**The Voice – Filling a Long Constitutional Silence**

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The Hon Robert French AC

## Introduction — The creation of a constitution

1. We begin with the question what is a national constitution? The Parliament of Australia website gives us a simple answer. A national constitution is a set of rules for governing a country. The *Australian Constitution* was the work of delegates from each of the Australian colonies who reflected the societies of which they were part and the world views of their time — world views which were not necessarily all the same. They were writing a constitution for a future which might be beyond their imagining. And so they provided for its amendment by the peoples' vote.

2. A number of factors drove the creation of the Australian nation out of a group of six self-governing colonies in the late 19th century. One of them was a notion of the Australian people as a 'race' reflected in Henry Parkes' statement at the Australian Federation Conference on 10 February 1890 when he said, to a standing ovation, that "the crimson thread of kinship runs through us all". Another was the need to present a collective voice in dealings with the Imperial Government of the United Kingdom. John Quick and Robert Garran in their classic work on the *Constitution* and the Australian Commonwealth wrote in 1901:

> … the colonies found that disunion hampered them in making proper representations to the Imperial Government, and weakened the effect of what representations they made.

> Here was a practical and convincing argument for Federation; …[1]

3. An old echo of present times can be found in the content of some of the opposition to the creation of the *Commonwealth Constitution* reflected in the Victorian radical journal *Tocsin*. In an article published on 24 February 1898, a contributor under the name 'Gavah' observed:

   (1) The people aren't ready to federate.

   (2) They don't know what it means.

   (3) Their leaders and their newspapers are not brainy enough or honest enough to try to teach them what it means.[2]

4. Another resonance with the present, was a degree of uncertainty about the future of the project. At a celebratory dinner at the outset of the drafting process in 1891, Sir Henry Parkes said to cheers and cries of 'hear, hear':

> Gentleman, I do not dive into the future – the conditions of which no man can foretell. But suffice it that the work which has begun this day be of sterling merit, and such that Australia will always have cause to remember it with just feelings of pride. There may be difficulties but no great object has been attained without difficulties.

Samuel Griffith, then Premier of Queensland, observed at the same dinner:

> There is no doubt that here, as everywhere, there will be timid men who are afraid of launching into something new;

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1 Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (Legal Books, 1976) 110.
2 'Radical Arguments against Federation 1897-1900' (1977) *Tocsin* 17.

> but when was ever a great thing achieved without risking something.

5. Compare the words of those indomitable spirits who drafted a durable, national *Constitution*, to the battle cry – 'If you don't know, vote No' — a slogan offered as an answer to a straight-forward but profoundly important proposal. The Australian spirit evoked by the 'don't know' slogan is a poor shadow of the spirit which drew up our *Constitution*. It invites us to a resentful, uninquiring passivity. Australians, whether they vote yes or no, are better than that. We are a people who for all our inevitable human shortcomings and stumbles have established and maintained a durable representative democracy for over 120 years. We have proven ourselves capable of accommodating our evolution into a vibrant, multicultural society. We look forward. But we can also look back to better understand where we have come from and where we are now. Looking back we may observe that for many decades to the 1950s the history which Australian students were taught was a white history in which Aboriginal and Torres Strait Islander people were, for the most part, invisible. Since that time however there has been a major shift in school curricula and in awareness of a nation better than what white Australia promised at Federation and in awareness of the true scope of our continental history. As I said when I was sworn in as Chief Justice in 2008:

> The history of Australia's indigenous peoples dwarfs in its temporal sweep the history that gave rise to the *Constitution* under which this Court was created. Our awareness and recognition of that history is becoming, if it has not already become, part of our national identity.

We know, not least from the products of the native title process, that the Australian landscape is covered with the intricate lacework of age-old but dynamic stories of what we inadequately call the Dreaming. From them we learn of creation processes involving ancestral beings, the description and delineation of the landscape by reference to that process and, through it, the relationship between First Peoples and their country. Those stories are expressed in oral traditions, in art and in ceremony and in the very language of the people. They provide us with glimpses of a powerful and living culture — described by Justice Blackburn in the important land rights case *Milirrpum v Nabalco Pty Ltd* in 1971 as "…a subtle and elaborate system highly adapted to the country in which the people led their lives". It was a system which he also characterised as a government of laws and not of men. With awareness of that culture and its longevity, we can take pride in the history of our First Peoples as part of ours, recognise it and give it voice — not as a matter of apology or reparation, but as an act of celebration. It is also an act which will provide a new impetus and new mechanism to better address the generational effects of the collisions of our histories.

