PARLIAMENT OF AUSTRALIA

# Advisory Report on the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023

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

May 2023

CANBERRA

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# Chair's Foreword

## ‘An honest question’

The late Yunupingu described recognition as a ‘gift’, not to Indigenous Australians but from them;

> Let us be who we are – Aboriginal people in a modern world – and be proud of us. Acknowledge that we have survived the worst that the past had thrown at us, and we are here with our songs, our ceremonies, our land, our language and our people – our full identity. What a gift this is that we can give you, if you choose to accept us in a meaningful way.

The need for constitutional recognition of Aboriginal and Torres Strait Islander peoples is unquestionable. The past two decades has seen consultations, reviews, inquiries and processes to develop a model for recognition that is both acceptable to Indigenous Australians and works within the framework of Australian public law and governance.

The legislation under consideration in this report is the culmination of this extraordinary path. This report presents the findings of the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum’s inquiry reviewing the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023, the proposed legislation to change the Constitution if supported at referendum.

This inquiry was conducted with a high degree of public interest and engagement. The Committee received hundreds of submissions, in addition to thousands of documents in correspondence. A significant majority of these all spoke of their strong support of the Constitution Alteration’s provisions, which was also reflected in evidence during hearings. The Committee thanks all those who participated in the inquiry.

The Committee was required to consider all of the legal and constitutional issues which have been raised about the proposed provision. We also considered whether the proposal gives effect to its intention, to give Australians an opportunity to meet the generous request in the Uluru Statement from the Heart for constitutional recognition through a Voice.

Witnesses spoke about the ‘torment of our powerlessness’, how it impacts Aboriginal and Torres Strait Islanders and threatens to affect their children’s lives, and their children. They spoke about the potential for a Voice to overcome this powerlessness.

Eminent constitutional experts, former justices and Aboriginal and Torres Strait Islander community leaders gave evidence to the inquiry during hearings in Canberra, Orange, Cairns and Perth. While some witnesses raised concerns regarding certain aspects of the

legislation, the Committee is satisfied that the Constitution Alteration is not only fit for purpose but also will enhance Australia's systems of governance and laws.

The Committee has only one recommendation: the passage of the Constitution Alteration, unamended.

Yunupingu called for, "… *an honest answer from the Australian people to an honest question*." This is an honest question; it is now time for the Australian people be given the opportunity to provide an honest answer.

**Senator Nita Green**
**Chair**
**Senator for Queensland**

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# Members

### *Chair*

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| Senator Nita Green | ALP, QLD |

### *Deputy Chair*

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| Mr Keith Wolahan MP | Menzies, VIC |

### *Members*

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| Senator Andrew Bragg | LP, NSW |
| Ms Sharon Claydon MP | Newcastle, NSW |
| Mr Pat Conaghan MP | Cowper, NSW |
| Senator Dorinda Cox | AG, WA |
| Hon Andrew Gee MP | Calare, NSW |
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| Ms Peta Murphy MP | Dunkley, VIC |
| Hon Shayne Neumann MP | Blair, QLD |
| Dr Gordon Reid MP | Robertson, NSW |
| Senator Jana Stewart | ALP, VIC |
| Senator Linda White | ALP, VIC |

# Terms of reference

On 30 March 2023 the House of Representatives and the Senate appointed the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum and referred the provisions of the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 for inquiry and report no later than 15 May 2023.

# List of recommendations

### Recommendation 1

**4.18 The Committee recommends that the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 be passed unamended.**

# 1. Background and conduct of the inquiry

1.1 The Constitution is Australia's founding legal document. It took effect on 1 January 1901, and has remained largely unchanged ever since. It does not recognise Aboriginal and Torres Strait Islander Peoples as the First Peoples of Australia. Despite being the first inhabitants of Australia, having occupied the Australian continent for over 65,000 years. Aboriginal and Torres Strait Islander peoples were not even represented at the Australian Federation Conventions where the draft of the Australian Constitution was developed.

1.2 The Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 (Constitution Alteration, the Bill) is intended to 'rectify over 120 years of explicit exclusion in provisions of Australia's founding legal document'.[1] The Bill would do this by amending the Australian Constitution to recognise the First Peoples of Australia by establishing an Aboriginal and Torres Strait Islander Voice.

1.3 The Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum (the Committee) was tasked by both the House of Representatives and the Senate to review and report on the legislative provisions that, if passed, will be considered at referendum for incorporation into the Constitution. This report sets out the Committee's review of the evidence, its findings and its recommendations.

## Outline of the Constitution amendment process

1.4 The Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 (Constitution Alteration, the Bill) is designed to 'amend the Australian Constitution to recognise the First Peoples of Australia by establishing an Aboriginal and Torres Strait Islander Voice'.[2] It proposes to achieve this through four elements in the legislation:

- introductory words to recognise Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia;
- subsection 129(i) to provide for the establishment of a new constitutional entity called the Aboriginal and Torres Strait Islander Voice;
- subsection 129(ii) to set out the representation-making function of the Voice; and

1 The Hon Mark Dreyfus MP, Attorney-General, House of Representatives Hansard, 30 March 2023, p. 1.
2 The Hon Mark Dreyfus MP, Attorney-General, House of Representatives Hansard, 30 March 2023, p. 1.

- subsection 129(iii) to confer upon the Parliament legislative power to make laws with respect to matters relating to the Voice, including its composition, functions, powers and procedures.[3]

1.5 If passed by the Parliament in accordance with section 129 of the Constitution, the Bill is then to be voted on at referendum by the Australian public. The referendum must then be held no sooner than two months and no later than six months after the legislation has passed Parliament. If successful, the legislation will alter the Constitution by including Chapter IX and section 129.

1.6 In his second reading speech, the Attorney-General explained that the proposed amendment to the Constitution is a simple but effective change that will not negatively impact the operations of the Parliament or the Executive Government, but will give Aboriginal and Torres Strait Islander peoples a voice:

> This is an important reform. But it is modest. It complements the existing structures of Australia's democratic system and enhances the normal functioning of government and the law. It creates an independent institution that speaks to the parliament and the executive government, but does not replace, direct or impede the actions of either.
>
> Recognising Aboriginal and Torres Strait Islander peoples in our founding legal document and listening to their views on laws and policies that matter to them will make a difference.[4]

1.7 This was reinforced in advice from the Solicitor-General, in Submission 64:

> The proposed amendment is not only compatible with the system of representative and responsible government established under the Constitution, but it enhances that system.[5]

# The process of amending the Constitution

1.8 This section provides a brief outline of how the Constitution is changed at referendum, and where this inquiry fits into the broader process in relation to this Bill in particular. Section 128 of the Constitution outlines the mode of altering the Constitution:

- The proposed law is to be passed by an absolute majority of each House of the Parliament, or under certain conditions, a law is to be passed by a majority of either House twice within three months.
- The proposal is to be put to the electors qualified to vote in elections for the House of Representatives between two and six months after the passage of the law.

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[3] Explanatory Memorandum, Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023, p. 7.
[4] The Hon Mark Dreyfus MP, Attorney-General, House of Representatives Hansard, 30 March 2023, p. 3.
[5] The Hon Mark Dreyfus KC MP, Attorney-General, Submission 64, p. 6.

- A majority of Australians are to vote to approve the change, as a total and in a majority of the six states (this is referred to as the 'double majority').

1.9 This inquiry comprises part of the first stage of this process, representing the consideration and passage of the relevant proposed law by the Parliament. At the conclusion of this inquiry, the Parliament will further deliberate the legislation before voting on it, potentially with amendments. If it is passed by both Houses of Parliament within the space of three months, it will then meet the requirements to be considered at referendum.

1.10 For a referendum to be successful, it requires a 'double majority':

- A national majority of voters (in other words, more than fifty per cent of voters) across all states and territories, and
- A majority of voters (over fifty per cent of voters) in a majority of states (at least four of the six states).[6]

# How did we get here? An overview of constitutional recognition of Aboriginal and Torres Strait Islander peoples

1.11 The constitutional recognition of Aboriginal and Torres Strait Islander peoples has been debated for over a century.[7] A range of inquiries, reviews and reports have been conducted over time, including:

- 1958: The Federal Council for Aboriginal Advancement's campaign to amend the Constitution, culminating in the 1967 referendum which successfully amended the Constitution to ensure Aboriginal and Torres Strait Islander people were included in all formal population counts, and provided Parliament with power to legislate for Aboriginal and Torres Strait Islander peoples as well as other races of people.
- 1995: The Aboriginal and Torres Strait Islander Commission (ATSIC) published a report stating that constitutional reform should be considered a priority and provided evidence for widespread support of such a change.
- 1999: A pre-amble to the Constitution was proposed to recognise Aboriginal peoples as the First peoples of Australia in a referendum. This referendum was not successful.
- 2007: Bipartisan support for constitutional recognition was taken to the 2007 election, which Professor Megan Davis specifically referenced in her evidence to

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6 The Australian Capital Territory and the Northern Territory are excluded from this requirement as per the constitutional requirements in section 128.

7 James Haughton and Apolline Kohen, Parliamentary Library, 'Indigenous constitutional recognition and representation', *Parliament of Australia*, https://www.aph.gov.au/About_Parliament/Parliamentary_departments/Parliamentary_Library/pubs/BriefingBook46p/IndigenousRecognition (accessed 19 April 2023).

the committee as the start of the 'contemporary consideration of constitutional recognition'.[8]

- 2012: A government-established Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (the Expert Panel) delivered a report recommending the removal of sections 25 and 51(xxvi) of the Constitution, and the insertion of new sections.
- 2015: The Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, established in 2013, provided a final report recommending that a referendum be conducted to recognise Aboriginal and Torres Strait Islander peoples in the Constitution. In its recommendations, it suggested similar amendments to those proposed by the Expert Panel in 2012.

## The Uluru Statement from the Heart

1.12 In December 2015, then-Prime Minister the Hon Malcolm Turnbull MP announced the establishment of the Referendum Council to progress towards a referendum on constitutional recognition. The Referendum Council was designed to be led by Aboriginal and Torres Strait Islander peoples to oversee the process and advise the Prime Minister and Leader of the Opposition on how to best recognise Aboriginal and Torres Strait Islander peoples in the Constitution. The Referendum Council conducted extensive consultations across the nation, including regional dialogues with local communities. Unlike the many historical processes exploring options for recognition, this was to be First Nations led.

1.13 The Uluru Statement from the Heart (the Uluru Statement) was a product of these comprehensive public consultations, a process outlined by the Indigenous Law Centre:

> Ultimately, between December 2016 and May 2017, deliberative Dialogues were held in 12 locations around Australia, with an additional meeting in the ACT. Each Dialogue brought together around 100 men and women, drawn in fixed proportions from traditional owner groups, regional organisations and significant individuals.[9]

1.14 These regional deliberations were then fed into a First Nations Constitutional Convention at Uluru, where:

> after several days of intensive discussions, they endorsed a reform agenda expressed in the Uluru Statement from the Heart.[10]

1.15 This proposal was presented to the Referendum Council during the convention. The Uluru Statement from the Heart lists three main proposals, colloquially known as 'Voice. Treaty. Truth.' These are:

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[8] Committee Hansard, Friday 14 April 2023, p. 3.

[9] Submission 44, p. 3.

[10] Indigenous Law Centre, Submission 44, p. 3.

1 The establishment of a First Nations Voice to Parliament, enshrined in the Constitution and

2 The establishment of a Makarrata Commission to supervise a process of agreement-making and truth-telling.[11]

1.16 In its final report, the Referendum Council reiterated the concerns expressed by the Uluru Statement from the Heart and called for the Uluru Statement's requests for constitutional amendment to be taken to a referendum.[12]

1.17 In 2018, the Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples recommended that the Australian Government 'initiate a process of co-design with Aboriginal and Torres Strait Islander peoples' in developing a design for the Voice.[13] This recommendation was agreed to by the Australian Government, which in 2019 established an Indigenous Voice Co-Design Process to achieve a design for The Voice that best suits the needs and aspirations of Aboriginal and Torres Strait Islander peoples.[14]

1.18 In July 2021, the Indigenous Voice Co-design Process presented its Final Report to the Australian Government, outlining the possible linkages of a Local and Regional Voice to the National Voice. It presented the possible structure, membership, and functions of the National Voice and how the National Voice can achieve its intention and meet expectations.[15]

## Conduct of the inquiry

1.19 On 30 March 2023 the Attorney-General, the Hon Mark Dreyfus SC, MP, introduced the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 (the Constitution Alteration, the Bill) to the House of Representatives (the House).[16] Following the introduction of the Bill, both the House and the Senate agreed to the establishment of the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum (the Committee).[17] The Committee was tasked with reviewing the Constitution as per the resolution of appointment, which is contained in the Terms of Reference section in this report at page ix.

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11 *Uluru Statement from the Heart*, 2017, https://ulurustatemdev.wpengine.com/wp-content/uploads/2022/01/UluruStatementfromtheHeartPLAINTEXT.pdf (accessed 5 May 2023).

12 Referendum Council, *Final Report of the Referendum Council 2017*, 30 June 2017, p. 2.

13 Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples 2018, Final Report, p. xvii (Recommendation 1).

14 National Indigenous Australians Agency, *Indigenous Voice Co-design Process: Final Report to the Australian Government*, July 2021, p. 240.

15 National Indigenous Australians Agency, *Indigenous Voice Co-design Process: Final Report to the Australian Government*, July 2021, p. 19.

16 Parliament of Australia, Order of the Day—Item 2, House Votes and Proceedings No. 51, Thursday, 30 March 2023, p. 649.

17 Parliament of Australia, Order of the Day—Item 3, House Votes and Proceedings No. 51, Thursday, 30 March 2023, pages 649-650.

1.20 Given the scope of the resolution of appointment and its focus on the provisions of the Constitution Alteration, the Committee determined that the inquiry should concentrate on the Bill's provisions rather than the Voice as a general proposition. The Committee was not asked to assess the merits of the proposal more broadly, or to assess the cases for either a 'yes' or 'no' vote in the proposed referendum.

1.21 The resolution of appointment determined that the Committee provide its final report by 15 May 2023. The Committee resolved to receive submissions up until 5.00pm AEST on Friday, 21 April 2023. A number of late submissions were received and agreed to by the Committee. A total of 270 submissions were received by the Committee. Appendix A sets out a list of submissions received.

1.22 In particular, the Committee notes the submission provided by the Attorney-General, Mr Mark Dreyfus SC, MP, who provided the Committee with the Solicitor-General's legal opinion on the Constitution Alteration.

1.23 The Committee received the following groups of campaign material during the course of the inquiry:

- Form letter 1, comprising two documents;
- Form letter 2, comprising 20 documents;
- Form letter 3, comprising 871 documents;
- Form letter 4, comprising 909 documents; and
- Form letter 5, comprising nine documents.

1.24 These documents contained identical or near-identical text across multiple authors, or self-identified as originating from a campaign source. While the Committee did not accept these documents as submissions to the inquiry, it agreed to publish illustrative examples of each form letter group to the webpage. Further, the Committee acknowledges that many of these contributions to the inquiry contained the views and experiences of ordinary Australians who wanted to participate in the inquiry, including Aboriginal and Torres Strait Islander people.

1.25 Similarly, several hundred contributions received by the Committee were not accepted as submissions due to not addressing the terms of reference (that is, the specific provisions of the legislation). These contributions generally addressed broader issues regarding the Voice, including the merits of the model chosen, the process in which the model has been chosen, and expressing generalised support or dissent for the concept. Given the inquiry's focus on the specific terms of the legislation, the Committee determined not to accept contributions that fell outside the terms of reference as formal submissions.

1.26 The Committee notes the strong views in the community which prompted the large number of contributions, indicating the importance of this issue to the Australian public. Over a period of three weeks, the Committee received more than 3,000 contributions via electronically submitted documents, videos, songs, poems and handwritten letters. It thanks all participants to the inquiry for their input, and assures

those whose submissions were not formally published as part of the inquiry that their contributions were considered.

1.27 A significant majority of submissions were in support of the legislation and the proposal for a Voice enshrined in the Constitution.

1.28 The Committee held five public hearings:

- Friday, 14 April 2023 in Canberra, Australian Capital Territory
- Monday, 17 April 2023 in Orange, New South Wales
- Wednesday, 19 April 2023 in Cairns, Queensland
- Friday, 28 April 2023 in Perth, Western Australia
- Monday, 1 May 2023 in Canberra, Australian Capital Territory

1.29 The hearings attracted a wide range of participants who provided evidence, including prominent former jurists, legal academics, representatives from local Aboriginal and Torres Strait Islander communities, and individuals who had participated in the many reviews and processes that have informed the legislation. Appendix B sets out a list of witnesses who appeared at the public hearing.

1.30 The Committee thanks all those who were involved in the hearings. In particular, the Committee expresses deep thanks to the local Aboriginal and Torres Strait Islander individuals and communities who welcomed the Committee to their lands of which they have been the Traditional Custodians for millennia. The Committee was also honoured to be received with a Welcome to Country by local Aboriginal and Torres Strait Islander representatives for many of its hearings, in addition to smoking ceremonies in Canberra and Orange, and traditional dances in Orange and Cairns. The Committee acknowledges and thanks:

- Mr Paul Girrawah House, Ngambri and Ngunnawal Nations (Canberra)
- Mr Doug Sutherland, Mr Ricky Ah-See and cultural dancers from the Wiradjuri Nation (Orange)
- The Minjil Cultural Group, Yidinydji, Djabuganydji and Gungganydji Nations (Cairns)
- The Gerib Sik Torres Strait Island Corporation Group, a Meriam group from Mer Island (Cairns)
- Mr Joseph ‘Joepossum’ Collard, Whadjuk Noongar Nation (Perth)

# 2. The Legislation

2.1 This chapter provides a brief outline of the Constitution Alteration and the intended effect on the Constitution. It sets out stakeholders' general views of the legislation and the key points of contention, which will be expanded in Chapter 3. It also examines how the legislation aims to meet the request made in the Uluru Statement of the Heart (Uluru Statement) by recognising Aboriginal and Torres Strait Islanders in the Constitution and establishing an Aboriginal and Torres Strait Islander Voice to Parliament and the Executive Government (the Voice).

## Outline of the Constitution Alteration

2.2 This is a Bill for an Act to alter the Constitution to recognise the First Peoples of Australia by establishing a First Nations Voice.

2.3 As explained in the Explanatory Memorandum, the Constitution Alteration has four key elements:

- To recognise Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia;
- To provide for the establishment of a new constitutional entity called the Aboriginal and Torres Strait Islander Voice;
- To set out the core representation-making function of the Voice; and
- To confer upon the Parliament legislative power to make laws with respect to matters relating to the Voice, including its composition, functions, powers and procedures.[1]

## General public sentiment in support of the Constitution Alteration

2.4 As outlined in Chapter 1, the Committee's resolution of appointment which guided the inquiry's terms of reference do not include consideration of issues relating more broadly to the proposed referendum or the Voice's constitution and operation after its enactment. These are matters that will be considered in other forums, and also to be considered and decided by the Parliament after a successful referendum.

2.5 Most of the material received by the Committee during the course of the inquiry expressed support for constitutional recognition for Aboriginal and Torres Strait

[1] Explanatory Memorandum, Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023, p. 2.

