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

Dear Secretary and members of the Committee

Inquiry into *Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023*

Thank you for the opportunity to make a submission. We do so in our capacities as academics at the ANU College of Law with relevant subject matter expertise in constitutional, administrative and international law.

We note that we are writing this submission on the traditional lands of the Ngunnawal and Ngambri people where our homes and places of work are located. We pay our respects to the elders of all First Nations peoples, and acknowledge the rich wisdom embedded in their enduring culture which stretches into deep time.

Principal Submission

We submit that the wording of proposed s 129 is technically and legally sound, consistent with both constitutional values as well as the intent and spirit of the Uluru Statement from the Heart, and should be passed by the Parliament, for consideration by the people at a referendum.

General Observations

As academics and advocates, we write in support the model as reflected in the wording of the Bill to amend the Constitution. We do so on several grounds. Notably:

- It reflects the considered deliberations and collective will of First Nations peoples undertaken over a period of years, as well as the spirit and intent of the Uluru Statement of the Heart.
- It is consistent with Australian constitutional law principles and the public law values upon which our democratic system of government is based.
- It implements in good faith Australia's international legal obligations with respect to the rights of Indigenous peoples, notably the right to self-determination under the Declaration of the Rights of Indigenous Peoples.
- It has been carefully drafted to ensure that parliament retains ultimate authority over the mechanism by which representations are received and treated.

We appreciate that these are all matters that have been robustly debated in many forums over recent years, as well as in oral and written submissions to this inquiry. We put on the record that we are in full agreement with the written submission made Professor Anne Twomey and the Indigenous Law Centre at UNSW,[1] the arguments made in oral evidence by Brett Walker KC and Kenneth Hayne on 14 April 2023, and the position

[1] Professor Anne Twomey, Submission 17; Indigenous Law Centre, UNSW, Submission 44 (Professor Gabrielle Appleby, Associate Professor Sean Brennan, Professor Megan Davis, Dr Dylan Lino and Eddie Synot).

of Robert French articulated in his speech at the *Exchanging Ideas Symposium*, delivered on Gadigal country and published on AUSPUBLAW on 20 February 2023.[2]

We commend the submissions and opinions of these jurists to the Committee. In particular, we note that their interpretation of the provision reflects our own understanding of how it must be read, consistent with both constitutional principle and long-standing rules of constitutional interpretation as reflected in the jurisprudence of the court.

In the interests of brevity, we limit our submissions on the concerns raised in some submissions regarding the inclusion of a power to make representations to the Executive.

Executive Power

A handful of submissions have expressed concerns revolving around a fear (a term we use advisedly) that the court will 'imply' into the text new obligations on the executive and limitations on the legislative power of Parliament that would have the effect of impeding the functioning of government, potentially elevating the body's power to make representations into an effective veto on government action. We consider this fear to be unfounded.

There are several aspects of the draft provision which in our opinion provide a full response to such concerns.

First, and most potently, such a reading relies almost entirely on subs 129(ii), overlooking or at least relegating to a minor role the existence, wording, intent and function of subs 129(iii). The section provides:

> 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.

Section 129(ii) must be read in context, not least by reference to the fact that parliament is given express powers to establish the mechanism governing the making of representations. Kenneth Hayne, former Justice of the High Court of Australia, put it succinctly:

> 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. If that is right, the implication suggested as a construction of (ii) is not available, and you are left with the text—only the text—without implication.

Parliament, in other words, is empowered to control the ways in which representations are both *made and considered*. Should parliament establish a mechanism for prior consultation on specific matters and impose obligations on the executive adequately to consider such matters, this would be determinative. A proper consultative process may well require such a mechanism, but that would be for parliament to decide in its discretion.

[2] Robert French 'The Voice - A step forward for Australian Nationhood' on AUSPUBLAW (20 February 2023) <https://www.auspublaw.org/first-nations-voice/the-voice-a-step-forward-for-australian-nationhood/>

To say the draft text retains and relies upon the principle of parliamentary supremacy is more than just a soundbite. As with so many things in our constitutional system, it is a statement of practical, pragmatic reality, built into the text and structure of the instrument. No court can or would ignore it.

