

13 April 2023

Senator Nita Green,  
Chair,  
Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum  
Parliament House,  
Canberra, ACT 2600

Dear Senator Green,

Please accept this submission to the Committee's inquiry into the *Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023*.

This submission:

- a) seeks to explain the purpose and intended operation of various elements of the proposed amendment;
- b) addresses the arguments about whether the High Court might draw certain implications from the proposed amendment;
- c) notes the important distinction between law and politics in relation to the operation of the proposed amendment and its drafting; and
- d) adds an appendix which gives some history of the drafting of the proposed amendment.

### **New Chapter**

The proposed amendment is placed in a new chapter in the Constitution. The reason for doing this was three-fold. First, it is to make it very clear that the Voice does not form part of, or have the powers of the institutions established by, the first three chapters of the Constitution. As the amendment is not placed in Chapter I, the Voice is not part of the Parliament and the Constitution does not confer legislative power upon the Voice. As it is not part of Chapter II, the Voice is not part of the Executive Government and the Constitution does not confer executive power upon it. As it is not part of Chapter III, the Voice is not part of the judiciary and the Constitution does not confer judicial power upon it.

The Voice will be a separate body and the only power conferred upon it by the Constitution is the power to make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples. Other functions and powers may be conferred upon it by Parliament.

The second reason for placing the Voice in a separate chapter in the Constitution is to ensure that it does not interfere in any way with the existing jurisprudence on the separation of powers, which is derived from the text and structure of the first three Chapters of the Constitution.

The third reason is that the Voice would not fit well within the other Chapters. It does not concern 'Finance and Trade' and therefore would be inappropriate for inclusion in Chapter IV. It does not concern 'The States' or 'New States', so would be inappropriate for inclusion in Chapters V or VI. The only other existing Chapter in which it could be placed is 'Miscellaneous' – but that would appear to be insulting, especially as it once included s 127, which was titled 'Aborigines not to be counted in reckoning population'.

## **Introductory words**

A significant aim of the proposed amendment is to provide recognition of Aboriginal and Torres Strait Islander peoples in the Constitution. While substantive recognition is given by the establishment of the Voice, as there is an act of recognition every time the Voice is heard, the introductory words of proposed s 129 make it clearer that symbolic recognition is also intended. The terminology ‘First Peoples of Australia’ is similar to the terminology proposed by John Howard for the 1999 preamble referendum (‘honouring Aborigines and Torres Strait Islanders, the nation’s first people’).

The statement is one of fact. It is also a statement that provides the explanation for establishing the Voice. It is not being established to favour the people of one race over those of other races, as some have suggested. The Voice is being established because Aboriginal and Torres Strait Islander peoples are the First Peoples of Australia and therefore have a unique place in Australia’s cultural history as well as continuing legal rights from before the colonisation of Australia.

### **S 129(i) – Existence**

Section 129(i) provides that there shall be a body to be called the Aboriginal and Torres Strait Islander Voice. The term ‘body’ indicates that it is an entity, rather than an individual person. The words ‘There shall be a’ are taken from s 101 of the Constitution regarding the establishment of the Inter-State Commission. Quick and Garran noted that such wording amounted to ‘a definite direction to the Parliament’, but that until Parliament provided for its members, powers, etc, it would not be able to operate. They added that the ‘Parliament cannot, of course, be compelled – except by its constituents – to constitute a Commission’.<sup>1</sup> It would be a ‘duty of imperfect obligation’ which could not be enforced by a court.

However, if once the Voice was established by legislation, subsequent legislation was enacted to abolish the Voice, without replacing it with another body called the Aboriginal and Torres Strait Islander Voice with the same power to make representations in s 129(ii), then the validity of such a law could be challenged in a court.

The power to give the Voice substance is conferred on Parliament in s 129(iii), which gives Parliament power to make laws with respect to matters relating to the Voice, including its composition, functions, powers and procedures.

### **S 129(ii) – the primary function and power of the Voice**

The primary function and power of the Voice is conferred directly by proposed s 129(ii). It says that the Voice ‘may make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples’.

First, the word ‘may’ is permissive. There is no obligation on the Voice to make representations in relation to any particular matter.

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<sup>1</sup> J Quick and R R Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 895-6. Note that the Inter-State Commission no longer exists. No one challenged the validity of its abolition and it had no supporters advocating for its continue existence.

Second, the word ‘representations’ means formal statements expressing a particular point of view on behalf of a represented group. They may include a complaint or a request for change.

Third, those representations can be made to the Parliament or the Executive Government of the Commonwealth. The procedure for doing so is left to the Parliament to determine in s 129(iii). For example, Parliament could legislate to require that all representations from the Voice to Parliament are to be sent to the Presiding Officers and tabled in Parliament, or sent to a specific parliamentary committee to be considered by it.

Parliament could also legislate to require that all representations to the Executive Government are to be sent to one office – eg the National Indigenous Australians Agency, which could then refer them as appropriate to other agencies or officers. Alternatively, it could legislate to require that representations be sent to the relevant Minister.<sup>2</sup> Such legislation would avert concerns that have been expressed about representations being sent to individual public servants, agencies and Commonwealth entities. Section 129(ii) refers to the Executive Government of the Commonwealth collectively – not to individual officers or agencies. As long as legislation enacted under s 129(iii) did not prevent representations being made to ‘the Executive Government’, it would be a matter for Parliament to determine the most efficient way to receive representations and deal with them.

