Voice doomsaying offensive

IN THE NEWS

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The Voice debate has ignored the actual words of the proposed addition to the Constitution. Those words will not lead to a torrent of legal cases, nor will they introduce social divisiveness in our foundation document.

The proposed addition commences: ‘‘There shall be a body to be called ...’’ the Voice. The words, which some decry as words of compulsion, have been in the Constitution since the beginning. It states: ‘‘There shall be an Inter-State Commission’’. The sections of the Constitution about the Inter-State Commission say that it would have ‘‘... such powers ... as the Parliament deems necessary ... relating to trade and commerce...’’

Similarly, the Voice proposal states that the parliament can make laws about the ‘‘composition, functions, powers and procedures’’ of the Voice. The proposal for the Voice was drafted with an eye on that history. It makes it clear the Voice amendment does not impinge on the role of the parliament.

Nothing about how the Voice operates is set in stone by the words of the amendment. Should a future parliament repeal the legislation, it cannot be forced to create a new Voice. The words ‘‘there shall be’’ are not words of compulsion enforceable on the parliament in our constitutional tradition. I find it difficult to envisage successful litigation based on this constitutional change.

As a former judge, I find it offensive that some participants in this debate cast doubts on the integrity of our judiciary when predicting what might happen if this addition is made. What is most offensive is the fact that they call themselves ‘‘conservatives’’.

The proposed amendment gives the parliament a wide discretion on how the Voice is structured. The proposal by Peter Dutton to create a regionally focused Voice can be achieved by amending the legislation which the Albanese government enacts. He does not need another referendum. If elected, he can use this one.

The second significant word in the Voice amendment is the reference to Aboriginal and Torres Strait Island *Peoples*. That was the word used when the discussion on constitutional recognition began. ‘‘Peoples’’ is also the word used in the United Nations resolution that has guided similar debates throughout the world.

Along the way in Australia, some participants in the debate changed ‘‘peoples’’ to ‘‘nations’’. The change reflects the more controversial language of ‘‘sovereignty’’ and ‘‘treaty’’, which some use to scare voters about the Voice. As the Uluru Statement recognises, these are issues to be considered later, together with truth telling.

The choice of the word ‘‘peoples’’ makes it clear that the Voice amendment has nothing to do with those issues, whatever the appendices to the Uluru Statement may say. That is the main reason some Indigenous representatives say, this is not good enough and advocate a No vote, without giving any reasons why it is not good, or even worse. As Voltaire put it: ‘‘The perfect is the enemy of the good.’’

The prime minister has correctly emphasised this is an advisory body. Divisiveness is not created by such a body.

The special status of our First Peoples has long been recognised in many ways, most clearly in the recognition of land rights as part of our common law by the High Court in the 1992 Mabo judgment – a decision reinforced by acts of all our parliaments. The referendum question is no more ‘‘divisive’’ than what we have already created, to the benefit of the whole nation. Many opponents of the Voice may not have shared that view about recognition of land rights. But they do not advocate repealing the land rights legislation, which, by accepting that Indigenous Australian are entitled to special treatment as First Peoples, has already reduced divisions in our nation.

Divisiveness was with us from the start. The 1967 referendum that enabled the Commonwealth to make laws for Indigenous Australians reduced divisiveness in our nation. It enabled the Commonwealth to override the long history of discrimination by state legislatures and governments. However, the race power can still be used for its original racist purpose. As a barrister, I appeared as the QC for the Indigenous women in the Hindmarsh Island Bridge case, better known as the ‘‘secret women’s business’’ case. I could not convince the High Court that the 1967 referendum had changed the original meaning of the race power, so it could not now be used to pass discriminatory legislation.

The Voice will operate as a brake on any future Commonwealth government attempting to do that. It is a further step to reduce the divisiveness in our constitutional structure.

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