Islander peoples in the form proposed by the Bill. The Committee received large amounts of evidence supporting this view, including many submissions received, material from form letter campaigns, correspondence to the Committee, and oral evidence at hearings.

2.6 Submitters supported the Constitution Alteration in a range of ways. An inexhaustive list of reasons provided by submitters in favour of the Bill is provided below:

- The Constitution's current lack of inclusion or recognition of Australia's First Nations peoples
- The development of the Constitution Alteration's wording over numerous reviews and consultations, directly by Indigenous Australians and constitutional experts[2]
- The 'simple and direct' wording which was said to be constitutionally appropriate and legally effective[3]
- The Voice being introduced as an enduring body protected by the Constitution as opposed to previous representative iterations which have been abolished and not replaced by previous governments
- The provision's balance between providing the Voice with appropriate powers to make representations to the Executive Government on matters directly relating to Aboriginal and Torres Strait Islander peoples, and ensuring that it does not result in 'problematic and unintended consequences'.[4]

2.7 Aboriginal and Torres Strait Islander stakeholders in particular expressed their hope that the Voice would fundamentally alter and improve the lives of current and future generations.[5] Many witnesses told the Committee that they were concerned that the lives of their children, grandchildren and great-grandchildren would not improve without change, and that they would 'like to be able to see that when they're adults, or when my great-grandchildren are going through school, they're not sitting here having the same conversations'.[6]

2.8 Alternative perspectives were raised from stakeholders who did not support either the entire Bill or particular aspects of its wording. The key criticisms of the Constitution Alteration included:

- Constitutional recognition of First Nations peoples or representative bodies not being required, due to other legislation in force or similar organisations in existence
- The Voice's proposed capacity to 'make representations to … the Executive Government of the Commonwealth', which was argued to lack clarity

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2 Mr Noel Pearson and Dr Shireen Morris, Submission 21, p. 1.

3 Professor George Williams AO, Submission 5, p. 1; Dr Elisa Arcioni and Dr Andrew Edgar, Submission 19, p. 2.

4 Professor George Williams AO, Submission 5, p. 1.

5 The Hon Mr Ken Wyatt, Committee Hansard, Friday 28 April 2023, p. 18.

6 Ms Alisha Agland, Committee Hansard, Monday 17 April 2023, p. 18.

- Despite there being no reference to race in the Voice amendment, and the Constitution already containing a 'race power', some submitters argued that the amendment would introduce the concept of 'race' into the Constitution.

2.9 It is important to note here that not all stakeholders who voiced criticisms of the Constitution Alteration shared the same concerns, and some of those who expressed concern made it clear that they would nonetheless vote – or even campaign – for the current version of the Constitution Alteration at referendum. Very few stakeholders disputed that Aboriginal and Torres Strait Islander peoples should be recognised in some form. The main point of contention was the inclusion of an Aboriginal and Torres Strait Islander Voice in the Constitution at all, which will be discussed further in Chapter 3.

# Alignment with the Uluru Statement from the Heart

2.10 The Explanatory Memorandum explains that the proposed legislation is intended to meet the request set out by the 2017 Uluru Statement from the Heart (the Uluru Statement).[7]

2.11 A range of Uluru Dialogue participants and facilitators put their view that the Bill as drafted meets the request set out in the Uluru Statement. Aunty Pat Anderson, Co-Chair of the Uluru Dialogue outlined the scale of this undertaking:

> This process is unprecedented in our nation's history. It is the first time the constitutional convention has been convened with and for first peoples. The dialogues engaged 1,200 Aboriginal and Torres Strait Islander delegates, an average of 100 delegates from each dialogue, out of a population of approximately 600,000 people nationally. This is the most proportionately significant consultation process that has ever been undertaken with first peoples.[8]

2.12 Mr Noel Pearson and Dr Shireen Morris emphasised that the wording had been negotiated and carefully considered by a range of participants to ensure that the legislation met the needs of the Uluru Statement:

> We negotiated every word, comma and semicolon of a proposed Voice amendment until each in the group was satisfied it would empower Indigenous peoples with an advisory say in their affairs while respecting parliamentary supremacy, minimising legal uncertainty and upholding the Constitution.[9]

2.13 Similarly, the Indigenous Law Centre further stated that the proposed amendment 'gives appropriate effect to the call for constitutional recognition in the Uluru

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7 Explanatory Memorandum, Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023, p. 1.

8 Committee Hansard, Friday 14 April 2023, p. 2.

9 Mr Noel Pearson and Dr Shireen Morris, Submission 21, p. 2.

Statement from the Heart, and should be passed by the Parliament, for consideration by the people at a referendum'.[10]

## Recognition of Aboriginal and Torres Strait Islander Peoples in the Constitution

2.14 The Constitution Alteration seeks to recognise Aboriginal and Torres Strait Islander peoples in the Australian Constitution. The Constitution currently does not contain any reference to Aboriginal and Torres Strait Islander peoples; however, powers to make laws specifically relating to Indigenous peoples have been derived from section 51(xxvi) since 1967, which enables the Parliament to make laws for any race. Despite this section referring to power to make laws on 'race', it has only ever been used to make laws in relation to Aboriginal and Torres Strait Islander people.

2.15 Many Aboriginal and Torres Strait Islander stakeholders passionately expressed the importance of being recognised as the First Australians in the Constitution. Mr Gerald Power, Deputy Mayor of the Orange City Council, explained to the Committee why constitutional recognition was so important to him:

> At the age of 61, I never thought that we would even come to this. I thought I'd be dead. I thought my son would have to pick it up. My mother died and my ancestors died without having a voice in the Constitution, and that lack of a voice is simply because we were never identified as humans. Why is it so important to have it in the Constitution? It is because it needs to be in there. It needs to at least acknowledge that there were humans here and that these are the oldest humans on the face of the planet—continuous, ongoing.[11]

2.16 It was widely recognised in the inquiry's evidence that the Constitution's lack of reference to Aboriginal and Torres Strait Islander people as the First Peoples of Australia is an unresolved omission in the Constitution. The Law Council of Australia outlined the three key reasons why constitutional recognition is needed:

- it will address the 'longstanding and unfinished business for the nation' by ensuring that Australia's supreme law substantially recognises Aboriginal and Torres Strait Islander peoples as the original custodians of the land;
- all Australians 'own' the Constitution and the proposed alteration will reflect the history of this land, and at last include all its peoples, when it recognises Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia; and

10 Indigenous Law Centre, Submission 44, p. 2.
11 Committee Hansard, Monday 17 April 2023, p. 3-4.

- a successful referendum will have significant value as a symbol of recognition and unity between Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians.[12]

2.17 Stakeholders in support of the legislation strongly put that the Bill recognises Aboriginal and Torres Strait Islanders in a twofold manner: by symbolically acknowledging them as Australia's First Nations peoples, and by creating the Voice in recognition of this fact. The Indigenous Law Centre submitted that the opening words of the proposed constitutional amendment 'appropriately make clear that amending the Constitution to enshrine the Voice is an exercise in recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of the country that is now called Australia'.[13] This section, according to the Law Council of Australia, also recognises the 'unique status and rights of Aboriginal and Torres Strait Islander peoples as Australia's Indigenous Peoples'.[14]

2.18 Professor Anne Twomey AO noted that, while the Voice itself provides substantive recognition of Aboriginal and Torres Strait Islander people, that the opening words of proposed section 129 more directly provide symbolic recognition.[15]

2.19 Professor Megan Davis explained that the concept of recognition 'sits on a spectrum', with varying degrees between models of power and the capacity to speak to the state. She observed that a statement in the Constitution acknowledging Aboriginal and Torres Strait Islanders was referred to during the Uluru Dialogues as a 'plaque', and that such a model was considered a weak form of reform as it would not make a substantive difference to reforming disadvantage.[16] Professor Davis further stated:

> A voice to parliament, for example, is at the strong end of the recognition spectrum, because it's empowering. It does something. It provides a Logan voice to Canberra. It provides a Cairns voice to Canberra. It provides an Alice Springs voice to Canberra. It provides a Yarrabah voice to Canberra.[17]

2.20 She also noted that the constitutionally-enshrined Voice option had been determined by the dialogue delegates as the preferred option of recognition. This was supported by Aunty Pat Anderson AO, who explained that the term 'Canberra Voice' did not adequately recognise the wishes of Aboriginal and Torres Strait Islander peoples to have direct input into decisions affecting them:

> What they asked for was a voice to Canberra, not a Canberra voice. What we heard in the dialogues was that—and this is why reserved seats and designated parliamentary seats weren't prominent—people don't want to be politicians. In the dialogues they said they did not want to be politicians. They don't belong to political parties. They don't want to be going to Canberra to be politicians. They

[12] Law Council of Australia, Submission 91, p. 7.
[13] Indigenous Law Centre, UNSW, Submission 44, pages 4-5.
[14] Law Council of Australia, Submission 91, p. 12.
[15] Professor Anne Twomey AO, Submission 17, p. 2.
[16] Professor Megan Davis, Committee Hansard, Friday 14 April 2023, p. 3.
[17] Committee Hansard, Friday 14 April 2023, p. 3.

> want to serve their community. They want to live in their communities and serve their mobs and their families. They're extraordinary men and women. They've lived their whole lives in their communities helping their own mobs. They don't want to be in Canberra as a Canberra voice. They have no intention of leaving their communities. That's at the heart of the Uluru Statement from the Heart and the Voice to Parliament. It is about getting grassroots voices amplified and feeding into Canberra, representing the views and voices of their communities. The really important message from the dialogues was that there are no voices that exist right now that represent who we are and what we want. That's a really critical message. The Canberra voice is just a term that's deployed to imply that our people want to be politicians in Canberra, when nothing could be further from the truth. They studied the legal and political system. They worked out an option that fits better with the Australian legal and political temperament than the non-discrimination clause that was rejected by an expert panel. They want a voice to the parliament and to Canberra.[18]

2.21 Further, Professor Davis explained that the options for constitutional amendment developed at the Uluru Dialogues had been signed off on by the Prime Minister and Leader of the Opposition of the day.[19]

## Recognition through a Voice to Parliament

2.22 The Uluru Statement called for the establishment of an Aboriginal and Torres Strait Islander Voice to Parliament enshrined in the Constitution. As explained by submitters and witnesses, the Voice is intended to be both a formal recognition of First Nations peoples but also an enduring mechanism protected by the Constitution to enable representations to be made to the Parliament and the Executive Government on matters that directly impact them.

2.23 This point was addressed in the Explanatory Memorandum, which provided that:

> By addressing the need for such an institution, this proposed constitutional amendment provides a form of recognition that is practical and substantive. It both ensures that the Constitution reflects the historical truth of Aboriginal and Torres Strait Islander peoples' long-standing and continuing place in Australia, and provides for an institution to improve their lives.[20]

2.24 Addressing the disempowerment of Aboriginal and Torres Strait Islander peoples was a key factor in the Uluru Statement, as expressed in the below excerpt:

> Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are aliened from their families at unprecedented rates. This cannot be because we have no love for them. And our

[18] Committee Hansard, Friday 14 April 2023, p. 5.
[19] Professor Megan Davis, Committee Hansard, Friday 14 April 2023, p. 3.
[20] Explanatory Memorandum, Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023, p. 4.

> youth languish in detention in obscene numbers. They should be our hope for the future.
>
> These dimensions of our crisis tell plainly the structural nature of our problem. This is the torment of our powerlessness.[21]

2.25 The Indigenous Law Centre detailed how the concept of the Voice came about. It explained that the Uluru Dialogues process evolved during the period of consultations in 2016 and 2017, moving from a position focusing on constitutional recognition towards providing a vehicle for Aboriginal and Torres Strait Islander peoples to have greater involvement in policy and decision-making.[22] They explained that, while other options for constitutional recognition were canvassed, the Voice was considered as the preferable method of doing so because it addressed disempowerment and issues that were of urgent and daily relevance:

> The intention was that it address the urgent need for First Nations people to have a greater say in decisions affecting their daily lives, while focusing on Australia's existing processes of parliamentary government rather than the courts.
>
> …
>
> The delegates at the Uluru Convention, and the Dialogue participants who sent them there, were determined to do something about 'the structural nature' of their problem, 'the torment of our powerlessness'. They advocated 'substantive constitutional change' that would alter the status quo. They called for empowerment through a Voice that could speak to both Parliament and Government, and could evolve as needs change over the decades to come.[23]

2.26 The Indigenous Law Centre further stated that the Voice was, for the reasons outlined above, a 'meaningful form of constitutional recognition' for Aboriginal and Torres Strait Islander peoples.[24] Professor Anne Twomey AO similarly noted that the concept of the Voice was born from changing the approach towards giving Indigenous peoples 'agency and ongoing recognition by hearing their voices (not those of lawyers and judges) before laws and policies are made, so they can influence them for the better'.[25]

2.27 The introduction of the Voice via constitutional amendment was argued by a range of submitters to be critical to its success. A number of Aboriginal and Torres Strait Islander witnesses to the inquiry strongly rejected constitutional recognition without the accompaniment of the Voice, calling such a proposal 'absolutely unacceptable'. Mr Roy Ah-See, Member of the Wellington Town Common Aboriginal Elders, explained that this proposal had been rejected by participants in the Uluru Dialogues:

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21 *Uluru Statement from the Heart*, 2017, https://ulurustatemdev.wpengine.com/wp-content/uploads/2022/01/UluruStatementfromtheHeartPLAINTEXT.pdf (accessed 4 May 2023).

22 Indigenous Law Centre, UNSW, Submission 44, p. 3.

23 Indigenous Law Centre, UNSW, Submission 44, pages 3-4.

24 Indigenous Law Centre, UNSW, Submission 44, p. 5.

25 Submission 17, p. 9.

> They didn't want symbolism or tokenism. They wanted substantial reform, and that was a voice enshrined in the Constitution. One of my elders taught me—he said, 'Listen, Roy; it's better to understand then to be understood.' It took me a long time to understand what he was saying. It's better to listen to others than to listen to yourself, pretty much. The people have spoken.[26]

2.28 This was a widely held position; others similarly noted that a statement of recognition in the Constitution would not address the structural and systemic reform required, and that a Voice 'can do that, but not recognition within a few lines. We need a framework within the Constitution that is accountable, that is transparent and that can't be removed'.[27]

2.29 This point was expanded on by Mr Jamie Newman, Chief Executive Officer of the Orange Aboriginal Medical Service, who noted that the Voice as currently designed would not be party-aligned or party-bound but comprised by those who 'understand community'.[28]

2.30 The Law Council of Australia outlined why it should not be introduced by lesser legislation:

> - it was the means chosen by Aboriginal and Torres Strait Islander people, through the Uluru Statement, and after careful and longstanding deliberation on the options available, to recognise and empower them and is thus an expression of self-determination;
> - constitutional enshrinement of the Voice would provide it with an enduring mandate and distinguish it from previous advisory bodies, such as the Aboriginal and Torres Strait Islander Commission, which were able to be established and dissolved and were consequently subject to the changing political landscape; and
> - the exercise of popular sovereignty at the referendum and then the constitutional status of the Voice will also be part of its success.[29]

2.31 Conversely, some submitters argued that an Aboriginal and Torres Strait Islander Peoples Voice to Parliament and to the Executive Government was not necessary as there are current mechanisms designed to achieve the same outcome.[30] These include representative organisations and agencies, including Indigenous members of the Federal Parliament. This argument will be discussed further in Chapter 3.

2.32 Further, it was put that a Voice may not be sufficiently representative of different perspectives and viewpoints.[31]

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26 Committee Hansard, Monday 17 April 2023, p. 26.
27 Mrs Kim Whitely, Committee Hansard, Monday 17 April 2023, p. 26.
28 Committee Hansard, Monday 17 April 2023, p. 11.
29 Law Council of Australia, Submission 91, p. 8.
30 Institute of Public Affairs, Submission 190, p. 7.
31 Institute of Public Affairs, Submission 190, p. 6; Mr Nyunggai Warren Mundine AO, Submission 20, p. 1.

# 3. The Wording

3.1 This chapter contains an examination of the key points of consideration and contention that arose during the Committee's inquiry.

3.2 Given the Committee's mandate by its resolution of appointment to examine only the provisions of the Constitution Alteration, this chapter does not examine broader issues in relation to the pending referendum or the operations, functions and powers of the Aboriginal and Torres Strait Islander Voice (Voice). However, as will be discussed in later sections, some of these issues are outside the scope of the inquiry at this stage given that the Parliament has not determined these points.

## Subsection 129(ii): A Voice to Parliament and Executive Government

3.3 One of the key points of contention regarding the legislation was the wording in proposed section 129(ii) which empowers the Voice to 'make representations to the Parliament and to the Executive Government of the Commonwealth'. There were two particular issues discussed in evidence – Executive Government and scope:

- the reasoning for and implications of the Voice's capacity to make representations to the 'Executive Government of the Commonwealth'; and whether subsection 129(ii) provides an obligation on the Executive Government to consult with or respond to representations from the Voice
- the intended scope of the power for the Voice to 'make representations'; and the wording 'matters relating to Aboriginal and Torres Strait Islander peoples'.

### 'Executive Government'

3.4 Proposed subsection 129(ii) provides that the Voice be empowered to make representations to the Executive Government of the Commonwealth. The term 'Executive Government', as explained in the Explanatory Memorandum, is intended to have the same meaning as in other parts of the Constitution. The term refers to Ministers and Departments of State.[1]

3.5 Professor Anne Twomey AO explained that subsection 129(iii), which provides the Parliament with powers regarding the form and operation of the Voice, including the way the Executive Government receives representations from the Voice:

[1] Explanatory Memorandum, Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023, p. 12.

> Parliament could also legislate to require that all representations to the Executive Government are to be sent to one office – eg the National Indigenous Australians Agency, which could then refer them as appropriate to other agencies or officers. Alternatively, it could legislate to require that representations be sent to the relevant Minister. Such legislation would avert concerns that have been expressed about representations being sent to individual public servants, agencies and Commonwealth entities. Section 129(ii) refers to the Executive Government of the Commonwealth collectively – not to individual officers or agencies. As long as legislation enacted under s 129(iii) did not prevent representations being made to 'the Executive Government', it would be a matter for Parliament to determine the most efficient way to receive representations and deal with them.[2]

3.6 Mr Noel Pearson and Dr Shireen Morris similarly pointed to Parliament's power to determine the Voice's rules and procedures, which could create avenues for the Voice to effectively engage with policymakers with the goal of improving decision-making.[3]

**Why Executive Government?**

3.7 The inclusion of Executive Government was expressed by many witnesses, including numerous Aboriginal and Torres Strait Islander individuals and groups, to be essential to the Constitution Alteration's effectiveness.

3.8 Many submitters commented on the public policy failures in relation to Aboriginal and Torres Strait Islander peoples over decades and multiple governments, many of which had not heeded Indigenous voices. This was said to be evidenced in policies such as the Stolen Generations and the Northern Territory Intervention, with devastating effects on First Nations peoples.[4] Stakeholders told the Committee that present-day public policy challenges and crises in Indigenous communities are a result of 'decades of neglect of remote communities and from the failure to listen to the people of those communities' by the Executive Government.[5]

3.9 Further, Aboriginal and Torres Strait Islander perspectives in public policy were said to be fragmented across multiple levels and systems:

> You have different levels of access and engagement from a local, regional, state and national level. That is not good if you're looking at trying to close the gap for our people. When we have multiple levels of government not even talking to one another and expect that's going to happen on the ground, it's doomed to failure. Nineteen years of close the gap tells us that it hasn't worked. It's beyond target

2 Professor Anne Twomey AO, Submission 17, p. 3.
3 Mr Noel Pearson and Dr Shireen Morris, Submission 21, p. 5.
4 Law Council of Australia, Submission 91, p. 9.
5 The Hon Mr Fred Chaney AO, Committee Hansard, Friday 28 April 2023, p. 18.