Fourth, the representations are to be ‘on matters relating to Aboriginal and Torres Strait Islander peoples’. The words ‘relating to’ have been interpreted broadly by the High Court. They would require a connection or association<sup>3</sup> between the representation and Aboriginal and Torres Strait Islander peoples. The degree of that connection would be governed by the context,<sup>4</sup> and may be direct or indirect.<sup>5</sup> A connection that was ‘insubstantial, tenuous or distant’<sup>6</sup> would probably be insufficient. The Explanatory Memorandum correctly notes that the phrase ‘matters relating to Aboriginal and Torres Strait Islander peoples’ would include matters specific to those peoples or relevant to them, including laws of general application which affect Aboriginal and Torres Strait Islander peoples differently.

Fifth, it is important to note what is not included in the words of s 129(ii). There is no obligation upon Parliament or the Executive Government to respond to the representations or give effect to them. There is no obligation of prior consultation. There is no requirement to wait to receive a representation before the Executive Government of Parliament can act. Indeed, there is no obligation imposed upon the Voice, Parliament or the Executive Government of any kind by s 129(ii). Sub-section 129(ii) is merely facultative – meaning it permits the Voice to make these representations.

But Parliament could not legislate to alter or remove that capacity of the Voice. For example, if Parliament passed a law that prohibited the Voice from making representations to Parliament or the Executive Government, or that prohibited it from making representations on particular

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<sup>2</sup> Robert French and Geoffrey Lindell, ‘The Voice – A Step Forward for Australian Nationhood’, (2023) 97 *Australian Law Journal* (May edition – forthcoming) [48] and [49].

<sup>3</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 [87] (McHugh, Gummow, Kirby and Hayne JJ).

<sup>4</sup> *Travellex Ltd v Federal Commissioner of Taxation* (2010) 241 CLR 510, [90] (Crennan and Bell JJ)

<sup>5</sup> *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323, 370 (McHugh J).

<sup>6</sup> *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323, 369 (McHugh J); *Re Maritime Union of Australia; ex parte CSL Pacific Shipping Inc* (2003) 214 CLR 397, 413 [35] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ). Note, however, that this jurisprudence concerns the words ‘with respect to’ in s 51 of the Constitution.

matters that fell within the scope of ‘matters relating to Aboriginal and Torres Strait Islander peoples’, such a law would be invalid as it would be contrary to the terms of s 129(ii).

### **S 129(iii) – the powers of Parliament**

Sub-section 129(iii) leaves it to Parliament to legislate to govern the operation of the Voice. It allows Parliament to determine the composition of the Voice, which Parliament can later change if the Voice is not working well. It allows Parliament to determine the procedures of how it operates, including how the Voice interacts with the Executive Government and with Parliament itself. It allows Parliament to determine what other functions the Voice may have, in addition to its representation-making function in s 129(ii), and to confer powers on it, such as the power to own property or employ staff.

Parliament’s power in s 129(iii) is wide. It extends to ‘matters relating to the Aboriginal and Torres Strait Islander Voice’. Again, the words ‘relating to’ are likely to be interpreted broadly by the High Court.

The Courts, however, cannot compel Parliament to legislate or to enact a particular type of law.<sup>7</sup>

Parliament’s power in s 129(iii) is ‘subject to the Constitution’, as are most other legislative powers conferred by the Constitution, including those in s 51. It would therefore be subject to express constitutional provisions and existing constitutional implications, such as the separation of powers, federalism and the implied freedom of political communication. For example, Parliament could not confer judicial power on the Voice, as this would breach the separation of powers. Further, Parliament could not legislate so as to abdicate its legislative power by requiring approval by the Voice before passing a law, as this would be inconsistent with Chapter I of the Constitution.<sup>8</sup>

Sub-section 129(iii) would also be subject to s 129(i) and s 129(ii), which means, as noted above, that Parliament would not be able to legislate to abolish the Voice (unless it replaced it with another body with the same power to make representations under s 129(ii)) and would not be able to abolish or restrict the ability of the Voice to make representations to Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples.<sup>9</sup>

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<sup>7</sup> Robert French, ‘The Voice – A step forward for Australian Nationhood’, AUPUBLAW (20 February 2023) <https://www.auspublaw.org/first-nations-voice/the-voice-a-step-forward-for-australian-nationhood/>.

<sup>8</sup> Robert French, ‘The Voice – A step forward for Australian Nationhood’, AUPUBLAW (20 February 2023) <https://www.auspublaw.org/first-nations-voice/the-voice-a-step-forward-for-australian-nationhood/>.

<sup>9</sup> Note that a constraint upon Parliament’s power to legislate to abolish or restrict the ability of the Voice to make representations to Parliament or the Executive Government would exist regardless of the application of s 129(ii). This is because the implied freedom of political communication would limit the power of Parliament to prohibit or unduly restrict the ability of the Voice to make representations that amount to political communication. It is difficult to see what legitimate purpose, compatible with the system of representative and responsible government, could support a law that prohibited the Voice from making representations to Parliament or the Executive Government. Any restriction would have to be for such a legitimate purpose and meet the proportionality test: *Brown v Tasmania* (2017) 261 CLR 328; *Unions NSW v New South Wales (No 2)* (2019) 264 CLR 595.

