

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

Fr Frank Brennan SJ AO

13 April 2023

As a non-Indigenous Australian with a long time commitment to Indigenous rights, I am a passionate advocate for recognition of Aboriginal and Torres Strait Islander peoples in the Constitution. I have published two books on the subject: *No Small Change: The Road to Recognition for Indigenous Australia* (University of Queensland Press, 2015) and *An Indigenous Voice to Parliament: Considering a Constitutional Bridge* (Garratt Publishing, 2023).

There is no point in seeking constitutional recognition except in a form sought, desired and approved by Aboriginal and Torres Strait Islander peoples themselves. That's why I am a strong supporter of a constitutionally entrenched Voice, that being the only mode of recognition acceptable to most of those Aboriginal and Torres Strait Islander citizens who participated in the Uluru dialogues.¹

A successful referendum on this topic would be one that not only wins the necessary super majority of voters but one that also unites the country with an overwhelming and joyful vote for the recognition of the First Australians.

Process and wording matter if we are to get to 'Yes' as resoundingly as possible. Given the lack of bipartisanship in the Parliament, it is all the more necessary that the wording of the proposed constitutional change, in the words of the late Robert Ellicott KC, 'contain no element of possible substantial confusion on legal or other grounds'.²

For that reason, **I urge the committee to recommend that the words 'Executive Government' be replaced with 'Ministers of State' in clause 129(ii).**

I suggest that this change, in conjunction with the proposed amendment, adopted by Federal Cabinet on 23 March 2023 after endorsement by the Referendum Working Group, would resolve most of the problems that have been raised by the considered, but very different, views as to the scope and potential operation of clauses 129(ii) and 129(iii) raised in the media and by the federal Opposition.

¹ The 2017 Referendum Council Final Report states that there were '12 First Nations Regional Dialogues, which culminated in the National Constitutional Convention at Uluru in May 2017' (p. iv) and 'The Dialogues engaged 1200 Aboriginal and Torres Strait Islander delegates – an average of 100 delegates from each Dialogue – out of a population of approximately 600,000 people nationally.' (p. 10).

² R. Ellicott, 'Indigenous Recognition: Some Issues', in Proceedings of the 23rd Conference of the Samuel Griffith Society, 2012, p. 80.

Process matters

Ever since the Uluru Statement from the Heart, it has been clear that there has been no point in pursuing any form of constitutional recognition unless it includes a Voice to Parliament. This was recommended in the final report of the Referendum Council in 2017. It might be noted that the Council's final report never mentioned 'Executive Government'.

Three Liberal Prime Ministers in a row rejected any notion of a constitutional Voice to Parliament.

The newly elected Labor government did not hesitate to act on the mandate afforded it for a referendum on constitutional recognition including a Voice to Parliament.

Prime Minister Anthony Albanese announced a suggested formula of words for insertion in the Constitution at the Garma Festival in July 2022. His formula was a refinement of one of 18 suggestions put forward to the 2018 Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples.³ The government then selected a group of Indigenous citizens to do further work on the proposed wording. This Referendum Working Group (RWG) included the authors of that suggested wording put to the 2018 committee, and two of the authors were members of the government's Constitutional Expert Group, which had the responsibility to provide the RWG with legal support on key issues. They advised on the content and drafting of the proposed constitutional amendment and on the referendum more generally. The prime minister assured the parliament and the public that there would be every opportunity for input on the proposed wording of the constitutional amendment.

Having undergone further refinement, the Prime Minister's Garma formula was endorsed by the RWG and then adopted by federal Cabinet on 23 March 2023. The government then introduced the *Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023* to Parliament on 30 March 2023.

On 4 April 2023, this committee announced that it would receive submissions from the public but only until 21 April 2023. Then, those wanting to appear before the committee were asked to provide initial submissions by 14 April 2023.

The Opposition announced its outright opposition to the proposed constitutional change on 5 April 2023.

³ Noel Pearson, Pat Anderson, Megan Davis et al, Submission 479, Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, 3 November 2018, p 6.

With a tight timeline, with both Coalition parties now having expressed outright opposition, and with the committee restricting comment only to provisions of the bill, I make these observations.

Clarify the meaning of ‘Executive Government of the Commonwealth’

The proposed amendment currently reads:

Chapter IX—Recognition of Aboriginal and Torres Strait Islander Peoples

129 Aboriginal and Torres Strait Islander Voice

In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia:

- (i) there shall be a body, to be called the Aboriginal and Torres Strait Islander Voice;*
- (ii) the Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples;*
- (iii) the Parliament shall, subject to this Constitution, have power to make laws with respect to matters relating to the Aboriginal and Torres Strait Islander Voice, including its composition, functions, powers and procedures.*

Executive Government of the Commonwealth arguably includes ministers and ‘other officers’, namely public servants. It may also include the ‘independent statutory offices and agencies’ of the Commonwealth.⁴

I suggest that the committee recommend in its report that the Parliament amend cl. 129(ii), replacing the words ‘Executive Government’ with ‘Ministers of State’:

*‘the Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the **Ministers of State** of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples;’*

‘Ministers of State’ is a readily defined term which is used in ss.64-66 of the Constitution.