> for two of them. The seven targets in 19 years tells us that what we're doing now, what we've been doing for the last 19 years, hasn't worked.[6]

3.10 Accordingly, submitters argued that the Voice's capacity to engage with Executive Government was essential in order to better address policy relevant to Aboriginal and Torres Strait Islander peoples. Mr Noel Pearson and Dr Shireen Morris argued that the inclusion of advice to the Executive was the 'practical substance of the Voice proposal' which provides Aboriginal and Torres Strait Islander peoples with a 'constitutionally guaranteed role in policy development that impacts their lives'.[7]

3.11 At the public hearing in Canberra, Mr Kerry O'Brien gave his perspective as a long-time journalist:

> the issue about executive government, to me, is a no-brainer. Again, over decades, I have reported on the whole processes of government and parliament. I understand the separation between the two and where they come together. I know from my reporting of it where the vast bulk of policy that ends up going through the parliament and becoming law comes from. So much of it stems through ministerial offices, through their public servants and then through the cabinet. It just makes eminent sense to me that, if you are seriously going to have an Indigenous Voice to Parliament—a Voice that's making representations only—of course it should have access, with those representations, to the very beginning of the process.[8]

3.12 Some submitters pointed to examples of Government decisions which they claimed could have been fundamentally different if the Voice had been enacted.

3.13 Illustrating this point, the Hon Mr Ken Wyatt AM, former Minister for Indigenous Australians, explained that legislation is regularly drafted and passed without significant consultation with Aboriginal and Torres Strait Islander groups despite its clear effect on them. He explained that he had conducted a review of Coalition party room papers to ascertain which entities had been involved in shaping the policy, and outlined his findings:

> In the period of 2022, the social services legislation amendments certainly had carers in the carers sector but there was no Indigenous representation to that legislation. The amendments to the Religious Discrimination Bill had many, many groups but not Indigenous people whose dreaming is their religion and their faith and their belief of our country and our Nation and our origins. The government amendments to the social security legislation amendments streamlined participation bill have some 20 organisations listed but not one is Indigenous, yet they have profound impacts on Indigenous families and communities. The National Health Amendment (Enhancing the Pharmaceutical Benefits Scheme)

6 Mr Jamie Newman, Chief Executive Officer, Orange Aboriginal Medical Service, Committee Hansard, Monday 17 April 2023, p. 11.

7 Mr Noel Pearson and Dr Shireen Morris, Submission 21, p. 6.

8 Committee Hansard, Friday 14 April 2023, p. 25.

> Bill had no Indigenous involvement but everybody else was able to provide input to the minister at the time before it went to the party room. In the amendment to the Family Law Amendment (Federal Family Violence Orders) Bill, there were no Aboriginal organisations, and yet we know that violence within Aboriginal communities is substantial in some locations and we've seen the coverage of Alice Springs. I could go on.[9]

3.14 Aboriginal elders who have decades of experience interacting with Government explained that interaction with the executive was the critical circuit breaker in delivering long overdue progress. Aunty Pat Anderson AO stated:

> They are the real decision-makers. The bureaucrats of the day decide how things are going to work and who they'll talk to and who they won't talk to. That's why it has to be—if we don't have that capacity to talk to them, there's not much left on the table, really, to be honest, in terms of practical application, to where the real needs are, for goodness sake.[10]

3.15 At the public hearing in Cairns, Mr Richard Ah Mat stated:

> The executive government is where most rules, regulations and policies are made. You have a right of veto to whatever we say to you. We don’t have that right. But we’re giving you an example of what we know is best for the mobs.[11]

3.16 Professor Tom Calma AO stated:

> … we have many programs the executive government delegate to implement themselves that don't require parliamentary intervention, so that's why it's important to work with the executive government and the bureaucrats particularly on how to implement a lot of their programs.[12]

### Alternative model

3.17 One potential alternative model was suggested by Father Frank Brennan SJ AO, who supported the amendment in principle but argued that the prospect of a successful referendum may be improved if the words ‘Executive Government’ were replaced with a reference to ‘Ministers of State’. He submitted:

> The one issue which I find difficult is this: the words, as they are at the moment, extend to executive government including public servants making routine administrative decisions. With a quarter of a million Commonwealth public servants, how do you deal with that in terms of it being constitutionalised? We've heard from all the legal experts that, under clause (iii), parliament can do what it likes, except for this: parliament cannot extinguish the capacity that's there under clause (ii). If, under clause (ii), executive government has a capacity to make

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9 Committee Hansard, Friday 28 April 2023, p. 17.
10 Committee Hansard, Friday, 14 April 2023, p. 6.
11 Committee Hansard, Wednesday, 19 April 2023, p. 17.
12 Committee Hansard, Friday, 14 April 2023, p. 16.

> representations to individual public servants about administrative decisions, then legitimate questions arise, such as: how is the Voice to know that an individual public servant is making an administrative decision which could affect Aboriginal and Torres Strait Islander people? For the Voice to make an adequate representation, how are they to have enough information available to be able to make a coherent representation? All my amendment is aimed at is saying that I agree with all of those legal experts who have said: 'Legislate all you like for the Voice to be not only a voice to parliament and not only a voice to ministers on matters of policy and practices. If you like, legislate for the Voice to be able to make representations to individual public servants on routine administrative decisions.' But that's got to be done by legislation, and to constitutionalise it is to risk that, in the future, as ex-justices Hayne and French have said, if you were to draw the implication that they were to have information about what could be done, that could clog the system of government.[13]

3.18 In response to this proposal, Mr Noel Pearson and Dr Shireen Morris argued that addressing only Ministers of State in the legislation would inappropriately stymie the power of the Voice. They argued that the Voice requires a 'guaranteed role advising policy departments and bureaucrats, if it is to have real positive impact on practical outcomes'.[14]

3.19 Mr Tom Brennan SC submitted that the inclusion of words in s 129(ii) 'to Ministers of State' would 'operate as a substantive limitation on the functions of the Voice'.[15] Further Mr Brennan stated that Father Brennan's proposed amendment 'would not avoid litigation, it would cause it':

> By his "to Ministers of State" criterion Father Brennan would draw a single line dividing representations which would be within the Voice's functions to make and those which are legally invalid. It would fall to the Courts to apply that single test to the extraordinary variety of relationships between Ministers and the public service. The consequence is that unless the legal line that Father Brennan would draw ("to Ministers of State") is very clear Father Brennan's amendment will operate to render insecure and uncertain a vast array of administrative decisions.[16]

3.20 The importance of the reference to Executive Government in the legislation was displayed in submitters' urging the Committee not to recommend its removal, as it was argued to be crucial to effecting real and systemic change in policymaking. Mr Noel Pearson and Dr Shireen Morris stated:

> If advice to the Executive is removed from the constitutional amendment, then advice on policy will most likely not be required under the legislation in any enduring way. The current pushback against the idea of the Voice having a

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13 Committee Hansard, Monday 1 May 2023, pp 21-22.
14 Mr Noel Pearson and Dr Shireen Morris, Submission 21, p. 7.
15 Mr Tom Brennan SC, Submission 247, pages 1-2.
16 Mr Tom Brennan SC, Submission 247, pages 1-2.

> guaranteed role advising policymakers demonstrates that many in power would prefer policymakers not to have to deal with Indigenous communities when making policies about them. Assuming true partnership will happen without a constitutional commitment is naïve: if policymakers were so willing to partner with Indigenous communities on policy development, why doesn't it happen already?[17]

## Effect of Representations by the Voice

3.21 The Explanatory Memorandum, and the advice of the Solicitor-General, outlines that the amendment was designed deliberately to ensure that Parliament has the power to determine the legal effect of representations made by the Voice. This was also the view of the overwhelming majority of constitutional experts who addressed this issue in their submissions or evidence.

3.22 It clearly states a representation by the Voice is designed to communicate the views or wishes of the body to the Parliament or the Executive Government, but is not binding on its recipient:

> A representation is a statement from the Voice to the Parliament or to the Executive Government, or both. A representation would communicate the Voice's view on a matter relating to Aboriginal and Torres Strait Islander peoples. The Parliament or the Executive Government may decide what action, if any, to take in response to a representation by the Voice. The Parliament may provide for the procedures to be followed by the Voice in making a representation.[18]

3.23 The Solicitor-General addressed the question of the effect of representations to the Executive Government. He advised:

> Nothing in proposed s 129(ii) expressly addresses the obligations of the Executive Government once it receives a representation from the Voice. For that reason, a law that purports to regulate the legal effect of such representations would not be contrary to any express constitutional requirement.
>
> The critical question is therefore whether proposed s 129(ii) governs the legal effect of representations to the Executive Government by implication, thereby taking that subject beyond the reach of laws passed pursuant to proposed s 129(iii). In my opinion, it is clear that it does not. I hold that opinion for three reasons.
>
> *First*, the High Court has frequently emphasised that constitutional implications must be "securely based" [which] means that a constitutional implication can be drawn "only so far as is necessary" to give effect to the text or structure of the Constitution … Focusing on what the text of proposed s 129 relevantly "authorises or requires", it authorises the Voice to make representations to the

17 Mr Noel Pearson and Dr Shireen Morris, Submission 21, pages 6-7.
18 Explanatory Memorandum, Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023, p. 11.

> Executive Government, but it does not impose any reciprocal requirement upon the Executive Government to consider or otherwise address those representations. In place of such a requirement, proposed s 129(iii) gives the Parliament a wide power to legislate with respect to matters relating to the Voice'.
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> …
>
> Second, while "it is the constitutional text which must always be controlling", the text must be read in light of its context, including any relevant drafting history. The drafting history of proposed s 129(iii) points strongly against drawing a constitutional implication that would prevent the Parliament from legislating as to the legal effect of representations of the Voice.
>
> …
>
> Third, and finally, the argument that proposed s 129(ii) implicitly requires the recipient of a representation to consider that representation is plainly not correct in that absolute form, because proposed s 129(ii) concerns representations both to the Parliament and to the Executive Government. An allegation that the Parliament had failed to consider representations made by the Voice clearly would not have justiciable consequences. [19]

3.24 This opinion was supported by Mr Bret Walker AO SC, former High Court Justice the Honourable Kenneth Hayne AC KC, former High Court Chief Justice the Honourable Robert French AC, Professor George Williams AO, and Professor Anne Twomey AO.[20]

3.25 Professor Twomey submitted that proposed subsection 129(ii) does not require or oblige the Parliament or the Executive Government to respond or give effect to the representations made by the Voice. This interpretation was supported by other witnesses, including legal experts and participants in the drafting process.[21] Professor Twomey explained that there is 'no obligation imposed upon the Voice, Parliament or the Executive Government of any kind by s 129(ii). Sub-section 129(ii) is merely facultative – meaning it permits the Voice to make these representations'.[22] She further stated that the words 'consult', 'consultation' and 'advice' were rejected due to their potentially imposing an obligation.[23] A number of legal experts similarly noted that the inclusion of the word 'may' is a permissive term, which indicates that the Voice is not obliged to make representations.[24]

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[19] Attorney-General, Submission 64, pages 18-22.

[20] Committee Hansard, Friday 14 April 2023, pages 38-49.

[21] Mr Noel Pearson and Dr Shireen Morris, Submission 21, p. 5.

[22] Professor Anne Twomey AO, Submission 17, p. 3.

[23] Professor Anne Twomey AO, Submission 17, p. 5.

[24] Professor Anne Twomey AO, Submission 17, p. 2 Gilbert + Tobin, Submission 189, p. 12; Indigenous Law Centre, UNSW, Submission 44, p. 5; The National Indigenous Australians Agency and the Attorney-General's Department, Submission 90, p. 11; The Hon Mark Dreyfus KC, MP, Attorney-General, Submission 64, p. 5.

### *The risks of 'unintended consequences'*

3.26 In contrast, some submitters and witnesses raised issues that the reference to 'Executive Government' could cause unintended consequences, particularly that the High Court could interpret the section in a range of ways that were not intended by the legislation, including:

- Implying obligations on the Parliament or the Executive Government to consult the Voice before making laws or policies on relevant matters[25]
- Implying obligations on the Parliament or the Executive Government to advise the Voice prior to making laws or policies on relevant matters, which may require additional time to make representations and thus slowing the passage of legislation
- Implying an obligation on the Parliament or the Executive Government to consider and/or give effect to any Voice representation before and during the process of making law or policy regarding related matters.[26]

3.27 According to some, these potential imputations would significantly slow the process of government, particularly if 'Executive Government' were broadly interpreted to mean the Australian Public Service at large and the Voice could make direct imputations to individual public servants or if all policy or legislative proposals required consultation.[27] As expressed by Father Frank Brennan:

> My issue [is] not with giving the Voice a broad panoply of roles in representation, but with constitutionalising all those roles, thereby rendering the system of governance more uncertain and ensuring ongoing litigation about such a novel constitutional set of functions. It is one thing to set up a new constitutional entity. It is another thing to give the entity a constitutional entitlement to make representations not only to parliament and ministers but also to public servants, thereby creating a constitutional duty for those persons, including all public servants, to consider representations, and presumably to give prior notice of intention to make a decision which might attract a representation.[28]

3.28 Advice from the Solicitor-General provided for the purposes of the inquiry states the following in relation to this issue:[29]

- There would be no obligation for the Parliament to wait to receive a representation from or consult with the Voice before legislating on a matter, given the Voice is not required to make representations and there is no imputation contained in the text;
- Proposed section 129 does not contain an enforceable obligation on the Parliament to consider or follow representations from the Voice;

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[25] Father Frank Brennan, Submission 18, p. 4.
[26] Father Frank Brennan, Submission 18, p. 3.
[27] Father Frank Brennan, Submission 18, pages 13-14.
[28] Father Frank Brennan, Submission 18, pages 13-14.
[29] The Hon Mark Dreyfus KC, MP, Attorney-General, Submission 64, pages 11-12.

- The Voice would not impose obligations on the Executive Government to follow representations or consult with the Voice before developing policy or make decisions;
- There may be some argument as to whether decision-makers would be required to consider representations depending on the context.

3.29 The Committee heard evidence from a range of constitutional experts who agreed that the High Court would not interpret the section to confer an obligation on the Executive Government to seek or act on the Voice's representations. Former Chief Justice of the High Court the Honourable Robert French AC, Mr Bret Walker AO KC and Professor George Williams AO all agreed with Professor Twomey's assessment that the High Court would interpret this section based on its intended purpose.[30] This would include sources such as the Explanatory Memorandum and the Attorney-General's second reading speech. In this case, these materials 'make clear, in unequivocal terms, that the proposed amendment is not intended to give rise' to consequences such as unintended conferrals of obligations.[31] Further, Professor Twomey noted that all sides of politics in the Parliament have indicated that an imputation should not be drawn, which would also affect a court's interpretation of the section.[32]

3.30 Former Chief Justice of the High Court the Honourable Robert French AC and Professor Geoffrey Lindell stated:

> In any event it is now likely in the light of modern developments regarding the use of extrinsic materials in relation to constitutional interpretation that a court interpreting the new provision could have regard to its context and purpose as disclosed by the Explanatory Memorandum and Second Reading Speech in interpreting it.[33]

3.31 In assessing the argument that a potential implication could be drawn, Professor Twomey stated:

> Both the government and the opposition say that they do not want this constitutional amendment to give rise to this implication. So what, effectively, people are arguing is that, when asked, the High Court will look at a provision of a constitutional reform where there is nothing in the words that suggests any kind of obligation of prior notice or prior consultation or prior information that a decision is going to be made or a requirement for consideration—where there is nothing, absolutely zero, in the words—yet it will still draw an implication, even though the terms of that implication are completely against what the Australian people were told that they were voting for at that referendum in official documents, in the explanatory memorandum and in the second reading speech.

30 Committee Hansard, Friday 14 April 2023, pages 38-55.
31 Professor Anne Twomey, Submission 17, p. 6; Professor George Williams AO, Committee Hansard, Friday 14 April 2023, pages 38-39.
32 Committee Hansard, Friday 14 April 2023, p. 41.
33 The Hon Robert French AC and Professor Geoffrey Lindell, Submission 98, p. 17.

> So we're saying the High Court will go contrary to the words of the Constitution despite the fact that the High Court has previously said that it's the text that's controlling, and that it will go completely contrary to the intent of both the government and the opposition—the parliament—and what the people thought they were doing when they voted on the basis of what they'd been told this meant in the Constitution. Yet we still come to this kind of implication which everyone has said would, if it were drawn, have catastrophic effects on government by gumming up the system and making government ungovernable. Do we really seriously think that the High Court is in a position that it would do that? And my answer is: no, I'm sorry, I don't.[34]

3.32 The legal experts described the risk of the High Court interpreting an imputation to consult with the Voice or act on its reputations as being 'very low'.[35] Former Justice Kenneth Hayne AO argued that the potential disruption such an imputation could cause was exactly why a High Court would not interpret it so. Mr Hayne stated that a court would 'not make implications in a constitution that will bring government to a halt', and that the point was 'untenable'.[36] In response to whether an imputation could be found in the text, Mr Bret Walker AO SC expressed:

> I must say I would regard it as a double backflip with pike, as an advocate in the High Court, to suggest that section 129 should be read with your ruler, coming down the text, and looking at (ii) without looking at (iii). I don't think I'd get half a sentence out if I was advancing an argument like that. I really think that we need to get a grip concerning this magical process of implication, which is only a matter of teasing out the meaning of text. It might be difficult, it might be subtle, but that's why we have the High Court.
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> …
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> It just seems to me that this notion that there is an implication threatened in the proposed subsection (ii), whereby the validity of executive action—multifarious decisions great, small and middling, by officials great, small and middling—will be somehow jamming the courts from here to kingdom come as a result of this enactment, is really too silly for words.[37]

3.33 The Honourable Robert French AC stated:

> It's a big thing to draw a constitutional implication, and the implications which have been suggested are not supported by the text and will in fact be inconsistent with it.[38]

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34 Committee Hansard, Friday 14 April 2023, p. 42.
35 Professor George Williams AO, Committee Hansard, Friday 14 April 2023, pages 38-39.
36 Committee Hansard, Friday 14 April 2023, p. 40.
37 Committee Hansard, Friday 14 April 2023, p. 39.
38 Committee Hansard, Friday 14 April 2023, p. 54.

3.34 It was noted, however, that the Parliament could legislate to provide that obligations to consult or act on representations, in addition to determining processes and rules to accompany such a requirement to avoid undue delay to the work of Government.[39]

## Matters relating to Aboriginal and Torres Strait Islander peoples

3.35 The Explanatory Memorandum defines 'Matters relating to' as:

> Subsection 129(ii) provides that the Voice's core representation making-function concerns 'matters relating to Aboriginal and Torres Strait Islander peoples'. This requires a connection between Aboriginal and Torres Strait Islander peoples and the matters on which the Voice makes representations.

