

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

### Brendan Welsh OAM

## 1 Getting to Yes

- As a non-Indigenous person with a long-standing commitment to furthering Indigenous higher education, I am a strong and passionate advocate for enshrining an Indigenous Voice in the Australian Constitution. We must do everything to ensure that the referendum on the Voice succeeds.
- I believe that the proposed wording of the referendum for the Voice is sensible and necessary. I favour giving the Voice broader powers to make representations to the Parliament and the Executive Government about matters relating to our First Nations people. I am confident that the First Nations people will embrace the opportunity of self-determination and ensure the Voice sensibly finds its way. I am confident our law makers will put in place the necessary checks and balances to ensure legal certainty, that the Voice will not be too bureaucratic, and that it will fairly represent our First Nations people. To quote Anthony Albanese, 'I am all in'.
- However, I am concerned. The path to 'Yes' is unclear. A significant portion of Australian voters have serious questions and concerns about the Voice, voters that fall within the 'Soft Yes', 'Soft No' and 'Undecided' camps. These voters will require reassurance that in voting 'Yes', they are doing the right thing. Although some of these voters will be more curious than others, they will not investigate deeply the issues and concerns. They will listen to both sides of the debate, and they will be guided by our political and Indigenous leaders. As referendum history cautions us, they will be more comfortable voting 'Yes' if the vast majority of key players are saying it is the right thing to do. In other words, significantly more of these voters are likely to vote 'Yes' if there is bipartisan support for the Voice.
- Unfortunately, Labor's current proposal for the Voice does not enjoy bipartisan support. The Nationals made an early decision to oppose the Voice. The Liberals prevaricated and recently announced that it would not support the Voice. Indeed, it seems the prospect of bipartisan support for the Voice is unlikely.
- The key question is, can a referendum on the Voice succeed without bipartisan support. One answer to this question is, why would you take the risk ?
- There is no doubt that Labor and the majority of Indigenous leaders would much prefer a resounding, united 'Yes' vote, rather than a hard-fought, divisive slim majority. I would like to think the Coalition, and in particular, the Liberals, have much to gain by supporting the Voice, as the Liberals have suffered greatly at the polls in recent times, amid relatively 'hard line' conservative positions and policies on key social justice issues.
- **I urge Labor, the Indigenous leaders and the Coalition to engage in constructive dialogue with a view to agreeing on a model for the Voice.** Agreement that will allow for bipartisan support for a referendum on the Voice. Agreement that will significantly increase the likelihood of a successful referendum.
- In searching for agreement on bipartisanship, one possible area to explore is the Voice's broader right to make representations to the 'Executive Government' in section 129(2) of the proposed referendum. Several prominent advocates have expressed concerns that this broader right will:
  - Significantly increase the risk of constitutional and administrative litigation; and
  - Unnecessarily bog down decision making within the public service.
- Should Labor, the Indigenous leaders and the Coalition agree on bipartisan support for the Voice, the path to 'Yes' becomes much clearer.

## 2 The Journey So Far

- First Nations people have long struggled for constitutional recognition.<sup>1</sup> Every Prime Minister since Gough Whitlam has supported constitutional recognition for First Nations people. Unfortunately, such recognition has been too elusive, and not yet achieved.
- The Voice to Parliament refers to a new representative body comprising First Nations people with the power to ‘have a say when Parliament makes laws and policies relating to Indigenous affairs’.<sup>2</sup>
- The concept of a Voice to Parliament was first introduced by Noel Pearson in 2014.<sup>3</sup> It represented a new and innovative way of thinking about constitutional recognition, in that it shifted the debate from notions of symbolic recognition, and outlawing racial discrimination, to one focused on Indigenous self-determination.
- In 2015, then Prime Minister Malcolm Turnbull and then Opposition leader Bill Shorten established a Referendum Council to investigate how best to go about recognising First Nations people in the Australian Constitution.<sup>4</sup> A key task of the Referendum Council was to consult widely with the First Nations people and to get their views on constitutional recognition. The consultation process became known as the ‘Regional Dialogues’ and they solicited the opinion of more than 1000 First Nations people from all parts of Australia. The Regional Dialogues confirmed the First Nations people’s preference for constitutional recognition was a Voice to Parliament.
- The Regional Dialogues culminated in the National Constitutional Convention at Uluru. At the end of the Constitutional Convention, the First Nations people issued ‘The Uluru Statement from the Heart’, an invitation to the Australian people. The Uluru Statement poignantly articulates why a Voice to Parliament is important for First Nations people, and called for a Voice to be enshrined in the Australian Constitution:

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

We seek constitutional reforms to empower our people and take a *rightful place* in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.