In public discussions on the interplay between sub clauses 129(ii) and 129(iii), there has been much discussion about the legal effect of representations to different emanations of the Executive Government. At one stage, the Attorney-General and Solicitor-General met with the RWG proposing that the Parliament be given explicit power to make laws with respect to the legal effect of representations. My concern is not so much with the legal effect of

⁴ Megan Davis and Gabrielle Appleby, ‘Voice only works if it’s free to choose what to talk about, *The Weekend Australian*, 1 April 2023, available at <https://www.theaustralian.com.au/inquirer/indigenous-voice-to-parliament-only-works-if-its-free-to-choose-what-to-talk-about/news-story/8361479386a83d8f569640a25622e4fd>

representations to Executive Government, but rather with the (arguable) constitutional requirement that public servants (a) give notice of an intention to make an administrative decision on a matter relating to any Aboriginal or Torres Strait Islander person; and (b) entertain any representation then received from the Voice before making such a decision.

What is presently proposed is the creation of a constitutional entity (the Voice) with a constitutional entitlement to make representations to public servants. The unresolved issue is determining the extent of the constitutional duty of public servants to ensure that the Voice is adequately apprised of information to know that a decision is contemplated and of information sufficient to allow the Voice to make a reasoned representation.

It is one thing to renew public administration in this way through legislative change which would permit future adjustment. It is another thing to constitutionalise such a renewal rendering the mode of relating between the Voice and the Commonwealth bureaucracy a matter of High Court jurisprudence rather than parliamentary oversight.

In relation to the prospect of litigation, Ex-Chief Justice Robert French made this observation on the Garma formula:⁵

‘As to litigation, there is always the possibility that someone, someday will want to litigate matters relating to The Voice as can anybody who seeks recourse to the courts. That flows from the fact that Australia is governed by the rule of law which provides access to the courts where it is said that public officials have exceeded their power. That said, **there is little or no scope for any court to find constitutional legal obligations in the facilitative and empowering provisions of the amendment.** And if Parliament made a law which created unintended opportunities for challenges to executive government action, the law could be adjusted.’

Mr French further expanded his public explanation of justiciability in his address to the Gilbert and Tobin Constitutional Conference on 10 February 2023:

‘If the Parliament wanted to it could make a law providing that the exercise of defined statutory or non-statutory executive power would be conditioned upon consideration of relevant representations from The Voice. And if Parliament imposed such a requirement, the exercise of the power would be judicially reviewable if it were not complied with. There is, however, no obligation to impose such a condition. That would be a matter for the Parliament.’⁶

Mr French did not address the question: what if clause (ii), being immune from constriction of scope of representations made pursuant to clause (iii) as interpreted by the High Court, ‘creates

⁵ Robert French, ‘The Voice — A Step Forward for Australian Nationhood’, Address to the Judicial Commission of New South Wales, 4 February 2023, available at https://www.judcom.nsw.gov.au/wp-content/uploads/2023/02/French_R_Exchanging-Ideas-Syposium-4-February-2023-3.pdf

⁶ Robert French, ‘Commentary on Climate Change Litigation and Voice Presentations’, Gilbert and Tobin Forum, 10 February 2023.

unintended opportunities for challenges to executive action’? The Constitution cannot be adjusted.

Mr French acknowledges: ‘A law providing that the Executive was required to take into account representations from The Voice as a condition of the exercise of executive power would, in all probability, be justiciable.’

If the Constitution, rather than a mere statute, imposed such a requirement, the Executive would be held to account if it did not comply with it.

Bret Walker SC told *The Australian Financial Review* that he does see one scenario for litigation: ‘If the Voice was muffled or muted to the point of silence. Of course that would go to court, and probably in the form of mandamus [a judicial writ] against whomever has refused, say, to receive messages from the Voice. It wouldn’t be litigation compelling anyone to agree with the latest message of the Voice. Nonsense. That will never happen.’⁷

Where the Voice has a constitutional entitlement to make representations to the Parliament and to Ministers of State, the scope of the entitlement is clearly defined and the risk of litigation in its operation is minimal. The Voice will know what Parliament is up to, and thus will be able to make representations. And the Voice will know who the ministers are and, under our system of responsible government, is likely to know, or have the capacity to know, what the ministers are up to within their portfolios. But if the Voice is kept in the dark about what thousands of public servants are up to in making administrative decisions impacting Aboriginal and Torres Strait Islander persons every day, then of course the Voice will be able rightly to claim that they have been ‘muffled or muted to the point of silence’ in making representations to those public servants. No one is seriously suggesting that it would be good enough just to leave it to the Voice to discover if a public servant was about to make a decision, and that the Voice’s ignorance of same would be a matter of supreme indifference to the courts. If the Voice has a constitutional entitlement to make representations to public servants, it will not be good enough to leave the Voice in the dark, allowing them simply to make *post facto* complaints about administrative decisions which would be legally valid. The Voice would need to know what is going on in public service offices.