It continues:

> The phrase 'matters relating to Aboriginal and Torres Strait Islander peoples' would include:
>
> a. matters specific to Aboriginal and Torres Strait Islander peoples; and
>
> b. 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.[40]

3.36 A small number of stakeholders argued that the reference to 'matters relating to Aboriginal and Torres Strait Islander peoples' could involve a range of diverse and potentially unconnected issues.

3.37 Professor Twomey observed that the term 'relating to' has been 'interpreted broadly' by the High Court, requiring some degree of connection between the representation made and those it purported to affect (i.e. Aboriginal and Torres Strait Islander peoples).[41] She explained that a valid exercise of the representation would likely be dependent on contextual factors, but that a tenuous or distant connection to the subject matter would likely be considered insufficient.[42]

3.38 Professor Twomey also explained that any attempt by the Parliament to prevent the Voice making representations on matters that were demonstrably on issues relating to Aboriginal and Torres Strait Islander peoples would be invalid.[43]

3.39 It was argued to be unlikely that representations would be made by the Voice on a myriad of remote subjects due to the Voice needing to restrain its power for matters which most require its attention. Mr Noel Pearson and Dr Shireen Morris observed:

> While clause 1 gives the Voice broad discretion to make representations to Parliament and the Executive, the Voice will operate through political influence: it

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39 Mr Noel Pearson and Dr Shireen Morris, Submission 21, p. 5.

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

41 Submission 17, p. 3.

42 Professor Anne Twomey AO, Submission 17, p. 3.

43 Submission 17, pages 3-4.

will need to protect its credibility and authority. The Voice will only have influence if it gives sensible and targeted advice. If it gives silly or irrelevant advice, its influence will quickly wane. Indigenous people do not want this, so they are unlikely to want to give advice on irrelevant matters. Nor will they have time: the Voice will be busy advising on how to improve Indigenous wellbeing.[44]

3.40 Mrs Kristyne Davis, Chief Executive Officer of the Cape York Institute stated:

> The purpose of the Voice to Parliament and the Executive Council is to create change for the future. We propose this, Indigenous people propose this, as a way to work in partnership with the government to create change and close the gap. We find it offensive that there are certain voices out there that are trying to put this as anything other than that.[45]

3.41 Mr Pearson and Dr Morris also pointed to the importance of the Voice's capacity to make representations being flexible to accommodate for unusual or seemingly unconnected matters. For example, environmental policy was suggested as a policy area which 'may not directly target Indigenous communities, but which may have detrimental impacts to economic development on underdeveloped Indigenous land'.[46] In relation to what should be covered by 'matters', Mr Bill Allen said:

> … the same old things that have been problems for us for a long time, and they are housing, health, educational opportunities and all those sorts of things.[47]

3.42 Dr Morris, at the Cairns public hearing, stated:

> … given that parliament and government already make special laws and policies about Indigenous people, which they need to, surely Indigenous people should have a guaranteed say in those laws and policies and other matters that affect them that they want to advise on. Given the history, that is not asking too much.[48]

# The effect of subsection 129(iii): The role of Parliament

3.43 Proposed subsection 129(iii) provides that:

> the Parliament shall, subject to [the] 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.

3.44 The Explanatory Memorandum defines the role and scope of the Parliament's power:

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44 Mr Noel Pearson and Dr Shireen Morris, Submission 21, p. 7.
45 Committee Hansard, Wednesday 19 April 2023, pages 27-28.
46 Mr Noel Pearson and Dr Shireen Morris, Submission 21, p. 8.
47 Committee Hansard, Monday 17 April 2023, p. 31.
48 Committee Hansard, Wednesday 19 April 2023, p. 43.

> Subsection 129(iii) would allow the Parliament, subject to the Constitution, to make laws with respect to matters relating to the Voice, including its composition, functions, powers and procedures. It confers upon the Parliament a broad power to make laws in relation to the Voice, without detracting from its constitutionally guaranteed existence (under s 129(i)) and representation-making function (under s 129(i)).[49]

3.45 Advice from the Solicitor-General stated the following in relation to the power of the Parliament under s129(iii):

> The Parliament's power under proposed s 129(iii) to make laws "with respect to matters relating to the … Voice" will be construed with "all the generality which the words used admit". It plainly empowers the Parliament to make laws with respect to the four topics mentioned after the word "including", being the "composition, functions, powers and procedures" of the Voice.
>
> However, unlike the Garma draft, the power conferred by proposed s 129(iii) extends well beyond those four topics. The double use of wide connecting language – to enact any law with respect to matters relating to the Voice – textually produces a legislative power of great width, because the subject-matter of the power is not "the Voice", but the wider "matters relating to the Voice". The result is that the Parliament may enact any law that has more than an insubstantial, tenuous or distant connection either to the Voice itself or to any subject relating to the Voice.[50]

3.46 According to Professor Twomey, proposed subsection 129(iii) authorises Parliament to determine multiple aspects of the Voice's operations and powers, including the procedures for the receipt and referral of representations to the Parliament or the Executive Government.[51] She further explained that this means that the composition, procedures and functions of the Voice could be changed by the Parliament at a later date if the model was not working well or to confer additional powers on the Voice if required.[52]

3.47 Importantly, Professor Twomey noted that Parliament's power in subsection 129(iii) is subject to the remainder of the Constitution, indicating that not only would Parliament's power be subject to other constitutional provisions and implications such as the separation of powers, but also that the Parliament could not 'legislate so as to abdicate its legislative power by requiring approval by the Voice before passing a law, as this would be inconsistent with Chapter I of the Constitution'.[53] On Twomey's interpretation, the Voice would therefore not create a 'third chamber' of Parliament or confer voting rights on the Voice.

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49 Explanatory Memorandum, Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023, p. 12.
50 The Hon Mark Dreyfus KC, MP, Attorney-General, Submission 64, pages 17-18.
51 Submission 17, p. 3.
52 Professor Anne Twomey, Submission 17, p. 4.
53 Submission 17, p. 4.

3.48 Additionally, Dr Elisa Arcioni and Associate Professor Andrew Edgar argued that the Constitution Alteration's sections relating to consultation clearly indicate that they are not enforceable by the courts. Further, other legislative requirements on Commonwealth regulations explicitly state that 'the form of consultation is a matter for the discretion of executive government officials and that the failure to consult does not affect the validity or enforceability of a regulation'.[54] They suggested that, given subsection 129(iii) empowers the Parliament to determine matters such as the process in which representations are received, the legal impact of representations would be better addressed after a successful referendum when the Parliament considers the scope and processes of the Voice.[55] On the issue of legal effect of representations made by the Voice, the Honourable Kenneth Hayne AC stated:

> The construction of 129(ii) would have to be a construction that takes account of 129(iii), and 129(iii) plainly allows parliament, subject to the Constitution, to make a law with respect to a matter relating to the Voice. The legal effect of representations made by the Voice is, I would have thought, plainly a matter relating to the Voice.[56]

# Race and the Constitution

3.49 The Constitution includes a 'race power' which has, for decades, been used to make laws about Aboriginal and Torres Strait Islander peoples (and only Aboriginal and Torres Strait Islander peoples).

3.50 The majority of evidence indicated that the proposed Constitution Alteration would not create inequality nor encourage discrimination; Rather, it could be a means of facilitating the right to equality for Indigenous Australians.[57]

3.51 Despite some submitters asserting that the proposed amendment would insert race – or recognise Aboriginal and Torres Strait Islander peoples on the basis of race – in the Constitution, the overwhelming majority of submitters repudiated that evidence. The Honourable Robert French AC stated that the proposed amendment moves away from the issue of race:

> Put shortly, the Voice provision provides for the recognition of Aboriginal and Torres Strait Islander peoples not as a race but as the First Peoples of Australia—that is, their particular part in the history of this continent, which goes back up to 65,000 years before the enactment of our Constitution. So the criterion of recognition and the basis for the creation of the Voice is their status as First Peoples, not their status as Aboriginal people or as Torres Strait Islander peoples, but that particular historical role. That provides a significant shift away from the existing race based legislative power that the Commonwealth has with

[54] Dr Elisa Arcioni and Dr Andrew Edgar, Submission 19, p. 3.
[55] Dr Elisa Arcioni and Dr Andrew Edgar, Submission 19, p. 5.
[56] Committee Hansard, Friday 14 April 2023, p. 39.
[57] Professor Ben Saul, Submission 191, p. 2.

> respect to Aboriginal and Torres Strait Islander people, although that power is still there.[58]

3.52 Professor George Williams AO agreed in relation to race:

> … and I think the whole race issue is a complete misnomer. Race is a 19th-century concept that has no longer any scientific credibility attached to it. A group has been identified because they're a unique group within our community. They are rightly identified because of their current and prior connections to land, and our nation is built upon their ancestral lands.[59]

3.53 Professor Anne Twomey AO argued that the proposal of a Voice is not to favour one race of people over other races, but in recognition of Aboriginal and Torres Strait Islander peoples as the first Australians and their holding a distinctive place in Australia's cultural history.[60] This recognition also asserts Indigenous Australians' status in international human rights law, affording them protections and rights on this basis. Dr Elisa Arcioni and Associate Professor Andrew Edgar further noted that:

> To enshrine a Voice is not to import an illegitimate racial element into the Constitution. It is simply to recognise the distinct place of First Nations peoples in the Australian polity, consistent with the ongoing development of the constitutional identity of 'the people'.[61]

3.54 The Honourable Ken Wyatt AM stated that the backlash to the Voice is based on race and that Indigenous Australians 'don't see ourselves as a race. We are nations of people and we are Australians. We retain our identity'.[62] He also observed that there are already race provisions in the Constitution which have been used in respect to Indigenous Australians.[63]

3.55 The Honourable Fred Chaney AO, former Minister for Aboriginal Affairs, similarly asserted that the Constitution Alteration 'is not an affront to our equal citizenship'. He explained further:

> I believe equal citizenship is an important principle. That's what motivated all of us in the early days in setting up Aboriginal legal and medical services, trying to get a better deal for Aboriginal people. But this important principle has to live with the facts. In Australia's democracy, like the democracies of Canada, the United States, New Zealand and the Scandinavian countries, it has to deal with the particular and distinct legal rights of the original peoples. In addition, it permits inequality between the states in terms of the voting powers of individual citizens.

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58 Committee Hansard, Friday 14 April 2023, p. 55.
59 Committee Hansard, Friday 14 April 2023, p. 46.
60 Professor Emerita Anne Twomey, Submission 17, p. 2.
61 Dr Elisa Arcioni and Dr Andrew Edgar, Submission 19, p. 2.
62 Committee Hansard, Friday 28 April 2023, p. 18.
63 Committee Hansard, Friday 28 April 2023, p. 18.

> It has to accommodate that. It will legislate about first peoples in their particularity.[64]

3.56 Conversely, it was argued that the Bill would insert a race component into the Constitution and that a body defined by race is not consistent with the principle of equal citizenship. Stakeholders argued that the basis of democracy is that all citizens have equal rights and a constitutionally enshrined body defined by race is not consistent with this principle.[65] The Honourable Nicholas Hasluck AM KC stated that a Voice defined by race is 'contrary to the democratic spirit of the constitution which is based on all citizens having equal democratic rights'.[66] Mr Nyunggai Warren Mundine AO is further noted that the Bill would be 'reinstating racial segregation into the Constitution. This Bill is reinstating race-based treatment of Aboriginal and Torres Strait Islander people'.[67]

3.57 Some stakeholders also argued that Aboriginal and Torres Strait Islander Australians can and do represent their interests as parliamentarians, and that a Voice was thus unneeded. However, others responded by noting that parliamentarians are elected to represent their constituency rather than Indigenous peoples specifically.[68]

3.58 Additionally, Mr Mundine put the view that the proposed Bill further entrenches Aboriginal and Torres Strait Islander peoples as a 'race of people' and does not recognise their nations.[69] He argued that the Constitution Alteration's premise is that Aboriginal and Torres Strait Islander peoples are a homogenous group, but that there exists hundreds of nations and communities of people who do not have homogenous views and perspectives. Mr Mundine asserted further that he did not believe the Voice can adequately represent First Nations people and will in fact undermine them.[70]

3.59 On this point, the evidence received by the Committee was consistent with the Explanatory Memorandum, with multiple legal experts concluding that the alteration is consistent with international human rights law. Mr Wyatt disagreed with Mr Mundine's assessment while agreeing that not all Indigenous peoples share the same viewpoints. Mr Wyatt stated that the Voice would represent every Indigenous Australian and require governments to consider consulting Indigenous people on matters relating to them.[71]

3.60 Of particular relevance was the Solicitor-General's advice that:

> Insofar as the Voice serves the objective of overcoming barriers that have historically impeded effective participation by Aboriginal and Torres Strait Islander peoples in political discussions and decisions that affect them, it seeks

64 Committee Hansard, Friday 28 April 2023, p. 18.
65 Institute of Public Affairs, Submission x, p. 3.
66 Mr Nicholas Hasluck AM, KC, Submission 56, p. 3, p. 7.
67 Mr Nyunggai Warren Mundine AO, Submission 20, pp 1-3.
68 Councillor Jeffrey Whitton, Orange City Council, Committee Hansard, Monday 17 April 2023, p. 4.
69 Mr Nyunggai Warren Mundine AO, Submission 20, pp 1-2
70 Mr Nyunggai Warren Mundine AO, Submission 20, p. 1.
71 Committee Hansard, Friday 28 April 2023, p. 24.

> to rectify a distortion in the existing system. For that reason, in addition to the other reasons stated above, in my opinion proposed s 129 is not just compatible with the system of representative and responsible government prescribed by the Constitution, but an enhancement of that system.[72]

3.61 Further to this evidence, Mr Jamie Newman, Chief Executive Officer of the Orange Aboriginal Medical Service, expressed that the current advisory system does not adequately address the needs of Indigenous communities. He explained:

> If you look across our systems right now—whether it's police, health, education or housing—we have all these liaisons with reference groups and consultation groups, and they're a mix of Aboriginal people from the same community. To me they're tokenistic. If our people don't have a single line where we are heard, then we're going to have 'divide and conquer' happening within our communities. This has happened for generations. We have too many liaison and referral groups or reference group advisory bodies that tick the box for government entities but do not meet the needs of our people. That creates division within our communities by saying, 'Well, such and such is on this committee; such and such is on that advisory committee; we have a bunch of elders here,' and then that creates division in our community.[73]

# Consistency with international human rights

3.62 Evidence to the inquiry indicated that the Bill was consistent with international human rights and in some cases advanced human rights, particularly the human rights of Aboriginal and Torres Strait Islander peoples. The Explanatory Memorandum contends that the Bill engages the following rights:

- The right to self-determination;
- The right to equality and non-discrimination; and
- The right to take part in public affairs.[74]

3.63 Professor Ben Saul argued that, under Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), Australia is required to consult with Indigenous representative bodies before implementing ‘legislative or administrative measures’, which would affect them. He explained that the Voice meets these standards under international human rights law, as it would enable Aboriginal and Torres Strait Islanders to have input into decisions relating to Commonwealth laws and policies which impact on Indigenous peoples. Professor Saul also asserted that it

[72] The Hon Mark Dreyfus KC, MP, Attorney-General, Submission 64, p. 12.
[73] Committee Hansard, Monday 17 April 2023, p. 12.
[74] Explanatory Memorandum, Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023, pages 7-9.

is consistent with international law that the Voice have the power to make representations to the Executive Government and the Parliament.[75]

3.64 Further, Professor Saul stated that the proposed Voice to Parliament is consistent with international human rights law as it relates to Indigenous people. Article 18 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) asserts the right to:

> participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures.[76]

3.65 The Indigenous Law Centre and the Law Council of Australia agreed with Professor Saul's interpretation, arguing that the Constitution Alteration would give Aboriginal and Torres Strait Islander peoples the right of self-determination in accordance with international human rights. The Voice was said to provide Indigenous Australians with a forum to participate in public discourse and make representations on decisions which would affect their rights and interests.[77] The right to self-determination is a principle of international law, which is also underlined by the UNDRIP.[78] It was noted by some submitters that the constitutional enshrinement of the Voice has been endorsed by multiple international human rights organisations.[79]

3.66 This point was expanded upon by Aboriginal and Torres Strait Islander stakeholders, who expressed an approach to policy that treats First Nations People as incapable of being involved in decision-making for policies that affect them. One stakeholder noted that they felt as though the Aboriginal and Torres Strait Islander people of this nation have been treated like children.[80]

# Potential amendments

3.67 A number of submitters recommended making amendments to the Constitution Amendment. The most prominent argument was the removal of 'Executive Government' in relation to the Voice's capacity to make recommendations in proposed section 129(ii). This was supported by stakeholders such as Father Brennan, Professor Greg Craven and the Institute of Public Affairs, many of which argued (as discussed in other sections of this report) that the reference to 'Executive Government' lacked clarity.[81]

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75 Professor Ben Saul, Submission 191, pages 1-2.
76 Professor Ben Saul, Submission 191, p. 1.
77 Indigenous Law Centre, UNSW, Submission 44, p. 10.
78 Law Council of Australia, Submission 91, p. 10.
79 Professor Ben Saul, Submission 191, pages 1-2; Indigenous Law Centre, UNSW, Submission 44, pages 9-10; Law Council of Australia, Submission 91, pages 10-11, 18-19; Associate Professor Matthew Zagor and Associate Professor Ron Levy, Submission 153, p. 1.
80 Ms Alisha Agland, Committee Hansard, Monday 17 April 2023, pages 21-22.
81 Father Frank Brennan, Submission 18, p. 1, Professor Greg Craven, Committee Hansard, Friday 14 April 2023, pages 27-28, Institute of Public Affairs, Submission 190, pages 22-23.

3.68 Responding to these concerns, Professor Twomey observed that such concerns regarding the Voice's capacity to make representations to Executive Government fundamentally misunderstand the nature of the Voice as a political entity:

> The Voice would have political, not legal, influence. Political pressures would both give the Voice authority and operate as a constraint on its operation and effectiveness. For example, the Voice's influence on law and policy would only be effective if it focused on things particularly relevant to Aboriginal and Torres Strait Islander peoples, where it has expertise and knowledge from people on the ground about the impact of the laws and policies. Concerns about the legal scope of the matters the Voice could make representations about are misconceived, because there will be political and practical constraints on the representations it makes. If the Voice were to make representations on matters that affect Aboriginal people in the same way as all other Australians, its representations would most likely be ignored in favour of those made by bodies with special expertise on the subject. Such an approach by the Voice would dilute its influence and squander its resources. Indigenous peoples would rightly be angered that the Voice was not focused on matters that have a direct and serious impact upon them, and it would be likely that they would change their representatives to ones that focus directly on the many Indigenous issues that need attention.[82]

3.69 Professor Twomey also observed that drafting amendments to the Constitution requires consideration of two audiences: the legal audience who will inevitably need to engage with the section to understand its meaning, and the broader Australian populace who need to understand what they're voting for at referendum. Drafting with one audience in mind can potentially come at a cost to the other, which has subsequent broader impacts in terms of the proposed amendment's success at referendum and – more critically – its support amongst those it is meant to address. She explained:

> If one was only drafting for lawyers and judges, one could be very precise and include complex clauses to make the intention abundantly clear. But because one has to draft something that is comprehensible and acceptable to a general public with no constitutional expertise, the provision needs to be short, simple and easily understandable.
>
> …
>
> From a legal point of view, there was an attraction to nailing down the various possibilities – making clear that the amendment would allow for this and would not permit that. But this would have made the provision appear too complex and confronting to the general public and cause it to fail at the referendum.[83]

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82 Professor Anne Twomey AO, Submission 17, p. 9.