To the extent that a statute sets up powers and duties, these are likely to be justiciable, just as any statutory scheme would be. There is no reason, however, why a model designed to facilitate First Nations input should be considered any more threatening in this respect to the functioning of government than the thousands of other extant schemes – legal and political – which establish systems of notification and consultation on a range of matters in which government is involved in some capacity. These exist to provide for the effective, informed and accountable functioning of government. Indeed, this is how good government works in the modern democratic state, consistent with both contemporary constitutional values and regulatory theory. It should be welcomed, not feared.

Moreover, a judicially reviewable statutory scheme is still ultimately governed by the principle of parliamentary supremacy reflected in subs 129(iii). As Robert French points out, 'if Parliament made a law which created unintended opportunities for challenges to executive government action, the law could be adjusted. There are many examples of that.'[3] Indeed, Committee members will undoubtedly be familiar with multiple such instances from their parliamentary experience where parliament has stepped in to tweak a legislative scheme after what it considers to be an inconvenient judicial decision. This is no different.

We note that in the absence of any such statutory requirement, should Parliament or the Executive decide *not* to adopt the substance of Voice representation, this decision could *not* be reviewed. The Voice is an advisory body. As with any advice, the recipient of the Voice's advice is never obligated to act according to that advice. The purpose of advice is to frame arguments and inform the recipient regarding perspectives that they may have overlooked. As Professor Twomey has stated, the term 'representation' was chosen deliberately with this in mind.[4] This position, moreover, is reflected in the Explanatory Memorandum which, as Professor Twomey emphasised by reference to the jurisprudence on interpreting provisions inserted through referenda, will be considered should the matter ever be litigated.[5] More so than with ordinary legislation or indeed other constitutional provisions, we consider that the history of the provision and the animating intention of those voting at the referendum will be given considerable weight in any judicial consideration of the meaning of the text.

In his oral submission to the Committee, Brett Walker KC made two valuable additional points, critiquing the analogies being made in some submissions to the rules of judicial review of administrative action. Mr Walker pointed out that these submissions appear to rely on the argument that the court could imply the existence of a 'mandatory relevant consideration' into the text:

> I have never seen any case and I don't think there'd be a single university course that teaches that you will find that supposed implication of mandatory relevant consideration—or, more accurately, the characterisation of some factor as having that status—in a provision that has nothing to do with giving

[3] French, n 2.
[4] See submission 17, Prof Anne Twomey, at 5 ('The word 'representation' was chosen because it has no meaning that requires reciprocity or obligation.')
[5] We refer to the cases cited by Professor Twomey in footnote 12 of her submission, notably *Wong v Commonwealth* (2009) 236 CLR 573, and *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

> a power to make a decision. That's what section 129 is. It's not a provision that says there is power in the executive to execute the legislation.

We agree with this reading. Section 129(ii) is entirely *facultative* – it permits 'representations', but imposes no obligations. Nothing in s 129 creates an administrative decision-making power. Thus any 'implication' that would limit a third body's executive decision-making power in the way suggested – creating what the courts would call an inviolable condition on the exercise of the power conferred – is simply unavailable on any reading of the text using the aforementioned tools of judicial review. It may arise in the interpretation of a separate instrument creating an administrative decision-making power, but that is again a matter into which parliament can step.

While this area of administrative law can be highly technical, the principles at play are relatively simple and, again, determinative.

Finally, as scholars who pay close attention to judicial methodology, we strongly endorse Kenneth Hayne's observation that a court will consider the *practical ramifications* of any question of implication, and rule accordingly. Such consequentialist reasoning is extremely common, especially in the High Court of Australia which has a culture and tradition of considering the practical realities within which government operates when making decisions. As his Honour points out, 'you do not make implications in a constitution that will bring government to a halt.'[6]

Conclusion

We consider the model established to be a modest but significant addition to and improvement of our constitutional system, drafted in such a way both to entrench the existence and political impact of a Voice, while ensuring that parliament retains oversight and authority over its functioning.

The model of the Voice set out in the Bill can be expected to be an effective body. It has the capacity to broaden perspectives of Parliament and the Executive, relying on local-level representations of Indigenous concerns as well as ideas as to what policies would best serve Indigenous people in Australia.[7] This is a good thing for our democracy, our constitution, and the future of our nation.

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[6] A similar point is made by Anne Twomey under the heading 'impracticality of drawing such implications' on p 8.
[7] For more on this see, eg, Gabrielle Appleby, Ron Levy and Helen Whalan, 'Voice Versus Rights: A First Nations Voice and the Australian Constitutional Crisis of Legitimacy' (2023) 46(3) *UNSW Law Journal* (forthcoming).