## Constitutional implication

Most of the opposition to proposed s 129 has related not to what it says or does, but to what is not said, but might in the future be implied by the High Court. Concerns have been raised that the High Court might imply from the proposed amendment:

- an obligation on Parliament and the Executive Government to advise the Voice in advance before making any law or policy on a matter relating to Aboriginal and Torres Strait Islander peoples, giving adequate time for it to make representations on the matter;
- an obligation on Parliament and the Executive Government to consult the Voice in advance before making any law or policy on a matter relating to Aboriginal and Torres Strait Islander peoples;
- an obligation on Parliament and the Executive Government not to make any law or policy on a matter relating to Aboriginal and Torres Strait Islander peoples until it has received a representation from the Voice with respect to it, or notice that no representation is proposed to be made about it;
- an obligation on Parliament and the Executive Government to consider any representation made by the Voice on a matter relating to Aboriginal and Torres Strait Islander peoples before making a law, policy or administrative decision; or
- an obligation on Parliament and the Executive Government to give effect to representations made by the Voice when making any law or policy on a matter relating to Aboriginal and Torres Strait Islander peoples.

In my view, the proposed amendment does not give rise to any implication of such obligations. This is because:

1. No such obligation is contained or can find its source in the text of the amendment.
2. The intent of the amendment, as expressed in official documents, does not support any such obligation.
3. The history of the development of the amendment does not support any such obligation.
4. It is impracticable to draw such implications from a provision of such breadth.

### 1. *The text*

The factor of primary importance in constitutional interpretation is the text. If the text is plain, without ambiguity, then it must be applied by the High Court. As Justices Gummow and Hayne noted in the *Kartinyeri* case concerning the meaning of the 1967 constitutional amendment, ‘it is the constitutional text which must always be controlling’.<sup>10</sup>

There are no words in proposed s 129(ii) which impose any kind of obligation on Parliament or the Executive Government. This is deliberately so. For example, the word ‘consultation’ was not used, as it might convey an obligation on the part of the Executive Government or Parliament to consult the Voice prior to making decisions. The word ‘advice’ was also rejected, lest it be interpreted as binding on the Executive Government in the same way that Ministerial advice can, by convention, bind the Governor-General. The word ‘representation’ was chosen because it has no meaning that requires reciprocity or obligation. It is no more than the offering of a view.

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<sup>10</sup> *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 382 [90].

Sub-section 129(ii) is a facultative provision. It facilitates, permits and empowers the taking of action by the Voice but it does not impose any obligations.

## **2. *The intent***

In interpreting the Constitution the High Court may have recourse to materials which indicate the intended meaning of the constitutional provision by showing the contemporary meaning of the language used, the mischief to which it was directed and the objective that was sought to be achieved. In relation to sections of the Constitution that were written in the 1890s, this will include reference to the Convention Debates of the 1890s and contemporary published works.<sup>11</sup> In relation to a subsequent constitutional amendment, the Court may consider materials including the explanatory memorandum, the Minister's second reading speech, the parliamentary debate, opinions on the proposed amendment by the Solicitor-General and Crown Law Officers and the official Yes and No cases.<sup>12</sup> These materials may be used 'to understand the cause which occasioned the amendment of the Constitution and to help resolve ambiguities in the resulting text' and 'to help to derive the meaning of the Constitution, where amended, on the basis of a through understanding of the reasons for the amendment and of the means by which it came about'.<sup>13</sup>

The Explanatory Memorandum and the Attorney-General's second reading speech both make clear, in unequivocal terms, that the proposed amendment is not intended to give rise to any of the mooted obligations noted above.

The Explanatory Memorandum states:

- The constitutional amendment confers no power on the Voice to prevent, delay or veto decisions of the Parliament or the Executive Government. (p 5)
- 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. (p 5)
- Subsection 129(ii) would not require the Parliament or the Executive Government to wait for the Voice to make a representation on a matter before taking action. Nor would s 129(ii) require the Parliament or the Executive Government to seek or invite representations from the Voice or consult it before enacting any law, taking any action or making any decision. Subsection 129(ii) would also not require the Parliament or the Executive Government to furnish the Voice with information about a decision, policy, or law (either proposed or in force) at any time. (p 11)
- Finally, s 129(ii) would not oblige the Parliament or the Executive Government to *follow* a representation of the Voice. While the constitutional nature of the body, and its expertise in matters relating to Aboriginal and Torres Strait Islander peoples would give weight to the representations of the Voice, those representations would be advisory in nature. (p 11)

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<sup>11</sup> *Cole v Whitfield* (1988) 165 CLR 360, 385.

<sup>12</sup> *Wong v Commonwealth* (2009) 236 CLR 573, 583 [23], 587 [43]-591 [55] (French CJ and Gummow J); 604 [96] (Kirby J); 622 [172] 623 [176]-625 [187] (Hayne, Crennan and Kiefel JJ); *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 361 [29]-362 [31] (Gaudron J); 382 [91]- 383 [94] (Gummow and Hayne JJ); 401 [132] and 406 [142]-408 [146] (Kirby J).

<sup>13</sup> *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 401 [132] (Kirby J).

- Section 129 does not impose any obligations on the Parliament in relation to representations made by the Voice. (p 12)
- It is a matter for the Parliament to determine, in the exercise of its power under s 129(iii), whether the Executive Government is under any obligation in relation to representations made by the Voice. (p 12)

The Attorney-General's second reading speech on 30 March 2023 also stated in the House of Representatives:

- [N]or will the constitutional amendment oblige the parliament or the executive government to consult the Voice before taking action.
- It will be a matter for the parliament to determine whether the executive government is under any obligation in relation to representations made by the Voice. There will be no requirement for the parliament or the executive government to follow the Voice's representations. The constitutional amendment confers no power on the Voice to prevent, delay or veto decisions of the parliament or the executive government. The parliament and the executive government will retain final decision-making power over all laws and policies.

The intention that the proposed amendment not entail any of the abovementioned obligations on the Parliament and the Executive Government is abundantly clear. It would be extraordinary for the High Court to ignore and overturn such a clear intention, especially in the absence of any contrary words in the text.