83 Professor Anne Twomey AO, Submission 17, p. 9.

3.70 Supporting this perspective, a majority of the evidence received urged that the proposed section not be changed in order to retain the simple and legally effective wording. As expressed by Mr Noel Pearson:

> These are beautiful words. The proposed provision will adorn the Constitution. I've listened to many submissions, I've read all them and I've listened to people present, and I haven't found a really compelling reason to change the words that the government has introduced into the House. I think children of the future will look back on these words and really be proud of the Constitution. I think this is a good provision. It has a real sense of history. It honours Aboriginal and Torres Strait Islander people. It's a safe provision. It's a provision that meets the needs of Australia and the needs of Aboriginal and Torres Strait Islander people.[84]

3.71 To that effect, Dr Shireen Morris advised the Committee:

> As I said before, we need to be really careful about rushed scrambling to appease what are actually exaggerated concerns. What we've been seeing playing out in the last few months is some constitutional conservatives diving into wholly political tactics, abandoning true legal principles and getting fully bogged into the politics of this….
>
> They've been asking for this for decades. Think about what they've been through: the dispossession, the policies of discrimination and the historical violence. All they're asking for is a constitutionally guaranteed advisory voice in their affairs, and all the details that matter after that are up to parliament, including changing the composition. They are prepared to wear all the risks that come with leaving the details up to parliament in that. Yes, a future body could be weakened. So this is already a compromise. They are not asking for much in the grand scheme of things, and I think we should remember that before scrambling to whittle it down to almost nothing.[85]

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84 Committee Hansard, Monday 1 May 2023, p. 39.
85 Committee Hansard, Wednesday 19 April 2023, p. 42.

# 4. Committee view and recommendations

## Method of recognition in the Constitution

4.1 The ultimate aim of the Bill is to recognize Aboriginal and Torres Strait Islander peoples in the Australian Constitution in a manner that reflects their wishes to have power over their own destiny through constitutional change, and appropriately acknowledges their status as the First Peoples of Australia. As outlined in the Attorney-General's Second Reading Speech:

> This bill is about recognising and listening. It recognises Aboriginal and Torres Strait Islander peoples as the First Peoples of this land. It is about creating a voice, and it is up to the parliament and the Executive to listen.[1]

4.2 The Committee acknowledges that the *Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023* is the product of countless reviews, inquiries, reports, consultations and development processes spanning over several decades. The text of the Bill reflects the pain-staking work conducted by those who have participated in these processes. More importantly, however, is that it is the product of the input by thousands of Aboriginal and Torres Strait Islander representatives who have expressed their desire for recognition in Australia's founding document.

4.3 As well as being a proposal that emerged from a process of consultation with Aboriginal and Torres Strait Islander Communities, the Committee has heard evidence that recognition through an Aboriginal and Torres Strait Islander Voice is supported by a significant majority of First Nations peoples.

4.4 The Committee recognises that a range of models for recognition have been suggested over time. These have involved constitutional recognition, recognition via legislation or representative bodies to assert the rights and interests of Aboriginal and Torres Strait Islander peoples, and quotas for Indigenous representation in Parliament, to name but a few.[2] These proposals are not for discussion here. However, the Committee recognises, as asserted by a range of participants, that the model established by the Bill both recognises Aboriginal and Torres Strait Islander peoples in the Constitution and provides a mechanism for direct input into matters that directly impact them.

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1 The Hon Mark Dreyfus MP, Attorney-General, House of Representatives Hansard, 30 March 2023, p. 3.

2 National Indigenous Australians Authority and the Attorney-General's Department, Submission 90, pages 4-9; Explanatory Memorandum, Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023, pages 2-4.

4.5 Representatives of Aboriginal and Torres Strait Islander communities across the nation told the Committee that the form of words contained in the Bill give effect to what was asked for in processes such as the Uluru Statement from the Heart and the *Final Report to the Australian Government on the Indigenous Voice Co-Design Process*. The Committee accepts the evidence of the inquiry participants that the Voice, as established by the Bill, is the preferred method of recognition sought by Aboriginal and Torres Strait Islander peoples in the Constitution. Moreover, the Committee accepts that the Voice has the potential to enable Aboriginal and Torres Strait Islander peoples with the capacity to provide input to matters that directly impact them.

4.6 The Committee is thus satisfied that the Bill is fit for purpose and meets the request expressed in the Uluru Statement from the Heart.

## Making representations to the Executive Government

4.7 The Committee notes that the consensus of constitutional experts who gave evidence to this inquiry supported the proposed wording of the Bill, including the ability of the Voice to make representations to the Executive Government under sub-section 129(iii).

4.8 While the Committee acknowledges that some witnesses raised concerns about the capacity of the Aboriginal and Torres Strait Islander Voice to 'make representations to the Executive Government of the Commonwealth', evidence received from former Chief Justice of the High Court Robert French, former High Court Justice Kenneth Hayne, Professor Anne Twomey, Professor George Williams AO, Mr Bret Walker KC, the Solicitor-General of the Commonwealth concluded that there was little to no basis for those concerns. The Committee is persuaded by the reasoned evidence of those eminent constitutional experts.

4.9 Furthermore, some witnesses urged the Committee not to recommend amending the provision because of its critical importance in formulating public policy and addressing structural inequality. The Committee concurs with this viewpoint. It acknowledges the long history of policy failures in relation to Aboriginal and Torres Strait Islander peoples, which has led to the significant life outcome gaps between Indigenous and non-Indigenous Australians. This cannot continue. The Bill provides a means for First Nations Australians to provide direct input and guidance to the Executive Government in designing and implementing policy that affects them.

4.10 The Committee notes in particular the argument that previous iterations of 'Voice-like' bodies have been subject to funding shortages and closures. Many witnesses with extensive backgrounds in First Nations' public policy pointed out that changes of government have repeatedly led to the repeated abolition of various models of representation or self-governance.

4.11 The strength of the Voice's model in addressing disadvantage and powerlessness is confirmed in the advice provided by the Solicitor-General to the Committee, which stated:

> Insofar as the Voice serves the objective of overcoming barriers that have historically impeded effective participation by Aboriginal and Torres Strait Islander peoples in political discussions and decisions that affect them, it seeks to rectify a distortion in the existing system. For that reason, in addition to the other reasons stated above, in my opinion proposed s 129 is not just compatible with the system of representative and responsible government prescribed by the Constitution, but an enhancement of that system.[3]

4.12 The Committee also accepts the advice of some witnesses that the provision not be amended to apply only to Ministers of the Executive Government. Addressing Executive Government on the whole enables Aboriginal and Torres Strait Islander peoples to have a direct input into matters concerning them. This would enable them to work with the broader Australian Public Service to better influence and direct public policy initiatives. The Committee accepts the advice provided by legal experts and the Solicitor-General that this would not unnecessarily slow down the operations of government, nor that it would give rise to a legal quagmire in which the courts would be overrun by cases (further discussion on this point is contained below).

4.13 Accordingly, the Committee considers that the provision enabling Aboriginal and Torres Strait Islander Peoples to make representations to the Executive Government is appropriate, fit for purpose as per the wishes of First Nations peoples, and should not be amended.

## Concerns regarding legal impact

4.14 The Committee heard a variety of evidence on the matter of the legal impact of the provisions of the Bill and the introduction of the Voice.

4.15 Based on a careful examination of the evidence, the Committee is of the view that the Bill is constitutionally sound. In coming to this conclusion, the Committee was particularly persuaded by the evidence of former High Court Chief Justice Robert French AO, who asserted that future High Courts are highly likely to apply the interpretation of identifying the intent of the Parliament. Further, a number of other distinguished legal experts, former judges, and current practitioners strongly asserted that the proposed amendment poses little to no risk to the processes of Executive Government or the broader legal system. While care should be taken in future when drafting further legislation to establish the Voice, the Committee is of the view that the Bill provides the necessary powers as requested by the Uluru Statement from the Heart, while also limiting potential risks and complications.

4.16 The Committee notes that many witnesses are understandably interested in how the Voice will operate in practice. The Committee observes that the effect of proposed section 129(iii) is that the Parliament will legislate on how the Voice will function. Not only does this ensure that the Voice's operation can be updated if required by

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3 The Hon Mark Dreyfus KC, MP, Attorney-General, *Submission 64*, p. 13.

changing circumstances, but it provides that the Parliament – and the Australian people, by virtue of their representatives – can assist to shape the Voice's impact.

4.17 Finally, the Committee does not consider it is required to form a view on the degree to which the words, or an amendment thereof, would lead to a successful Referendum. Bi-partisanship or the nature in which it is reached is a matter for party leaders and party rooms. However, the Committee notes that the consultation on this proposal has been extensive, and this legislation represents years of compromise, negotiation and advice. As Mr Noel Pearson notes, '*Many of the compromises have already been made. They've been made over the course of the last nine years, and even before that, and all of the compromises have come from Indigenous advocates*.' It is in this context that the Committee reached a view on its recommendation.

## Recommendation 1

**4.18 The Committee recommends that the *Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023* be passed unamended.**

**Senator Nita Green**
**Chair**
**11 May 2023**

# A. Submissions

**1** *Name Withheld*

**2** Hon Reginald Barrett AO

- 2.1 Supplementary to submission 2

**3** Mr Stuart McRae

**4** Mr David Booth

**5** Prof George Williams

- 5.1 Supplementary to submission 5
- 5.2 Supplementary to submission 5

**6** Dr Simon White

**7** Prof Mark Elgar

**8** Yes 23

**9** Mr Michael Fox

**10** Mr Michael O'Halloran

**11** Mr William Purvis

**12** Mr Martin Page

**13** Mr David Malouf

**14** Mr Brendan Roberts

**15** Mr John Chadderton

**16** Mr Craig Myatt

**17** Prof Anne Twomey

- 17.1 Supplementary to submission 17
- 17.2 Supplementary to submission 17

**18** Father Frank Brennan

- 18.1 Supplementary to submission 18
- 18.2 Supplementary to submission 18

**19** Dr Elisa Arcioni and Dr Andrew Edgar

**20** Mr Nyunggai Warren Mundine

**21** Mr Noel Pearson and Dr Shireen Morris

- 21.1 Supplementary to submission 21

**22** Adjunct Professor Victoria Grieves Williams

**23** Mr Tom Ravlic

**24** Mr Robert S Nixon

**25** Prof Greg Craven

**26** Richard Jones

**27** Graham Connolly

**28** Fiona O'Loughlin

**29** Niels C Munksgaard

**30** David Hind

**31** David Jackson AM KC

**32** Mr David Scown

**33** *Name Withheld*

**34** Mr Paul Rogerson

**35** *Name Withheld*

**36** Rule of Law Institute of Australia

**37** Paul Nolan

**38** Mr Jayden Anthony

**39** John Christensen

**40** Uphold and Recognise

- Attachment 1

**41** Ms Louise Clegg

- 41.1 Supplementary to submission 41

**42** Russell Goldberg

**43** Dr Harry Hobbs

**44** Indigenous Law Centre, UNSW

**45** Bill Gray AM and Fred Chaney AO

**46** Mr Peter Egan

**47** Ms Leslie Shirreffs

**48** Central Land Council

**49** *Name Withheld*

**50** Professor Sarah Joseph

**51** Bruce Watson

**52** Dr Bryan Keon-Cohen AM, KC

**53** Mr Peter Grimshaw

**54** Ms Teela Reid

**55** Dr Ian H Wilson

**56** Mr Nicholas Hasluck AM, KC

**57** Professor Bertus De Villiers

**58** Mrs Joanne Foreman

**59** Dr Ian Killey

**60** Mabo Chambers Barristers and Solicitors

**61** *Name Withheld*

**62** Kim Rubenstein

**63** Australian Monarchist League

**64** The Hon Mark Dreyfus KC, MP, Attorney-General

**65** Michael Dillon

**66** Elizabeth Evatt

**67** Voices for YES!

**68** The Hon Tony Abbott AC

**69** Gillian Calvert AO

**70** Gilbert + Tobin Centre of Public Law

**71** The Hon Ian Callinan AC

**72** David Havyatt

**73** Assistant Professor Narelle Bedford

**74** Ms Maggie Lake

**75** *Name Withheld*

**76** Mr Jeremy Travers

**77** Assoc Prof Rebecca Ananian- Walsh, Prof Peter Billings, Prof Anthony Cassimatis AM, Dr Dani Larkin, Dr Dylan Lino and Prof Graeme Orr

**78** Dr Sean Sexton

**79** Reconciliation Australia

**80** SGS Economics and Planning

**81** The Hon Councillor Philip Ruddock AO

**82** Sydney Law School

**83** Empowered Communities

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**84** Dr Bede Harris

**85** Mr James Blackwell

**86** M. Leah Billeam

**87** Michael Buss

**88** Castan Centre for Human Rights Law

**89** Mr Julian Leeser MP

**90** The National Indigenous Australians Agency and the Attorney-General's Department

**91** Law Council of Australia

- 91.1 Supplementary to submission 91
- 91.2 Supplementary to submission 91

**92** Professor Nicholas Aroney and Professor Peter Gerangelos

**93** Allan Hall AM LLB

**94** Professor Dan Meagher

**95** Reconciliation Tasmania

**96** Peter Bridge

**97** The Benevolent Society

**98** The Hon Robert French AC and Prof Geoffrey Lindell

- 98.1 Supplementary to submission 98
- 98.2 Supplementary to submission 98

**99** *Name Withheld*

**100** Violet Town & District Recognise Group

**101** Flinders University

**102** Mr John Norman

**103** Henry Litton

**104** Radical Centre Reform Lab

**105** RC Davis

**106** Assoc Prof Tamara Tulich, Prof Sarah Murray and Assoc Prof Murray Wesson

**107** Prof A J University

**108** Jeff Williamson

**109** Anglican Church Southern Queensland

**110** Dale Price

**111** Mr Christopher Piggott-Mckellar

**112** ANTAR

**113** NSW Aboriginal Land Council

| | |
|---|---|
| **114** | Australian Council for International Development |
| **115** | Adelaide Law School Researchers and Educators |
| **116** | The Fred Hollows Foundation |
| **117** | Clem van der Weegen |
| **118** | Asylum Seeker Resource Centre (ASRC) |
| **119** | Catholic Social Services Australia Limited |
| **120** | Brotherhood of St. Laurence |
| **121** | Australian Human Rights Institute at UNSW Sydney |
| **122** | Edmund Rice Centre for Justice and Community Education & Edmund Rice Community Services |
| **123** | *Name Withheld* |
| **124** | National Council of Churches in Australia |
| **125** | FRSA |
| **126** | Miss Holly Edwards |
| **127** | Bede Webster |
| **128** | TRH Cole AO RFD KC |
| **129** | Ms Pauline Bleach |
| **130** | St Vincent de Paul Society National Council |
| **131** | The Australian Pro Bono Centre |
| **132** | Mr Guy Alexander |
| **133** | FamilyVoice Australia |
| **134** | Human Rights Council of Australia Inc |
| **135** | The Hon Kyam Maher MLC and The Hon Peter Malinauskas MP |
| **136** | Inner Sydney Voice |
| **137** | Central Australian Aboriginal Congress |
| **138** | Dr Matt Harvey |

**139** Settlement Services International

**140** Australian Lawyers Alliance

**141** Dr Diann Rodgers-Healey

**142** Multicultural Australia

**143** Feminist Legal Clinic Inc.

**144** Federation of Victorian Traditional Owner Corporations

**145** Mr Richard Maguire

**146** The Samuel Griffith Society

**147** *Name Withheld*

**148** Kimberley Land Council

**149** New South Wales Council for Civil Liberties

**150** ANTaR Victoria

**151** Prof Luke Beck

**152** Public Law and Policy Research Unit

**153** Associate Professor Matthew Zagor and Associate Professor Ron Levy

**154** *Name Withheld*

**155** Munganbana Norman Miller

**156** Dr Gary A Rumble

**157** North Australian  Aboriginal Justice Agency Ltd

**158** Reconciliation Victoria

**159** Professor Bronwyn Fredericks

**160** Reconciliation NSW

**161** Brendan Welsh OAM

**162** Mr Fred Chaney

**163** Mr Karl Reed

**164** Mr Andrew Bunn

**165** Ms Barbara Livesey

**166** Torres Shire Council

**167** Lander & Rogers

**168** Religions for Peace Australia

**169** SEARCH Foundation

**170** Australian Christian Lobby

**171** The Hon Matt Foley

**172** Mr Franklin Gaffney

**173** Aboriginal and Torres Strait Islander Justice Project

**174** ANU First Nations Portfolio

**175** Western Sydney University School of Law

**176** Economic Justice Australia

**177** The Lowitja Institute

**178** *Name Withheld*

**180** Gerard Flood

**181** Hon John Anderson

**182** Emeritus Professor Bernhard (Ben) Boer

**183** Dr Robert Oakeshott

**184** University of South Australia - Five Law Academics

**185** Social Justice Advocates of the Sapphire Coast (SJASC)

**186** Jesuit Social Services

**187** Recognise a Better Way

**188** Anthony J H Morris KC

**189** Gilbert + Tobin

**190** The Institute of Public Affairs

**191** Professor Ben Saul

**192** Prof Anthony E Cassimatis AM

**193** Unitng Church in Australia, Synod of Victoria and Tasmania

**194** The Public Health Association of Australia

**195** Diccon Loxton

**196** The Hon Kenneth Hayne AC

**197** Mr Bret Walker AO SC

- 197.1 Supplementary to submission 197
- 197.2 Supplementary to submission 197
- 197.3 Supplementary to submission 197