As Walker says: ‘Of course that would go to court, and probably in the form of mandamus [a judicial writ] against whomever has refused, say, to receive messages from the Voice.’ And one might add: whomever has failed to inform the Voice that they are considering making a decision, and whomever has failed to give the Voice sufficient information about the proposed decision so that the Voice might make a sensible representation.

⁷Michael Pelly, ‘Why Bret Walker says Voice litigation ‘won’t matter’, *Australian Financial Review*, 16 March 2023, available at <https://www.afr.com/politics/why-bret-walker-says-voice-litigation-won-t-matter-20230313-p5crlj>

Walker is surely right when he says: ‘It wouldn’t be litigation compelling anyone to agree with the latest message of the Voice. Nonsense. That will never happen.’ But it might be litigation compelling the public servant to give due consideration to the latest message of the Voice. And it is a brave counsel who would suggest that the parameters of that due consideration can be set down confidently in advance even if the Voice’s novel mandate be only statutory. What then if it is a constitutional mandate?

Representations to Parliament considering new laws are one thing. Representations to ministers considering policies or practices, another. Representations to public servants making administrative decisions are an altogether different matter.⁸

I make no objection in principle to the Voice having a statutory entitlement to make representations to public servants on administrative decisions relating to Aboriginal and Torres Strait Islander persons. Such a wide sweeping administrative law reform would be subject to legislative amendment should there be any unforeseen consequences or inordinate cost burdens bearing little substantive change to the quality of administrative decision making.

If there is a desire by this Joint committee to include, in cl 129(ii), representations to Commonwealth officers other than ministers (by express clarification or by making no change to the current amendment), could I respectfully and strongly urge that you first seek advice from the Department of Social Services, the Department of Health and Aged Care, the Department of Employment and Workplace Relations, the Department of Education and the Department of Prime Minister and Cabinet.

A comprehensive constitutional change to the system of public administration should be proposed to the Australian people only once competent advice has been provided to this committee.

Some government members and some lawyers have suggested that the reworked clause (iii), when read with clause (ii), ensures that the parliament has full control over the Voice. Some have even suggested that Parliament could restrict the class of representations or exclude certain public servants, departments or agencies from being required to receive representations or from being required to make any disclosure of intention to make a decision which might warrant a representation from the Voice.

⁸ It’s worth recalling that Professor Anne Twomey’s 2015 draft which was recommended by the Cape York Institute proposed: ‘(3) The Prime Minister [or the Speaker/President of the Senate] shall cause a copy of the [body’s] advice to be tabled in each House of Parliament as soon as practicable after receiving it. (4) The House of Representatives and the Senate shall give consideration to the tabled advice of the [body] in debating proposed laws with respect to Aboriginal and Torres Strait Islander peoples.’ No one at that stage was envisaging the Voice making representations to a plethora of public servants and government instrumentalities.

Professor Megan Davis (one of the drafters of the pre-Garma formula put to the 2018 Joint Committee) and her colleague Professor Gabrielle Appleby have outlined a different view as to the scope of representations which might be made by the Voice:

‘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. This isn’t to be feared: as the Explanatory Memorandum says, the parliament will be able to set the procedure through which the voice’s representations are received, with the important caveat that the parliament won’t be able to stop the voice making those representations. It can’t shut the voice up.’⁹

The Davis-Appleby position gives primacy to cl (ii) noting ‘the important caveat that the parliament won’t be able to stop the voice making those representations’.

The Davis-Appleby position may find support in the text of clause (iii) specifying that ‘the Parliament shall, **subject to this Constitution**, have power to make laws’. The words of limitation, ‘subject to this Constitution’ are taken from s.51 of the Constitution which then sets out the various heads of Commonwealth power. It is arguable those words have work to do should there be a conflict between the broad scope of clause (ii) and a restrictive law purportedly made under clause (iii).

Justice McHugh in *Newcrest Mining v The Commonwealth* put the matter simply:

‘In interpreting the Constitution, no section or paragraph can be interpreted without recourse to the other provisions of the instrument. Effect must be given to every word of the Constitution that is capable of a sensible meaning. So far as the Constitution permits, conflicting provisions must be interpreted in a way that maximises the scope for operation of each provision. But this does not mean that, where conflict arises, every provision of the Constitution must be given equal weight. Either expressly or by necessary implication, the Constitution may indicate that some provisions must be read subject to one or more of the other provisions. Thus, to confer a power “subject to this Constitution ” is “a standard way of making clear” that, **where another provision of the Constitution which is not so qualified conflicts with that power, the unqualified provision is to prevail**. It is not possible therefore to treat the phrase “subject to this Constitution ” or any similar word or phrase as superfluous or to ignore its declaration of priority. If the provisions conflict, it is a mistake to attempt to

⁹ Megan Davis and Gabrielle Appleby, ‘Voice only works if it’s free to choose what to talk about’, *The Weekend Australian*, 1 April 2023, available at <https://www.theaustralian.com.au/inquirer/indigenous-voice-to-parliament-only-works-if-its-free-to-choose-what-to-talk-about/news-story/8361479386a83d8f569640a25622e4fd>

reconcile them in a way that gives the maximum possible effect to both the dominant and the subordinate provision.’ (emphasis added)¹⁰

The failure of the government to give full effect to the scope of the unqualified clause (ii) and to acknowledge the limitation of clause (iii) is highlighted in the Explanatory Memorandum of the bill.