### **3. *The history***

The High Court is also entitled to have regard to the history of the development of a constitutional amendment to aid its understanding of its purpose and meaning.<sup>14</sup> As that history is long, but worth recording for future reference, I have attached a summary of it as an appendix to this submission. In short, the history also shows that there was no intention, from the inception of the idea of a Voice, to the point at which the constitution alteration was introduced into the House of Representatives, for any of the above obligations to be imposed upon the Parliament or the Executive Government.

In particular, the wording of proposed s 129(iii) was altered to expand the scope of Parliament's power to make laws with respect to matters relating to the Aboriginal and Torres Strait Islander Voice, to ensure that it could include laws concerning whether government decision-makers are required to take into account representations as mandatory relevant considerations. That intention was confirmed by the Attorney-General<sup>15</sup> and was understood by the Referendum Working Group.<sup>16</sup>

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<sup>14</sup> See the authorities cited above in *Cole v Whitfield*, *Kartinyeri v Commonwealth* and *Wong v Commonwealth*, amongst others.

<sup>15</sup> See interview with the Attorney-General, Mark Dreyfus, ABC, *Insiders*, 26 March 2023, <https://www.youtube.com/watch?v=jQqYKbYHmSA>.

<sup>16</sup> See Interview, Marcia Langton, ABC 7.30, 6 April 2023, at [6.10 onwards]: <https://www.abc.net.au/news/2023-04-06/marcia-langton-accuses-peter-dutton-of-lying/102199586>.

#### **4. Impracticality of drawing such implications**

Former Chief Justice of the High Court, Robert French, has pointed out why the High Court would not be able to draw the kind of implications, outlined above, from the proposed amendment. First, proposed s 129(ii) applies to representations to both Parliament and the Executive Government, and it would not be possible for an implication to be drawn that Parliament’s powers are fettered by the need to receive or take into account representations, as this would be contrary to Chapter I of the Constitution.<sup>17</sup>

Second, the breadth of matters upon which the Voice could make representations to the Executive Government is such, that it would be impossible to apply an implication to all of them. French noted, for example, that there may be representations on ‘many matters of policy of the kind that Allsop CJ in *Sharma* described as “core policy” and on any view outside the purview of the judiciary’<sup>18</sup> (i.e. they are non-justiciable matters). This would mean that if a Court were to draw an implication from the broad terms of proposed s 129(ii), it would have to narrow it down so that it only extended to representations that are relevant to decisions by executive decision-makers that could attract judicial review.

There would also be a temporal problem with the application of representations which may have been made 6 months ago, or 20 years ago (once the Voice has been in existence for many decades) or even longer. If the Voice makes a general representation in relation to environmental matters, would every decision-maker have to take it into consideration and how would one know when a representation becomes stale and no longer applicable? Would a decision-maker have to take into consideration 42 different representations made in the past, many of which conflict, or even a recent representation which may contain a number of different views?

The breadth of the scope of potential representations under proposed s 129(ii) means that any implication drawn from proposed s 129(ii) would have to be read down so much to be practicable that the implication would be left without a foundation in the text and structure of the Constitution or any plausible legal justification.

#### **Conclusion**

For these reasons, I do not believe that the High Court would draw any of the implications outlined above.<sup>19</sup> I am therefore satisfied with the current wording. I would have no objection, however, to the addition of further wording to make this even clearer – as it would only achieve exactly the same outcome – but I do not believe that it is legally necessary. The question is one of politics, rather than law. Would the alteration of the wording increase support for it by assuaging legal concerns or decrease its support if those changes were opposed by the very people the proposed amendment seeks to recognise? This is ultimately a political assessment.

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<sup>17</sup> Robert French, ‘Commentary on Climate Change Litigation and Voice Presentations’, Gilbert + Tobin Constitutional Conference, 10 February 2022, [12].

<sup>18</sup> Robert French, ‘Commentary on Climate Change Litigation and Voice Presentations’, Gilbert + Tobin Constitutional Conference, 10 February 2022, [12].

<sup>19</sup> The same view has been taken by the former Chief Justice of the High Court, Robert French, who said ‘there is little or no scope to find constitutional, legal obligations in the facilitative and empowering provisions of the amendment’: Robert French, ‘Commentary on Climate Change Litigation and Voice Presentations’, Gilbert + Tobin Constitutional Conference, 10 February 2022, [13].



## Politics v Law

My final observation is that to understand the current debate, one must distinguish between politics and law in relation to two matters.

First, the 2012 proposal by the Expert Panel was essentially focused on law. Laws would be made and could be challenged in the courts if they breached the anti-discrimination provision that was proposed to be included in the Constitution. Litigation is time-consuming, costly and entails high risks if the case is lost and costs are awarded against the plaintiff. It would be lawyers and courts that would be actively involved, with Aboriginal and Torres Strait Islander people playing bit-roles as clients. The original idea of a Voice involved flipping the approach to give Aboriginal and Torres Strait people agency and ongoing recognition by hearing *their* voices (not those of lawyers and judges) *before* laws and policies are made, so they can influence them for the better. The intention was to shift out of the legal domain and into the political domain.

The Voice would have political, not legal, influence. Political pressures would both give the Voice authority and operate as a constraint on its operation and effectiveness. For example, the Voice's influence on law and policy would only be effective if it focused on things particularly relevant to Aboriginal and Torres Strait Islander peoples, where it has expertise and knowledge from people on the ground about the impact of the laws and policies. Concerns about the legal scope of the matters the Voice could make representations about are misconceived, because there will be political and practical constraints on the representations it makes. If the Voice were to make representations on matters that affect Aboriginal people in the same way as all other Australians, its representations would most likely be ignored in favour of those made by bodies with special expertise on the subject. Such an approach by the Voice would dilute its influence and squander its resources. Indigenous peoples would rightly be angered that the Voice was not focused on matters that have a direct and serious impact upon them, and it would be likely that they would change their representatives to ones that focus directly on the many Indigenous issues that need attention.

