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Committee Secretary

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

C/- PO Box 6201

CANBERRA ACT 2600

By e-mail: jscvr@aph.gov.au

Dear Sir/Madam,

1. Uphold & Recognise welcomes the opportunity to make a submission to the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum about the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023.
2. This submission is made by the chairman and executive director for and on behalf of the board of directors of Uphold & Recognise: Ms Theresa Ardler, Emeritus Professor Greg Craven AO, Mr Sam Fay, Dr Damien Freeman, Mr Sean Gordon, Mr Ian McGill, Ms Kerry Pinkstone, Associate Professor Michael Reynolds, and the Hon. Ken Wyatt AM.
3. In 2017, as part of the Referendum Council consultations, the Uluru Statement from the Heart rejected all previous proposals and instead called for 'the establishment of a First Nations Voice enshrined in the Constitution'. The final recommendation of the Referendum Council that reported to the Prime Minister and Leader of the Opposition 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. One of the specific functions of such a body, to be set out in legislation outside the Constitution, should include the function of monitoring the use of the heads of power in

section 51 (xxvi) and section 122. The body will recognise the status of Aboriginal and Torres Strait Islander peoples as the first peoples of Australia.

4. In 2018 the Joint Select Committee chaired by Julian Leeser MP and Senator Patrick Dodson endorsed the proposal for a voice, but first recommended a process of co-design between the government and Indigenous people to determine the voice detail. This report received bipartisan support and recommended that, ‘following a process of co-design, the Australian Government consider, in a deliberate and timely manner, legislative, executive and constitutional options to establish The Voice’. The Committee received 18 different draft constitutional provisions, and there has not been a public process to examine the creation of a constitutional provision in the 5 years since the Joint Select Committee reported.
5. In 2019, the Hon. Ken Wyatt AM MP, Minister for Indigenous Australians, launched the co-design Senior Advisory Group to advise on options for models that will ensure that Indigenous Australians are heard at all levels of government - local, state and federal.
6. In July 2021, the co-design groups refined the proposals and recommendations in their Indigenous Voice Co-design Final Report which included Local / Regional bodies across 35 regions, and a national voice to provide advice to the Parliament and the government.
7. The Australian Labor Party made an explicit commitment at the last Federal election that it would ‘move quickly on a referendum to constitutionally enshrine a Voice to Parliament in our first term’.
8. Uphold & Recognise acknowledges that the Labor Government has an electoral mandate to put the referendum to the Australian people to enshrine the Voice to Parliament, and welcomes Labor’s leadership through the introduction of the Bill.
9. It should be noted, however, that there was no mention of a Voice to the *Executive* in Labor’s election policy document¹, the Uluru Statement from the Heart², or the Yarrabah Affirmation.³
10. This submission addresses six key issues:
 - a. Scope Issue

¹ The Australian Labor Party, ‘Labor’s Commitment to First Nations Peoples 2022’, accessed online <https://apo.org.au/sites/default/files/resource-files/2022-05/apo-nid319334.pdf>

² The Uluru Statement website <https://ulurustatement.org/the-statement/view-the-statement/>

³ The Uluru Statement website <https://ulurustatement.org/take-action/yarrabah-affirmation/>

- b. Executive Issue
- c. Jurisdiction Issue
- d. Operation Issue
- e. Consensus Issue
- f. Ethical Issue

11. Uphold & Recognise supports the Bill, subject to the concerns about the issues identified above, and which are discussed in detail below.

12. Four documents are annexed to this submission and they present the views of Uphold & Recognise in relation to a number of matters that are relevant to this submission:

a. Annexure A: ‘Questions About the Bill’

For such an important change to our Constitution, the Parliament has a duty to test the legal limits of the proposed new powers by separating out two key questions:

- Constitutionally, what *could* the new body do and what are the limits on the new body’s power as proposed?
- Politically, what *would* the body do and how, in practice, might the body choose to use its power, given that there is no draft legislation or final model for drafting instructions?

This document sets out the specific questions that need to be answered in order to answer these two fundamental questions.

b. Annexure B: *Guaranteeing a Grassroots Megaphone* by Greg Craven and Damien Freeman (Centre for Independent Studies Occasional Paper, 2023)

This paper provides a centre-right perspective on:

- how and why Indigenous peoples should be recognised in the Constitution through a guarantee that their voices will be heard;
- how legislation might be drafted to give effect to such an amendment to the Constitution.

c. Annexure C: *Who is speaking? Who is listening? Voice architecture and operational considerations* (PwC Indigenous Consulting Report, 2023)

This paper provides an account of how ‘architecture’ could be developed that:

- moves beyond ‘design principles’
- without the need to provide all the ‘detail’ of draft legislation, and

- could give an indication of what a post-referendum agenda might look like.
- d. Annexure D: *Statements from the Soul* (as extracted in the *Journal of the Law Society of NSW*)
- Damien Freeman’s concluding chapter from *Statements from the Soul*, which is a collection of essays published by religious leaders making the moral case for a First Nations Voice to be enshrined in the Australian Constitution.