I will highlight in bold print some observations on paragraphs 13, 14 and 28 of the Explanatory Memorandum which might assist to give a more complete explanation of the true scope of clause (ii) which cannot be constricted by parliamentary action under clause (iii).

Explanatory Memorandum with Observations Interspersed

13. While the Voice would be able to make representations on a broad range of matters, it would be both impractical and unrealistic to require or expect the Voice to make representations about all matters relating to Aboriginal and Torres Strait Islander peoples.

No one is requiring or expecting the Voice to make representations about all matters. But the Voice, if it wants to, MAY make representations about all such matters.

14. Subsection 129(ii) would not require the Parliament or the Executive Government to wait for the Voice to make a representation on a matter before taking action.

But Executive Government may have to wait while they give the Voice notice that they are thinking of making a decision and while they wait a reasonable time for the Voice to make the representation.

Nor would s 129(ii) require the Parliament or the Executive Government to seek or invite representations from the Voice or consult it before enacting any law, taking any action or making any decision.

But if the Voice chooses to make a representation, the public servants will need to give due consideration (whatever that is – and only the courts will be able to decide that) to the representation.

Subsection 129(ii) would also not require the Parliament or the Executive Government to furnish the Voice with information about a decision, policy, or law (either proposed or in force) at any time.

¹⁰ *Newcrest Mining (WA) Ltd v The Commonwealth* (1996-7) 190 CLR 513, 577.

But the Executive Government may be required to provide the Voice with sufficient information for the Voice to know what sort of public service decision is envisaged and for the Voice to be able to make a reasoned representation.

28. The legislative power under s 129(iii) would also allow the Parliament to make laws about the Voice's representations, including specifying whether or not, and if so in which circumstances, an Executive Government decision-maker has a legal obligation to consider the Voice's representations.

If the Voice makes a representation under s. 129(ii), the decision maker would ALWAYS have a legal obligation to consider the representation. Having considered it, the decision maker may disregard it but that is an altogether different matter.¹¹

Questions for the Solicitor-General

In his second reading speech, the Attorney General said: 'It will be a matter for the parliament to determine whether the executive government is under any obligation in relation to representations made by the Voice. ... The constitutional amendment confers no power on the Voice to prevent, delay or veto decisions of the parliament or the executive government.'¹²

With respect, the timing of information to, and the making of representations by the Voice to those who exercise the executive power of the government is part of the core function of the Voice under cl (ii). It cannot be "muffled or muted" by the Parliament failing to give full effect to the entitlement in cl(ii).

The committee should require that the Solicitor General provide advice on whether the Voice could delay decisions of the public service. His advice should address questions such as:

- Would the proposed amendment, unaltered, provide the Voice with a constitutional entitlement to receive notice that a public servant was considering making an administrative decision/s relating to Aboriginal and Torres Strait Islander peoples?
- Would the Voice then have a constitutional entitlement to receive sufficient information from the public servant about the proposed decision so as to make an informed representation?
- What would constitute due consideration of any representation received?
- Would the public service have a constitutional duty to inform the Voice that they were about to consider some policy options for submission to their Minister when those options could relate to Aboriginal and Torres Strait Islander peoples? And how early in

¹¹Mark Dreyfus KC MP, Explanatory Memorandum, *Constitution Alteration (Aboriginal and Torres Strait Islander Voice)* 2023, available at https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r7019_ems_30a282a6-7b5a-4659-b9cb-13da5698bca1/upload_pdf/JC009279.pdf;fileType=application%2Fpdf

¹² Commonwealth, *Parliamentary Debates*, House of Representatives, 30 March 2023, 4 (Mark Dreyfus, Attorney-General)

the development of policy options would the constitutional duty to inform come into play?¹³

- To what extent, if any, could any constitutional duty on the public service required by clause (ii) be modified or negated by Parliament enacting a law pursuant to clause (iii) which is specified to be ‘subject to this Constitution’?
- By virtue of the current cl (ii), which Commonwealth agencies would be required to receive representations from the Voice?
- By virtue of the current cl (ii), what limits, if any, might Parliament set on representations from the Voice to ‘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’ (the Davis/Appleby list)?

The committee should insist that the government publish the Solicitor General’s advice.