**Two illustrations**

6. The distance we have come may be illustrated with two examples from our past. There was, at Federation, a view, at least among some, that Australia's first people would ultimately die out or simply be absorbed. Alfred Deakin, spoke about s 51(xxvi) of the *Constitution* which was, as originally enacted, the power of the Commonwealth Parliament to make special laws with respect to the people of any race for whom it was deemed necessary to make special laws. It expressly excluded people of the Aboriginal race in any State from the scope of the power. Deakin said:

> We have power to deal with people of any and every race within our borders, except the Aboriginal inhabitants of the continent who remain under the custody of the States. There is that single exception of a dying race; and if they be a dying race, let us hope that in their last hours they will be able to recognise not simply the justice, but the generosity of the treatment which the white race, who are dispossessing them and entering into their heritage are according them.

7. A less generous spirit, if that be possible, was reflected in Western Australia in a book entitled *Travels in Western* Australia, written by May Vivienne and published in 1901. She wrote glowingly of the pretty western suburbs of Perth — Claremont where there were some "very elegant villas" and the old Osborne Hotel in Cottesloe "a palace lifting to eternal summer". She also visited Bunbury. She reflected upon a homicide perpetrated at Bunbury some sixty years before in 1840 by an Aboriginal man who had stolen some damper and killed a white man who had grabbed him by the beard and forced him to give it up. A posse of settlers was raised to catch the killer. May Vivienne wrote:

> The settlers, about 20 in number, determined to follow and execute him, but found many difficulties in the way, as none of the natives would lead them to his tracks. They, however, tracked him as well as they could, and to frighten the tribe they shot down every native they came across.

And further:

> The shooting of the blacks although it seems cruel was the means of showing them that the white man was their master and after this no more trouble arose with the various tribes.[3]

8. These examples of attitudes at the time the *Constitution* came into effect were not necessarily uniform. No doubt there was a spectrum. They were, however, confronting indications of that historical collision over which the education of many Australians passed in silence for more than half a century. It does not require a black armband view of history to conclude that colonisation did not bring unalloyed benefits to our First Peoples. Nor does it require rocket science logic to conclude that we live today with the cross-generational effects of that collision. Our *Constitution* as it stands passes over these things in silence. Awareness of that silence straddles the boundaries between the Yes and the No cases. It was recognised by Warren Mundine in a paper published in the week leading up to the Uluru Convention in which he called for practical recognition of Indigenous people. He said:

> The pathway to constitutional recognition holds profound importance for today's Australian nation and for all Australians. To understand its importance, however, requires us to understand the power of legal silence about the peoplehood of our mobs in our nation's birth certificate. Silence may not seem harmful. But silence can validate invisibility. From 1788 until 1992, there was a great silence about each of our mob's country, and this silence persists in Australia's constitutional arrangements. Non-Indigenous Australians need to go on a journey to understand why this

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3 May Vivienne, *Travels in Western Australia* (London, William Heinemann, 1901) 114.

> silence is so harmful to our mobs and to the Australian nation.[4]

**The *Australian Constitution***

9. Let us now turn to that silent *Constitution*. The *Constitution* defines the three branches of Government. Chapter I provides for the making of laws by the Parliament; Chapter II for their administration by the Executive Government of the Commonwealth and Chapter III for the determination of disputes by the High Court and courts exercising federal jurisdiction.

10. Those first three chapters provide for the constitutional institutions which exercise substantive powers: Parliament, the Executive Government and the courts. Chapter IV sets out rules for the appropriation and expenditure of public money and the establishment of Australia as a single economy. Chapter V deals with the States, their constitutions and laws, the paramountcy of valid Commonwealth laws and guarantees freedom of religion. Chapter VI provides for the establishment of new States. Chapter VII has two miscellaneous provisions and Chapter VIII has just one provision, section 128 which provides for the alteration of the *Constitution* by referendum.