Background about Uphold & Recognise

13. Uphold & Recognise is a non-profit organisation committed to the twin imperatives of recognising Aboriginal and Torres Strait Islander peoples and upholding the Australian Constitution.
14. Uphold & Recognise has long advocated an approach to constitutional recognition of Indigenous peoples which guarantees that Indigenous voices will be heard by lawmakers and policymakers when they are dealing with Indigenous affairs (the ‘Indigenous Guarantee’), and which, at the same time, guarantees that the Parliament of the Commonwealth will retain control over all aspects of how the mechanism for hearing Indigenous voices operates (the ‘Parliamentary Guarantee’).
15. Uphold & Recognise has always sought to find common ground between the aspirations of Indigenous peoples and the need for the Indigenous Guarantee, and the views of liberals and conservatives seeking to uphold the Parliamentary Guarantee.

Indigenous Guarantee

16. The Indigenous Guarantee is a response to the failure since 1788 to ensure that laws and policies relating to Indigenous affairs in Australia reflect the concerns of the Indigenous people affected by those laws and policies. This history gives rise to a need to give Indigenous people reason to believe that the future will be different from the past.
17. Since the Uluru Statement from the Heart in 2017, the consensus position of Indigenous people has been that this should be achieved through a ‘First Nations Voice enshrined in the Constitution’. This must now be the basis for the Indigenous Guarantee, namely that constitutional provision must be made to ensure that

Indigenous voices are heard by lawmakers and policymakers in Indigenous affairs by inserting a provision creating a new body in the Constitution.

18. The Indigenous Guarantee is tied closely to the shared goal of Closing the Gap in outcomes between Indigenous Australians, and all other Australians. Uphold & Recognise's chairman, Mr Sean Gordon, reflected on this in his speech to the Sydney Institute on 1 September 2022, when he outlined how Australia's history can also be addressed through this change:

The 1967 Referendum was a turning point. The oppression that Aboriginal people had long suffered was being replaced by the 'rights agenda'. Winning these rights was vitally important. It finally made us equal in the eyes of the law. But things were not equal. Our starting positions were not same. Too many people were coming from a very broken place - economically, socially, mentally, and culturally. Many of our families were left shattered after the decades of failed laws, which included the cruelty of separating children from their families, and being reminded that we were a lesser race of people. So, when we won the same rights as everyone else, what we also saw was a rise in harmful social dysfunction. Peter Sutton's book 'The Politics of Suffering', details the unintended damage from having a tunnel vision on rights, which robbed our people of the thing we needed to be doing as we gained these rights: taking responsibility. As the saying goes, we ended up having things done to us and for us, not with us, because the rights agenda was not met in equal parts with a responsibility agenda..... The [Voice] empowers Indigenous peoples to take responsibility in their affairs, while upholding the Australian Constitution. It will be up to the Parliament to decide exactly how we will get to have a say, so this change will not empower the High Court.

Parliamentary Guarantee

19. The Parliamentary Guarantee reflects the basic understanding of the Westminster system that the two Houses of Parliament are accountable to the people and, since they have the strongest democratic mandate, all other organs within the democratic system must be directly or indirectly subordinate to the Parliament. This means that if a new entity is to be established in the Constitution, its operation and interaction with other organs of government must be subject to parliamentary control.

20. Uphold & Recognise co-founder, Mr Julian Leeser MP, articulated the parameters for conservative support for constitutional recognition to the Samuel Griffith Society in 2017: ‘any package of reforms worth considering must be consistent with Australia’s constitutional architecture’ and it ‘should not affect the Crown, the Federation, the sovereignty of Parliament, or create a bill of rights’. Mr Leeser argued in 2017 the change should aim to create better public policy by mandating that Aboriginal and Torres Strait Islander people, as the only people about whom that Parliament can make specific laws, be consulted about those laws.
21. In his address to the National Press Club on Monday, 2 April 2023, Mr Leeser explained why he believed the proposed s 129 does not uphold the Parliamentary Guarantee, even if it does preserve the Indigenous Guarantee.⁴ On his analysis, the difficulty comes from the uncertainty of the words in the chapeau and the proposed s 129(2). He proposes a solution which is to delete the chapeau and the second subsection entirely. His version of s 129 would then consist of two subsections. The first subsection establishes the Aboriginal and Torres Strait Islander Voice. Mr Leeser believes that this is sufficient to establish the Indigenous Guarantee. The second subsection gives the Parliament power to make laws with respect to the Voice. This, establishes the Parliamentary Guarantee. Whilst it is clear that Mr Leeser’s proposal preserves the Parliamentary Guarantee, it is less clear whether it would be possible to obtain a consensus that it is sufficient to establish the Indigenous Guarantee.
22. Uphold & Recognise is concerned to ensure the final amendment to be put to the Australian people enshrines both the Indigenous Guarantee and the Parliamentary Guarantee in the Constitution, and is committed to exploring all options that might form the basis for a consensus that both guarantees are preserved by the proposed amendment.

