Committee Secretary
Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum
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21 April 2023

Supplementary Submission to the

Inquiry into *Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023*

Dear Secretary,

We make this supplementary joint submission to explain the problems with the constitutional alterations that have been proposed by Uphold & Recognise[1] and Frank Brennan.[2] Our submission demonstrates the perverse consequences that arise from ill-conceived attempts to confine the constitutional scope of the Voice to address spurious and exaggerated concerns, and highlight the comparative soundness and elegance of the amendment set out in the Bill, which has benefitted from 9 years of debate and refinement since 2014.

We make two preliminary points, underscoring comments made by Dr Shireen Morris in her testimony to the Committee on 19 April 2023 in Cairns. First, over 9 years of discussion and improvement since 2014, the use of 'advice' in the original drafting has been changed to 'representations'. As Professor Anne Twomey explains in her submission,[3] this is to avoid the possibility that the word 'advice' could be argued to carry implications that advice by convention should be followed, just as advice from Ministers to the Governor-General by convention should be followed. Though we think the use of the word 'advice' was also sound in previous iterations, use of 'representations' instead of 'advice' appears prudent, because it makes abundantly clear that the Voice's advice is non-binding. It is a double precaution, which confirms the amendment's intended respect for parliamentary supremacy.[4] We are not persuaded by Professor Greg Craven's testimony to the Committee on 14 April 2023 in Canberra, which suggested that the word 'representations' had more adverse implications than 'advice'. Craven did not provide any cogent reasons or evidence for this claim,[5] whereas reasons have been provided explaining why 'representations' is a preferable word to use. The Explanatory Memorandum should also explain that the word 'representations' has been chosen instead of 'advice' to confirm that representations are non-binding, in line with the intent of this proposal.

Second, Twomey has made clear in her testimony to the Committee on 14 April 2023 in Canberra, her submission and extensive writings on this topic, that the broad scope of clause 2 is deliberate: it ensures there will not be extensive litigation to determine what matters are within or outside of the Voice's scope. The broadness of clause 2 makes the question of scope a political and practical issue.

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[1] Submission 40.
[2] Submission 18.
[3] Submission 17.
[4] Twomey's submission answers Julian Leeser's question about what 'make representations' conveys. Julian Leeser, Address to the National Press Club, 3 April 2023: https://www.julianleeser.com.au/news/address-to-the-national-press-club/.
[5] Craven argued: "…you've got 'advice' rather than 'representations'. 'Representations' is a much more fundamental sort of thing. A representation is something that comes from someone with their own power, in a sense. If I give a representation to you, it's quite different from giving advice to you."

It ensures that the Voice's discretion in relation to what matters to advise on is a political and practical judgment. It is not a question that needs to be argued about in the High Court. This is deliberate, as Twomey has persuasively explained.[6]

Notably, the Voice's broad discretion to advise Parliament and the Executive began with the original amendment drafted with constitutional conservatives (including Leeser, Craven and Freeman) in 2014 and is reflected in the current amendment. The broad scope has withstood legal scrutiny and debate over 9 years, precisely because it is justified and legally sound. Broadness keeps the scope issue within the realm of politics and out of the courts. By contrast, recent rushed attempts to confine and narrow the scope of clause 2 are inelegant, complicated, and would likely open up avenues for litigation, as we demonstrate below.

Uphold & Recognise proposals

The Uphold & Recognise submission conspicuously omits to mention the seminal involvement of the Uphold & Recognise founders, Julian Leeser and Damien Freeman, and Uphold & Recognise director, Professor Greg Craven, in the original 2014 drafting of the Voice constitutional amendment with the Cape York Institute. As noted, the original amendment devised with Leeser, Freeman, Craven and Twomey included constitutional advice to the Executive Government.

As we explained in our previous submission and in Dr Morris' testimony, Craven, Freeman and Leeser have for 8+ years supported the idea of the Voice having a constitutionally guaranteed ability to advise both Parliament and the Executive. They have defended the 2014 drafting as "legally sound"[7] and constitutionally conservative,[8] and have admitted that the original drafting they helped create formed the basis for the proposal contained in the Bill.[9] Craven and Freeman have long noted the importance of the Voice's constitutionally guaranteed role in advising both Parliament and the Executive in various writings. In 2014, Craven advocated in *The Australian* for an Indigenous body "charged with counselling parliament and government on indigenous matters". He argued "Government would be empowered, not disempowered" by its "timely and wise counsel".[10]

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[6] See pages 43-44 of Professor Anne Twomey Hansard transcript, 14 April 2023.