Second, when it comes to drafting a constitutional amendment, one is drafting for two distinct audiences in Australia. One audience is the lawyers and judges who will interpret the provision in the future. The other audience is the people who must vote to approve the amendment which, due to compulsory voting, will include a large number of people who have had little previous engagement with the Constitution. If one was only drafting for lawyers and judges, one could be very precise and include complex clauses to make the intention abundantly clear. But because one has to draft something that is comprehensible and acceptable to a general public with no constitutional expertise, the provision needs to be short, simple and easily understandable.

This was the dilemma faced by the Constitutional Expert Group in advising on the wording. From a legal point of view, there was an attraction to nailing down the various possibilities – making clear that the amendment would allow for this and would not permit that. But this would have made the provision appear too complex and confronting to the general public and cause it to fail at the referendum. There was also particular concern amongst the members of the Referendum Working Group that they would have to explain to their Indigenous constituency any changes and retain their support. When a constitutional amendment is being made for the purpose of representing a particular group, it cannot succeed if a majority of that group objects to its terms.

Accordingly, drafting is a compromise between the legal desire for specificity and the political need for generality and simplicity. This explains, in particular, the alteration in the drafting of proposed s 129(iii), and will be the dilemma the Committee also faces if it proposes to make any changes to the draft amendment.

Yours sincerely

Anne Twomey  
Professor Emerita, University of Sydney<sup>20</sup>

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<sup>20</sup> I am a Professor Emerita of the University of Sydney and a part-time consultant at Gilbert + Tobin Lawyers. This submission represents my own views, and not those of the University or Gilbert + Tobin. I was also a member of the Commonwealth Government's Constitutional Expert Group which advised the Referendum Working Group on questions that it raised in relation to the draft amendment. Many years prior to that I participated with the Cape York Institute and others in the formulation of the idea for a Voice to Parliament and transforming it into the form of a proposed amendment.

## **APPENDIX – HISTORY OF THE DRAFTING OF THE VOICE AMENDMENT**

In 2012, the Expert Panel on Constitutional Recognition of Indigenous Australians issued its final report, making a number of recommendations for constitutional reform to give effect to Indigenous constitutional recognition. They included an amendment to the race power in s 51(xxvi) of the Constitution and the insertion of an anti-racial discrimination clause in the Constitution. These proposals were rejected by the conservative side of politics and proceeded no further.

Seeking an alternative approach that would be acceptable to constitutional conservatives, Noel Pearson and Shireen Morris from the Cape York Institute approached Greg Craven, Julian Leaser and Damien Freeman in 2014. I was invited to join as the technical constitutional specialist. This appendix sets out my knowledge of the history and intention of the proposal and its drafting. It contains gaps for the periods in which I was not involved, which no doubt others will fill.

The ‘Voice’ was originally called the ‘Delak’ (later with revised spelling to ‘Dilak’) being a Yolngu word for a council of elders. The word was later dropped because of the likelihood that cartoonists would transform it into a Dalek. While it was hoped that an equivalent word from another Indigenous language would be found to name the body, none was identified and it was later given the short-hand term of the Voice, which stuck.

Five points are notable from this history. From the very start:

1. The Indigenous advisory body was always intended to be able to speak to both the Executive Government and Parliament.
2. The only obligation that was ever intended to be imposed, however, was an obligation on the Houses to consider the advice during the passage of certain laws (which obligation was later removed from the drafting).
3. This obligation on the Houses was always intended to be non-justiciable.
4. No obligation was intended to be imposed upon the Executive Government.
5. It was regarded as essential to include machinery provisions that would ensure Parliament would not be delayed or impeded in its enactment of laws.

The first meeting to design a constitutional amendment was held on 19 June 2014 at the Australian Catholic University’s North Sydney campus. In attendance were Noel Pearson, Shireen Morris and Jimi Bostock from Cape York Institute, Greg Craven and Julian Leaser from ACU, Anne Twomey and Damien Freeman. The agreed aim was to achieve ‘stable constitutional protection of Indigenous rights and interests, shielded from short term political fluctuations’ in a manner that was consistent with the Constitution, did not derogate from parliamentary sovereignty and did not transfer power from Parliament to judges.

It was agreed that the best approach was the establishment of a package, with some constitutional elements but with others dealt with by legislation and policy, along with an extra-constitutional Declaration of Recognition to deal with symbolic issues. Part of the proposed constitutional reform was to ‘add a new Chapter IX to the Constitution (dealing with [an] Indigenous review body)’. Throughout the drafting process, the location of the proposed amendment changed a number of times to different places in the Constitution. The early drafting was also predicated upon the assumption that there would also be an amendment to

the race power which would change it into a power to make laws with respect to Aboriginal and Torres Strait Islander peoples.