**The text of The Voice proposal**

11. The proposal for The Voice would insert a new Chapter IX consisting of one section, 129. The opening words of the new provision in s 129(i) provide:

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[4] Warren Mundine, *Practical Recognition from the Mobs' Perspective: Enabling our mobs to speak for country* (Uphold & Recognise Monograph Services, 2017) 2.

> In recognition of the Aboriginal and Torres Strait Islander peoples as the first peoples of Australia:
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> (i) there shall be a body, to be called the Aboriginal and Torres Strait Islander Voice.

These words tell us that here is an act of recognition. The act of recognition is the creation of The Voice. And it tells us that that recognition is based upon the historical character of Aboriginal and Torres Strait Islander peoples as the first peoples of Australia.

12. The Voice is 'a body'. The ordinary meaning of that word in this context is a group of people who work or act together. The only constitutional requirement is that it be called The Aboriginal and Torres Strait Islander Voice.

13. The core function of the Voice is set out in s 129(ii) of the proposed amendment:

> the Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples.

14. The word 'representations' would cover submissions or advice about existing or proposed laws, administrative policies and practices. On no view can they give rise to any constitutional legal obligation for the Parliament or the Executive to accept or be bound by such submissions or advice. That said, the establishment of The Voice by popular vote would generate a democratic mandate to respect those representations and to take them into account. That does not translate into a mandate enforceable by the courts. I will return to that legal issue shortly.

15. The representations which The Voice may make are about "matters relating to Aboriginal and Torres Strait Islander peoples". The term "relating to" can cover a broad range of matters. Laws, policies and practices affecting Aboriginal and Torres Strait Islanders include education and training, family and social welfare, health, remote community services, community policing, Aboriginal art, cultural and heritage protection, traditional ownership of land and waters, are well within that range. The practical priorities which the Voice will have to address are obvious enough. From the outset, it will be its responsibility to establish its credibility and practical value to Parliament, the Executive Government and, through them, to the Australian people.

16. The composition, functions, powers, and procedures of The Voice will be up to the Parliament to determine using the authority conferred upon it by s 129(iii), which provides:

> the parliament shall, subject to this Constitution, have power to make laws with respect to matters relating to the Aboriginal and Torres Strait Islander Voice, including its composition, functions, powers and procedures.

**The design principles**

17. The government has set out proposed design principles of The Voice which fit logically with its constitutional character. Those principles include the following elements:

- The provision of independent advice to the Parliament and the Government of its own initiative or in response to requests.

- A membership chosen by Aboriginal and Torres Strait Islander peoples based on the wishes of local communities and serving for fixed terms to ensure accountability.

- Membership coming from every State and Territory and the Torres Strait Islands with specific provision for remote community representatives.

- Accountability and transparency and standard governance and reporting requirements, working in conjunction with existing organisations and traditional structures and respecting their work.

- No veto power and no delivery of programs or management of funding.

The design principles are not part of the constitutional amendment. They foreshadow proposed legislation creating The Voice in the exercise of the law-making power of the Parliament under s 129(iii). Its ultimate form and functions will be in the hands of the elected parliament. If the people say yes, then it will be up to everybody on both sides of the debate to contribute to making Australia's decision work for the benefit of all Australians.

18. One example of what the design principles could give rise to is found in the co-design model proposed by Professor Marcia Langton and Tom Calma. On that model:

(1) The Voice would consist of 24 members in three categories, base members, additional remote members and a mainland Torres Strait Islander member. There would be two members from each State and Territory as well as the Torres Strait Islands. There would be a third member for remote representation for New South Wales, the Northern Territory, Queensland, Western Australia and South

Australia and one member for mainland Torres Strait Islander people.

(2) Gender balance would be structurally guaranteed.

(3) There would be an option for two additional members jointly appointed between the National Voice and the Government.