**198** ANTaR ACT

**199** Mr Michael Mazengarb

**200** Australian Nursing & Midwifery Federation

**201** Dr Daniel Lavery

**202** Dr Christopher Rudge

**203** National Foundation for Australian Women (NFAW)

**204** Tom Gordon

**205** Paul Sonntag

**206** Ms Elizabeth Rice

**207** Australian Sangha Association

**208** Dr Helen Bishop

**209** Arnold Bloch Leibler

**210** Peter Sutton

**211** Michael Mathieson

**212** *Name Withheld*

**213** Professor Graeme Orr

**214** Ms Sally Grimsley - Ballard

**215** National Health Leadership Forum

**216** Northern Sydney Alliance for the Uluru Statement

**217** Northsiders Belief in Action

**218** Orange Region Voice Working Group

**219** Public Interest Advocacy Centre

**220** Sydney Alliance Board

**221** The Snow Foundation

**222** Constitutional Equality

**223** Dr Karen Newkirk

**224** Federation of Ethnic Communities Councils of Australia

**225** Mr Lee Arlidge

**226** Mr Robert Hill

**227** Mr Tom Brideson

**228** Mrs Jo Karaolis

**229** Ms Anny Druett

**230** Northern Land Council

**231** Tyson McEwan

**232** Democracy Matters

**233** Ganesh Sahathevan

**234** Chong Lam

**235** Associate Professor Mark Fowler

**236** Bruce Alexander

**237** Joe Stella

**238** Josephite Justice Office, Ministry of Sisters of Saint Joseph

**239** Stephen Mason

**240** Mental Health Community Coalition ACT (MHCC ACT)

**241** Brendan A McCarthy

**242** *Name Withheld*

**243** George Willis

**244** Mark Huxstep

**245** Singleton Shire Healthy Environment Group

**246** Hon Roger Gyles AO KC

**247** Tom Brennan SC

**248** Sydney University - Sydney Arts Students' Society

**249** Uniting NSW.ACT

**250** Maranguka Limited

**251** Mr Francis Devine

**252** GetUp

**253** Treaty Before Voice

**254** Australian Catholic Bishops Conference Office for Justice, Ecology and Peace

**255** Dr David Barton

**256** *Confidential*

**257** NSW Bar Association

**258** Dominic Wykanak

**259** National Aboriginal and Torres Strait Islander Catholic Council

**260** PwC Indigenous Consulting

**261** The Salvation Army Australia

**262** Anne Carlin

**263** *Name Withheld*

**264** Mr Nawal Kant Maharaj

**265** Dr Toni Robertson

**266** Ms Bianca Janovic

**267** Associate Professor Anna Boucher

**268** Rt Rev Dr Matt Brain and Rev Canon Assoc Prof Uncle Glenn Loughrey

**269** ANTaR Queensland

**270** Fiona McLeod AO SC

# B. Public Hearings

## Friday, 14 April 2023

Canberra

*Panel: The Uluru Statements from the Heart*

- Professor Megan Davis
- Aunty Pat Anderson AO

*Panel: Indigenous Voice Co-design Process*

- Professor Tom Calma AO
- Professor Marcia Langton AO

*Panel: Legal Witnesses*

- Ms Louise Clegg
- Professor Greg Craven AO
- Hon Kenneth Hayne AC KC
- Professor Anne Twomey AO
- Mr Bret Walker AO SC
- Professor George Williams AO

*Private Capacity*

- Mr Thomas Mayo
- Mr Kerry O'Brien
- Hon Robert French AC

## Monday, 17 April 2023

Orange

*Orange City Council*

- Mr Gerald Power, Deputy Mayor
- Mr Jeff Whitton, Councillor

*Orange Aboriginal Medical Service*

- Mr Jamie Newman, Chief Executive Officer

*Uluru Youth Dialogue*

- Ms Alisha Agland

*Mingaan Wiradjuri Aboriginal Corporation*

- Ms Helen Riley, Wiradjuri Elder
- Ms Sharon Riley

*Private Capacity*

- Ms Annette Steel
- Mr Roy Ah-See
- Ms Kim Whitely
- Mr Bill Allen

## Wednesday, 19 April 2023

Cairns

*Torres Strait Island Councils*

- Mayor Yen Loban
- Dalassa Yorkston, Chief Executive Officer
- Mayor Phillemon Mosby
- James Williams, Chief Executive Officer
- Deputy Mayor Getano Lui
- Mayor Patricia Yusia

*Yarrabah Aboriginal Shire Council*

- Mayor Ross Andrews

*Traditional Owners Groups - Cape York and Torres Strait*

- Mr Lul Ned David, Chairperson
- Mr Richard Ah Mat, Chairperson

*Cape York Partnerships*

- Ms Kirstyne Davis, Chief Executive Officer
- Ms Fiona Jose, Chief Executive Officer

*Private Capacity*

Mr Jack Wilkie-Jans

Dr Shireen Morris

## Friday, 28 April 2023

Perth

*Noongar Panel*

- Mr Daniel Morrison, Chief Executive Officer, Wungening Aboriginal Corporation
- Mr Joseph Collard

*Reconciliation WA*

- Ms Jody Nunn, Chief Executive Officer

*Regional Panel*

- Mr Anthony Watson, Chairman, Kimberley Land Council
- Mr Daniel Brown, Chief Executive Officer, Nyamal Aboriginal Corporation
- Ms Kyra Galante, First Nations Participation Director, Worley Resources

*WA Aboriginal Advisory Council*

- Mr Marty Sibosado

*Community Representatives Panel:*

- Professor Fiona Stanley AC, Epidemiologist and Public Health Expert

*Private capacity:*

- The Hon Ken Wyatt AM
- The Hon Fred Chaney AO
- Adjunct Professor Victoria Grieves Williams

## Monday, 1 May 2023

Canberra

*Panel: Existing Voice Bodies*

- Mr Dale Agius, Commissioner First Nations Voice, South Australia
- Aunty Geraldine Atkinson

*Uphold and Recognise*

- Dr Damien Freeman, Founder and Director

- Mr Sean Gordon, Chairman
- Ms Kerry Pinkstone, Executive Director

*Empowered Communities*

- Mr Ian Trust, Chair

*Private Capacity*

- Father Frank Brennan SJ AO
- The Hon Tony Abbott AC
- Nyunggai Warren Mundine
- Mr Noel Pearson
- Mr Julian Leeser MP

*Law Council of Australia*

- Professor Cheryl Saunders AO, Member of the Voice Referendum Working Group
- Mr Luke Murphy, President
- Mr Greg McIntyre SC, President-Elect, and Co-Chair of the Voice Referendum Working Group
- Ms Fiona McLeod SC, Former President
- Ms Leonie Campbell, Director of Policy
- Ms Gabrielle Bashir SC, President

*Attorney-General's Department*

- Ms Katherine Jones PSM, Secretary
- Ms Tamsyn Harvey, Deputy Secretary, Justice and Communities
- Mr David Lewis, General Counsel (Constitutional), Office of Constitutional Law

*National Indigenous Australians Agency*

- Ms Jody Broun, Chief Executive Officer
- Mr Simon Gordon, Acting Group Manager, Empowerment and Recognition
- Ms Julie-Ann Guivarra, Deputy Chief Executive Officer, Policy and Programs

# Liberal Members' Dissenting Report

## Foreword

1.1 This dissenting report deals with issues of constitutional risk raised by the proposed wording in the Bill. We take the Parliament's role seriously and have attempted in good faith to engage with complex issues of constitutional law. Before dealing with those issues, we wish to make some observations on the process.

1.2 There is no defensible reason why the government established a committee to consider a permanent change to our country's constitution with only six weeks to receive submissions, hold public hearings around the country, and report back to the Parliament on the legal effect of the constitutional change.

1.3 The Committee was hamstrung by the government's refusal to provide any detail that would illustrate how the constitutional change might operate. The government has taken the extraordinary approach of saying that the institution would be designed *after* the referendum.

1.4 The comparisons of the constitutional provisions that establish the High Court and the Australian Defence Force (then "Naval and military defence") are oversimplified. At Federation, voters could point to examples of those institutions here and overseas. No such comparison can be made for this proposal, which is novel.

1.5 The uncertainty and risk associated with the proposal as currently drafted are unquantifiable, and if adopted at a referendum would in effect be permanent.

1.6 The Committee, the Parliament, and all Australians have been denied the benefit of a constitutional convention. In the ordinary course, a constitutional convention would iron out issues with the drafting and narrow the areas of dispute. As has been demonstrated by the sum of the submissions, there is no agreement on the drafting, and the issues are manifold.

1.7 The Parliament should never again be asked to consider a constitutional change that is put forward without detail, without process, and without a proper understanding of the risks. More importantly, the Australian people should not be asked to vote on a serious constitutional change in those circumstances.

1.8 However, the Coalition will not stand in the way of Australians voting on the government's proposal. While the Coalition does not support the proposal as presently drafted, it is right that Australians will have the final say on the Referendum. Their vote may hinge on the principle of equality of citizenship, whether a new

national institution can address disadvantage, or whether the wording contains unacceptable constitutional risk, as this report addresses.

## Executive Summary

1.9 Evidence presented to the Committee demonstrated that if the Constitution is amended in accordance with the Bill, there is a risk that government could become unworkable. The risk arises from the proposal to entrench in the Constitution the Voice's power to make representations to the Executive.

1.10 If the Constitution is amended in accordance with the Bill, it is inevitable that the High Court will be asked to decide whether the Executive is under a **duty to consult** the Voice in advance of making decisions and a **duty to consider** the Voice's representations. Two former justices of the High Court gave evidence that if the High Court found these duties to exist, government would become unworkable.

1.11 There are reasonable arguments for and against finding that the Executive would have a duty to consult the Voice and consider its representations. The Committee received submissions from legal experts setting out both sides of the argument.

1.12 No lawyer, no matter their status or how distinguished their career, can seriously guarantee which arguments the High Court will accept in the future. As former Chief Justice Robert French said, predictions about how courts will decide questions of law "involve evaluative judgements upon which reasonable minds can differ."[1] That uncertainty is magnified where a provision is unique and has no constitutional comparison.

1.13 The response to risk can't be judged by counting the number of lawyers for and against a particular argument. The fact is, serious experts, including former High Court and Federal Court judges, gave conflicting evidence about the risk. That is enough cause for the Parliament to take the issue seriously and take steps to eliminate it.

1.14 Even if the chance of the High Court finding the duties to consult and consider is low, the risk of government becoming unworkable is too great to ignore. The question is: would it be *open* to the High Court at some stage to find those duties are implied? The answer is yes.

1.15 The evidence also demonstrated that through minor amendments there are options available to reduce the risk of government becoming unworkable. Some of those options are outlined and considered below.

[1] Committee Hansard, 14 April 2023, p. 50.

## Our Constitutional Democracy

1.16 Australia is a highly stable democracy. Human history and current affairs should remind us that stable and effective democratic government is not inevitable.

1.17 The ingredients for stable democracy should be zealously protected. For Australia, our Constitution is undoubtedly one such ingredient.

1.18 Members and Senators of this Parliament are provided with booklets to distribute to schoolchildren to explain the Constitution. The booklet makes this insightful observation:

> Australia's Constitution contains little of the soaring rhetoric which is familiar in the constitutions of many other lands. That is one of its strengths. It is a practical, matter-of-fact, unpretentious but effective document. As such, it reflects the pragmatic, no-nonsense attitude which we like to think is among the most attractive features of the Australian character.

1.19 The framers of our Constitution sought to distil the best features of the constitutional arrangements in the United Kingdom and the United States: thus 'Washminster' is sometimes used to describe the Australian system of government.

1.20 One important choice made by the framers of our Constitution was to leave out an extensive statement of citizen rights. In this respect, our Constitution differs greatly from the United States Constitution.

1.21 The Bill of Rights in the United States Constitution has had profound effects on how democracy is practised in that country. Laws and government action are routinely challenged in US courts on constitutional grounds. Two well-known examples of this are cases concerning the first amendment right to freedom of speech and the second amendment right to keep and bear arms.

1.22 Each of those rights have drawn US courts into political controversies in a way that has not happened in Australia. Furthermore, each of those rights have been interpreted by US courts in ways that many, if not most Australians would find surprising.

1.23 Australia's Constitution confers very few rights.[2] That is its strength. The Constitution instead leaves it to the Parliament to make laws providing for rights where necessary, with the flexibility to adjust to changing circumstances over time [3]

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[2] There are five explicit individual rights in the Constitution. These are the right to vote (section 41), protection against acquisition of property on unjust terms (section 51 (xxxi)), the right to a trial by jury (section 80), freedom of religion (section 116) and prohibition of discrimination on the basis of State of residency (section 117).

[3] A recent example of Parliament conferring a new right is the *Marriage Amendment (Definition and Religious Freedoms) Act 2017 (Cth)* reforms to permit same sex marriage

1.24 Improvements can be made, and mistakes can be undone. Through the democratic process, governments are constantly accountable to the people for the quality of our laws.

## Entrenching laws in the Constitution

1.25 Entrenching laws in the Constitution denies the Parliament the flexibility to adapt or abandon those laws in the light of changed circumstances. A pertinent example of this is section 25 of the Constitution, which is in these terms:

> **25 Provisions as to races disqualified from voting**
>
> For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

1.26 Section 25 was modelled on the fourteenth amendment to the US Constitution. According to Quick and Garran, that amendment was passed after the US Civil War, in order to induce governments of the US states to confer the right to vote on emancipated slaves.[4]

1.27 What might have seemed like a good idea to the framers of Australia's Constitution in the 1890s, section 25 should now be viewed by all Australians as an embarrassing remnant of a 19th century preoccupation with notions of "race". Despite repeated bipartisan calls for the repeal of section 25[5], the goal of removing it has so far remained elusive.

1.28 The fact that the current government proposes a Referendum to recognise Aboriginal and Torres Strait Islander peoples in the Constitution while at the same time leaving section 25 untouched, demonstrates the political and social reality that once something goes in the Constitution, it is extremely difficult to get it out.

## Constitutional rights

1.29 Section 75(v) of the Constitution entrenches the High Court's jurisdiction to conduct judicial review of executive action undertaken by officers of the Commonwealth. While this is not an explicit right conferred on any person, it does have the practical effect of enabling people to call on the High Court to determine whether the Executive has acted in accordance with Parliament's laws.

1.30 Consequently, the "right" to judicial review is largely controlled by the Parliament, in the sense that legislation will usually provide the framework by which the courts review Executive decisions. Access to the right of judicial review is further limited by

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[4] Quick & Garran, The Annotated Constitution of the Australian Commonwealth (revised ed) (2015), p. 518.

[5] *Final Report of the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples*, November 2018, p .121 – 124.

a requirement that the party seeking review must either show that their legal rights are affected by the decision, or that they have a sufficiently special interest.[6]

1.31 The primary issue this Committee has considered is whether the government's proposed amendment to the Constitution will generate grounds for judicial review of Executive action under s 75(v). In short, the question is this: could the High Court interpret the proposed new Chapter IX of the Constitution in a way that imposes duties[7] on the Executive?

## What duties might the amendment to the Constitution impose?

1.32 Various legal experts made submissions to the Committee on whether proposed s 129 could be interpreted by the High Court in a way that would impose duties on the Executive Government.

1.33 In summary, the legal experts considered whether s 129 could be interpreted by the High Court as imposing on the Executive either or both of two related duties.

1.34 The first duty considered by the experts is one which would make it mandatory for the Executive to give the Voice an opportunity to submit a representation before making decisions on matters relating to Aboriginal and Torres Strait Islander people (**duty to consult**).

1.35 The second duty considered by the experts is one which would make it mandatory for the Executive to consider representations from the Voice before making decisions on matters relating to Aboriginal and Torres Strait Islander people (**duty to consider**).

1.36 Before addressing the arguments about whether these duties could arise, it is crucial to understand why this debate is important.

1.37 If proposed s 129 is interpreted by the High Court in a way that imposes on the Executive either a duty to consult the Voice or consider its representations, this will have profoundly disruptive effects on the operation of government. This is not a rhetorical flourish on our part. This was the undisputed evidence presented to the Committee, including from witnesses who were intimately involved in the government's design process.

1.38 Robert French AC, a retired Chief Justice of Australia, gave evidence that if a duty to consult the Voice was to be found in proposed s 129, this would "make government unworkable".[8]

1.39 Kenneth Hayne AC, a retired justice of the High Court and a member of the government's Constitutional Expert Group, gave evidence that a duty to consult the

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6 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10, [142] – [144].

7 We use the word "duties", recognising that there are various other ways in which the law might deal with this idea, such as a condition on executive power.

8 Committee Hansard, Friday 14 April 2023, p. 52.

Voice would "disrupt the ordinary and efficient working of government" to such an extent that it would "bring government to a halt".[9]

1.40 The disruption that a duty to consult the Voice or consider its representations could cause is a product of the scope of the Voice's power to make representations.

1.41 Proposed s 129 would empower the Voice to make representations on all matters relating to Aboriginal and Torres Strait Islander people. According to Professor Megan Davis, the chair of the government's Referendum Working Group:

> The Voice will be able to speak to all parts of the government, including the cabinet, ministers, public servants, and independent statutory offices and agencies - such as the Reserve Bank, as well as a wide array of other agencies including, to name a few, Centrelink, the Great Barrier Marine Park Authority and the Ombudsman - on matters relating to Aboriginal and Torres Strait Islander people.[10]

1.42 Assuming Professor Davis' view of the scope of the Voice's power is correct, the Executive Government would make thousands of decisions every year on matters relating to Aboriginal and Torres Strait Islander people in relation to which the Voice would be entitled to make representations.

1.43 If the High Court finds that there is a duty to consult the Voice or consider its representations within proposed s 129, this will have several practical effects.

1.44 If there is a duty to consider the Voice's representations, any administrative decision that failed to take into account the representations could be set aside by the High Court in judicial review proceedings under s 75(v) of the Constitution.[11]

1.45 To discharge the duty to consider, there would need to be systems for ensuring that before any relevant decision was made, the decision-maker had received and considered any representation made by the Voice.

1.46 The magnitude of designing and implementing a system of this kind would be affected by the number and form of the Voice's representations.

1.47 As Professors Aroney and Gerangelos observed, it appears that proposed s 129(ii) contemplates the Voice's representations being made either orally or in writing.[12]

1.48 It is unclear how the Voice's oral representations could be reliably captured and considered.

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9 Committee Hansard, Friday 14 April 2023, p. 40.

10 The Hon R Barrett AO, Submission 02.2.

11 Professor Nicholas Aroney and Professor Peter Gerangelos Submission 92, p.14-15.

12 Professor Nicholas Aroney and Professor Peter Gerangelos Submission 92, p. 8.

1.49 The Government offered no submission to the Committee explaining how these systems would be designed and implemented, or how much they would cost taxpayers.

1.50 It is likely that the systems would be difficult to design, even harder to implement and extremely expensive.

1.51 The duty to consult the Voice would be even more onerous than the duty to consider.

1.52 In various contexts, the common law of Australia already recognises a duty to consult as part of the law of natural justice and procedural fairness.[13]

1.53 Conventionally, a duty to consult would involve the Executive giving a person who might be affected by a decision a reasonable opportunity to make a representation about the decision before it is made.

1.54 Usually, a duty to give a person an opportunity to make a representation would be accompanied by a duty to provide reasonable information about the proposed decision, so that a meaningful representation can be made.

1.55 As Mr French and Mr Hayne said, a duty to consult the Voice would make government unworkable.

## There are legitimate arguments in favour of a duty to consult and consider

1.56 In this section of the dissenting report, we explain why there is a genuine risk of the High Court finding a duty to consult the Voice and/or a duty to consider its representations.

1.57 Proposed s 129 does not expressly impose a duty on the Executive to consult the Voice or consider its representations. The question is: would it be open to the High Court to find those duties are implied?

1.58 The High Court has found implications in the Constitution that have had major effects on the distribution of power between the branches of government. For example, in *Lange v Commonwealth* (1997) 189 CLR 520 the High Court held that the Constitution contained an implicit freedom of communication between the people concerning political and government matters.

1.59 The High Court's preparedness to find implications in the Constitution is not limited to restraints on power. For example, Commonwealth executive power also includes

[13] *Annetts v McCann* (1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh JJ; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [11] – [15] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ.

the implied power that is part of nationhood[14]and the power to respond to a national emergency.[15]

1.60 Proposed s 129(ii) will confer on the Voice a power, right or function to make representations to the Parliament and the Executive. It is unlikely that the High Court will interpret that provision in a way that gives it no practical effect.

1.61 Based on existing principles, the High Court will interpret proposed s 129(ii) in a way that enables it to achieve its intended purpose. As the explanatory memorandum and the Minister's second reading speech make plain, the purpose of s 129(ii) is to enable the Voice to influence government decisions.