The first draft, prepared by the Cape York Institute, and put to the second workshop of the group on 15 August 2014 was as follows:

**CHAPTER IX**  
**ABORIGINAL AND TORRES STRAIT ISLANDER REVIEW BODY**

*129. There shall be an Aboriginal and Torres Strait Islander review body, to be called the Delak, which shall advise the Parliament and the Executive Government on matters relating to the first occupants of Australia, the Aboriginal and Torres Strait Islander peoples.*

*(i.) The Parliament may make laws providing for all aspects of the composition of the Delak, its terms of reference, and procedures.*

*(ii.) The Parliament shall receive and consider the advice of the Delak when making a law relating to Aboriginal and Torres Strait Islander peoples, whether under section 51 (xxvi) or any other section of this Constitution.*

*(iii.) The Parliament shall be deemed to have received and considered the advice of the Delak if the proposed law is accompanied by a certificate signed by both the President of the Senate and the Speaker of the House of Representatives, when it is presented to the Governor-General for the Queen's assent, certifying that a report of the Delak concerning the proposed law was laid before the Senate and the House of Representatives at least thirty days before the respective House passed the proposed law.*

This proposal was subject to considerable debate at the workshop. There was concern that the 30 day requirement would clog up the parliamentary process and that the Delak might be able to hold Parliament hostage by not producing a report. There was discussion of the inclusion of a clause to the effect that failure to follow the procedure would not result in the invalidity of a law. There was discussion of the inclusion of a separate non-justiciability clause.

A number of other interim drafts were produced in August 2014, suggesting different procedural mechanisms to impose an obligation while at the same time seeking to avoid any impediment to the operation of Parliament and involvement of the courts.

On 22 August 2014, I provided a revised draft in the following terms:

*60A(1) There shall be an Aboriginal and Torres Strait Islander body, to be called the Delak, which shall provide advice to the Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander peoples.*

*(2) The Parliament shall, subject to this Constitution, have power to make laws with respect to the composition, roles, functions and procedures of the Delak.*

*(3) The Prime Minister shall cause a copy of the Delak's advice to be tabled in each House of Parliament as soon as practicable after receiving it.*

*(4) The House of Representatives and the Senate shall give consideration to [any relevant] tabled advice of the Delak in debating proposed laws relating to Aboriginal and Torres Strait Islander peoples.*

This draft provision was accompanied by notes to explain the purpose of the use of different words and the proposed non-justiciability of the obligation to give consideration to tabled advice. These notes included the following:

#### **S 60A(1)**

*The opening words of this provision are based upon s 101 of the Constitution – ‘There shall be an Inter-State Commission’. Sub-section 60A(1) is deliberately drafted more broadly than the other sub-sections. It gives the Delak a role in providing advice to both the Parliament and the Executive Government on a wide range of matters relating to Aboriginal and Torres Strait Islander peoples. It would extend beyond laws enacted under s 51(xxvi) to other legislative and executive issues.*

*The words ‘provide advice’, rather than ‘advise’, have been chosen as a way of distinguishing the position from the constitutional role of ministers in ‘advising’ the Crown, where that advice for the most part entails an obligation to obey. Here, the Delak provides advice in the form of wise counsel and representative views that should be given serious consideration, rather than an instruction or the imposition of an obligation.*

#### **S 60A(2)**

*I have inserted ‘subject to this Constitution’ here, despite the circularity with s 51, because it would prevent, for example, the conferral of judicial functions on the Delak or other roles or powers that would otherwise breach constitutional implications or other express constitutional prohibitions. It is therefore a necessary safeguard.*

#### **S 60A(3) – Tabling the advice**

*Proposed s 60A(3) provides that: ‘The Prime Minister shall cause a copy of the Delak’s advice to be tabled in each House of Parliament as soon as practicable after receiving it.’ There are several reasons for this provision. First, it provides a permanent public record of the formal advice of the Delak. People in the future will be able to look at a law and go back to the record to cross-check what advice the Delak gave in relation to that law. Secondly, it gives that advice the benefit of parliamentary privilege. Thirdly, it provides certainty for the Parliament – its members know and have a formal record of the advice to which they must give consideration. There can be no dispute about what that advice is. Fourthly, it gives the Delak’s advice status by having it form part of the parliamentary record.*

*A question arises as to the person who should have the obligation of causing the advice to be tabled. For present purposes, I have suggested the Prime Minister – again for reasons of giving status and gravity to the process. This would also have the effect of ‘recognising’ for the first time the office of Prime Minister in the Constitution. The*

*more traditional approach, and a possible alternative, would be for the Speaker and the President to table it in their respective Houses. This would have the effect of distancing the advice of the Delak from the government, as it would not be a 'government document', but rather one that falls within the jurisdiction of the Parliament. Either approach would be appropriate.*

*The use of the terminology 'as soon as practicable' and the obligation on a Minister who sits in one House to cause a copy of a document to be tabled in both Houses, both fall within standard legislative practice. For legislative examples, see: Public Governance, Performance and Accountability Act 2013, s 549(4); Aboriginal Land Rights (Northern Territory) Act 1976, s 64B(3); and Family Law Act 1975, s 385(3).*

#### **S 60A(4) – Non-justiciability**

*Proposed s 60A(4) provides: 'The House of Representatives and the Senate shall give consideration to any relevant tabled advice of the Delak in debating proposed laws relating to Aboriginal and Torres Strait Islander peoples.' In order to make it non-justiciable, I have employed the approach in ss 53 and 54 of the Constitution which deal with 'proposed laws' (rather than laws). As a matter of comity between the institutions of government, the High Court will not interfere with the internal workings of the Houses. It has also regarded the term 'proposed law' as an indication that an obligation imposed upon a House is not intended to be justiciable.*

*The reason for the use of the word 'relevant' is that over time lots of advice might be tabled, and it would be absurd if the Houses had to consider it all each time such a bill arose. The reason for the word 'any' is that it may be the case that no relevant advice has been tabled. The reason for the tabling requirement, as noted above, is to provide certainty as to what must be considered.*