(4) Membership would be structurally linked to local and regional Voices. Three options for the nature of that linkage are suggested. The first option is for local and regional Voices collectively to determine the national Voice members for their State and Territory and the Torres Strait. The second is for national Voice members to be determined by State, Territory and Torres Strait Islander representative assemblies formed by drawing on local and regional Voices where they exist. A third or hybrid arrangement would combine determining members by special meetings of local and regional Voice representatives and by relevant jurisdiction-level representative assemblies where they exist – either an elected assembly or drawn from local and regional Voices. .

19. The role of members on the Calma/Langton model would be to represent the diverse perspectives of all Aboriginal and Torres Strait Islander people at the national level. Part of the role would be to represent the views of local and regional Voices in State, Territory or Torres Strait.

20. Members would have four-year staggered terms with a maximum of two successive terms. They would select two fulltime co-chairs of different gender from amongst themselves. They would be subject to eligibility requirements, age, indigenous identity and disqualifying events such as criminal conviction and bankruptcy. A member could be removed for

misconduct subject to a review process. They would be supported by an Office of the National Voice to provide policy and administrative support.

21. All that, of course, is just a model, an example of the way in which The Voice could be constructed and which accords with the design principles. Ultimately, the detailed design would be in the hands of the elected members of the Commonwealth Parliament exercising its powers under s 129(iii) of the proposed amendment.

22. If the Australian people say Yes to The Voice, they will be saying to the Parliament, the Government and First Peoples — this is our decision now you make it work.

**Race**

23. It has been argued that The Voice would entrench a race-based division in the *Constitution*. The Voice is not a race-based institution. It would not matter whether Aboriginal and Torres Strait Islander peoples were one race or dozens of different races. At Federation there were hundreds of different Aboriginal languages spoken across Australia. The unifying characteristic which underpins The Voice is their history as our First Peoples. Race is a term which began to emerge in the 17th century. Most definitions of race attempt to label groups of people primarily by their physical differences. It has also been applied to linguistic groups such as the Arab race, or the Latin race or to religious groups. As the Encyclopedia Brittanica observes "race has never in the history of its use had a precise meaning". There are no genes that identify distinct groups which accord with conventional race categories. When we talk of race we talk of a scientifically meaningless linguistic usage, sometimes called a cultural construct.

24. Race was a well-established construct when our *Constitution* was drawn up. It is still reflected in the power conferred upon the Commonwealth Parliament by s 51(xxvi) to make special laws with respect to the people of any race for whom it is deemed necessary to make special laws. Until 1967 that law-making power did not extend to "people of the Aboriginal race in any State".

25. The 1967 referendum deleted the exclusion of Aboriginal people from the race power. That referendum was beneficial in its intent to extend the law-making powers of the Commonwealth Parliament to Aboriginal and Torres Strait Islander people. It was supported by an overwhelming majority of Australia electors. Its legal effect however was to put Australia's first peoples into the bucket of races for any of whom the Commonwealth could make special laws. Just another race. In the same referendum another explicit reference to Aboriginal people was removed from the *Constitution*. That was s 127, which provided;

> In reckoning the numbers of people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.

So from 1967 the *Constitution* which had referred to Australia's First Peoples by exclusion fell silent about them altogether. That silence is now to be filled by an act of practical recognition.

**Recognition and The Voice — the link**

26. John Howard told the Sydney Institute in 2007:

> I believe we must find room in our national life to formally recognise the special status of Aboriginal and Torres Strait Islanders as the first peoples of our nation. We must

> recognise the distinctiveness of Indigenous identity and culture and the right of Indigenous people to preserve that heritage. The crisis of indigenous social and cultural disintegration requires a stronger affirmation of Indigenous identity and culture as a source of dignity, self-esteem and pride.[5]

27. With respect, I do not agree with the apparently sweeping assertion of a crisis of indigenous social and cultural disintegration. There are many challenging issues which have to be dealt with. But there is also much strength and strength of culture among First Peoples and their leaders. I do agree with John Howard that recognition in the *Constitution* is a strong affirmation of Indigenous identity and culture. A stronger and practical affirmation will give content to that recognition by the creation of the constitutional voice to Parliament and the Executive Government. Most importantly, it is a means of better addressing the challenges of apparently intractable social and economic disadvantage.