[7] See Greg Craven and Damien Freeman submission to the Voice Co-Design Process, 2021 (submission 37). The wrote: "They wrote: In 2015, Professor Anne Twomey published a proposal for an amendment to the Constitution that could give effect to (Noel) Pearson's Indigenous advisory body. We were actively involved in the discussions through which this amendment was drafted. We believed in 2015, and still believe, that it is legally sound. It is a provision that would not undermine the supremacy of parliament or give rise to uncertainty in the High Court's interpretation of the Constitution."

[8] In 2016, in *The Forgotten People,* Julian Leeser wrote it was the kind of machinery clause that "Griffith, Barton and their colleagues might have drafted, had they turned their minds to it". Julian Leeser, 'Uphold & Recognise' in Damien Freeman and Shireen Morris, *The Forgotten People: liberal and conservative approaches to recognising Indigenous peoples* (MUP 2016) 87.

[9] Craven and Freeman explained that Twomey's 2015 drafting provided "the basis for the Prime Minister's simplified drafting in 2022": see Greg Craven and Damien Freeman, 'Guaranteeing a Grassroots Megaphone: A centre-right approach to hearing Indigenous voices', Centre for Independent Studies, 23 January 2023: https://www.cis.org.au/publication/guaranteeing-a-grassroots-megaphone-a-centre-right-approach-to-hearing-indigenous-voices/. Julian Leeser also talked about this history in his recent press conference: Julian Leeser, Press Conference – the Voice, 11 April 2023: https://www.julianleeser.com.au/news/press-conference-the-voice/.

[10] Greg Craven, 'We need to work out how indigenous voices can be heard,' *The Australian*, 13 September 2013: https://www.theaustralian.com.au/nation/news-story/a1999e244fe74a28f9eda7bab814afe3.

The necessity of constitutionally guaranteed advice to the Executive was also noted in their paper for the Centre for Independent Studies (January 2023)[11] and Freeman's conclusion to *Statements from the Soul* (February 2023).[12] In our first submission and in many published opinions, we have quoted many of their assertions endorsing the original drafting they co-created, which included constitutionally guaranteed advice to the Executive in the same broad terms as the current drafting.

Craven, Freeman and Leeser had 8+ years to raise concerns about the inclusion of advice to the Executive in the drafting they co-created. They had 8+ years to formulate sensible refinements to the draft if there was a genuine problem to fix (which we dispute). They never raised any of these concerns during the last 8+ years. Concerns about the Voice's constitutional role advising the Executive have only been raised in the last several months. Such concerns have been raised with much panic and hyperbole, suggesting hurried political tactics from those resisting the Prime Minister's announcement of his preferred drafting at the Garma Festival last year. This appears to be a misguided last-minute attempt to win more conservative support. This is important for the Committee to note, because it helps explain why the changes to the drafting now being floated seem rushed and ill-considered and suffer serious legal deficiencies as a result.

We should be careful not to scramble to address spurious and exaggerated concerns. Ill-considered refinements tend to create other much worse real problems than the exaggerated problems they purport to fix. Nor should we rush to appease those making exaggerated, bad faith or false claims (for example, claims about the Voice clogging up and stalling government action on nuclear submarines and lighthouses). Rushing to make changes to appease spurious concerns, without careful legal scrutiny, risks mistakes being made. Such panic risks creating new legal problems and inflaming unnecessary litigation through lack of care – the very problem the Voice amendment as currently drafted successfully avoids. It also risks creating an amendment so complex that ordinary people cannot understand it.

We must also keep faith with Indigenous people, who have said they need a constitutionally guaranteed ability to advise both Parliament and the Executive. As previously noted, the original amendment conceived with constitutional conservatives in 2014 included advice to the Executive and was drafted in the same broad terms – for good reason. That original amendment informed the First Nations dialogues which gave rise to the Uluru Statement from the Heart. To unduly narrow or remove the Voice's guaranteed ability to advice the Executive would dishonour the Uluru Statement and short-change Indigenous people.

