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

Fr Frank Brennan SJ AO
18 April 2023

This submission is supplementary to my Submission 18, 13 April 2023.

In Submission 18, I raised a number of questions requiring answers from the Solicitor-General including:

- 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?

If those questions are answered 'Yes', then presumably government would be brought 'to a halt' and would be rendered 'unworkable'.

At the parliamentary hearing on 14 April 2023, Mr Kenneth Hayne AC KC, the Chair of the Constitutional Expert Group was asked about the last sentence of the Explanatory Memorandum for the Bill on the Voice which states: 'The constitutional amendment would not oblige the Parliament or the Executive Government to consult the Voice prior to enacting, amending or repealing any law, making a decision, or taking any other action.'

Mr Hayne was asked about the risks of delay etc if the Voice had an implied entitlement to know what public servants were up to and an implied entitlement to enough information to allow the Voice to make a reasoned representation.

He replied: 'The very argument that requiring consultation, advanced notice and delay would disrupt the ordinary and efficient working of government, and the executive government in particular, demonstrates conclusively, and I use the word conclusively deliberately, demonstrates conclusively why you do not make the implication suggested. You do not make implications in a Constitution that will bring government to a halt.'

Ex Chief Justice Mr Robert French AC later added: 'I think a similar argument relates to the concern that there might be implied a constitutional duty to consult. I can't see, given the immense range of matters in which there might be an interaction between a proposed policy or practice and impacts on Indigenous people in one way or another, to imply a duty to consult across all of that range would really make government unworkable. And I don't think the High Court is in that business.'

Presumably any clogging of government resulting from the need for the public service to provide the Voice with notice and sufficient information could not be readily rectified by a law passed under the proposed clause 129(3). Mr David Jackson AM KC notes in paragraph 7 of Submission 31:

'Greater potential difficulty is provided by the phrase "subject to this Constitution" in proposed s 129(3). That usage would ordinarily cause no difficulty, but one provision which would be likely to fall within it would be the proposed s 129(2). If a law made pursuant to s 129(3) had the effect that the Voice (however constituted under s 129(3)) was not empowered to make a representation of the nature referred to in s 129(2), the relevant provisions enacted pursuant to s 129(2) would be invalid.'

At the hearing of constitutional experts on 14 April 2023, there was general agreement that prompt prerogative relief would be available were a public servant or department to block their ears, refusing to receive a representation. Would not the same relief be available were a public servant or department (even if purportedly acting under a law made pursuant to clause 129(3)) to lock the Voice outside the room, refusing access to information about proposed decisions relating to Aboriginal and Torres Strait Islander peoples?

On the other hand if the two questions are answered 'No', Aboriginal and Torres Strait Islander peoples would find themselves having been seriously misled about the reach of representations made under clause 129(2).

For example, Noel Pearson and Shireen Morris in Submission 21 at p. 7 state:

'The Voice needs a guaranteed role advising policy departments and bureaucrats, if it is to have real positive impact on practical outcomes. Removing the Voice's guaranteed ability to advise bureaucrats and departments will reduce its practical benefit.
'This is about compelling real cultural change in the way we do business in Indigenous affairs. The constitutional ability of the Voice to give advice to the Executive must therefore be kept. How the Executive interacts with the Voice will be determined by legislation setting out rules and processes. Underpinned by the constitutional commitment, these processes will create a new culture of partnership and dialogue, adding much needed rigour to policy making and administration of Indigenous affairs. This will facilitate improved political culture and better practical outcomes.'

The evidence of 14 April 2023 and the recently published submissions of David Jackson AM KC and Noel Pearson and Shireen Morrison highlight the need for the committee to receive a comprehensive opinion from the Solicitor-General as well as hearing from government departments about how representations to public servants could work and must work if there is to be compliance with the proposed constitutional amendment while leaving day-to-day government workable.

There is one other matter requiring urgent clarification.

There are conflicting opinions from members of the Constitutional Expert Group about whether clause 129(2) would include representations made 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). See also Submission 2 from the Hon. R I Barrett AO.

Whether the two questions above are to be answered 'yes' or 'no', I submit that the only way to avoid the clogging of government or the misleading of Aboriginal and Torres Strait Islander peoples would be by replacing the words 'Executive Government' with 'Ministers of State'.

I would be happy to give evidence to the committee in Canberra on 1 May 2023 if required.