



21 April 2022

Committee Secretary
Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum
PO Box 6021 Parliament House
Canberra ACT 2600

Dear Committee Secretary,

Submission from the Federation of Victorian Traditional Owner Corporations regarding the Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum - Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 Bill.

The Federation of Victorian Traditional Owner Corporations (**Federation**) welcomes the opportunity to provide a submission to the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum.

The Federation is the Victorian state-wide body that convenes and advocates for the rights and interests of Traditional Owners while progressing wider social, economic, environmental, and cultural objectives. We support the progress of agreement-making and participation in decision-making to enhance the authority of Traditional Owner Corporations on behalf of their communities. On this basis we make the following submission.

The Federation supports the proposed amendments to the Australian Constitution to provide for the creation of an Aboriginal and Torres Strait Islander Voice. As a federation, we reflect the voices of Traditional Owners across Victoria and have heard that Traditional Owners need time to consult and discuss the referendum question, but that the principle of a Voice is broadly supported in their communities.

We make the following points on the proposed provisions of the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 Bill.

1. Constitutional enshrinement

The Federation supports the enshrinement of the Voice in the Constitution.

Firstly, a constitutionally enshrined voice is the only form of constitutional recognition that has been collectively endorsed by Aboriginal and Torres Strait Islander peoples through an extensive dialogue

process that culminated in the Uluru Statement from the Heart.¹ The Regional Dialogues process incorporated the experiences, perspectives, and aspirations of over 1200 Aboriginal and Torres Strait Islander delegates from across the country.

Constitutional enshrinement of the Voice is essential to honour the aspirations of Aboriginal and Torres Strait Islander peoples and deliver on the mandate of the Uluru Statement from the Heart.

Enshrining the Voice in the Constitution is an important step in advancing the right to self-determination of Aboriginal and Torres Strait Islander peoples. The Uluru Statement from the Heart is a self-determining document that calls for the Voice as a practical and meaningful mechanism by which the right to self-determination can be achieved,² and the act of enshrining the Voice in the Constitution is a realisation of the right to self-determination. The right to self-determination is contained in the United Nations Declaration on the Rights of Indigenous Peoples and is fundamental to activating the collective rights of Aboriginal and Torres Strait Islander peoples.

Secondly, Constitutional enshrinement establishes the Voice as an enduring body. It provides the Voice with the necessary stability and certainty to empower Aboriginal and Torres Strait Islander peoples to shape the laws, policies and programs governing their affairs across the longer term. A Voice simply established by legislation is vulnerable to being abolished by an act of parliament or at the whim of the government of the day. The risk of abolition may also limit the capacity of such a Voice to speak frankly or properly represent the views of Aboriginal and Torres Strait Islander peoples to the Parliament and the Government, thus compromising its function.³

Third, constitutional enshrinement will confer constitutional status on the Voice. It would signal that it is a foundational institution of significant importance (approved by the majority of electors), helping to establish its legitimacy with the broader Australian public into the future, and enhancing its ability to effectively represent and advocate for Aboriginal and Torres Strait Islander peoples.⁴

2. Recognition

A principle aim of the proposed amendment to the Constitution is to provide recognition of Aboriginal and Torres Strait Islander peoples in the Constitution.

¹ From the Heart, 'The Journey to the Uluru Statement' <[The History of The Uluru Statement - From The Heart](#)>.

² Eddie Synot, 'The Universal Declaration of Human Rights at 70: Indigenous Rights and the Uluru Statement from the Heart' (2019) 73 (4) *Australian Journal of International Affairs* 320, 325.

³ Indigenous Constitutional Law, *Submission: The imperative of Constitutional Enshrinement*, Submission to Interim Report to the Australian Government on Indigenous Voice Co-Design Process (October 2020) <[Submission: The imperative of constitutional enshrinement — Indigenous Constitutional Law \(indigconlaw.org\)](#)>

⁴ Indigenous Constitutional Law, *Submission: The imperative of Constitutional Enshrinement*, Submission to Interim Report to the Australian Government on Indigenous Voice Co-Design Process (October 2020 <[Submission: The imperative of constitutional enshrinement — Indigenous Constitutional Law \(indigconlaw.org\)](#)>

Inserting the proposed new provisions in its own separate chapter titled 'Recognition of Aboriginal and Torres Strait Islander Peoples' makes clear that the amendment to the Constitution is aimed at recognition of Aboriginal and Torres Strait Islander peoples in the Constitution.