Conclusion

I urge the committee to make the following recommendations:

1. That clause (ii) be amended, replacing the words ‘Executive Government’ with ‘Ministers of State’.
2. That the Bill as amended be passed.

I would be happy to appear before the committee in Canberra on 1 May 2023.

¹³ The Design Principles for the Voice state: ‘The Parliament and Executive Government should seek representations in writing from the Voice early in the development of proposed laws and policies.’ (available at <https://voice.niaa.gov.au/sites/default/files/2023-03/design-principles-aboriginal-torres-strait-islander-voice.pdf>).

POSTSCRIPT

I note that submissions are to address only the provisions of the Bill. As this is the only opportunity for citizens to present their views to Parliament on the question of constitutional recognition of First Peoples, I would like to place on the public record a postscript setting out my concerns about the need for our parliamentary leaders to have more actively sought a bipartisan approach. I will also detail my failed suggestions as to how a more bipartisan process and agreed wording might have helped the country, rather than just a bare majority of voters, to get to YES.

1. Constitutional amendment processes

Amending the Australian Constitution is a very difficult task. There have been only 8 successful attempts out of 44. Of those attempts 25 were instituted by Labor governments which failed 24 times.

In the past, bipartisanship in the Parliament has been a necessary though not always a sufficient condition for winning the required majority of voters nationally as well as a majority of voters in at least 4 of the 6 states.

Proposals for successful constitutional change usually emerge from constitutional conventions or parliamentary committee processes which yield a bipartisan consensus.

The parliamentary debate on the successful 1977 referenda proposals provides us with the most recent example of the bipartisanship which usually precedes amendment of the Constitution. Introducing the bill for those four referenda, Liberal Attorney General Robert Ellicott KC pointed out: ‘All these proposals stem from the Hobart meeting of the Australian Constitutional Convention.’¹⁴

In relation to one measure, Ellicott was at pains to point out that it was similar to one proposed by Labor in 1974 and ‘It is one, moreover, for which substantial support was expressed from both sides of Australian politics at the Hobart meeting of the Australian Constitutional Convention held in October last year.’¹⁵

Gough Whitlam as Leader of the Opposition was unequivocal in his support: ‘The Opposition supports all 4 Bills. I found the arguments of the Attorney-General (Mr Ellicott) compelling, not least because I have advanced them myself in this place over 2 decades, in opposition and in government. The 4 proposals have become steadily more relevant and in 1975 they became urgent and crucial. Ten years ago when my Party was in opposition and I had just become its leader we supported the referendums put by the Holt Government. My Party will take the same attitude towards these referendums. We have not been soured by the attitude which our

¹⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 16 February 1977, 144 (Robert Ellicott, Attorney-General).

¹⁵ *Ibid*, 145.

opponents took to the proposals which we put to the people when we were in government and which they are now putting to the people while they are in government. My Party sees no mileage in wrecking referendums. Our opponents now realise that too.’¹⁶

Whitlam concluded his second reading speech with these words:

‘The whole tenor in which the matter has so been dealt with in this House, would, I believe be calculated to secure a rational and relevant approach to matters of real relevance and increasing urgency. My Party hopes that the people will support these 4 referendums. Whatever government the people hereafter elect in this House of Representatives, whatever members the people hereafter elect to this Federal Parliament, the Federal Parliament and Government will be able to operate in a more rational, contemporary and constructive way than the Parliament and governments have been able to operate hitherto. The Bills should be supported in the Parliament; they should be supported outside the Parliament. I do not believe that any Party in Australia can gain anything from the rejection of any of these Bills.’¹⁷

Ian Sinclair as Leader of the Country Party immediately spoke and said: ‘There are few occasions when I rise in this House following the Leader of the Opposition (Mr E. G. Whitlam) that I find myself in substantial agreement with most of what he has said. This is one of those rare occasions. There are, of course, in the electorate at large a good many divided views about the character and the manner of the Australian Constitution, in terms both of its relationship to individuals and of the necessity for change. Emotions are very easily generated when we speak of altering the Australian Constitution.’

Gordon Scholes then had the carriage of the matter for the Labor Opposition and concluded his second reading speech with these words: ‘I think that the Australian people should carry all the referenda put forward on this occasion and I’m sure that, given honest argument, on the merits of such argument they will do so.’¹⁸

Even with this degree of bipartisan support, one of the referenda proposals for simultaneous elections did not carry in a majority of states even though 62.2% of voters voted in favour.

2. Two Personal Failed Attempts to Gain Bipartisan Support for a Constitutional Voice

I wrote to the Prime Minister on 9 November 2022 suggesting that it was ‘time to set up a parliamentary committee process allowing anyone and everyone to have their “say” on the proposed words of amendment to place in the Constitution’ and that it was ‘time to return to formal bipartisan co-operation between the Prime Minister and the Leader of the Opposition so as to maximise the prospect of Coalition support for the referendum’. (Attachment 1).

¹⁶ Ibid, 17 February 1977, 197 (E G Whitlam).