Uphold & Recognise’s unique position

23. Uphold & Recognise has constructively advocated for Indigenous constitutional recognition, with three of its directors involved in the Government’s working groups. Two directors of Uphold & Recognise, the Hon. Ken Wyatt AM and Mr Sean Gordon, were members of the Referendum Working Group. In that capacity, they

⁴ Mr. Julian Leeser MP, Address to the National Press Club, 3 April 2023, accessed online <https://www.julianleeser.com.au/news/address-to-the-national-press-club/>

both personally endorsed the advice of the Referendum Working Group to the Government that the Constitution be amended in the manner provided for in the Constitution Alteration.

24. One director of Uphold & Recognise, Professor Greg Craven AO, was a member of the Constitutional Experts Group which provided advice to the Referendum Working Group up until 16 February 2023. In that capacity, he personally endorsed the advice of the Constitutional Experts Group to the Referendum Working Group that although there is no obligation on the Parliament or the Government to follow the Voice's representations, it is possible that the Executive Government's decisions could be found invalid if the Government failed to consider a relevant representation by the Voice.
25. The Constitutional Experts Group advised the Referendum Working Group that, if it were desired, there are different ways in which the draft constitutional provision could be amended to make it clear that Parliament could legislate about the legal effect of Voice representations to the Executive Government. This would explicitly leave the legal effect of representations as a matter for democratic control by the Parliament. However, the Prime Minister announced that the Cabinet had accepted the final advice that it had received from the Referendum Working Group, and that the Attorney-General would introduce a Bill for a Constitution Alteration to insert the proposed Chapter IX into the Constitution as advised by the Working Group. Professor Craven publicly expressed his personal view that the Voice's right to make representations covers all executive action, and, consequently, that decisions, such as those of the Reserve Bank, decisions on national security and carbon guarantees, could attract Voice representations. Professor Craven believes that the potential for judicial review of such decisions for failure to consider representations goes against the principle of not conferring power onto judges.
26. Given the public stance of Messrs Gordon and Wyatt about the need for the reference to the Executive Government in the amendment in order to preserve the Indigenous Guarantee, on the one hand, and of Professor Craven that this reference to Executive Government in the amendment compromises the Parliamentary Guarantee, on the other, Uphold & Recognise finds itself in a unique position. This has required our organisation to consider strategically the views and concerns of our directors and to work constructively towards developing a solution that would address these concerns. To do this, we have relied heavily on our founding director, Dr Damien Freeman, and

executive director, Ms Kerry Pinkstone. Dr Freeman and Ms Pinkstone have been given carriage to find common ground between the public stances of the other directors, and to identify solutions that balance the both of the Guarantees.

Comments on the anatomy of the Bill

27. With respect to the creation of a new Chapter IX in the Constitution, consideration should be given to the observations of Professor Nicholas Aroney and the questions to which these give rise in paragraphs 4-6 of Annexure A.
28. With respect to the chapeau to the proposed s 129 of the Constitution, consideration should be given to the observations and questions raised in paragraphs 7-10 of Annexure A.
29. With regard to the proposed s 129(2), there are three issues that need to be considered, the Scope Issue, the Executive Issue and the Jurisdiction Issue discussed below, and, more generally, consideration should be given to the observations and questions raised in paragraphs 11-45 of Annexure A.
30. With regard to the proposed s 129(3), consideration should be given to the observations and questions raised in paragraphs 18, 41, 46-54 of Annexure A, and, in particular, the possible need to address the Jurisdiction Issue, the Executive Issue and the Scope Issue that might be raised by the proposed s 129(2), but which are also relevant for understanding the effectiveness of the proposed s 129(3).
31. Irrespective of how the specific clauses of the Bill and the proposed Constitution Alteration are assessed, the Bill as a whole, when viewed in the context of the current social and political climate, gives rise to two broader sets of considerations which are addressed under the Operation Issue and the Consensus Issue below. It also needs to be considered in light of the ethical issues raised later in this submission.

Scope Issue

32. There are three categories of matters about which the body established in the proposed s 129(1) might make representations to the Parliament and the Executive Government of the Commonwealth:
 - a. Special measures (including laws made under s 51(xxvi) or s 122 of the Constitution that apply only to Indigenous people);
 - b. Laws of general application (and policies) that impact Indigenous people in a special way;

- c. All other laws of general application (and policies) that impact Indigenous people in the same way that these impact people who are not Indigenous.
33. There should be general agreement that the new body can make representations in relation to (a) and (b) above but not (c), and that the proposed s 129(2) appears to provide for this.
34. The question, then, is who determines when a matter falls within (a), (b) or (c) above. This determination must be made either by the Parliament, the Executive, the High Court, or the Voice.
35. On Thursday, 30 March 2023, *The Australian* reported that although the Prime Minister has said that the proposed s 129(2) maintains ‘the primacy of the Parliament to determine the structure and functions, including to determine the operation, essentially, of the Voice and what it considers’, this has been disputed by Professor Anne Twomey AO and Professor George Williams AO. Professor Twomey was reported as stating:

The scope of what the Voice can make representations about is determined by proposed s 129(2) (the second clause), which states that the Voice can make representations ‘on matters relating to Aboriginal and Torres Strait Islander peoples’. That cannot be altered or limited by an act of Parliament.