We call for the establishment of a First Nations Voice enshrined in the Constitution...”

*Extract from Uluru Statement from the Heart, 2017<sup>5</sup>*

- In endorsing the Uluru Statement, the Referendum Council in 2017 recommended that a Voice to Parliament be enshrined in the Australian Constitution.<sup>6</sup>
- The then Coalition Government immediately rejected the notion of a constitutionally enshrined Voice to Parliament, and characterised the Voice as a ‘third chamber of Parliament’, which cast significant doubt on the prospect of bipartisan support for, and therefore the future of, a Voice to Parliament.

<sup>1</sup> Final Report of the Referendum Council, 30 June 2017, forward, page iii

<sup>2</sup> Ibid, page 35

<sup>3</sup> *Quarterly Essay – A Rightful Place: Race Recognition and a More Complete Commonwealth*, Noel Pearson.

<sup>4</sup> Final Report of the Referendum Council, 30 June 2017

<sup>5</sup> Uluru Statement from the Heart, First Nations people, 26 May 2017. Emphasis in Original

<sup>6</sup> Final Report of the Referendum Council, 30 June 2017, page 2

- Despite the ‘third chamber of Parliament’ labelling, the Coalition continued to support work on the Voice, including a Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples in 2018, co-chaired by Liberal MP Julian Leeser and Labor Senator Patrick Dodson.
- The Joint Select Committee canvassed a range of options for the referendum wording to enshrine a Voice to Parliament in the Constitution<sup>7</sup>. The Joint Select Committee also recommended that further work be done to explore how the Voice might work in practice, which led to the Coalition commissioning an Indigenous Voice Co-design Process, chaired by Marcia Langton and Tom Calma.<sup>8</sup>
- In June 2021, then Opposition Leader, Anthony Albanese, announced that if Labor won the next Federal election, the Labor Party would hold a referendum to enshrine a Voice in the Australian Constitution. Albanese indicated that the referendum wording would be developed in consultation with First Nations people and their representatives.
- On 30 July 2022, just over 2 months following his election victory, Anthony Albanese released draft wording for a referendum to enshrine a Voice in the Australian Constitution. The wording was based upon a submission by Pat Anderson, Noel Pearson, Megan Davis and others to the Joint Select Committee.<sup>9</sup> Anthony Albanese indicated that the wording was not final, and he was open to further consultation.
- On 23 March 2022, Albanese released the following wording for a referendum on the Voice:

**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:

- (1) There shall be a body, to be called the Aboriginal and Torres Strait Islander Voice;
- (2) The Aboriginal and Torres Strait Islander Voice may make representations to Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples;
- (3) 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.

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<sup>7</sup> Final Report of the Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, November 2018, page 86

<sup>8</sup> Indigenous Voice Co-design Process, Final Report to the Australian Government, July 2021, Marcia Langton and Tom Calma

<sup>9</sup> Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, November 2018, Submission 479, page 6

### 3 We Need a Voice to Parliament

- The Uluru Statement from the Heart is a beautifully written and powerful statement by our First Nations people. It educates us. It inspires us. It encourages us. It invites us. For a one-page document it delivers in spades. However, the Uluru Statement also breaks us.
- The references to *“the torment of our powerlessness”*, and our First Nations people wanting to take *“a rightful place in our own home”* is a wakeup call for non-Indigenous Australians. How is it possible that our First Nations people still feel tormented and powerless, or that they do not occupy a rightful place, in a country that they have inhabited for more than 60,000 years ?
- Further, why haven’t we been able to make significant progress in ‘closing the gap’ on Indigenous disadvantage despite many years of well-meaning, genuine effort ? The answer is simple. We as a nation have never properly listened to our First Nations people.
- Our First Nations people are inviting the Australian people to give them a Voice to Parliament. They are telling us that this is the best way forward. We must listen now. Failure to do so will only repeat the mistakes of the past.