¹⁷ Ibid, 202.

¹⁸ Ibid, 233 (Gordon Scholes).

The National Party announced its outright opposition to a constitutional Voice on 28 November 2022. On 1 December 2022, the government announced its intention not to provide the usual Yes/No pamphlet to voters.

Though it was late in the day, I decided to make one citizen's attempt to see if it were possible to design a formula of words which could win some bipartisan support in the Parliament, while still being acceptable to a majority of Aboriginal and Torres Strait Islander citizens. As there was no parliamentary committee process on the horizon, there was no forum for bringing all parties to the table. I published my suggestion in the last week of February 2023.¹⁹

My major reservation about the Garma formula of words was with the overbroad provision for the Voice to have a constitutional entitlement to make representations to Executive Government, including all Commonwealth public servants making administrative decisions which may affect any Aboriginal or Torres Strait Islander person.

Back in January 2022, Noel Pearson had told the ABC, 'We need a new constitutional hook inserted into the Constitution on which we can hang this structure of the Voice'. I found the image of a constitutional hook useful. The Senior Advisory Group of the Indigenous Voice Co-design Process, of which I was a member, and which was co-chaired by Marcia Langton and Tom Calma, summarised in our final report the obligation to consult in these terms: 'The Australian Parliament and Government would be *obliged* to consult on proposed laws which overwhelmingly relate to Aboriginal and Torres Strait Islander people, or which are special measures under the *Racial Discrimination Act 1975* (Cth).'²⁰

So I considered the constitutionalising of that function of the national Voice as a possible hook. Parliament could then put whatever else it liked on that precise hook, including an entitlement to make representations to Parliament on all manner of laws, and an entitlement to make representations not only to ministers on policies and proposed laws, but also to public servants on all manner of things, including administrative decisions and the planning of policy proposals. Thus my proposed amendment:

'In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia, there shall be an Aboriginal and Torres Strait Islander Voice with such structure and functions as the Parliament deems necessary to facilitate consultation prior to the making of special laws with respect to Aboriginal and Torres Strait Islander peoples, and with such other functions as the Parliament determines.'

My issue was 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

¹⁹ Frank Brennan, 'Voice to parliament: look for wording all stakeholders can support', *The Weekend Australian*, 25 February 2023 available at <https://www.theaustralian.com.au/inquirer/voice-to-parliament-look-for-wording-all-stakeholders-can-support/news-story/bf3f1abf0a05899d2d6f8c44eadc094a>.

²⁰Senior Advisory Group, Indigenous Voice Co-Design Process, *Final Report to the Australian Government*, 2021, p.161.

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.

Though some regarded my proposal as too minimalist, I thought it completely consistent with our Constitution's architecture, the Uluru Statement from the Heart, Recommendation 1 of the Referendum Council, and with the suggestion put by Senator Patrick Dodson and the Hon. Warren Snowdon MP in the course of questioning witnesses before the 2018 Committee. Dodson and Snowdon proposed a constitutional provision providing:

- 1. There shall be a First Nations Voice to Parliament;*
- 2. The Voice shall not be a third chamber of the Parliament;*
- 3. The Voice shall be advisory only and its advice will not be justiciable; and*
- 4. Its powers and functions shall be determined by the Parliament of Australia.²¹*

I also thought my proposal was consistent with the final report of the Langton/Calma committee. I willingly conceded that my proposal went nowhere near as far as that proposed to the 2018 Joint committee by Noel Pearson, Megan Davis and Pat Anderson – the submission which later became the basis for the Prime Minister's Garma formula.

My attempt failed to attract any buy in. My attempt to garner bipartisan support in the parliament failed completely. There was no significant support from the government, the Opposition, or members of the RWG. Some thought it wrong that I, or anyone else, even try to find a formula of words which might attract bipartisan support. Despite the failure, I would still beg to differ. If ever there was a referendum deserving bipartisan support aimed at maximising a 'Yes' vote and uniting the nation, this was the one. Sadly, it was not to be.

On 5 March 2023, I followed up with a second forlorn attempt at seeking a bipartisan approach after the Prime Minister said he would 'consider anything that's put forward in good faith'. I wrote to Messrs Albanese and Dutton (Attachment 2):

Following the exchange of letters between you on 7 January 2023 and 1 February 2023, there was the Prime Minister's statement on 1 March 2023: 'I've said I'll consider anything that's put forward in good faith. What I don't see from the Opposition, or from the leadership of the Opposition anyway, is good faith at the moment. There aren't suggestions coming forward. There is a conscious decision to

²¹ Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Final Report*, 2018, para 3.46.

try to confuse the issue.’ This does not bode well for the process and timing of the proposed referendum in October-November 2023.

I understand there will be no parliamentary committee in place until the end of this month and the government presently intends to introduce a bill at that time containing a proposed formula of words to be put at referendum to amend the Australian Constitution.

Furthermore, I understand that the present intention is that there be no more than six weeks allowed for members of the public to make submissions to the committee and for the committee to reach its final recommendations about proposed changes to the Constitution.