Professor Williams was reported as challenging the Prime Minister’s statement about the primacy of the Parliament, saying it could not stand without qualification. He was reported as disagreeing with the Prime Minister that the Voice would only be able to make representations about matters that ‘directly’ affect Indigenous people, and explained that the scope of the right to make representations was broader than what the Prime Minister had indicated. We agree, particularly given that the proposed s129(3) is expressed to be subject to the Constitution, that is, subject to proposed s129(2). That is, the Constitution controls, not the Parliament.

36. This was confirmed by Professor Megan Davis and Professor Gabrielle Appleby, who outlined the Voice will have the broadest constitutional remit possible:

The proposed constitutional amendment says the voice may make representations on ‘matters relating to Aboriginal and Torres Strait Islander peoples’. This is a broad remit: while there must be a connection, it is not limited to matters specifically or directly related to Aboriginal and Torres Strait Islander peoples. The voice will be able to speak to all parts of the government, including the cabinet, ministers, public servants, and 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 – on matters relating to Aboriginal and Torres Strait Islander people. This isn't to be feared: as the Explanatory Memorandum says, the parliament will be able to set the procedure through which the voice's representations are received, with the important caveat that the parliament won't be able to stop the voice making those representations. It can't shut the voice up.⁵

37. Before the last general election, Professor Tom Calma AO and Professor Marcia Langton AO led a co-design process whose final report proposed that 'consultation standards' be developed to determine this issue.⁶ This proposal envisages that the Parliament establishes the basis on which a determination is made, although the statutory scheme that it enacts might delegate the actual determination to the Voice, providing that the Voice acts in accordance with the statutory consultation standards.
38. According to the final report, the consultation standards would set out when, how and on what type of matters the Parliament and the Government should engage with the Voice. There would be two elements to the consultation standards:
- a. An *obligation* to consult on proposed laws and policies that overwhelmingly relate to Aboriginal and Torres Strait Islander peoples, or is a special measure within the definition of the Racial Discrimination Act 1975 (Cth). The obligation to consult would only apply to primary legislation.
 - b. An *expectation* to consult on proposed laws and policies that have a significant or distinctive impact on Aboriginal and Torres Strait Islander peoples. The expectation to consult would apply to legislative instruments and other policies.
39. This proposal provides a suitable way of enabling Parliament to retain control of the scheme by which the determination is made, whilst delegating the power to make the determination (subject to the statutory consultation standards) to the Voice.

⁵ Megan Davis and Gabrielle Appleby, 'Voice only works if it's free to choose what to talk about', The Australian newspaper, 1 April 2023, accessed online <https://www.theaustralian.com.au/inquirer/indigenous-voice-to-parliament-only-works-if-its-free-to-choose-what-to-talk-about/news-story/8361479386a83d8f569640a25622e4fd>

⁶ Commonwealth of Australia, National Indigenous Australians Agency, Indigenous Voice Co-design Process Final Report to the Australian Government 2021, accessed online https://voice.niaa.gov.au/sites/default/files/2021-12/indigenous-voice-co-design-process-final-report_1.pdf

40. The consultation standards might not be possible once the proposed s 129(2) is inserted into the Constitution, as the Parliament will no longer be able to restrict the scope of the matters about which the Constitution gives the Voice a right to make representations. In this case, it appears that it would be either for the Voice or the High Court to determine whether a matter falls within category (b) or category (c) above.
41. In the event that the Voice or the High Court, rather than the Parliament, is responsible for determining when a proposed law of general application (or a policy) affects Indigenous people in a special way, it could not be said that the Parliament retains control over all aspects of the operation of the Voice. In this case, the Indigenous Guarantee would be affirmed, but the Parliamentary Guarantee would not be.
42. Consideration should be given to whether the proposed s 129(2) as currently drafted preserves both the Indigenous Guarantee and the Parliamentary Guarantee in relation to the Scope Issue. If there is uncertainty as to whether it preserves both guarantees, consideration should be given to how it might be redrafted so as to preserve both guarantees. This may be necessary because a Constitution Alteration that does not preserve both guarantees is unlikely to achieve the consensus necessary for a successful referendum.
43. One way of preserving the Parliamentary Guarantee would be to delete the words ‘on matters relating to Aboriginal and Torres Strait Islander peoples’ and substitute a different formula of words, such as ‘on proposed laws and matters with respect to Aboriginal and Torres Strait Islander peoples and such other matters as the Parliament provides’.
44. This would preserve the Indigenous Guarantee in relation to special measures under ss 51(xxvi) and 122 and the Parliamentary Guarantee in relation to laws of general application that impact Indigenous people in a special way, because it would allow the Parliament to legislate for the consultation standards proposed by Professors Calma and Langton to deal with this issue.