**The challenges — closing the gap**

28. The challenges are reflected in the Draft Report of the Productivity Commission on the National Agreement on Closing the Gap. Coincidentally today, Friday, 6 October 2023, is the closing date for written submissions in respect of that Draft Report. The National Agreement on Closing the Gap was signed by all Australian governments and the Coalition of Aboriginal and Torres Strait Islander peak organisations in 2020. The objective of the Agreement was to overcome entrenched inequality faced by Aboriginal and Torres Strait Islander people so that their life outcomes are equal to those of all Australians. The Productivity

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5 John Howard, Address to the Sydney Institute, Four Seasons Hotel, Sydney, 25 June 2007.

Commission's review has led it to the conclusion that governments are not adequately delivering on this commitment.

29. The Agreement set out four Priority Reforms:

(1) Formal partnerships and shared decision-making.

(2) Building the community-controlled sector.

(3) Transforming government organisations.

(4) Shared access to data and information at a regional level.

Those Priority Reforms were directed to accelerating improvements and outcomes for Aboriginal and Torres Strait Islander people measured against 17 socio-economic outcomes.

30. The Productivity Commission found that although there were pockets of good practice, overall progress against the priority reforms has been slow, uncoordinated and piecemeal. It referred to over 2,000 initiatives listed in Government's First Implementation Plans for Closing the Gap. Many of those reflected what governments have been doing for many years. Actions were said to focus often on the 'what' with little or any detail on the 'how' or the 'why'. There was no strategic approach that would explain and provide evidence for how the initiatives that governments have identified will achieve the fundamental transformation envisaged in the Agreement. This, it was said, makes it near impossible for Aboriginal and Torres Strait Islander people and the broader Australian community to use these plans to hold governments to account. Relevantly to the present debate, the Commission observed that:

> In recent years, Aboriginal and Torres Strait Islander bodies have been established in jurisdictions across Australia, and

> others are proposed or are being developed. They include the proposed Voice to the Australian Parliament and Government, state and territory Aboriginal and Torres Strait Islander representative bodies, Voices to State Parliaments, Treaty processes, and justice commissions. Each of these bodies will (or could) have a role to play in holding governments to account for actions affecting Aboriginal and Torres Strait Island people. Similarly, the independent mechanism may be positioned to shine a spotlight on good and bad practices under the Agreement and advocate for improved policies, programs and services affecting Aboriginal and Torres Strait Island people, though its role may need to expand beyond Priority Reform 3 to include the Agreement in its entirety.[6]

31. For those who ask: What are the practical benefits of a Voice to the Australian Parliament and the Executive Government of the Commonwealth, the answer is clear. Constituted according to the design principles outlined by the Prime Minister, it will provide an opportunity for coordinated, national advice from a First Peoples' body combining the experience of its constituencies and the competency and high professional expertise available from many emerging First Peoples leaders. If the intractable problems of education, housing, health, employment and incarceration can be more effectively and efficiently addressed with the assistance of The Voice, the potential benefits in the more efficient use of public funding and the practical improvement of our society generally will emerge.

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[6] Australian Government, Productivity Commission 'Review of the National Agreement on Closing the Gap, Draft Report' (July 2023) 5.

**First Peoples —knowledge, expertise, experience**

32. There is an immense accumulated body of knowledge and expertise, lived experience and connection to their own communities of First Peoples across Australia. From time to time in my career I have seen concrete examples of that potential and its realisation.

33. An early experience was that of the formation of the Aboriginal Legal Service of Western Australia, in which I was involved in the early 1970s, along with a number of non-indigenous lawyers, including Ronald Wilson, John Toohey, Fred Chaney, Peter Dowding, George Winterton, and many others. Today, that Service is led by an executive committee which consists of elected Aboriginal community representatives from each of eight electoral regions within Western Australia. It has 12 offices throughout Western Australia, from Kununurra in the north, to Albany in the south. It assists rural and remote clients, children and youth, homeless Aboriginal people and Aboriginal people in custody.