*The word 'debating' is used, rather than the more customary reference to the passage of bills, to reinforce the notion that what is at issue here is the internal workings of the House which is subject to parliamentary privilege and protected from interference by the Courts (eg art 9 of the Bill of Rights 1688).*

*In terms of what is meant by 'consideration', I would envisage that the Government in the second reading speech to a bill would draw the attention of the House to any relevant tabled advice of the Delak and note the Government's response to that advice. Other Members and Senators would then be free to debate it and take it into consideration when voting.*

This became the primary draft model for some years. It was first published in *The Conversation* on 20 May 2015.<sup>21</sup> The proposal was the subject of a conference held by the Constitutional Reform Unit at the University of Sydney Law School on 12 June 2015. The papers for that conference are published in (2015) 8(19) *Indigenous Law Bulletin*. My paper addressed the issues of parliamentary sovereignty and justiciability. On that subject, it made the following observations about the limited obligation contained in the then proposed s 60A(4):

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<sup>21</sup> Anne Twomey, 'Putting words to the tune of Indigenous constitutional recognition', *The Conversation*, 20 May 2015: <https://theconversation.com/putting-words-to-the-tune-of-indigenous-constitutional-recognition-42038>.

*The obligation on Parliament is to give consideration to the tabled advice of the Indigenous advisory body. If no advice is given, or if it is not given before a bill is debated, then there would be no tabled advice that could be debated and hence no obligation to consider it. There would be no prospect that the failure of the Indigenous advisory body to give advice could prevent the Commonwealth Parliament from considering and debating any bill and there would be no obligation to achieve the approval of the body to any law before it was enacted. The onus would be on the Indigenous advisory body to provide the advice if it wanted it to be considered by Parliament. There would also be a political (but not legal) onus on the Government to ensure that the Indigenous advisory body was properly consulted, well in advance of the introduction of bills concerning Indigenous matters, so that it can fulfil its constitutional mandate.*

*In short, there would be no limitation on the power of Parliament to make such laws as it wishes, when it wishes. The point of the provision is not about limiting the powers of Parliament, but rather giving Aboriginal and Torres Strait Islander peoples a voice in parliamentary proceedings so that they can influence the development of laws and policies and persuade Members of Parliament to better tailor laws to meet the needs of Aboriginal and Torres Strait Islander peoples.*

The paper also addressed the justiciability of the parliamentary obligation of consideration, noting that it was a matter internal to the Houses and that a court would not interfere with such deliberations.

Finally, the paper noted that the provision was drafted to give the body the very broad ‘function of providing advice to the Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander peoples’. But any such advice had to be tabled in Parliament – putting it on the public record and making it directly accessible to Parliament as well as the Executive Government. There would be no legal obligation to consider that advice, except by the Houses in relation to the small category of bills falling within the then proposed revised race power to make laws with respect to Aboriginal and Torres Strait Islander peoples. But the mere fact of the tabling of the broader advice would mean that it would be likely to be picked up and debated by Members and Senators and that questions would be asked if it was ignored by the Executive Government. It would therefore operate by way of political influence rather than legal obligation.

The paper concluded:

*One of the most notable aspects of this proposal is that it gives Indigenous Australians an active, rather than a passive, form of recognition by providing them with a direct voice into Parliament in relation to the matters that affect them, while imposing minimal and non-justiciable obligations on the Houses in relation to the consideration of that advice. It is based upon a shrewd assessment of how power operates in practice, rather than reliance on the legal system to enforce rules of behaviour.*

This proposal and draft amendment were put to the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, which was co-chaired by Ken

Wyatt and Senator Nova Peris.<sup>22</sup> The Committee noted the following evidence from Noel Pearson:

*[T]he procedure in the new Chapter could be drafted such that the advice of the Indigenous body is highly persuasive and authoritative, but not binding on Parliament. It would not constitute a veto over Parliament's law making. It would not derogate from parliamentary sovereignty in any way. It need not create an unwieldy bureaucracy; rather, it would enhance Indigenous participation in democracy. This proposed structure is about democracy, not bureaucracy.*<sup>23</sup>

In its final report in June 2015, the Committee suggested that this proposal 'would benefit from wider community consultation and debate' as it had not received 'the thorough and discursive consultation of the Expert Panel's deliberations'.<sup>24</sup>

To achieve this, the Prime Minister, Malcolm Turnbull and the Opposition Leader, Bill Shorten, established a Referendum Council in December 2015. Its task was to consult with Aboriginal and Torres Strait Islander peoples across the country to ascertain the form of constitutional recognition that they wanted. The proposal for an advisory body, including the above draft wording,<sup>25</sup> was put to the twelve regional dialogues, along with a range of other proposals. A broader community consultation process was also undertaken. The process culminated with the National Constitutional Convention at Uluru which produced the Uluru Statement from the Heart. This Statement called for a 'First Nations Voice enshrined in the Constitution.'

The Referendum Council recommended 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'.<sup>26</sup> The Council described its recommendation as 'both modest and substantive'. It stated:

The proposed Voice would not interfere with parliamentary supremacy, it would not be justiciable, and the details of its structure and functions would be established by Parliament through legislation that could be altered by Parliament. This is modest.<sup>27</sup>

The matter then went to the Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, which issued its Final Report in November 2018. The Committee noted that it had received 18 different draft constitutional provision that took a range of different approaches.<sup>28</sup> By this time, the primary objection to the proposal was that it would be a 'third House of Parliament'. Accordingly, most of the proposed amendments

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<sup>22</sup> Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Final Report*, (June 2015), [4.57].