1.62 Proposed s 129(ii) will be pointless if the Executive is free to make irreversible decisions without first consulting the Voice. As stated earlier, a "duty to consult" in this context means providing the Voice with a prior opportunity to make a representation and providing reasonable information about the issue so that a meaningful representation can be prepared.

1.63 Similarly, proposed s 129(ii) will be pointless if the Executive is free to refuse to receive the Voice's representations, or receive them but ignore them.

1.64 There is at least a reasonable argument that to avoid s 129(ii) being pointless and to allow it to achieve its intended purpose, the Executive is under an implied constitutional duty to consult with the Voice and consider its representations.

1.65 At least some of these arguments are supported by some of the government's own constitutional experts. The third tranche of advice from the Constitutional Expert Group released on 27 April 2023 records that there were differing views among the Expert Group as to whether proposed s 129 is likely to be interpreted by a court as giving rise to a constitutional duty for government decision-makers to consider relevant representations by the Voice, even if Parliament did not require this.[16]

1.66 Furthermore, the Solicitor General considers there is room for argument in relation to a duty to consider.[17]

1.67 Similar views were expressed by Professor Craven, Professors Aroney and Gerangelos, Father Brennan and others.

1.68 The force of the argument in favour of the duty to consult the Voice and consider its representations can be tested by considering the alternative analysis put forward by the government and some of the legal experts who made submissions supporting the government's proposal.

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14 *Davis v The Commonwealth* (1988) 166 CLR 79 at 110-111; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 48-49 [92].

15 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 89 [233]. See also *Williams v The Commonwealth (No 2)* (2014) 252 CLR 416 at 454 [23].

16 Third tranche of advice from the Constitutional Expert Group released on 27 April 2023, section 3.

17 Opinion of the Solicitor General, annexed to Submission 64, p. 29.

1.69 Every year, the Executive makes thousands of decisions on matters relating to Aboriginal and Torres Strait Islander people. The overwhelming majority of those decisions are made in private without prior notice to the public.

1.70 On the view put forward by the government, the Voice will have no legal ground to complain if the Executive carries on making decisions relating to Aboriginal and Torres Strait Islander people without first consulting the Voice.

1.71 Similarly, on the view put forward by the government, the Voice will have no legal ground to complain if the Voice attempts to make a representation and the Executive either refuses to receive it, or having received it, ignores it.

1.72 We accept that there may be reasonable arguments supporting the government's position, however, we cannot agree that those arguments are so overwhelmingly and obviously correct that it is inevitable the High Court will accept them.

1.73 The uncertainty around how proposed s 129(ii) should be interpreted is further demonstrated by the fact that there is no agreement on how it should be characterised. Some experts described it as conferring a "power", while others described it as a "function". The distinction can be important.

1.74 In the High Court's recent judgment in ***Davis*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10, Edelman J explained the difference between a "power" and a "capacity". His Honour said at [120]:

> Perhaps the best known, and most widely accepted, legal and analytical meaning given to the term "power", which separates it from other forms of legal relation, is that it is the ability to effect a change in legal relations.
> (underlining added)

1.75 A "capacity" can be distinguished from a power. In some contexts, the term capacity has been used to describe "rights, liberties or privileges, and immunities", but in others it has been used to describe a general freedom to act in a way that does not alter legal relations with third parties: *Davis* [122] – [123].

1.76 The distinction between a "power" and a "function" is not rigid,[18]however, a "function" is typically an action which is deemed to be authorised, but not necessarily a legal obligation.[19]

1.77 The Voice does not need proposed s 129(ii) to have the freedom to make a representation to the Executive. Any person or body can do this. Therefore, if proposed s 129(ii) confers a power that effects a change in legal relations, it is arguable that it does so by changing the legal relations between the Voice and the Executive. Arguably, that change in relations is brought about by imposing on the Executive a duty to consult the Voice and consider its representations.

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[18] *Wilkie v Commonwealth; Australian Marriage Equality Ltd v Cormann* (2017) 263 CLR 487, [149] – [150].

[19] *Canadian Pacific Tobacco Co Ltd v Stapleton* (1952) 86 CLR 1, 6 (Dixon CJ); *Binsaris v Northern Territory* (2020) 270 CLR 549, [17].

1.78 The extrinsic materials to the Bill inconsistently describe the character of s 129(ii). The Explanatory Memorandum describes s 129(ii) as setting out "the core function of the Voice".[20] Elsewhere, the Explanatory Memorandum describes s 129(ii) as a provision which "*empowers* the Voice to make representations".[21]

1.79 The submissions to the Committee are also inconsistent on this point.

1.80 For example, Professors Twomey,[22]Williams[23]and Craven[24]and Mr Hayne[25]described s 129(ii) as conferring a power on the Voice, whereas the Solicitor-General and Mr French[26]used the terminology of "empower" and "function" in the same manner in which those terms are used in the Explanatory Memorandum. The Government's Constitutional Expert Group describes s 129(ii) as providing a power.[27]

1.81 The diverse views on this topic, including from experts who have been close to the government and the design of the proposed s 129, demonstrates that the High Court could reasonably adopt either point of view.

## How should the risk of duties on the Executive be assessed?

1.82 As already stated, the Committee received submissions and evidence from various legal experts for and against the proposition that s 129(ii) could be interpreted in a way that would impose duties on the Executive.

1.83 Fundamentally, each of the legal opinions put to the Committee involve a prediction about how the High Court might interpret s 129 in the future. As Robert French said, predictions about how courts will decide questions of law "involve evaluative judgements upon which reasonable minds can differ". He went on to say:

> When we get to legal texts, be they contracts, statutes or constitutional provisions, there is never absolute precision. There is always a boundary area of choices of construction, and a lot of that has engaged the work of the High Court over many years, particularly in the area of statutory construction.[28]

1.84 Many of the predictions offered to the Committee by legal experts were put with a degree of certitude that cannot be reconciled with Mr French's cautious observation reproduced above.

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20 Explanatory Memorandum, Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023, p 2.
21 Explanatory Memorandum, Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023, p12.
22 Professor Anne Twomey, Submission 17, p. 3.
23 Committee Hansard, p 38.
24 Committee Hansard, Friday 14 April 2023, p. 28.
25 Committee Hansard, Friday 14 April 2023, p. 48.
26 Committee Hansard, Friday 14 April 2023, p. 52.
27 Third tranche of advice from the Constitutional Expert Group released on 27 April 2023; https://voice.gov.au/news/third-tranche-advice-constitutional-expert-group-released
28 Committee Hansard, 14 April 2023, p. 50.

1.85 Indeed, some of the predictions differed so significantly, that at least some of them cannot be correct. To recognise this is not to doubt the sincerity or expertise of the lawyers who took the time to make submissions.

1.86 Several legal experts, such as Mr Ian Callinan AC, a retired justice of the High Court, and Mr Roger Gyles AO KC, a retired justice of the Federal Court, have pointed out that Australian legal history is replete with decisions of the High Court where the outcome was opposed by the government of the day and would have come as a surprise to many lawyers, including many senior lawyers advising the government.

1.87 To give just a few recent examples:

- ***Kable v Director of Public Prosecutions (DPP) (NSW)* (1996) 189 CLR 51:** the High Court struck down legislation that attempted to vest state courts with functions incompatible with Chapter III of the Constitution;[29]
- ***Lange v Commonwealth* (1997) 189 CLR 520**: the High Court held that the Constitution contained an implicit protection of the freedom of communication between the people concerning political and government matters. That decision has generated a large number of subsequent cases in the High Court and lower courts, where the scope of the freedom has been disputed;[30]
- ***Roach v Electoral Commissioner* (2007) 233 CLR 162**: a majority of the High Court held that it was beyond the power of the Commonwealth to prohibit certain classes of convicted criminals form voting in federal elections, because such laws were not reasonably appropriate and adapted to the constitutional requirement for representative government;
- ***Lane v Morrison* (2009) 239 CLR 230**: the High Court held that it was beyond the power of the Commonwealth to make laws establishing a military court which did not satisfy Chapter III of the Constitution. The Court reached that decision, having held only two years previously in *White v Director of Military Prosecutions* (2007) 231 CLR 570, that the Commonwealth had the power to make laws establishing military tribunals which did not satisfy Chapter III of the Constitution;
- ***Love v Commonwealth* (2020) 270 CLR 152**: a majority of the High Court held that a man born in New Zealand and a citizen of that country could not be deported as an "alien" with the meaning of s 51(xix) of the Constitution, because he descended from and identified as an Aboriginal Australian. The majority reached this conclusion because Aboriginal Australians have a "special cultural, historical and spiritual connection with the territory of Australia".

1.88 There are many other examples of decisions that have invalidated legislation or government decisions, especially in the field of migration.

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[29] See also, *Wainohu v New South Wales* (2011) 243 CLR 181.

[30] See also *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 177 CLR 106.

1.89 The examples cited above and the differences in the various legal opinions offered to the Committee prove the truth of Mr French's observation: reasonable minds can and frequently do differ on important questions of law.

1.90 As Mr Gyles observed, arguments in favour of an implied duty to consult in proposed s 129(ii) are not fanciful or absurd.[31]

1.91 They are serious arguments that the High Court could reasonably accept, even if that comes as a surprise to those who hold the contrary view. It should not be necessary to point out that even justices of the High Court find themselves in the minority dissent from time to time.

1.92 In our view, the Committee ought not attempt to decide which of the legal opinions should be accepted and which should be rejected.

1.93 The Committee's membership and procedures are not suited to making a choice between competing legal arguments.

1.94 The courts are the appropriate forum for resolving these issues.

1.95 In any event, on a question where reasonable minds may differ, it is not useful for the Committee to attempt to decide which opinion might ultimately find favour with the High Court.

1.96 Even if there is only a slight risk of the High Court finding duty to consult the Voice or consider its representations, common sense dictates that an attempt should be made to eliminate that risk, if that can be done without significantly detracting from what the amendment is hoping to achieve.

## OPTIONS:

1.97 The Committee received various submissions suggesting amendments to proposed s 129 that would eliminate or reduce the risk of it being interpreted in a way that would impose unworkable burdens on government. We address some of these below.

### Option 1: Deletion of s 129(ii)

1.98 Some urge the deletion of s 129(ii).[32]

1.99 Deleting s 129(ii) will eliminate the risk of making government unworkable, but will make no practical difference to what the government is hoping the Voice can achieve.

1.100 If s 129(ii) is deleted, there is no reduction of the constitutional recognition of Aboriginal and Torres Strait Islander peoples as the first peoples of Australia.

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31 Roger Gyles AO KC, Submission 246, p. 2.
32 Julian Leeser MP, Submission 89, p. 5-6.

1.101 The title of Chapter IX will remain “Recognition of Aboriginal and Torres Strait Islander Peoples” and the opening words of s 129 will remain “[i]n recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia”.

1.102 If s 129(ii) is deleted, the Voice will still have the same constitutionally protected freedom as everyone else to make representations to Parliament and the Executive.[33]

1.103 The Parliament could not enact a valid law prohibiting the Voice from making representations to the Parliament and the Executive, for such a law would almost certainly breach the implied constitutional freedom of communication on political and government matters.[34]

1.104 If s 129(ii) is deleted, the Parliament's power to make laws under s 129(iii) would be simplified and enhanced. There would no occasion to debate, either politically or in legal proceedings, whether or to what extent the power in s 129(iii) is limited by the grant of power or function in s 129(ii).

1.105 If s 129(ii) is deleted, there will be no occasion for any person to argue that the Executive is under a constitutional duty to consider or consult.

1.106 If the government's model is adopted without s 129(ii), the Voice will still have a constitutionally guaranteed existence and a constitutionally protected freedom to make representations to the Parliament and the Executive.

1.107 Those who support the government's current model insist that s 129(ii) will not impose any duties on the Executive and that this is not the intention.

1.108 All sides of the debate are in fierce agreement that if s 129(ii) does impose duties on the Executive, this would make government unworkable. In these circumstances, there is no sensible reason to retain s 129(ii).

1.109 We urge the government to give the most serious consideration to amending the Bill by deleting s 129(ii). If the government is not prepared to adopt that course, we think it is incumbent on the government to clearly explain exactly what it is that s 129(ii) will enable the Voice to do, that it could not do without it.

### Option 2: a new section 77(iv)

1.110 Uphold & Recognise[35] submits that if proposed s 129 is left in its current form, a new s 77(iv) should be inserted into the Constitution, giving the Parliament power to make laws about the application of s 75(v) to the body established in s 129(i).[36]

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[33] Professor Anne Twomey, Submission 17.2, p. 1-3.

[34] *Lange v Commonwealth* (1997) 189 CLR 520; *Unions New South Wales v New South Wales* (2013) 252 CLR 530.

[35] Uphold & Recognise, Submission 40, p. 15.

[36] Uphold & Recognise, Submission 40, p. 15.

1.111 Proposed s 77(iv) would enable Parliament to prevent or restrict the Voice from pursuing judicial review proceedings in the High Court. The practical effect of this would be that the opportunity for legal proceedings in relation to the Voice would be reduced, although not eliminated.

1.112 The logic of this proposal is similar to option 1. There cannot be any good reason to refrain from including proposed s 77(iv), when those who support the government's model insist that legal proceedings will not arise in any event.

1.113 If, as the Government has repeatedly claimed, there is little or no risk of the courts finding a duty to consult, there is nothing to lose by enabling the Parliament to make laws to make certain of that outcome.

1.114 We note that similar amendments would need to be made to s 39B of the *Judiciary Act 1903* (Cth) and the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

**Option 3: Clarify s 129(iii)**

1.115 It was reported that in the Referendum Working Group, the Solicitor-General and Attorney-General had proposed an addition to the end of s 129(iii) of seven words: "and the legal effect of its representations."[37]

1.116 Professor Craven submitted that proposed s 129(iii) should be amended to expressly empower the Parliament to make laws declaring the legal effect of the Voice's representations.[38]

1.117 Professor Twomey agreed that the proposed wording could be more precise and had no objection to including Professor Craven's suggestion.[39]

1.118 However, as the Solicitor General observed, that contention depends on accepting that the High Court will not find a contrary implication in s 129(ii).[40]

1.119 According to some, it is unnecessary to expressly empower the Parliament to make laws declaring the legal effect of the Voice's representations, because that power is already implicitly contained in the proposed wording of s 129(iii).[41]

1.120 We do not believe there is any good reason to refrain from amending proposed s 129(iii) by adding at the end "and the legal effect of the Voice's representations".

1.121 All this would do is make express that which the Solicitor General says is implicit and would strengthen the argument that an express power to make laws as to the legal

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37 https://www.smh.com.au/politics/federal/the-seven-extra-words-that-could-broker-a-compromise-deal-and-win-the-referendum-20230312-p5crct.html
38 Committee Hansard, Canberra, 14 April 2023
39 Committee Hansard, Canberra, 14 April 2023, p. 44.
40 Opinion of the Solicitor General, annexed to Submission 64, p. 17.
41 Opinion of the Solicitor General, annexed to Submission 64, p. 15-17.

effect of the Voice's representations is inconsistent with an implication in s 129(ii) on that same matter.[42]

### Option 4: Substitute 'Executive Government' for 'Ministers of State in s 129(ii)

1.122 Father Frank Brennan SJ AO urges that the words 'Executive Government' in s 129(ii) be replaced with 'Ministers of State'.[43]

1.123 The logic of this option is that if the government insists on retaining s 129(ii), it would avoid the disruption of representations being made directly to public servants.

## Recommendations

### Recommendation 1

**1.124 The proposal for an Aboriginal and Torres Strait Islander Voice should not be adopted in its current form.**

### Recommendation 2

**1.125 Noting the Coalition will not stand in the way of Australians having their say on the proposal, the Government should amend the drafting of the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 to address the significant risks identified through the Committee process.**

### Recommendation 3

**1.126 The People should never again be asked to vote on constitutional amendments that do not have the benefit of detailed public debate, in the form constitutional conventions or similar.**

42 Opinion of the Solicitor General, annexed to Submission 64, p. 19.

43 Fr Frank Brennan, SJ AO, Submission 18, p. 1. Father Brennan's recommendation is supported by Mr Matt Foley, the former Attorney General of Queensland: Submission 171, p. 4.

## Acknowledgements and reflections

1.127 We thank all who took the time to prepare submissions and appear as witnesses.

1.128 We especially thank those witnesses who were prepared to publicly raise their concerns about the government's model. To do so required moral courage. Many were, and still are, passionate supporters of the idea of the Voice yet felt compelled to come forward and warn of risk in this proposed draft. No one can question their motives in doing so.

1.129 A dispiriting feature of the public debate about the Voice over the last year has been the countless accusations of bad faith levelled at people who have spoken out on ways the government's proposal could be improved.

1.130 It is mystifying that public discussion about issues of constitutional law have resulted in distinguished advocates for the Voice labelling opponents with terms such as "racist" and "scaremongering". These lazy, ad hominin insults have done no credit to those who advanced them and, if anything, have made reaching consensus more difficult.

1.131 We have prepared this report in good faith, conscious of our duties to the Parliament and to the Australian people. We hope that the government will consider this report with the same good faith.

**Mr Keith Wolahan MP**
**Deputy Chair**
**Member for Menzies**

**Senator Kerrynne Liddle**
**Senator for South Australia**

**Senator Andrew Bragg**
**Senator for New South Wales**

# National Members' Dissenting Report

The Nationals do not support the Report of the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum or its recommendations.

The Nationals, including members of the Liberal National Party and Country Liberal Party, have represented regional, rural and remote Australia for more than century. Aboriginal and Torres Strait Islander Australians are the founding part of the cultural and social fabric of our communities, and we acknowledge their essential and ongoing contribution to our nation.

The Nationals believe in the principle that all people are to be considered equal, and this value should extend within the doctrine of our Constitution.

Instead of being one and equal, this change encourages Australians to become divided along the lines of ‘us’ and ‘them’, a notion that the Nationals do not believe has a place within our constitution.

We recognise the entrenched, systemic and historical challenges faced in many Aboriginal and Torres Strait Islander communities, particularly those in remote Australia. These issues must be addressed and in our view the delivery of evidenced-based, community-led initiatives will better address these challenges and improve the lives of Aboriginal and Torres Strait Islander people. This can be done immediately.

This dissenting report acknowledges the constructive dissenting report of Mr Keith Wolahan MP, Deputy Chair. We do not adopt or agree with any recommendations or options provided in that report.

## The Bill

This bill conflates two entirely separate issues. These are-

- Firstly, recognising Aboriginal and Torres Strait Islander people in the Australian constitution.
- Secondly, support for a constitutionally enshrined Aboriginal and Torres Strait Islander advisory body.

These two distinct and separate issues have not been made clear to the Australian public throughout this inquiry and would appear to have been designed with that intent.

All Australians want guidance as to the true intention of this bill.  The deliberate blending of these two separate issues will undoubtedly divide Australians and this goes against the intent of genuine reconciliation which aspires to secure unity.

## Inquiry Process

The time afforded for consideration of the provisions of the Bill has been inadequate and does not acknowledge the magnitude of changing our constitution. The Committee has held a total of five public hearings over 15 consecutive days, in which an unreasonably tight deadline was dictated to explore the evidence and provide a report.