34. Another example of which I have personal experience is the Polly Farmer Foundation, instigated by the late, great AFL footballer, Graham Farmer, over 25 years ago. There was a strong involvement of non-Aboriginal support and involvement in it in the governance of the Foundation over the years including Sir Ronald Wilson and John Toohey as successive chairs. Fred Chaney was a long-standing member of the Board, which I chaired from 2018 to 2022. This remarkable organisation provides in-school programs at primary and secondary levels. Learning Clubs and STEM Clubs in primary schools and the Follow the Dream program in secondary schools. The programs operate in 138 schools mainly concentrated in Western Australia and serve some 2,700 students. They have led to significantly enhanced secondary school completion rates from those

participating. They are represented in many fields, including law, arts, education, medicine, financial services, sciences, trade, community work and incorporations and small business. Like the Aboriginal Legal Service before it, the Foundation has evolved into an Aboriginal-led body with an impressively professional Board. And yet those programs only touch a percentage of Aboriginal students. The overall rates of school completion in Western Australia are lamentable.

35. Those two cases are but examples, of which I can speak, of the substantial reservoir of First Peoples' talents, experience and expertise in "matters relating to Aboriginal and Torres Strait Islander peoples". There is a rising generation of such expertise and experience coming through our education system and into the wider community. This significant and expanding resource will be able to be drawn upon by The Voice in its membership and in formulating the priorities and content of representations to Parliament and the Executive.

36. There is an older generation of outstanding Aboriginal leaders who have paved the way to this moment. Patrick Dodson, whom I hope will be speaking to you next Wednesday, 11 October 2023, is a key example. He has done many things as an Aboriginal leader in his lifetime. One of them I observed at close quarters as President of the National Native Title Tribunal in 1995. In that year in Broome he brought together three local clans with somewhat differing perspectives on their native title claims and formed a working group representing all of them — the Rubibi Working Group — so that they could engage effectively with the Shire of Broome on pressing issues of town development. The Shire of Broome was a local authority seeking to engage proactively with native title claimants at a time when the State Government was seeking to challenge the validity of the *Native Title Act* and to replace common law native title with inferior

statutory title. The Working Group became a means by which different Aboriginal voices who might disagree on some things could come together as one on matters in which they had a common interest. There were so many others I met in travels which took me across the length and breadth of Australia and into the islands to the north who were labouring in the interests of their communities and who were truly impressive leaders.

37. There will be, as there always has been, diversity of views among First Peoples. That diversity is on display in the referendum campaign. There will be diversity of views inside and outside The Voice about its priorities and about representations that The Voice might make. There may be dissent within on some questions. Diversity and dissent are part of public discourse. In the end, The Voice will have the authority to take positions on what its members, or a majority of its members, judge to be common interests.

38. There is an immense task for The Voice as an instrument for the informed improvement by Parliament and the Government of the chronic challenges of social and economic disadvantage suffered by many of Australia's First Peoples. They have what it takes to lend themselves to that task if the opportunity is afforded.

**The Voice — High Return, Low Risk**

39. Much has been said about legal risks associated with the inclusion of The Voice in the *Constitution*. I will repeat here the basic propositions which I have made about those risks publicly and in other places, including before the Joint Select Committee.

40. The first proposition is that the value of The Voice will derive from the content of the representations which it makes to Parliament about existing

or proposed laws and to the Executive Government about existing or proposed administrative policies and practices. There is no available reading of the amendment which would require either Parliament or the Executive Government to act upon representations made by The Voice. They would have to be considered on their merits and in the light of other legislative and administrative priorities.

41. Nor is there any available reading of the constitutional change which would bind the Parliament to have regard to representations from The Voice about a proposed law as a condition of its power to make such a law. Absent express words to that effect, the law-making powers of Parliament set out in Chapter I of the *Constitution* could not be impaired by an implication based simply upon the power of The Voice to make representations to it.

42. Further, Parliament could not make a law limiting its own law-making powers by legally requiring prior consultation with The Voice. The Voice is not a third chamber. The constitutional amendment would, however, support the adoption by Parliament of internal procedures to provide for The Voice to be heard. Such internal procedures would not have a constitutional status enforceable before the courts. The Parliament could make a law defining the means by which The Voice would make its representations and the ways in which Parliament would receive them. They could include the establishment of a joint standing committee as the point of communication with the Parliament or the nomination of a particular Minister as the Minister responsible for bringing representations from The Voice to the Parliament.