*I am an Australian citizen with a strong commitment to Indigenous recognition in the Constitution through the placement of a Voice in the Constitution. **I have serious reservations about the Garma formula of words, especially with provision for the Voice to have a constitutional entitlement to make representations to Executive Government, including all Commonwealth public servants making administrative decisions which may affect any Aboriginal or Torres Strait Islander person.***

I am worried that a ‘yes’ vote might not carry because of the deficiencies in the process for general community consultation and input, and because the proposed formula of words will be too broad risking the clogging of the workings of government and ongoing litigation in the High Court.

So I would like to take this opportunity to give advance notice of the proposals I will be putting to the parliamentary committee for consideration as words of amendment to be put to the people at referendum. I do so, simply so that you might have additional time for consultation with members of your own parties and for the obtaining of competent legal advice.

I make no pretence that my suggestions would be deserving of carriage. But I suspect from my own discussions with a range of citizens that there will be many similar suggestions being put. It is unreal to expect that the Australian public will be satisfied with a six week process for consultation and determination. Let’s remember that Aboriginal and Torres Strait Islander representatives will have been afforded eight months for their input to the proposed amendment to the Constitution.

The tragedy I am wanting to avoid is a ‘No’ vote carried because of flaws in the process resulting in a lack of time for real community engagement and for proper legal analysis.

Be assured my willingness to discuss these proposals with you or your officers, even before the institution of the committee process.

I met with key ministers and held discussions with the Shadow Minister Julian Leeser. There was no significant interest from either side. No independent legal advice has been produced by the government or the government appointed consultation groups addressing the scope and operation of clauses 129(ii) and 129(iii) particularly in relation to representations by the Voice to the public service.

Attachment 1

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9 November 2022

The Hon Mr Anthony Albanese MP
Prime Minister of Australia
Parliament House
Canberra
ACT 2600

Dear Mr Albanese

Thank you for your commitment to holding a referendum on ‘the Voice’ in the next financial year, during the first term of your government.

Today, like many Australians, I heard Professor Megan Davis and Pat Anderson AO speak at the National Press Club.

Professor Davis made a number of points which now require close attention.

Speaking of your proposed wording for the constitutional change which you announced at the Garma Festival on 30 July 2022, she said, ‘It’s not set in stone, but it’s a good beginning.’

When asked about the Opposition Leader’s failure to commit at this stage of the process, she said, ‘That’s in some way the job of an Opposition, to raise these questions. Questions about detail are perfectly legitimate questions.’

Professor Davis insisted that the First Nations leaders of the Uluru dialogues had decided to ‘leave the politics for the politicians’. She told the national audience that from their discussions with Opposition members, ‘There’s strong support from members of the LNP.’

As a non-Indigenous Australian with a longtime commitment to constitutional recognition, could I put two suggestions:

- 1. Now is the time to set up a parliamentary committee process allowing anyone and everyone to have their ‘say’ on the proposed words of amendment to place in the Constitution.**

Even if the parliamentary committee were to conclude that your Garma formula was the appropriate formula, this would be a worthwhile and necessary exercise as it would transform the formula from (a) the government’s suggestion in consultation with First Nations leaders and their advisers, to (b) the parliament’s proposal to be put to the Australian people.

Such a process would also allow heightened scrutiny of any proposed wording, minimising the risk of unintended consequences.

Such a process would enhance the prospect of buy-in and ownership by the Federal Opposition and all other parties in the Parliament. You will recall that Noel Pearson in his first Boyer Lecture referred to your Garma proposal and then said, ‘We know the nation’s leader must be joined by all his counterparties in the federal parliament’. If not now, when?

- 2. Now is the time to return to formal bipartisan co-operation between the Prime Minister and the Leader of the Opposition so as to maximise the prospect of Coalition support for the referendum.**

You will recall that on 17 September 2014 Prime Minister Tony Abbott and Leader of the Opposition Bill Shorten met to discuss constitutional recognition after which Mr Shorten said, ‘It needs to be bipartisan, it needs to be meaningful, and it needs to be something which all Australians can get behind and say, “At last, we are going to let our constitution catch up to the world we live in.”’

Then on 19 March 2015, Mr Abbott agreed to convene a meeting with Mr Shorten and key indigenous leaders. That meeting then took place at Kirribilli House on 5 July 2015. They jointly agreed to a way forward.

The Referendum Council was then jointly appointed by the new Prime Minister Malcolm Turnbull and Bill Shorten on 7 December 2015. On 20 October 2016, Messrs Turnbull and Shorten then approved the way forward for the Referendum Council to proceed.

Then on 25 November 2016 Messrs Turnbull and Shorten met with the four Aboriginal members of parliament (Labor members Patrick Dodson, Linda Burney and Malarndirri McCarthy and Liberal member Ken Wyatt), and Noel Pearson after a meeting of the Referendum Council when Mr Pearson ‘said that he was expecting the Uluru conference to recommend that there be a change to the Constitution to establish “a Voice”, which would be a national advisory assembly composed of and elected by Aboriginal and Torres Strait Islander peoples.’