<sup>23</sup> Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Final Report*, (June 2015), [4.47].

<sup>24</sup> Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Final Report*, (June 2015), [4.60].

<sup>25</sup> Gabrielle Appleby, Sean Brennan and Megan Davis, 'A First Nations Voice and the exercise of constitutional drafting' (2023) *Public Law Review* (forthcoming): [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4346447](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4346447).

<sup>26</sup> Referendum Council, *Final Report*, (30 June 2017), p 2.

<sup>27</sup> Referendum Council, *Final Report*, (30 June 2017) p 38.

<sup>28</sup> Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, *Final Report* (November 2018), [3.31].



were drafted with a view to excluding any impression that the Voice could be a part of Parliament or involved in law-making. There was no focus on the Executive Government at that stage.

The Committee noted a number of similarities amongst the draft provisions, including that they:

- unequivocally uphold the sovereignty of the Australian Parliament by providing for a Voice which is external to Parliament and which has functions which do not constitute a veto over Parliament; and
- provide for a First Nations Voice in a manner which renders its structure and functions non-justiciable, so as to avoid legal uncertainty.<sup>29</sup>

Amongst the range of options was the following draft submitted by Patricia Anderson, Megan Davis, Noel Pearson, Sean Brennan, Gabrielle Appleby, Dylan Lino and Gemma McKinnon:

***Chapter 9 First Nations***  
***Section 129 The First Nations Voice***

- 1. There shall be a First Nations Voice.*
- 2. The First Nations Voice shall present its views to Parliament and the Executive 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 the composition, functions, powers and procedures of the First Nations Voice.*<sup>30</sup>

It was this proposal that was supported by the Indigenous Law Centre at the University of New South Wales, and was gradually altered and expanded at a number of workshops with a range of academics across the nation. It stripped out any obligation at all, as well as the structure of tabling advice in Parliament. After numerous further iterations, by 2022 it had developed into the following form:

***Section 129 The First Nations Voice***

- (1) There shall be a body, to be called the First Nations Voice.*
- (2) The First Nations Voice:*
  - (a) shall make representations to Parliament and to the Executive Government of the Commonwealth on matters it deems relevant to Aboriginal and Torres Strait Islander peoples; and*
  - (b) may perform such additional functions as the Parliament provides, including, at the request or with the concurrence of the Parliament of a State or Territory, the function of making representations to the Parliament or government of that State or Territory.*
- (3) The Parliament shall, subject to this Constitution, have power to make laws with respect to the composition, functions, powers and procedures of the First Nations*

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<sup>29</sup> Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, *Final Report* (November 2018), [3.50]

<sup>30</sup> Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, *Final Report* (November 2018), [3.45].

*Voice, and matters incidental to the execution of the powers vested by this Constitution in the First Nations Voice.*

The Albanese Government, however, after undertaking consultations with others,<sup>31</sup> produced a more minimal proposed amendment at the Garma Festival. It provided:

*(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 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 the composition, functions, powers and procedures of the Aboriginal and Torres Strait Islander Voice.*

That formulation was the subject of detailed discussion by the Constitutional Expert Group, of which I was a member, which gave advice to the Referendum Working Group on matters including justiciability, whether the Voice would have a ‘veto’ power, the potential impact on sovereignty, the effect of the inclusion of ‘Executive Government’ in (2), the inclusion of opening preambular words of recognition, the use of the terminology ‘First Nations’, ‘First Peoples’ and ‘Aboriginal and Torres Strait Islander Voice’, the capacity for the creation of sub-national Voices and whether the proposal gives ‘special rights’. Some of the advice of the Constitutional Expert Group was published in a summary form.<sup>32</sup>

Minor changes were agreed to the draft proposal. The Solicitor-General proposed, as a matter of drafting, that the word ‘the’ be inserted before ‘Parliament’, and the words ‘of the Commonwealth’ be inserted after ‘Executive Government’. This was to achieve consistency in drafting style with the rest of the Constitution. This was agreed without debate.

It was also agreed to include introductory words of recognition. These had been mentioned in the Prime Minister’s Garma speech,<sup>33</sup> but had dropped off the formulation of the original draft provision. The Constitutional Expert Group agreed that this formulation of words would not give rise to unintended consequences or implications, and the Referendum Working Group also accepted the words.

The Attorney-General proposed the inclusion of the words “and the effects of its representations” at the end of (3), but this was not agreed by the Referendum Working Group.

I was not a party to the further negotiation of the change to the wording of (3). I was told by the Attorney-General, however, prior to the release of the revised version, that the expansion of the Parliament’s powers so that it had power to ‘make laws with respect to matters relating

<sup>31</sup> I was not amongst those consulted, but I have heard informally that two former High Court judges were consulted.

<sup>32</sup> Summary of first tranche of advice: <https://voice.niaa.gov.au/news/communique-referendum-working-group-december-2022>. Summary of second tranche advice: <https://ministers.pmc.gov.au/sites/default/files/media/referendum-working-group-advice-from-the-constitutional-expert-group.pdf>.

<sup>33</sup> The Prime Minister stated: ‘Our starting point is a recommendation to add three sentences to the Constitution, in recognition of Aboriginal and Torres Strait Islanders as the First Peoples of Australia’ and then set out the three sentences. See: <https://www.pm.gov.au/media/address-garma-festival>.

to the Aboriginal and Torres Strait Islander Voice, including ...’ was intended to achieve exactly the same outcome as the prior formulation of words, ‘and the effects of its representations’. Both were intended to ensure Parliament could enact laws to determine whether executive government decision-makers must, or need not, take into consideration representations by the Voice when making decisions.