43. It has been suggested that an over-speaking Voice might deluge all and sundry in the Executive Government with its opinions. The Parliament can, under s 129(iii) prescribe the means and mechanisms for

representations to be made to the Executive Government. Representations might, for example, have to be directed to the relevant Minister or a body nominated by the relevant Minister, such as the National Indigenous Australians Agency. The Parliament can determine to whom and how representations can be made. It is not required to allow representations to be made to any person or authority engaged in the work of the Executive Government, which could cover a spectrum from the Governor-General to Ministers of the Crown and a vast array of public officials.

44. And apart from these formal statutory means, there would almost certainly be communication protocols established to ensure timely and efficient interactions between The Voice and the Executive Government.

45. It has been argued that representations made by The Voice to the Executive Government of the Commonwealth could be mandatory relevant considerations in executive decision-making. That is to say, that there could be enforceable legal requirement upon executive decision-makers to have regard to a representation relevant to decisions which they make. And if there were such an implication, then a failure to take into account the relevant representation might mean that a decision made in those circumstances would be invalid and would have to be reconsidered in the light of the representation. This implication is improbable. We can see that by looking at the language of s 129(ii). That provision encompasses in one set of words representations to the Parliament and to the Executive. For reasons I have already given, those words cannot bear an implication that the Parliament is bound to have regard to Voice representations as a legal condition of its law-making powers. As to the Executive Government, its functions range from the formulation of high-level policy to highly specific decisions such as the granting of a license for someone to do something. As a general proposition, high-level policy decisions

taken by the Executive, are not amenable to challenge in the courts. That is because they often involve multifactorial considerations of the public interest and political judgments from which the courts properly exclude themselves. If no legally enforceable implication can arise in relation to the law-making power of the Parliament and if no such implication can arise in relation to the formulation of general policies by the Executive, it is highly unlikely that out of the same set of words in s 129(ii) a legally enforceable constitutional implication could arise in relation to specific executive decision-making powers.

46. The same reasoning applies to the question whether the *Constitution* itself might give rise to a legally enforceable duty to consult The Voice in relation to law-making or the exercise of Commonwealth executive functions.

47. Of course the Parliament itself under s 129(iii) can make laws providing mechanisms for representations to the Parliament and the Executive and the legal effect of representations to the Executive. It could, if it wanted to, specify classes of specific executive decisions where the decision-maker would be obliged to take into account any representations received from The Voice. The Parliament itself could also specify that for particular classes of executive decisions, the decision-maker should invite The Voice to make representations. Parliament can determine the extent, if any, to which any legal duties might be imposed on executive decision-makers in relation to representations made by The Voice.

48. There is, of course, always the possibility that someone, someday will want to litigate a matter relating to The Voice. Australia is governed by the rule of law which provides access to the courts where it is alleged that public officials or public bodies have exceeded their power or failed to exercise their statutory duties. The risk of any such litigation succeeding and

imposing any burdensome duties, or any duties at all, upon the Executive Government of the Commonwealth is low when set against the potential benefits for better outcomes which an expert body drawing upon the experience of First Peoples across Australia, urban, regional, rural and remote is able to assist in the formulation of laws and policies affecting them.

**A short note on the drafting history**

49. There has been debate about the inclusion of the reference to the Executive Government of the Commonwealth in s 129(ii). It is helpful to recall that in 2015 Anne Twomey published in *The Conversation* an agreed draft for an Aboriginal and Torres Strait Islander Voice. That draft provision originated in 2014 with the work of the Cape York Institute led by Noel Pearson and Shireen Morris, in collaboration with Julian Leeser, Anne Twomey, Greg Craven and Damien Freeman. They proposed a Voice solution as an alternative to a constitutional guarantee against racial discrimination. Their idea was that instead of amending the *Constitution* by creating a justiciable prohibition, they would seek to create a constitutional mechanism by which indigenous communities themselves would have a fairer say in laws and policies made about them. Their proposed draft provided for an Aboriginal and Torres Strait Islander body, which would have the function of providing advice to the Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander peoples. And under that draft, the Parliament was, subject to the *Constitution,* to have power to make laws to the composition, roles, powers and procedures of the body. There were additional requirements for the body's advice to be tabled in each House of Parliament, requirements which do not appear in the current draft. As Pearson and Morris observed, the original amendment was constitutionally