In comparison, other Joint Select Committees that have been dedicated towards less consequential pieces of legislation have taken place over many months, while having less inherent, immovable and longstanding impacts than that of Constitutional change. The Committee process should have conformed to the complexity and impact of the issue at hand, rather than any party, or individual group's politically motivated timeline.

Significantly, much of the evidence that was received did not address the provisions of the bill, or the stated intention of the inquiry to '*amend the Australian Constitution to recognise the First Peoples of Australia by establishing an Aboriginal and Torres Strait Islander Voice*.' Whilst no objection was taken to receiving the evidence, much of it related to personal, and quite often tragic life stories, however this did not address any of the four elements of the legislation.

Of most concern was the Government Committee members' ready acceptance that the Bill was 'constitutionally sound', and its willingness to prefer the evidence of those who formed the view that the Bill posed no or little risk to the process of Executive Government or the broader legal system, over equally qualified witnesses who took a more cautious view that appeals to the High Court were not simply possible, but real. No reasoning was provided as to why this evidence was simply rejected.

Under any circumstance, when considering expertise in any field a balanced view should be given to both sides and a rejection of evidence should only be considered where independent evidence proves otherwise. No such evidence was given during the enquiry that met this threshold.

## Absence of Detail

A recurring theme throughout the inquiry was a consensus on the lack of detail of the Voice to Parliament.  During the course of the committee's hearings, witnesses for both the 'Yes' and 'No' case agreed that there was a need for considerably more detail with respect to the design of the Voice to Parliament.

Those who did not support the bill highlighted the lack of specific detail of the Voice design as an impediment to allow for their informed consideration of the proposal.

In contrast, despite agreeing to the lack of detail, the witnesses giving evidence in favour of the bill were prepared to proceed blindly in the absence of specifics of the voice to Parliament, with a view to 'work it out as we go along'. From any reasonable point of view, this would be considered reckless.

While the Committee's report lauds the Voice's role to improve outcomes for Aboriginal and Torres Strait Islander people, the essential and fundamental questions on how the Voice will function, and how it will deliver positive, meaningful, and evidence-based results in Indigenous communities remain unanswered.

It is not unreasonable that details to crucial questions be answered such as those proposed by the Leader of the Opposition in January 2023

1. Who will be eligible to serve on the proposed body?
2. What are the prerequisites for nomination?
3. Will the Government clarify the definition of aboriginality to determine who can serve on the body?
4. How will members be elected, chosen or appointed?
5. How many people will make up the body?
6. How much will it cost taxpayers annually?
7. What are its functions and powers?
8. Is it purely advisory, or will it have decision-making capabilities?
9. Who will oversee the body and ensure it is accountable?
10. If needed, can the body be dissolved and reconstituted in extraordinary circumstances?
11. How will the Government ensure that the body includes those who still need to get a platform in Australian public life?
12. How will it interact with the Closing the Gap process?
13. Will the Government rule out using the Voice to negotiate any national treaty?

## A lack of diverse views

Of particular concern was a consistent lack of any reasonable diversity of opinion amongst the witnesses who were selected to appear before the Committee. It is arguable that the witness selection was skewed in favour of the yes proposition, in that a clear majority of the witnesses who took part in the consultations were unequivocal in their support for the provisions of the bill establishing the Voice.

This does not take into account those voices who are reluctant to be heard publicly either in a private or commercial capacity to not support the proposition. It is not unreasonable to assume that average Australians, both Indigenous and non-Indigenous, do not wish to enter into a divisive or potentially inflammatory discussion or be subjected to public shame or judgement.

## Summary

The Federal Nationals recognise the immense challenges impacting many Aboriginal and Torres Strait Islander communities, including domestic and family violence, healthcare, substance abuse, child safety, education, housing and unemployment. Each community has vastly different needs.

The Nationals want to address the serious issues impacting Indigenous Australians by delivering frontline, evidence-based and place-based solutions which will help lift Aboriginal and Torres Strait Islander people out of poverty. By stimulating economic participation, improving access to education, enhancing the provision of health services, and eliminating domestic and family violence. By doing this together we can address the 17 Closing the Gap Targets.

Ultimately, The Nationals believe that adding another layer of bureaucracy in Canberra will not genuinely close the gap for Aboriginal and Torres Strait Islander Australians.

It is essential that all politicians should leave Canberra and visit those indigenous communities and sit in town halls, missions and at campfires instead of relying on the advice of Canberra-based bureaucrats.

In closing, many would remember Faith Bandler, a prominent indigenous civil rights activist and campaigner, who said leading up to the 1967 referendum, "*there is only one Australian, and his colour doesn't matter at all*."

We in The Nationals agree.

Accordingly, The Nationals do not support the Committee Report's recommendations.

**Mr Pat Conaghan MP**
**Member for Cowper**

# Additional Comments from Senator Andrew Bragg

## 1. Overview

The Voice is a concept which provides Indigenous people with a say on special laws and policies. This recognises Indigenous people are the only Australians for which a large body of special laws and policies exist. The Voice is a good and fair idea.

This process is an Inquiry into a constitutional amendment. Unfortunately, the majority report did not undertake the detailed analysis which was expected of this Inquiry. Chiefly, it failed to engage with the primary risks and to examine and assess the options required to address these risks. The majority report is a missed opportunity.

The Liberal Party report is a serious attempt to engage with the risks and the options for improvement. The Liberal members of this Committee have different views about the level of risk the proposed amendment presents to Australia's institutional framework.

We are united in our belief that the risks should be addressed with amendments to the current model before the Referendum is conducted. The Referendum should be presented without risk. Even the lowest level of risk should be addressed. It can be done in a way which is entirely consistent with the function and capacity of the Voice concept.

If the legal risk is minimised, then the chances of a successful Referendum are maximised.

The drafting of the Voice encased in this bill is just one iteration of the concept which has been drafted differently on dozens of occasions. The idea that the proposed amendment cannot be improved or de-risked cannot be true.

There is one outstanding risk with the proposed wording before this Committee: whether the proposed constitutional amendment to enshrine a Voice would deliver an effective transfer of power from the Parliament to the High Court.

This is a technical legal question that could undermine the referendum and damage our institutions if it is not addressed.

It hinges on the second limb of the proposed constitutional amendment, which empowers the Voice to make "representations to the Parliament and the Executive Government."

In my mind, there is no doubt that the Voice should be able to speak to the Executive, because it is the Executive that is responsible for a large portion of the daily decision-making that affects Indigenous people.

For example, the National Indigenous Australians Agency (NIAA) makes funding decisions about community programmes on Aboriginal Medical Services or childcare services. The idea that the Voice wouldn't talk to the Executive is completely wrong. It would neuter the Voice.

## 2. Constitutional risk

There are two ways to look at this risk:

First, would the ability of the Voice to make representations to the Executive slow down decision-making in Australia, or would it unreasonably encroach on Executive decision-making?

Would there be excessive litigation on matters which do not specifically relate to special laws and policies concerning Indigenous people?

The primary question for this Committee is whether the Parliament will be able to effectively manage these legal effects of the Voice's operation.

A slowing down of the system of government may occur if the High Court was to review administrative decisions of the Executive on a large scale, and potentially force decisions to be remade. In other words, litigation risk.

There are mixed views on the degree of risk, but it cannot be ruled out under the current wording.

Appearing before the Committee, Professor Emeritus Greg Craven AO described a scenario in which Executive decisions are invalidated by the courts on the basis of non-compliance with procedural fairness requirements.[1]

Professor Craven said that to give the Voice sufficient time to make a representation, Executive decision-makers may have to "facilitate that representation in the sense of giving notice. And you probably have to take account of it, which is not to mean to agree with it, it is at least to plug it in."[2]

The court may invalidate a decision where the Voice has not been given prior notice or reasonable information during the decision-making process. This scenario has been canvassed extensively in the Liberal Party report.

However, Constitutional law experts, Professor George Williams AO and Professor Emerita Anne Twomey AO, rejected Professor Craven's assessment. They told the

1 Professor Emeritus Greg Craven AO, private capacity, *Proof Committee Hansard*, 14 April 2023, 27.
2 Professor Emeritus Greg Craven AO, private capacity, *Proof Committee Hansard*, 14 April 2023, 27.

Committee that the risk is low, and could only eventuate if Executive decision-makers "put their fingers in their ears"[3] and refused to receive representations from the Voice.

Professor Williams told the Committee:

> "... but, here, I think it would be a stretch to read in an obligation to require prior consent, notification or even take into account a representation without some supporting statutory context."[4]

Also dismissing the risk of High Court interpretation, Professor Twomey said:

> "Yet we still come to this kind of implication which everyone has said would, if it were drawn, have catastrophic effects on government by gumming up the system and making government ungovernable. Do we really seriously think that the High Court is in a position that it would do that? And my answer is: no, I'm sorry, I don't."[5]

The reality is that the evidence presented to the Committee varied. No one knows how the High Court would interpret a new provision. It is unclear if the current proposal provides for the Parliament to manage the legal effects. That is the risk.

The second issue is whether representations on matters unrelated to special laws and policies for Indigenous people could impact our system of government. Again, the subsidiary question is whether the Parliament can control the scope of the body's activities.

This relates to the Voice's representations to the Executive under proposed subsection (ii) and whether the Voice would be able to make extraneous representations to the Executive.

Professor Twomey told the Committee:

> "the representations are to be 'on matters relating to Aboriginal and Torres Strait Islander peoples'. The words 'relating to' have been interpreted broadly by the High Court. They would require a connection or association between the representation and Aboriginal and Torres Strait Islander peoples. The degree of that connection would be governed by the context, and may be direct or indirect."[6]

The question that remains is whether the proposed constitutional amendment addresses the scope issue adequately, or whether more clarity can be provided.

This was a matter of debate during the Committee hearings:

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3 Professor George Williams AO, private capacity, *Proof Committee Hansard,* 14 April 2023, 39.
4 Professor George Williams AO, private capacity, *Proof Committee Hansard,* 14 April 2023, 38.
5 Professor Emerita Anne Twomey AO, private capacity, *Proof Committee Hansard,* 14 April 2023, 41.
6 Professor Emerita Anne Twomey AO, *Submission 17*, 3.

"Senator Bragg: Okay, my last question is just to clarify then. There's an Explanatory Memorandum and there's a Bill. You've said there you think that the EM does a good job in confirming what exactly the body should be doing, or the body should be doing. Do you think the Bill reflects the EM?

Professor Twomey: I think that the EM helps clarify the intention of the Bill. As I've said before, I'm relatively relaxed to the extent I do not believe the High Court will draw the implications people have said. Could the wording be more precise? The answer is always yes. Do I have objections to it being more precise? The answer is no."[7]

Professor Twomey went on to consider the Solicitor-General's reported proposal during the drafting stage that seven additional words be included in the amendment, a proposal that was also discussed with Professor Craven. The proposed additional words to be placed at the end of section 129(ii) are "and the legal effect of its representations."

This matter was not addressed in the Solicitor-General's submission to the Committee, but it was reported in the media.

The purpose of these words would be to guarantee the Parliament's capacity to legislate the scope of the Voice's representations and manage future legal effects. In other words, the alteration is intended to assure parliamentary supremacy.

Professor Twomey told the Committee:

"I have no objection to putting in the words that Professor Craven was so concerned about being, and the effects of its representations. I have no problem with putting that in. I don't think it overly complicates the legislation. I personally have no objection about that."[8]

Professor Williams said:

"If there's a sensible, modest way of clarifying that which is consistent with the intent, then, yes, that would be a reasonable and appropriate thing to do to help mitigate the political [risk].."[9]

## 3. Models to address risk

There are four alternative sets of words that have been proposed to address risk.

First, the "Seven Words" model raised above. This is the addition of the words "and the legal effect of its representations" to the end of subsection (iii). This model gives the Parliament the express power to determine the legal effect of the Voice's representations.

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7 *Proof Committee Hansard,* 14 April 2023, 44.

8 Professor Emerita Anne Twomey AO, private capacity, *Proof Committee Hansard,* 14 April 2023, 44.

9 Professor George Williams, *Committee Hansard*, 14 April 2023, p. 47.

Second, the "Press Club" model proposed by Mr Julian Leeser MP. This is the removal of subsection (ii). The amendment creates a constitutionally-enshrined Voice without constitutionally-prescribed composition, functions, powers or procedures.

Third, the model proposed by Father Frank Brennan SJ. This is the replacement of the words "Executive Government" with the words "Ministers of State". This would empower the Voice to make representations to Government Ministers, as opposed to any agency or official under the umbrella of the Executive Government.

Fourth, the alternative to subsection (ii) proposed by Uphold & Recognise. This is the replacement of the proposed wording of subsection (ii) with:

> "The Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the Ministers of State for the Commonwealth on proposed laws and matters with respect to Aboriginal and Torres Strait Islander peoples and to the Parliament and the Executive Government of the Commonwealth on such other matters as the Parliament provides."

In addition to limiting the Voice's power to make representations to the Parliament and Government Ministers, this amendment seeks to clarify the matters that may be the subject of a representation.

These models were comprehensively examined during the Committee process, particularly through an exhaustive series of questions on notice. While each alternative model may have merit, the Committee did not collect a large body of evidence to support options two, three and four.

In response to the many questions on notice I asked of the legal expert witnesses, the weight of the evidence was supportive of alternative model one: the "Seven Words" model.

It was reported in the media that this model was proposed in the Referendum Working Group by the Solicitor-General and Attorney-General to various stages in their internal debates.[10]

The practical effect of this amendment would be to guarantee the Parliament's capacity to legislate the scope of the Voice's representations and manage future legal effects. In other words, the amendment would assure parliamentary supremacy.

Although it has been argued that it is an unnecessary amendment given the non-exhaustive drafting of the Parliament's s 129(iii) powers, the evidence tells us that the amendment is inoffensive at worst, but productive at best.

Professor Williams told the Committee "if there is a sensible, modest way of clarifying that which is consistent with the intent, then, yes, that would be a reasonable and

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10 Paul Sakkal and James Massola, The Sydney Morning Herald, *The seven extra words that could broker a compromise deal and win the referendum*, March 13 2023, https://www.smh.com.au/politics/federal/the-seven-extra-words-that-could-broker-a-compromise-deal-and-win-the-referendum-20230312-p5crct.html (accessed 12 May 2023).

appropriate thing to do to help mitigate the political [risk]."[11] Professor Williams later confirmed that the amendment "reflects the intended scope of the clause."[12]

The Hon Robert French AC noted the merits of the amendment in gathering political support for the referendum, and confirmed that it would not create any further legal complexities.[13]

Professor Craven submitted that the amendment would "make it significantly clearer that Parliament has full power to determine a legislative environment within which the Voice would operate."[14]

Professor Twomey, accepting that the proposed wording could be more precise, also had no objection to the inclusion of these seven words to address the concerns of those seeking clarification around the intended scope of the Parliament's powers.[15]

The wording in the bill is just one of the dozens of iterations of the Voice drafting seen in recent years. The proposition that it cannot be further refined to eliminate risk is dishonest.

It is on this basis that I recommend that those seven words be added to the constitutional amendment.

The "seven words" proposal is sound. It balances the need to minimise the risk of High Court interpretation, while preserving the capacity and function of the body. It guarantees parliamentary supremacy. It should be adopted.

**Recommendation 1 - the "seven words" model be adopted into the constitutional amendment.**

## 4. Acknowledgements

I am grateful for the opportunity to serve on this Committee. I thank all my colleagues and the secretariat. I had hoped for a bipartisan Committee process to have been established early in this Parliament.

It would have been better if the Parliament had been given an opportunity to recommend the wording before the government introduced a bill. This Bill has been treated as if it was a routine government Bill. This has reduced the opportunity for bipartisanship, or at least broader support within the Parliament. Regardless, I acknowledge the collegiate manner in which the Chair and Deputy Chair have engaged throughout the process and I thank them both.

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11 Professor George Williams, *Committee Hansard*, 14 April 2023, p. 47.
12 Professor George Williams AO, *supplementary submission 5.1*, 1.
13 The Hon Robert French, *Committee Hansard*, 14 April 2023, p. 51.
14 Professor Greg Craven, *Submission 25*, p. 1.
15 Professor Emerita Anne Twomey AO, *supplementary submission 17.1*, 2.

I also acknowledge the contributions to the recognition and Voice debate over the past decade and everyone who has engaged with this Committee. I particularly appreciate the effort made by the witnesses in answering my endless questions.

Finally, Australia is a great country but it has badly let down Indigenous people over the past 250 years. The status quo is not good enough. We should be coming together to find common ground, rather than reverting to talking points and glib slogans. We have to do better than this.

**Senator Andrew Bragg**
**Senator for New South Wales**

# Additional Comments from Australian Greens Members

1.1 As a political party with a strong social justice pillar, The Australians Greens have an inclusive process in which all members can have a say in our policies. Our grassroots democratic process has led us to have a different order from voice, truth, treaty. The Australian Greens position is truth, treaty, voice, and we believe that progress can, and should, be made on all three elements of the Uluru Statement from the Heart at the same time.

1.2 We welcome the inclusion of the preamble sentence as an important recognition of First People's cultural ties to Country along with the inclusion of the Statement from the Heart into the Bill's Explanatory Memorandum, containing as it does, multiple references to First Nations Sovereignty. We also note and welcome the advice of the Legal Working Group, the Attorney General's Office and other prominent legal experts that this Bill and the subsequent referendum will not impact on the Sovereignty of First Nations people or their ability to engage in future Treaty negotiations. We are however disappointed that the final bill did not take the obvious extra step and refer to the *First Nations* of this country.

1.3 We note that the Committee heard evidence from several witnesses regarding the Government's proposed stand alone cultural heritage legislation that The Australian Greens would like to highlight;

Ms Galante spoke to this during the Perth hearing:

> "I didn't feel that there was enough protection for our people locally under the legislation to protect their cultural heritage, and we weren't having much input from them or even management plans around protecting it. I know that from experience, and I don't think that has changed. This was before the Juukan Gorge incident, and I believe it's still current today."[1]

1.4 Noting that we do not have a model of what the Voice would look like and that is beyond the scope of this inquiry, the Australian Greens nonetheless reiterate the importance of the final model being both democratic and consulted with First Nations People before it's adoption;

1.5 We also note that the Committee heard evidence from several witnesses about the complimentary but different roles that the Voice and Land Councils and other First Nations bodies would play.

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1 Ms Kyra Galante, Committee Hansard, Friday 28th April 2023, page 26.

One witness, Mr Collard spoke to this saying:

> “What we do great in Australia is inclusion. What we do great in Australia is diversity. What we don't do good in Australia is equity. What we need here is equity, and the 101s of governance and good structures are enabling”[2]

Another witness, Mayor Andrews said:

> “My assumption is the model of a Voice would be complementary to existing structures. There are structures out there, some organisations or representative bodies, that have a mandate or opportunity for advice around policy and legislation. …. My assumption is the Voice would not duplicate the existing structures or framework out there in place. You've got many organisations out there representing their members and their membership. The Voice is around complementing existing structures that are out there.”[3]

**Senator Dorinda Cox**
**Senator for Western Australia**

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[2] Mr Joseph Collard, Committee Hansard, Friday 28th April 2023, page 4.

[3] Mayor Ross Andrews, Committee Hansard, Wednesday 19th April 2023, page 3.