The opening preambular statement proposed in section 129 'In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia' is an important inclusion that makes clear the intention of the proposed amendment to acknowledge the unique place Aboriginal and Torres Strait Islander people occupy in Australia's history as the First Peoples of Australia. The proposed amendment is not predicated on race, as some have challenged. While the creation of the Voice mechanism in section 129 (i) provides an ongoing substantive form of recognition, in the manner sought in the Uluru Statement from the Heart, the preambular text articulates a symbolic statement of recognition too.

3. Voice to the Parliament and the Executive

The proposed amendment provides for representations to be made to both the Parliament and the Executive Government.

Ensuring the Voice is heard by both the Parliament and the Executive is critical to delivering meaningful outcomes for Aboriginal and Torres Strait Islander peoples.

The need to provide for a voice, not only to the Parliament, but also to the Executive Government largely arises from the critical importance of being able to advise and influence the development of proposed laws during the critical early stages of policy and law development. As canvassed in the Indigenous Voice Co-design Process Final Report to the Australian Government, typically, laws go through significant development by Ministers and Government agencies before they are introduced to Parliament. Thus, restricting the Voice's representations to the Parliament would prevent the Voice from being able to influence the development of proposed laws at the critical early stages. Further, the Final Report notes that the boundaries between policy-making and law-making are often blurred and it would be difficult to draw such a distinction in the scope of the representations of the Voice.⁵

In addition to its role in the development of legislation, the Executive Government is also responsible for the development and administration of policies, programs and services. By advising both the Parliament and the Executive, the Voice has the opportunity to engage fully with a range of policy, programs and law affecting Aboriginal and Torres Strait Islander peoples and to be involved at multiple stages in the policy and law-making process.⁶

Providing for representations to be made to the Executive also provides a critical opportunity for Aboriginal and Torres Strait Islander peoples to have input on the implementation and administration of

⁵ Australian Government, Indigenous Voice Co-design Process, Final Report to the Australian Government <[Indigenous Voice Co-design Process Final Report to the Australian Government \(niaa.gov.au\)](https://www.niaa.gov.au/indigenous-voice-co-design-process-final-report-to-the-australian-government)>, p150.

⁶ Australian Government, Indigenous Voice Co-design Process, Final Report to the Australian Government <[Indigenous Voice Co-design Process Final Report to the Australian Government \(niaa.gov.au\)](https://www.niaa.gov.au/indigenous-voice-co-design-process-final-report-to-the-australian-government)>, p151.

laws, policies and programs. In our experience, while Traditional Owners can be conferred rights through various legislative and other regimes, the implementation of those rights depends on the Executive Government fulfilling its obligations under those laws and policies, and this does not always happen. The ongoing need for transparency and accountability necessary for Traditional Owners to have real impact, to not just have a voice but be heard, sits in the routine work of the Executive.

As the Voice will not have a power of veto over decisions, or the power to delay legislative or executive decision-making⁷, the breadth of the Voice's function to present its views to both the Parliament and the Executive does not challenge the sovereignty of the Australian Parliament or interfere with the legislative or executive function.

4. Constitutional obligations on the Voice, Parliament and the Executive

There has been some public discussion about whether the Voice's proposed power to advise the Executive Government could lead to court challenges and delay government decision-making if its advice isn't followed.