Executive Issue

45. In Australian constitutional law, the Executive Government of the Commonwealth is taken to include the King and the Governor-General, the Federal Executive Council, Ministers of State and the Cabinet, parliamentary secretaries, and all members of the

Australian Public Service (which is around 254,000 employees at the Commonwealth level and 1.7m at the State level).⁷ It may also include other statutory bodies that do not form part of a Department of State (such as the Reserve Bank of Australia) and employees of those bodies who are not strictly public servants and would include those Commonwealth entities and companies regulated under the *Public Governance Performance and Accountability Act 2013*. The Administrative Arrangement Orders should be examined in this light.⁸

46. The reference to the Executive Government of the Commonwealth in the proposed s 129(2) could, therefore, be taken to include all of these. If that is the case, then the Parliament could not restrict the parts of the Executive Government to which the body established in s 129(1) can make representations, as the body would have a constitutional right to make representations to any part of the Executive Government on any issue.
47. We agree that this is consistent with the Indigenous Guarantee. However, consideration should be given to whether it is necessary for the new body to have a constitutional right to make representations to every part of the Executive Government of the Commonwealth and if this is the best way to improve outcomes for Indigenous people on the ground. If so, it should be possible to explain why such a broad right is necessary. If such an explanation is not forthcoming, there is a significant risk that an unnecessarily broad right to make representations to the Executive Government could undermine the Parliamentary Guarantee.
48. One option would be to delete the reference to ‘the Executive Government of the Commonwealth’ and substitute ‘the Ministers of State for the Commonwealth’.
49. The Ministers are responsible to Parliament for the Departments of State that they administer and for the lawful actions of the public servants within those Departments. Thus, there is no matter about which a public servant makes a decision for which the Minister is not constitutionally responsible. Australian Public Service employees are accountable under the law and within the framework of ministerial responsibility.

⁷ Australian Bureau of Statistics, Employment and Earnings, Public Sector Australia 2021-22, accessed online <https://www.abs.gov.au/statistics/labour/employment-and-unemployment/employment-and-earnings-public-sector-australia/latest-release>

⁸ Australian Government, Department of Prime Minister and Cabinet, Administrative Arrangement Orders accessed online <https://www.pmc.gov.au/government/parliamentary-information/administrative-arrangements-orders>

50. For this reason, consideration should be given to the possibility that the constitutionally guaranteed right to make representations could be a right to make representations to the person who is constitutionally responsible to Parliament.
51. Furthermore, consideration could be given to making provision for Parliament to extend the right to make representations to other parts of the Executive Government.
52. If the right to make representations to Ministers were constitutionally guaranteed and the right to make representations to other parts of the Executive Government were statutory, it could be argued that the Indigenous Guarantee and the Parliamentary Guarantee would both be preserved.
53. If it were deemed legally necessary and/or politically desirable to amend the proposed s 129(2) to address both the Scope Issue and the Executive Issue, the subsection might be amended to read as follows:
 2. The Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the Ministers of State for the Commonwealth on proposed laws and matters with respect to Aboriginal and Torres Strait Islander peoples and to the Parliament and the Executive Government of the Commonwealth on such other matters as the Parliament provides;

Jurisdiction Issue

54. It is widely agreed that the Voice should be able to make representations to the Executive in relation to matters that affect Indigenous people, and that there needs to be some constitutional guarantee in relation to this right. There is some contention as to how broad or narrow this constitutional guarantee should be. In addition to the Scope Issue and the Executive Issue raised above, however, a further issue has been identified in relation to some matters about which representations might be made, namely the Jurisdiction Issue.
55. The matters about which it is widely agreed that the Voice should be able to make representations to the Executive include policy, practice, and administrative decisions relating to Indigenous people.
56. The Jurisdiction Issue arises when the right to make representations is constitutional rather than statutory, and in relation to administrative decisions but not in relation to representations about matters concerning policy or practice.
57. The Revd Professor Frank Brennan SJ AO has observed that if the Voice has a constitutional right to make representations on administrative decisions under the

proposed s 129(2), then this will enliven a constitutional right under s 75(v) to seek a writ of mandamus or prohibition or an injunction against the decision-maker, if that person is an officer of the Commonwealth.⁹

