

Submission to the Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum

To the Honourable Members and Senators of the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum

I have prepared this submission for your inquiry and trust that it will receive due consideration.

Introduction

I am a Commonwealth public servant of 30 years' service. For most of my adult life, I have been concerned by the plight of our First Peoples. In the early 1990s, I participated in a programme in which I was billeted with an Aboriginal family in their home in country SA, and took part in activities with them, as well as discussions about the situation of their people.

In more recent times, I have informed myself about the Uluru Statement from the Heart, and the various proposals for an Aboriginal and Torres Strait Islander Voice. I have read many articles and obtained books on the matter, including a recent one by Fr Frank Brennan, and a forthcoming one by Thomas Mayo (a member of the First Nations Referendum Working Group) and Kerry O'Brien.

It concerns me that the proposed addition to the Constitution as given in the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 bill may overreach to the extent that the referendum is likely to either be passed by a small margin or indeed to fail.

Submission

Having reviewed various documents, I note the following.

- The Uluru Statement from the Heart in 2017 called for "the establishment of a First Nations Voice enshrined in the Constitution"¹, however did not specify to whom the Voice should make representations.
- Also in 2017, the Referendum Council (appointed by the then Prime Minister and Leader of the Opposition) delivered its final report. Its first recommendation was "that a referendum be held to provide in the Australian Constitution for a representative body that gives Aboriginal and Torres Strait Islander First Nations a Voice to the Commonwealth Parliament".²

Since that time, and more so since the election of the ALP Government in May 2022, the proposal for the Aboriginal and Torres Strait Islander Voice has evolved to the point where it would be able to make representations to the Parliament, and to the Executive Government. This culminated in the Prime Minister's announcement on 23rd March 2023, and the presentation of the aforementioned bill to the House of Representatives on 30th March 2023.

I note that most of this process since the change of government has not been conducted in public, nor has it been particularly transparent. It cannot be said to be inclusive of the other parties represented in Parliament, nor of the wider community. The First Nations Referendum Working Group has published its terms of reference, and communiqués from time to time, however there does not appear to be a publicly available record of its deliberations.³

¹ <https://ulurustatement.org/the-statement/view-the-statement/>

² Final Report of the Referendum Council, p. 2, https://www.referendumcouncil.org.au/sites/default/files/report_attachments/Referendum_Council_Final_Report.pdf

³ <https://voice.niaa.gov.au/who-involved>

Submission to the Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum

I also note that despite its calls for bipartisanship, it is difficult to accept that the Government would have taken its actual course of action if bipartisanship was what it genuinely wanted. Nor is the Opposition blameless in this regard. They do not appear to have taken much in the way of positive action on the matter, being content to criticize from a distance.

I believe that I could wholeheartedly support a Constitutional Voice to Parliament, as recommended by the Referendum Council. (Fr Frank Brennan in his recent book makes a proposal that is somewhat similar.⁴) Such a Voice to Parliament would have as its main function representations about the making of special laws affecting Aboriginal and Torres Strait Islanders. It would be for Parliament to legislate any functions beyond that.

However, as a matter of political reality, given the process that the Government has followed until now and the expectations that have been thus created, I accept that indigenous leaders, particularly those of the First Nations Referendum Working Group, may not accept such a variation from the current proposal. An achievable compromise may be for the Voice to make representations to Parliament and Commonwealth Ministers, which I have seen referred to in the press, although I have not been able to identify who might have first suggested it. That is also something that I could support, were it properly designed.

What I fear that I cannot support (and hence I will reluctantly vote “No” if the referendum proceeds as currently proposed) is the power of the Voice to make representations to Executive Government. Justice Robert French, who supports the current proposal, agrees that there is a risk “that the executive might be legally required to have regard to representations made to it”.⁵

Fr Frank Brennan, who does not support the current proposal and offers his own in his book, argues that because the current proposal has the potential for much legal confusion, it is likely to fail.⁶

An experienced senior public servant, Peter Conran, who has served several governments, argues “that a constitutionally entrenched voice to executive government is unworkable”.⁷

What I fear is that if the electorate understands that a Voice to Executive Government carries with it the risks of legal action and of the functions of Government being impeded, they will vote it down. That would be detrimental to the continuing project of Reconciliation and to the nation. The current proposal may not be a case of the perfect being the enemy of the good, however it seems very much a case of the highly desirable (at least for some) being the enemy of that which is less confusing, less divisive, and hence more achievable.

I therefore implore the Committee to put aside partisanship and to seek a modified proposal such that the Australian people, understanding its ramifications, will know neither confusion nor doubt, and will

⁴ “An Indigenous Voice to Parliament: Considering a constitutional bridge”, Fr Frank Brennan, Garratt Publishing (2023), p. 113.

⁵ “Benefits of Indigenous voice to parliament far outweigh risks”, Robert French, <https://www.theaustralian.com.au/commentary/benefits-of-the-voice-will-far-outweigh-risks/news-story/aa752c3d9ac7a9f4ec6d70f1fc7b872d>

⁶ Op. cit., p. 116.

⁷ “Many more questions than answers before we even vote”, Peter Conran, <https://www.theaustralian.com.au/inquirer/many-more-questions-than-answers-before-we-even-vote/news-story/af0710d763dcdebbdb07dfa058f2503a>

Submission to the Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum

throw their weight behind it, to the benefit of Aboriginal and Torres Strait Islanders, and to the nation.