A number of Constitutional experts⁸ have stressed, however, there are no words in the proposed amendment which impose any kind of Constitutional obligation upon the Voice, Parliament or the Executive Government. The proposed amendment is merely 'facilitative' and 'empowering',⁹ it simply enables the establishment of the Voice. The Federation endorses this assessment. Further, the Explanatory Memorandum and the Attorney-General's second reading speech both make it abundantly clear that the intention of the proposed amendment is not to impose any kind of obligation. The Explanatory Memorandum states the following in relation to the proposed amendment:

- It does not oblige the Voice to make representations in relation to any matter. The Voice 'may' make representations.¹⁰
- It confers no power on the voice to prevent, delay or veto decisions of the Parliament or the Executive Government.¹¹
- It would not oblige the Parliament or Executive Government to consult the Voice prior to enacting, amending or repealing any law, making a decision, or taking any other action.¹²
- It would not require the Parliament or the Executive Government to wait for the Voice to make a representation on a matter before taking action.

⁷ Explanatory Memorandum, Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023, p5.

⁸ For example: Anne Twomey, Robert French, Bret Walker and Kenneth Hayne.

⁹ Robert French, 'The Voice – A step forward for Australian Nationhood', AUSPUBLAW (20 February 2023) [The Voice — A Step Forward for Australian Nationhood — Australian Public Law \(auspublaw.org\)](#)

¹⁰ Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023, s129 (ii); Explanatory Memorandum, Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023, p11.

¹¹ Explanatory Memorandum, Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023, p5.

¹² Explanatory Memorandum, Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023, p5.

- It would not require the Parliament or the Executive Government to seek or invite representations from the Voice or consult it before enacting any law, taking any action or making any decision.¹³
- It would not require the Parliament or the Executive Government to furnish the Voice with information about a decision, policy, or law (either proposed or in force) at any time.¹⁴
- It would not oblige the Parliament or the Executive Government to *follow* a representation of the Voice. Those representations are advisory in nature. While the Constitutional nature of the body, and its expertise in matters relating to Aboriginal and Torres Strait islander peoples would give weight to the representations of the Voice, those representations would be advisory in nature.¹⁵
- It does not impose any obligations on the Parliament in relation to representations made by the Voice.¹⁶
- It is a matter for the Parliament to determine, in the exercise of its power under proposed s129 (iii), whether the Executive Government is under any obligation in relation to representations made by the Voice.¹⁷

In his second-reading speech in the House of Representatives on 30 March 2023, the Attorney-General stated:

- The Voice will not be required to make recommendations on every law, policy or program. The Voice will determine when to make representations by managing its own priorities and allocating its resources in accordance with the priorities on First Nations peoples. Critically, the Voice will be proactive. It will not wait for the Parliament or the Executive to seek its views before it can provide them. But nor will the constitutional amendment oblige the Parliament or the Executive to consult the Voice before taking action.
- It will be a matter for Parliament to determine whether the Executive Government is under any obligation in relation to representations made by the Voice. There will be no requirement for the Parliament or the Executive Government to follow the Voice's representations. The constitutional amendment confers no power on the Voice to prevent, delay or veto decisions of the Parliament or the Executive Government. The Parliament and the Executive Government will retain final decision-making power over all laws and policies.

It is clear from the text of the proposed provision, the Explanatory Memorandum and the Attorney-General's second reading speech that the intention of the amendment is not to impose any kind of obligation on the Voice, the Parliament or the Executive.

In summary, the Federation supports the proposed amendments to the Australian Constitution as set out in the proposed provisions of the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 Bill, to provide for the long overdue creation of an Aboriginal and Torres Strait Islander Voice.

¹³ Explanatory Memorandum, Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023, p11.

¹⁴ Explanatory Memorandum, Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023, p11.

¹⁵ Explanatory Memorandum, Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023, p11.

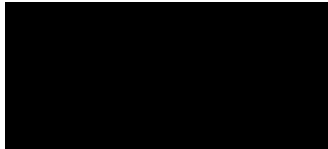
¹⁶ Explanatory memorandum, Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023, p12.

¹⁷ Explanatory Memorandum, Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023, p12.

Please contact Jill Webb [REDACTED] if you would like to discuss our submission further.

We thank you for considering our submission and we would be happy to provide further assistance as required.

Yours sincerely

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Paul Paton
Chief Executive Officer