### 4 Current Sentiment for a Voice to Parliament

- Public support for the Voice has been strong. However, more recently there has been some strident opposition to the Voice, including opposition from high-profile Indigenous leaders such as Warren Mundine and Jacinta Price. The Coalition parties have also confirmed that they will not be supporting the current proposal for the Voice. There is little doubt that public support for the Voice is gradually waning, although as of March 2023, a majority of the public still supported the Voice.
- There are 6 major camps when it comes to the question of voter support for the Voice. They are:
  - Strong Yes – Traditionally Progressive Voters  

This camp comprises traditionally progressive voters who have supported Indigenous recognition for many years. Even though many in this group are not well informed about the Voice, they will support the Voice based upon political principle. This group of voters will support a Voice with broad powers to advise and make representations not only to Parliament, but also to Ministers and senior bureaucrats. Further, that these representations may be about laws, policies and programs that relate to First Nations people, and not just about laws that directly affect them. Anthony Albanese and all prominent Indigenous supporters of the Voice, including Marcia Langton, Tom Calma, Pat Anderson, Noel Pearson and Megan Davis appeal to voters within this camp.
  - Soft Yes – Voters Sympathetic to the Voice with Minimal Knowledge of how the Voice will Work  

This camp comprises voters who are very sympathetic to the notion of the Voice, primarily based on their belief that we must right the many wrongs that modern Australia has inflicted upon our First Nations people. Voters in this camp are typically not well informed, nor inclined to investigate how the Voice will work in practice. These voters will be very receptive to a well-crafted ‘Yes’ campaign. Some of these voters may be receptive to a strong ‘No’ campaign, particularly one that includes prominent Indigenous leaders who argue the Voice will have no practical impact on remedying Indigenous disadvantage. A significant proportion of voters fall within this camp.
  - Soft Yes – Voters Sympathetic to the Voice with Concerns about how the Voice is Designed  

This camp comprises voters who are very sympathetic to the notion of the Voice, but have concerns about the design of the Voice. Some of the design concerns include that the current language proposed by Albanese is too broad, and gives the Voice a right to make representations to the Executive Government (including Ministers and senior bureaucrats), or that the Voice may make representations on laws not directly related to First Nations people. Some voters in this

camp may simply be hesitant about changing the Constitution, preferring to run with the status quo rather than risk introducing a Voice that ends up with unintended powers. Voters in this camp are seeking reassurance that their 'Yes' vote is the right thing to do, and they will be very receptive to changes in the design of the Voice that simplify the functions and powers of the Voice to be enshrined in the Constitution. Even better, changes that will permit bipartisan support of the Voice.

- Soft No – Voters Concerned that the Voice will not Practically Benefit First Nations People

This camp comprises voters who tend to be sympathetic to the notion of the Voice, but have concerns that the Voice will not practically benefit the lives of First Nations people. Further, that the best way to improve the lot of First Nations people is through practical, on the ground policies rather than the 'empty symbolism' of a Voice led by the Indigenous elite. Most voters in this camp will be receptive to a strong bipartisan 'Yes' campaign that highlights the positive and practical benefits of the Voice. However, if there is not bipartisan support for the Voice, voters within this camp will be very receptive to a strong 'No' campaign, particularly one that highlights deep divisions within the Indigenous leadership. Peter Dutton, Warren Mundine and Jacinta Price appeal to voters within this camp.

- Strong No – Voters Concerned that the Voice would Divide our Country and Entrench Separatism

This camp comprises traditionally conservative voters who are concerned that the Voice, in whatever form it takes, will divide our country, entrench separatism, and for some, is inherently 'racist'. They will vote 'No' to the referendum regardless of the wording of the referendum, and are hardwired to politically conservative rhetoric. John Howard, Tony Abbott, David Littleproud and Barnaby Joyce appeal to voters within this camp. A subset of voters in this camp are either ignorant, indifferent, or unsympathetic to the plight of Indigenous Australians and their rhetoric may lead to a very divisive 'No' campaign.