58. Professor Brennan agrees that the Voice should have a right to make representations about administrative decisions, however, he argues that the right should be statutory rather than constitutional.¹⁰ If the right is statutory rather than constitutional, judicial review of the administrative decision would still be possible, but the Parliament would retain control over the terms on which such review could be sought. If the right is constitutional, the Jurisdiction Issue arises, because the Parliament cannot restrict the terms on which judicial review can be sought under s 75(v).
59. As such, although a constitutional right for the Voice to make representations to an administrative decision-maker under the proposed s 129(2) and the ensuing constitutional right to seek judicial review of the administrative decision under s 75(v) would be consistent with the Indigenous Guarantee, it would be inconsistent with the Parliamentary Guarantee.
60. It may be argued that the proposed s 129(3) would give the Parliament power to make laws restricting the right to seek judicial review of administrative decisions on the basis that the s 129(1) body's representations were not properly considered, or that it was not given adequate opportunity to make such representations. The difficulty with this interpretation of the proposed s 129(3) is that, as we have noted in relation to the Scope Issue, the grant of legislative power is explicitly 'subject to this Constitution'. It is hard to see how such a grant of power could support a law that purported to diminish the jurisdiction of the High Court established elsewhere in the Constitution, such as in s 75(v). Indeed, the jurisdiction of the High Court under s 75(v) is an irremovable source of High Court jurisdiction and power.¹¹
61. There are two options for ensuring that the Voice's right to make representations is compatible with both the Indigenous Guarantee and the Parliamentary Guarantee:

⁹ Fr Frank Brennan SJ AO, Indigenous Constitutional Recognition through a Voice, Uphold and Recognise conference, Sydney 28 February 2023, accessed online <https://static1.squarespace.com/static/57e8c98bbebafba4113308f7/t/640025429e5f851f484ca350/1677731139965/U%26R+Frank+Brennan+Feb+2023.pdf>

¹⁰ Fr Frank Brennan SJ AO, Indigenous Constitutional Recognition through a Voice, Uphold and Recognise conference, Sydney 28 February 2023, accessed online <https://static1.squarespace.com/static/57e8c98bbebafba4113308f7/t/640025429e5f851f484ca350/1677731139965/U%26R+Frank+Brennan+Feb+2023.pdf>

¹¹ See *Smethurst v Commissioner of Police* [2020] HCA 14, at 31 (per Kiefel, Bell and Keane JJ) and at 84 (per Edelman J).

- a. the right to make representations to the Executive about policy and practice is constitutional, but the right to make representations to the Executive about administrative decisions is statutory;
 - b. the right to make representations to the Executive about administrative decisions is constitutional, but the right to judicial review of such administrative decisions is statutory.
62. There are several options for addressing the Jurisdiction Issue, including:
- a. Deleting the words ‘and the Executive Government’ in the proposed 129(2);
 - b. Inserting additional words in the proposed s 129 explicitly giving the Parliament power to make laws about the legal effect of representations made under subsection (2);
 - c. Inserting in s 77 of the Constitution a new subsection (iv) giving the Parliament power to make laws about the application of s 75(v) to the body established in s 129(1).
63. Consideration should be given to how the operation of s 75(v) and the proposed s 129(2) can preserve both the Indigenous Guarantee and the Parliamentary Guarantee in relation to the Jurisdiction Issue, as a Constitution Alteration that does not preserve both guarantees risks disrupting the system of government.
64. It should be stressed that if the right of the body created under the proposed s 129(2) to bring an action under s 75(v) were to be limited by the Parliament, that would not affect the rights of any Indigenous person. If, for instance, an officer of the Commonwealth was making an administrative decision that affected an Indigenous person, that person would still retain any existing legal right to seek a writ or injunction under s 75 of the Constitution. The Parliament would not be able to restrict that right. What the Parliament could restrict, however, would be the additional right of the new body established in s 129(1) to bring an action in relation to that decision.

Operation Issue

65. Senator Andrew Bragg has argued that the Government should not propose a new power in the Constitution without setting out how they plan on using it.¹² This is a fair statement.

¹² Senator Andrew Bragg, Senator for New South Wales, speech to Uphold and Recognise forum, Sydney 28 February 2023, accessed online <https://www.andrewbragg.com/post/speech-to-uphold-and-recognise>

66. The Morrison Government’s co-design process attempted to set out the model for the body, and the functions of an Indigenous voice at local, regional and national levels. The Albanese Government is yet to respond to this report, and the contents of the Alteration Bill may now conflict with elements of that report as set out above. The proposed Consultation Standards are one example.

67. It is unclear how the body will operate post-referendum. In the absence of a final model, some advocates argue it will be for the purpose of being consulted and having a say:

A Voice to Parliament will give Indigenous communities a route to help inform policy and legal decisions that impact their lives. Giving people a say will lead to more effective results.¹³

This is in line with the 2017 Referendum Council report which stated:

A constitutionally entrenched Voice appealed to Aboriginal and Torres Strait Islander communities because of the history of poor or non-existent consultation with communities by the Commonwealth. Consultation is either very superficial or it is more meaningful, but then wholly ignored. For Dialogue participants, the logic of a constitutionally enshrined Voice – rather than a legislative body alone – is that it provides reassurance and recognition that this new norm of participation and consultation would be different to the practices of the past.