After community consultations and the publication of the Uluru Statement from the Heart, Messrs Turnbull and Shorten announced on 1 March 2018 their agreement on the scope of a new parliamentary committee that would seek to find common ground and work towards a successful referendum on Indigenous recognition in the Constitution.

Your predecessors as Prime Minister and as Leader of the Opposition displayed a level of bipartisanship on process for advancing this matter – a level not usual in other matters of public policy. It is needed once again if there is to be any prospect of deciding a formula of words for insertion into the Constitution which is acceptable to the key First Nations leaders, the Government and the Opposition. Without the support of all three, you know that there is no realistic prospect of ‘the Voice’ being inserted in the Constitution.

I wish you well in this exercise of national statesmanship. It is now 15 years since Prime Minister John Howard placed constitutional recognition on the national agenda. For the good of our First Nations peoples, for the good of public administration and for the good of the nation, it is essential that this matter now be brought to timely successful resolution. In my humble opinion, that cannot be done without your government now taking the prompt initiative to call the Opposition to the table.

Yours sincerely

Fr Frank Brennan SJ AO

Attachment 2

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5 March 2023

The Hon Anthony Albanese MP
Prime Minister
Parliament House
Canberra
ACT 2600

The Hon Peter Dutton MP
Leader of the Opposition
Parliament House
Canberra
ACT 2600

Dear Prime Minister and Leader of the Opposition

Following the exchange of letters between you on 7 January 2023 and 1 February 2023, there was the Prime Minister's statement on 1 March 2023: 'I've said I'll consider anything that's put forward in good faith. What I don't see from the Opposition, or from the leadership of the Opposition anyway, is good faith at the moment. There aren't suggestions coming forward. There is a conscious decision to try to confuse the issue.' This does not bode well for the process and timing of the proposed referendum in October-November 2023.

I understand there will be no parliamentary committee in place until the end of this month and the government presently intends to introduce a bill at that time containing a proposed formula of words to be put at referendum to amend the Australian Constitution.

Furthermore, I understand that the present intention is that there be no more than six weeks allowed for members of the public to make submissions to the committee and for the committee to reach its final recommendations about proposed changes to the Constitution.

I am an Australian citizen with a strong commitment to Indigenous recognition in the Constitution through the placement of a Voice in the Constitution. I have serious reservations about the Garma formula of words, especially with provision for the Voice to have a constitutional entitlement to make representations to Executive Government, including all Commonwealth public servants making administrative decisions which may affect any Aboriginal or Torres Strait Islander person.

I am worried that a 'yes' vote might not carry because of the deficiencies in the process for general community consultation and input, and because the proposed formula of words will be too broad risking the clogging of the workings of government and ongoing litigation in the High Court.

So I would like to take this opportunity to give advance notice of the proposals I will be putting to the parliamentary committee for consideration as words of amendment to be put to the people at referendum. I do so, simply so that you might have additional time for consultation with members of your own parties and for the obtaining of competent legal advice.

I make no pretence that my suggestions would be deserving of carriage. But I suspect from my own discussions with a range of citizens that there will be many similar suggestions being put. It is unreal to expect that the Australian public will be satisfied with a six week process for consultation and determination. Let's remember that Aboriginal and Torres Strait Islander representatives will have been afforded eight months for their input to the proposed amendment to the Constitution.

The tragedy I am wanting to avoid is a 'No' vote carried because of flaws in the process resulting in a lack of time for real community engagement and for proper legal analysis.

Be assured my willingness to discuss these proposals with you or your officers, even before the institution of the committee process.

My suggestions are attached.

Wishing you well in your deliberations on this matter which is critical to our national life at this time.

Yours sincerely

Fr Frank Brennan SJ AO

Suggested amendments to the Constitution

1. Insert prior to Chapter 1:

Chapter 1A

The Aboriginal and Torres Strait Islander Peoples

1A. The people of the Commonwealth:

1. recognise that the continent and the islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples.
2. acknowledge the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters.
3. acknowledge and respect the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples.

1B. In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia, there shall be an Aboriginal and Torres Strait Islander Voice with such structure and functions as the Parliament deems necessary to facilitate consultation prior to the making of special laws with respect to Aboriginal and Torres Strait Islander peoples, and with such other functions as the Parliament determines.

2. Delete s.25.

3. Amend s.51(xxvi) to read:

Aboriginal and Torres Strait Islander peoples for whom it is deemed necessary to make special laws;

Should these three amendments be unacceptable, I would suggest:

Insert s.127:

In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia, there shall be an Aboriginal and Torres Strait Islander Voice with such structure and functions as the Parliament deems necessary to facilitate consultation prior to the making of special laws with respect to Aboriginal and Torres Strait Islander peoples, and with such other functions as the Parliament determines.