- Undecided

There are still a significant number of voters who are undecided on the proposal for a Voice. No doubt, this number will decrease as we get closer to the date for the referendum. However, the novelty of the proposal for the Voice, the current lack of bipartisan support, and the strident criticism of the Voice by key Indigenous leaders, will be fertile ground for a strong 'No' campaign, and will appeal to many voters within this camp.

## 5 Public Concerns with the Proposed Voice to Parliament

### 5.1 Is the Proposal for the Voice too Complicated ?

- The current proposal to enshrine a Voice in the Australian Constitution is seen by many as a complicated proposal. It involves the establishment of a new Indigenous body in the Australian Constitution with broad powers to make representations to Parliament and to all levels of the Australian Government. Not only is it complicated, it is novel.
- The overwhelming majority of voters simply do not understand the concept of a Voice and how it will work in practice. There are some strong education campaigns by various organisations that have attempted to explain the Voice. However, these campaigns tend to gloss over the more complicated elements of the Voice.<sup>10</sup>

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<sup>10</sup>For example, Reconciliation Australia, History is Calling (<https://www.reconciliation.org.au/reconciliation/support-a-voice-to-parliament/>)

- This is a significant problem for the ‘Yes’ campaign, as history shows that when voters do not understand a referendum proposal, they tend to vote ‘No’.<sup>11</sup>

## 5.2 Are the Powers of the Voice too Broad ?

- Some commentators have argued that the powers given to the Voice under the current referendum wording are too broad, in that it will permit the Voice:
  - to make representations to ‘Parliament and the Executive Government’ (which includes senior bureaucrats) rather than to Parliament only;
  - to make representation on any matters relating to First Nations people (including laws, policies and programs) rather than only being able to make representations on laws directly affecting our First Nations people.
- These commentators argue that the original proposal of the Voice, was a Voice to Parliament only. And that it was to provide advice on laws that directly affected First Nations people. For example, the original proposal for the Voice did not include a Voice to ‘the Executive Government’. They suggest it is better to enshrine the original proposal for the Voice to Parliament in the Constitution, and then let Parliament itself extend the functions of the Voice to include any broader functions (eg to extend the representations to ‘the Executive Government’; or to extend the representations to laws with general application; or to extend the representations to policy or programs). They argue that this approach is far more minimalist, and a far safer approach to changing the Australian Constitution. For example, if Parliament was to give the Voice broader functions and powers than those given in the Constitution, and there was a need to amend these broader functions and powers to give better effect to the Voice, then Parliament could easily make these changes.

## 5.3 The Current Proposal for the Voice Lacks Detail

- There have been calls for Labor to provide more details about its preferred design and plans for implementing the Voice, including Peter Dutton’s letter to Anthony Albanese seeking answers to 15 questions about the Voice.<sup>12</sup>
- Labor argues that there is no need to provide extensive detail on the Voice before the referendum, as this will be developed after the referendum and in consultation with First Nations people and the Australian public. Further, there has been significant effort over the last 5 years to canvass options about the design of the Voice and how it will be implemented, including the Voice Co-design process established by the previous Coalition Government.<sup>13</sup>
- Liberals argue that it is necessary for voters to understand, even at a basic level, how Labor now intends to implement the Voice, so that they may make an informed choice on the Voice referendum. Further, that regardless of options outlined in past reports, it is important to understand Labor’s preferred model for the Voice.
- Labor’s concern with providing detail on the Voice before the referendum is that it might be different to the detail agreed following the referendum, and thereby mislead the voters. There is also a concern that in

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<sup>11</sup> Indigenous Law Bulletin, July / August 2011, “How to Win the Referendum to Recognise Indigenous Peoples in the Australian Constitution”, by George Williams, page 19

<sup>12</sup> Peter Dutton open letter to Anthony Albanese, 7 January 2023

<sup>13</sup> Indigenous Voice Co-design Process, Final Report to the Australian Government, July 2021, Marcia Langton and Tom Calma

providing the detail, the debate will get bogged down on implementation issues that should be properly addressed after the referendum.

- Liberal's concern is that the proposal for the Voice is complicated, difficult to understand, and that it is important voters are given a basic understanding of Labor's preferred design for the Voice, and some basic details on how it intends to implement the Voice. In other words, it is unreasonable to expect Australians to vote for something they do not understand.