68. Others view the body as a mechanism for Agreement Making. This was noted in the 2017 Referendum Council report where a Voice to Parliament met the agreed principle of ‘provides a mechanism for First Nations agreement-making’.¹⁴ This has been supported in the past by leaders such as Noel Pearson who said ‘my synthesis is simply that constitutional recognition provides the hook that enables agreements to be made, and a Makarrata, a national settlement, to be made’. Mr. Pearson states they are inextricably linked ‘if we think they are somehow separate agendas, this whole agenda will fail’.¹⁵

69. The Government has opted not to deliver a package of legislation alongside the Alteration Bill, and has asked the Australian community to vote on the principle that

¹³ Reconciliation Australia, Voice to Parliament, accessed online <https://www.reconciliation.org.au/reconciliation/support-a-voice-to-parliament/>

¹⁴ Referendum Council, Final Report of the Referendum Council, 2017, pg 29 accessed online https://www.referendumcouncil.org.au/sites/default/files/report_attachments/Referendum_Council_Final_Report.pdf

¹⁵ ‘Noel Pearson hits out at ‘bureaucratic and political bastardry’, The Guardian, 30 July 2016, accessed online <https://www.theguardian.com/australia-news/2016/jul/30/garma-festival-noel-pearson-hits-out-at-bureaucratic-and-political-bastardry>

there should be a Voice for the purpose of consultation with recognition of Aboriginal and Torres Strait Islander peoples.

70. Indigenous leaders have previously called for the details to be spelled out in draft legislation, and they have even gone so far as to argue that the legislation should be passed prior to a referendum:

a. In 2021, in an address to the National Museum of Australia Noel Pearson stated:

Let us complete the legislative design of the voice, and produce an exposure draft of the bill so that all parliamentarians and the members of the Australian public can see exactly what the voice entails.¹⁶

b. At the time, Marcia Langton rebuffed this suggestion saying we should legislate the Voice first before going to a Referendum:

My opinion is that if Pearson's sequence occurred and a referendum were lost, we would also lose the opportunity to legislate the voice co-design. I believe the risk is too great and I am hopeful our final report to the minister in July (2021) will result in legislation.¹⁷

71. Annexure B to this submission is an occasional paper published by the Centre for Independent Studies, which offers suggestions for how legislation could be developed to address the growing range of concerns that have been expressed about how an Indigenous Voice could be consistent with promoting the priorities of Australians at large and the national interest.

72. The PwC Indigenous Consulting Report titled *Who is Speaking? Who is Listening?* (Annexure C to this submission) acknowledges the vigorous debate about whether 'the detail' for the Voice should be provided before or after the referendum. The Government's current position is that electors should vote on the concept that there should be a body, and that high-level principles are sufficient for this decision. The Opposition says the electors need to understand the detail of what the body is, and how it will work.

73. A third option is to find a middle ground between high-level principles on one hand, and detailed model legislation on the other, by talking about what the PwC report

¹⁶ Noel Pearson, *It's Time for True Constitutional Recognition*, 17 March 2021, accessed online <https://www.nma.gov.au/audio/australia-speaks/transcript/australia-speaks-noel-pearson>

¹⁷ Indigenous Voice co-chairs reject Noel Pearson call, *The Australian newspaper*, 19 March 2021, accessed online <https://www.theaustralian.com.au/nation/politics/no-clear-consensus-pm-pours-cold-water-on-constitutional-recognition/news-story/6b40221c6fc4465758cc37762d15cca6>

calls the ‘architecture’ of the body. This could provide the basis for the Parliament to agree on the broad parameters of the Voice prior to the referendum (with those broad parameters to be subject to further consultation with Indigenous people), noting that the model itself will not be in the Constitution. The Parliament can then authorise the change to the Constitution, which will be put to the Australian people, knowing what a post-referendum agenda might look like.

74. To outline the architecture, consideration should be given ‘who is listening’, and the ‘bridge’ between the two, that is, the way the Voice and government come together in a reframed relationship of mutual respect. The ‘bridge’ between government and communities will enable the Voice to deliver on-the-ground impact.
75. Other key points that should be considered from this report include:
 - a. A strong focus on structural and systemic reforms as a means by which communities could engage meaningfully with government to provide advice on a range of complex challenges which require government and community collaboration;
 - b. A well-designed structure which provides for local, regional and national input can in fact be a crucial enabler for improving outcomes for Indigenous peoples
 - c. Structural reform which provides for a level of shared decision-making, also promotes shared responsibility;
 - d. Local and regional Voices are a critical power base, and with a clear structural link between them and the national Voice, this congruence can help to align advice, resources and effort - better informing decision making, and also potentially helping to identify duplication across government programs and spending;
 - e. In practice, each region may have consistent overarching principles at a high level, but have a level of flexibility to enable local/regional Voices to take into account their local/regional cultural and other contexts. This ‘fit-for-purpose’ approach would also enable the Voice model to take into account things like a community’s experience with this style of operating and decision-making, existing capacity, and the breadth and depth of local/regional leadership available;
 - f. For the Voice to be effective, it needs to be connected to governments in a structured way through appropriate interfaces at the local, regional and national level.

