

21 April 2023

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

Further to my appearance at a hearing of the Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum, I have been asked to respond to a number of questions. My responses are below:

1. My question is, how did we get from 18 versions to one?

My understanding of the drafting process is set out in the attachment to my submission (no 17) to the Committee at pp 11-19. As I understand it, the first published draft of a version of an amendment to give effect to the Voice was published by me in 2015. At the 2018 parliamentary committee, a number of other versions of this type of amendment were proposed. One of those drafts, submitted by Patricia Anderson, Megan Davis, Noel Pearson, Sean Brennan, Gabrielle Appleby, Dylan Lino and Gemma McKinnon, was later further developed through a number of Workshops run by the Indigenous Law Centre and the Gilbert + Tobin Centre of Public Law at UNSW. I participated in most, and perhaps all, of those workshops along with many academics and practitioners across the country. The form of this draft amendment varied from time to time as detail was added to it and sometimes revised or removed. I believe, but do not know, that a version of it was put to the Albanese Government after its election. The Garma version, however, was significantly different from the UNSW draft in a number of respects, although some elements were similar.

2. Did you draft the Garma 2022 amendment the Prime Minister released?

No. I was not involved in the drafting of the Garma 2022 amendment (although it may have taken into account my previous drafts and past comments on drafting issues).

3. Did you provide legal advice to anyone in relation to the development of the wording? Or after the wording had been formulated?

I assume you are referring here to the Garma wording, rather than previous drafts. No, I did not provide legal advice in relation to that wording before it was publicly announced.

I did participate in the Constitutional Expert Group in advising on that wording after the Group was formed, which was after the Garma wording was announced.

4. Were you asked to evaluate or endorse the Garma amendment?

No – except for my involvement in the Constitutional Expert Group.

5. Were you involved in an informal legal working group of some description? Who else participated?

I was involved in the informal academic group coordinated by UNSW which held workshops on the pre-Garma version, as noted above, but not in relation to the Commonwealth Government's formulation of the Garma wording.

6. Is this how you would draft the provision if you were given a blank slate? How else might the provision be drafted? If you've written a paper on this, please table it as evidence.

I still prefer my 2015 version, as published in *The Conversation*:

<https://theconversation.com/putting-words-to-the-tune-of-indigenous-constitutional-recognition-42038>. However, I also acknowledge that there is political value in the simpler form of the amendment proposed by the Commonwealth Government, as it is easier for the public to understand.

Given the public controversy about potential implications, I would certainly consider inserting extra words in the proposed amendment to make it clear that no such implications could be drawn – but this would be at the risk of complicating the amendment, making it harder for the public to comprehend. There is a risk that if the amendment *looks* more complicated, it can cause people to vote ‘no’ because they feel they do not understand it. It is therefore a very difficult task to balance the benefit of legal clarity against the cost of public perceptions of complexity, and I do not yet have a decided view on which is the preferable course.

7. Or were you asked to comment on or evaluate someone else's drafting? Can you table your response?

No, I was not asked to comment on or evaluate someone else's drafting (other than participation as an academic in the pre-Garma workshops run by UNSW, as discussed above).

8. Have you provided any legal advice to the Prime Minister or anyone else in the Government about this amendment? Can you table that advice?

I have only provided advice through the Constitutional Expert Group. It is a matter for the Government as to how it wishes to deal with the advice of the Constitutional Expert Group.

9. Proposed section 129 (iii) reads: “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.” Please provide your view on including the following words at the end of section 129 (iii) as follows: “and the legal effect of its representations”.

I don't think they are legally necessary, as they fall within the scope of ‘matters relating to the Aboriginal and Torres Strait Islander Voice’, as noted in the Solicitor-General's opinion, but I have no objection to including them in the proposed amendment if they assuage the concerns of those who wish to further clarify the intended scope of Parliament's powers.

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