSION

Introduction

1. The current Constitution Alteration words contain significant deficiencies which if not remedied will, if carried, introduce fundamental inappropriate change to the character of Australian citizenship and Constitutional governance.
2. I seek to highlight these issues for the Committee's consideration.

Current Proposal

3. A Proposed Law: to alter the Constitution to recognise the First Peoples of Australia by establishing an Aboriginal and Torres Strait Islander Voice.

Do you approve this proposed alteration?

Chapter IX Recognition of Aboriginal and Torres Strait Islander Peoples

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 composition, functions, powers and procedures."

Principal Consideration

4. **Recognition:** The intended recognition words, inserted in an 'active' clause of the Constitution, create two separate classes of Australians, those of Aboriginal and Torres Strait Islander Heritage and the Rest. It confers on the former Constitutional rights and privileges not available to the latter. The issue is not whether this be lawful or unlawful but whether it be proper and appropriate. This is totally improper and inappropriate, representing as it does a fundamental change to Australian citizenship.
5. **Principal Questions.** As Parliament considers the Referendum there are two Principal Questions:
 1. Do you agree to the separation of Australians, within the Constitution, based on their Racial Heritage?

2. Do you intend to recommend such to your fellow Australians by advocating a YES Vote?

Further Deficiencies

6. The current Referendum Words contain other deficiencies, each of which individually if not modified predicate inappropriate outcomes:
7. **The Voice is not designated as an ‘Advisory’ body.** If it is advisory, it should be described as such.
8. **Representations.**
 - Designating representations to ‘Executive Government’ is fraught and is likely to impede good governance. This proposed extraordinary relationship between a select group of Australian citizens, not available generally to others, and the machinery of National Governance represents a fundamental change, the potential risk of bureaucratic, legislative, and judicial gridlock is significant.
 - Representations on ‘matters relating to ATSI Peoples’ allows representations on all Government matters, the Budget, Defence, Immigration, Industry etc. This is effectively a Constitutionally embedded ‘Third Chamber of Legislative Process’, chosen on racial heritage grounds.
 - The Attorney-General in introducing the Bill said matters relating to Aboriginal and Torres Strait Islander peoples would 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.*
 - A truly heroic interpretation of the actual words! There is considerable doubt that such an interpretation would survive a High Court review. Moreover, the current words do not accord with the public assurances provided by the Prime Minister, who has on several occasions used examples such as, - No, no the Voice would not represent on things like Medicare, ‘things that impact everyone’.
 - Additionally, the matter of the ‘primacy of Parliament’ has been canvassed in the context of the Voice arrangements imposing obligations on Parliament to consult or otherwise action any representations and the possibility of a Voice veto. Any such restrictions on the conduct and processes of Parliament would be totally inappropriate.

Solutions

9. **Recognition:** Solution – see 1999 Preamble Referendum precedent. Removing the ‘Recognition’ from an active clause within the Constitution to a Preamble can avoid the creation of separate Australian citizenship.
 - The Constitution is altered by inserting after the Title the preamble.
 - Effect of preamble The Constitution is altered by inserting section 125A. *The preamble to this Constitution has no legal force and shall not be considered in*

interpreting this Constitution or the law in force in the Commonwealth or any part of the Commonwealth.

- The following words or other suitable alternatives could be incorporated in the preamble. - *'...honouring Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country...'*

10. **The Voice is not designated as an 'Advisory' body.** Solution – Insert – •1. There shall be an *advisory* body, to be called the Aboriginal and Torres Strait Islander Voice (The Voice)

11. **Representations.** Addressing the representation issues:

- **Executive Government.** Given the significant risk of bureaucratic, legislative, and judicial gridlock and the extraordinary nature of granting such access to only a select portion of Australian citizens, this provision should be removed.
- **Matters Relating.** To clarify and establish Constitutional certainty as to the meaning and intent of what matters representations are to be granted :Solution – Insert – • 2. *The Voice may make representations to Parliament on matters relating solely and exclusively to the Aboriginal and Torres Strait Islander Peoples.*
- **Primacy of Parliament.** To clarify and establish Constitutional certainty as to the meaning and intent regarding the primacy of parliament – Solution – Insert *There shall be no compulsion on Parliament to solicit, agree or act upon any such representations.*

Addition Issues

12. The current intended referendum information package appears to have little appreciation of risk.

- To still now be talking of putting the referendum on a principle unsupported by any substantive details, is Reckless. Waiting to beyond mid-2024 and perhaps into 2025 to have any idea of The Voice structure, organizational details and supportive Legislation, borders on extreme risk. It just invites a No vote on any analysis of history.
- It would be prudent for all participants to remember what is supposed to be the fundamental basis of all this, addressing the plight of the most disadvantaged the Aboriginal and Torres Strait Islander citizens.
- The package would benefit from being supplemented by an Explanatory Memorandum including:
 - Solicitor General's opinion on the legal adequacy.
 - Broad characteristics of The Voice:
 - Government Voice 'design-principles'.
 - Indicative details of intended organisational structure, number of National / Regional / Local members. terms of appointment. remuneration. reporting arrangements. budget. ethics / integrity oversight. etc.

Recommendation

13. The recommendation is that the current Constitutional Wording be changed to reflect the suggestions below:

Do you support this alteration to the Constitution that establishes an Aboriginal and Torres Strait Islander voice?

Insert: Preamble to Constitution after Title. ‘...honouring Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country...’

Insert: Effect of preamble. Effect of preamble The Constitution is altered by inserting after section 125 the following section:

o 125A. The preamble to this Constitution has no legal force and shall not be considered in interpreting this Constitution or the law in force in the Commonwealth or any part of the Commonwealth.

Insert: Section IX – Recognition of Aboriginal and Torres Strait Islander Peoples Voice. Clause 129

1. There shall be an *advisory* body, to be called the Aboriginal and Torres Strait Islander Voice (The Voice).

2. The Voice may make representations to Parliament *on matters relating solely and exclusively to Aboriginal and Torres Strait Islander Peoples. There shall be no compulsion on Parliament to solicit, agree or act upon any such representations.*

3. The Parliament shall, subject to this Constitution, have power to make laws with respect to the composition, functions, powers, and procedures of The Voice.

14. Additionally, the appropriate Constitutional Alteration Bill should be supplemented by an Explanatory Memorandum including:

- Solicitor General’s opinion on the legal adequacy.
- Broad characteristics of The Voice:
 - o Government Voice ‘design-principles’.
 - o Indicative details of intended organisational structure, number of National / Regional / Local members. terms of appointment. remuneration. reporting arrangements. budget. ethics / integrity oversight. etc.

1 APRIL 2023

(Personal Details withheld by request)