#### 5.4 The Proposal for the Voice Lacks Bipartisan Support

- Since 2007, the notion of Indigenous recognition in the Australian Constitution has enjoyed bipartisan support. If the referendum was merely about recognising our First Nations people in the Constitution, there is no doubt such a referendum would have strong bipartisan support and would have every chance of a resounding 'Yes' vote.
- Unfortunately, bipartisan support for the Voice has proven elusive. Following the release of Anthony Albanese's preferred referendum language for the Voice in 2022, the Nationals and the Liberals have advised that they will not support the Voice.
- This appears to be a very significant problem for the 'Yes' campaign, as history shows that bipartisan support is essential to referendum success.<sup>14</sup> Conversely, some advocates for the Voice argue that times have changed, and bipartisan support is no longer a 'pre-condition' for a successful referendum.<sup>15</sup>
- No doubt Labor and the Indigenous leaders supporting the Voice have made efforts to secure bipartisan support from the Coalition. Unfortunately, there is little evidence that the major parties are prepared to compromise at this stage. Moreover, Labor and the Indigenous leaders supporting the Voice appear to be adopting a 'crash or crash through' approach on the Voice, an approach heroically lionised by Gough Whitlam.<sup>16</sup>

#### 5.5 The Proposal for the Voice Creates Legal Uncertainty

- There has been broad acceptance by all proponents of the Voice that it should not have a power of veto over Parliament. However, respected legal commentators have argued that by enshrining the broader power for the Voice to make representations to the Executive Government, we may inadvertently enshrine a de facto veto over Parliament. For example, it has been stated by one former High Court judge that concerns 'the Voice as propounded would delay and disrupt government and business activity cannot be brushed aside'<sup>17</sup>. Conversely, another former High Court judge has suggested that the current proposal for the Voice is 'low risk for a high return'.<sup>18</sup>
- When it comes to voting 'Yes' or 'No' for the Voice, the Australian public should not have to weigh up differing opinions of respected senior legal commentators. Rather, it is incumbent on Labor to put forward a set of words for the referendum that creates a Voice with as much legal certainty as is possible.

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<sup>14</sup> Indigenous Law Bulletin, July / August 2011, "How to Win the Referendum to Recognise Indigenous Peoples in the Australian Constitution", by George Williams, page 18

<sup>15</sup> Paul Kildea, 'Getting to 'Yes': Why our approach to winning referendums needs a rethink' on AUSPUBLAW, 12 December 2018. <<https://auspublaw.org/blog/2018/12/getting-to-yes-why-our-approach-to-winning-referendums-needs-a-rethink/>>

<sup>16</sup> Gough Whitlam Governments failed in all 6 attempts to change the Australian Constitution

<sup>17</sup> Ian Callinan, Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum, Submission 71, 20 April 2023, para 9

<sup>18</sup> Robert French, The Voice — A Step Forward for Australian Nationhood Exchanging Ideas Symposium, 4 February 2023, page 11

## 6 Next Steps

- It is important to remember the proposal to enshrine a Voice in the Australian Constitution is not a Labor project, it is an Australian project.<sup>19</sup>
- For some time, constitutional recognition of First Nations people has very much enjoyed the support of the Coalition parties. Unfortunately, this is not the case with Labor's current proposal for the Voice. And history teaches us that bipartisan support is critical for the success of a referendum to change the Australian Constitution.
- On 30 March 2023, Labor introduced into Parliament a bill for a referendum on the Voice. The House of Representatives and the Senate established a Joint Select Committee to enquire into and report on the provisions of the bill, and the committee is due to present its report by 15 May 2023. I sincerely hope the committee process will allay any concerns about legal 'uncertainty' of the Voice, as well as key concerns about how the Voice will function in practice.
- One would like to think that the outcome of the committee process will be a principled and pragmatic agreement between Labor, the Indigenous leaders and the Coalition on a model for the Voice. Agreement that will allow for bipartisan support for a referendum on the Voice. Agreement that will significantly increase the likelihood of a successful referendum. An outcome that will truly benefit all Australians.

21 April 2023

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<sup>19</sup> The Indigenous Voice to Parliament – Five reasons the Voice is right, Andrew Bragg, page 11