



Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum
Online submission

21 April 2023

Dear Joint Select Committee

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

I appreciate the opportunity to make a submission to this inquiry, addressing select international aspects of the Bill. Relevantly I am the author of the book *Indigenous Peoples and Human Rights: International and Regional Jurisprudence* (Bloomsbury, London, 2016). The proposed Voice is consistent with international human rights law standards relating to indigenous peoples. Australia supports the United Nations Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP), which particularises existing binding human rights treaty standards as they apply to the special circumstances of indigenous peoples, including under the International Covenant on Civil and Political Rights 1966, International Covenant on Economic, Social and Cultural Rights 1966, and the International Convention on the Elimination of All Forms of Racial Discrimination 1969. Australia is party to all of these.

UNDRIP and the Design of the Voice under the Bill

Article 18 of UNDRIP recognises the indigenous right to ‘participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures’. Article 19 requires Australia to consult with indigenous representative institutions before adopting ‘legislative or administrative measures’ that affect their peoples. Article 3 recognises the overriding indigenous right of self-determination. Numerous other articles require indigenous participation in specific areas.

These articles have a number of implications for the design of the Voice under the Bill:

- Indigenous peoples should lead in designing representative institutions to advise state authorities on decisions affecting them, including any mix of local, regional and federal components, and the selection of representatives themselves. The extensive processes of indigenous consultations over many years leading to the present model strongly affirm that the Voice reflects a reasonable indigenous consensus, notwithstanding the inevitability of minority dissenting views. I note that the Voice also does not affect the availability of other consultative mechanisms of different kinds and at different levels.
- The right to participate in decision-making encompasses all relevant levels of state authority, including at the local, regional and national levels. A national Voice is clearly justified given the obvious impacts of Commonwealth laws, policies and decisions.

- The duty to consult with indigenous peoples explicitly extends to both ‘legislative’ and ‘administrative’ measures. As such, it is consistent with international law that the Voice, as one important means of consultation, is empowered to make representations to both the Commonwealth Parliament and the executive government.
- The right to participate in decision-making extends to ‘matters which would affect their rights’, whether directly or indirectly, relevantly including civil and political and economic, social and cultural rights, rights specific to indigenous peoples, and rights specific to sub-groups within indigenous populations (including persons with disabilities, children, women, the elderly, and persons of diverse sexual orientation). Research strongly indicates that policy outcomes for indigenous peoples improve when they have a meaningful say in decisions affecting their lives, particularly when governments do not adequately know or reflect their interests.

Equality and Non-Discrimination

The Voice as proposed would not create inequality, or discriminate, between indigenous peoples and other Australians. To the contrary, the Voice is one modest means of fulfilling the right to equality and non-discrimination of indigenous peoples (UNDRIP article 2) given their position of severe inequality. The Voice also recognises that the distinctive collective identity and right to self-determination of indigenous peoples, coupled with their history and present of severe disadvantage, justify taking steps to ensure their views and interests are properly heard by Australia’s mainstream political institutions, as recognised under UNDRIP.

Other Considerations

The Voice is a cautious reform. It is carefully limited to making representations on matters affecting indigenous peoples. Representations are advisory only, not binding, so neither parliamentary supremacy nor executive freedom of action are impaired. The Bill imposes no duty on either the parliament or the executive to consult on the Voice on any matter. At most, the Voice would create a political convention that authoritative indigenous views will be adequately considered by the parliament and the executive.

Legally, the executive’s failure to take into account a relevant representation from the Voice when making certain decisions may be judicially reviewable. But that is just an ordinary principle of good public administration, that government decisions should consider all relevant considerations to make the best possible decision. Having considered a representation, the government remains free to disagree with it.

The modesty of the Voice is starkly illustrated by the many more ambitious rights in the UN Declaration which the Bill does not address. The Declaration recognises indigenous rights not merely to offer advice to government, but to maintain indigenous institutions to make real decisions about their affairs (art 18); to control local self-government and finances; to determine their development priorities (art 23); to administer their own programs (arts 4-5); to veto adverse decisions (art 19); to control development of their lands (art 26), and veto development they oppose (art 32), not just be consulted; to control their own educational systems (art 14); to be compensated for the non-consensual taking or damaging of their traditional lands (arts 28 and 20), and so on. In this light the Voice is only a modest first step towards fulfilling the full spectrum of indigenous rights necessary to achieve fair and genuine reconciliation.

Yours sincerely
 [Ben Saul]