Consensus Issue

76. The record of failed referendums is well documented. The referendums that succeed appear to be overwhelmingly supported and accepted by the community prior to the Parliament debating the Alteration Bill.
77. It is difficult to predict if this referendum will succeed or not, but what is clear is that a failure to carry a double majority would be a very tragic outcome.
78. There are four stages that require as much consensus as possible:
- a. The final Alteration Bill passing the Parliament;
 - b. Establishing a mandate from the Australian people to enshrine the body by securing a double majority at the Referendum;
 - c. Developing and then passing the legislation to establish the body in the Parliament post-referendum;
 - d. Implementation of these reforms over many years.
79. It is challenging for the Parliament to reach a consensus position to pass the Alteration Bill when the model has not been settled, and the electors are asked to vote with high-level design principles only. The way the Voice is designed and then operationalised post-referendum will determine how outcomes are improved on the ground.
80. In seeking to build consensus and a mandate for the necessary double majority, the Parliament should, in our view, explicitly commit to another of the key recommendations from the Referendum Council. That is, an extra-constitutional Declaration of Recognition be enacted by legislation passed by all Australian Parliaments, ideally on the same day, to articulate a symbolic statement of recognition to unify Australians. This would be a powerful unifying moment for all Australians that they would see as inextricably linked to a successful Referendum outcome.
81. In response to the latest poll released by Newspoll in the Australian newspaper, Labor Premier of Queensland, Annastacia Palaszczuk, suggested voters in Queensland were ‘looking for more information’, and that ‘the federal government needs to really be a lot more proactive than – as well as First Nations people – in terms of, you know, explaining what it means... I think people are after the detail’.¹⁸

¹⁸ ‘Liberal leaders refuse to join Dutton’s ‘no’ campaign on voice’, The Australian newspaper, 6 April 2023, accessed online <https://www.theaustralian.com.au/nation/politics/liberal-leaders-refuse-to-join-duttons-no-campaign-on-voice/news-story/65982231d1ba4e4049ab9da3be2f64cc>

82. There is a saying that the only poll that matters is the one on election day. The Parliament must consider a scenario where the Alteration Bill passes and receives Royal Assent, but the polls continue to fall as the nation heads towards the referendum. According to section 128 of the Constitution, the referendum must take place between 2 and 6 months after the bill is passed. If the Parliament backs a proposal that has weak public support and the vote collapses, it is too late to change course. There could be a challenge in the High Court to force the proposal to be put to the Australian people, even if it is destined to lose.

Ethical Issue

83. Uphold & Recognise notes that it is impossible in discussion of the voice to divorce constitutional values and policy considerations on the one hand, and matters of public and personal morality on the other. Many of those favouring the enshrinement of the Voice will have come to a constitutional or policy position via a deep conviction as to the position of Aboriginal and Torres Strait Islander peoples.

84. John Howard spoke of this ethical conviction when he first proposed recognition:

It goes to love of country and a fair go. It's about understanding the destiny we share as Australians – that we are all in this together. It's about recognising that while ever our Indigenous citizens are left out or marginalised or feel their identity is challenged we are all diminished. It's about appreciating that their long struggle for a fair place in the country is our struggle too.¹⁹

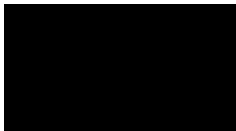
85. Annexure C to this submission is an extract from the conclusion to *Statements from the Soul: the moral case for the Uluru Statement from the Heart*, which was launched by the Hon. T. F. Bathurst AC KC at the Great Synagogue, Sydney, in February 2023. It sums up the way in which Australians from a range of different faith communities have come to the conclusion that their own religious convictions and experiences lead them to believe that there is a moral obligation to implement the Uluru Statement from the Heart.

86. Although the Alteration Bill and the Government's design principles for subsequent legislation may raise issues that need to be addressed, we are confident that it is possible to address these issues, and that once these issues are addressed, the Electors

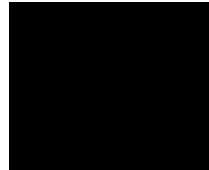
¹⁹ The Hon John Howard MP, Prime Minister, Address to the Sydney Institute, Sydney 25 June 2007, accessed online <https://pmtranscripts.pmc.gov.au/release/transcript-15332>

might reasonably be expected to approve the Constitution Alteration at a referendum.
This is an unparalleled opportunity for not only reconciliation but also national unity.
87. The directors of Uphold & Recognise would be pleased to discuss these submissions
with the Joint Select Committee, should it be deemed of use for us to elaborate further
on any of the issues raised above.

Yours faithfully,



SEAN GORDON
CHAIRMAN
FOR AND ON BEHALF OF THE DIRECTORS



KERRY PINKSTONE
EXECUTIVE DIRECTOR