conservative. At a press conference in April this year, Julian Leeser described it as different and organic, consistent with our constitutional heritage and a uniquely Australian idea designed for Australian conditions. Back in 2016, he described it as fitting with the *Constitution* and said of it that it was the kind of machinery clause that "Griffith, Barton and their colleagues might have drafted had they turned their minds to it."[7]

50. Former Chief Justice Murray Gleeson also noted in a speech in 2019 that Twomey's Voice drafting "demonstrated that a constitutional entrenched Voice can be achieved without legal derogation from parliamentary supremacy".[8] Craven and Freeman also endorsed the drafting which they had co-created.

51. As Pearson and Morris said in their submission to the Joint Committee:

> Notably, constitutionally mandated advice to the Executive was there from the start. Contrary to recent false assertions, the reference to Executive Government is not a new addition inserted by 'Indigenous radicals'. Rather, it was part of the Voice proposal, as devised with constitutional conservatives, from the beginning – a fact Twomey reiterates in her submission and is readily substantiated on the public historical record.
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> … the idea of an Indigenous body providing constitutionally mandated advice to both Parliament and the Executive was

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7 D Freeman and S Morris (eds), *The Forgotten People: Liberal and Conservative Approaches to Recognising Indigenous Peoples,* (Melbourne University Press, 2016) 87.

8 Murray Gleeson, 'Recognition in Keeping with the Constitution: A Worthwhile Idea', Speech delivered at Gilbert & Tobin, 18 July 2019.

endorsed by Indigenous national consensus through the Uluru Statement.[9]

**A Canberra Bureaucracy**

52. The Voice proposal has been called another Canberra bureaucracy. Bureaucracy is defined in the Shorter Oxford English Dictionary as "a central administrative group, especially one made accountable to the public etc; officialism or officials of such a group collectively". A bureaucrat is defined as an "officer especially an unimaginative or doctrinaire one in a bureaucracy. A person who endeavours to centralise administrative powers."

53. The use of the term "bureaucracy" to describe The Voice proposal reflects a fundamental misunderstanding of its place in the *Constitution*. It is set apart from the Executive Government of the Commonwealth. It is not a collection of officials. The label has no doubt been applied because of the negative connotations of the word "bureaucracy". To reinforce that negative stereotype it has been called a "Canberra bureaucracy". That is no doubt because if bureaucrats are a bad lot, then Canberra bureaucrats must be the worst of them. So the city of Canberra and those who live and work here become an adjectival term of abuse. No doubt members of The Voice will meet and carry out their core function of making representations to the Parliament of the Commonwealth and the Executive Government of the Commonwealth in Canberra. But they will be selected from Aboriginal and Torres Strait Islander societies across the nation. If this is a Canberra bureaucracy, what then is parliament, which unlike The Voice has decision-making powers, but a species of Canberra bureaucracy on steroids. Terms

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9 Noel Pearson and Shireen Morris, Submission to Joint Select Committee on Aboriginal and Torres Strait Islander Voice Referendum, 14 April 2023.

such as ‘Canberra bureaucracy’ weaponise words by distorting their meaning in a way which is unhappily characteristic of public, political discourse today.

**Conclusion**

54. What goes before the Australian people in this referendum is the simple idea of a national advisory body incorporated into the *Constitution* as an act of recognition of our First Peoples and thus of our own continental history and national identity. If, as I hope, the Australian people say ‘Yes’ to the proposal, they will confer authority and impose the obligation on their elected representatives and representatives of First Peoples to make that simple idea work. A vote in favour of The Voice is a new beginning and something in which this generation and generations to come should be able to take justifiable pride.