All these deficiencies are evident in the Uphold & Recognise proposals, which are rushed and susceptible to unintended consequences – including litigation – that no constitutional conservative should support. Their submission claims to find "common ground" between Indigenous members of the organisation, Ken Wyatt and Sean Gordon, who have publicly said they want the Voice's constitutionally guaranteed ability to advise Executive government to be kept,[13] and the concerns

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[11] Greg Craven and Damien Freeman, 'Guaranteeing a Grassroots Megaphone: A centre-right approach to hearing Indigenous voices', Centre for Independent Studies, 23 January 2023: https://www.cis.org.au/publication/guaranteeing-a-grassroots-megaphone-a-centre-right-approach-to-hearing-indigenous-voices/.

[12] Shireen Morris and Damien Freeman (eds), *Statements from the Soul: the Moral Case for the Uluru Statement from the Heart* (La Trobe University Press, 2023).

[13] On 9 March 2023 Gordon "revealed he had shifted his position and now thought it was imperative for the Voice to have the power to advise the executive". James Massola and Lisa Visentin, 'Greens say more detail on Voice to parliament needed' *SMH* 9 March 2023: https://amp.smh.com.au/politics/federal/greens-say-more-detail-on-voice-to-parliament-needed-20230308-p5cqe4.html. See also James Elton and Sarah Ferguson, 'Ken

raised by Craven about clogging up government decision-making on everything from nuclear submarines to lighthouses. The submission says that Freeman and Kerry Pinkstone were "given carriage" to determine and resolve this "common ground". However, the proposals do not reflect such common ground. Rather, the proposed changes involve removal or clear weakening of the constitutional ability of the Voice to advise the Executive that Gordon and Wyatt have said they want to keep. We are therefore concerned that Indigenous participants in the organisation are not being properly advised and that this submission does not reflect their views.

The legal problems and errors in the Uphold & Recognise proposals and arguments are many. First, the claim that "consultation standards might not be possible once the proposed s 129(2) is inserted into the Constitution, as the Parliament will no longer be able to restrict the scope of the matters about which the Constitution gives the Voice a right to make representations"[14] is incorrect. As the submission notes, the Voice Co-Design report's consultation standards explain when the Voice should be proactively consulted. This is clearly within Parliament's control under the current drafting. The current drafting only permits the Voice to make representations to Parliament and the Executive. It does not include any duty to consult the Voice. Frank Brennan's previous suggestions for a constitutionally guaranteed duty to consult (discussed below) have not been adopted for good reasons – because they would precipitate litigation, delay government and undermine parliamentary supremacy. As we and other experts have explained, the risk of any implied constitutional obligation to consult the Voice is highly improbable, because it is not in the text, it is not politically intended, and other proposals for a justiciable duty to consult have not been adopted. It is therefore clearly within Parliament's power under the current constitutional amendment to determine whether and how the Voice should be proactively consulted. It would be entirely possible to implement the Co-design Report's consultation standards.

Second, the suggestion "to delete the words 'on matters relating to Aboriginal and Torres Strait Islander peoples' and substitute a different formula of words, such as 'on proposed laws and matters with respect to Aboriginal and Torres Strait Islander peoples and such other matters as the Parliament provides'"[15] in clause 2 is not sensible. This would invite litigation about whether or not a matter is "with respect to" Indigenous people, and therefore whether the Voice's ability to give advice on that matter is constitutionally guaranteed. Only the High Court can ultimately determine whether a particular law is enacted under one head of power or another. This is a recipe for extensive litigation. Every time the Voice wanted to give advice on a borderline matter, there would be another issue for the High Court to resolve.

Additionally, only a handful of laws are enacted under s 51(xxvi). The suggested change would make the constitutionally guaranteed ability of the Voice to advise very narrow. If Parliament did not expand the scope of the Voice's ability to give advice, it would have almost nothing to do. If Parliament keeps the Voice's ability to give advice narrow, litigation will be assured as the parties will be forced to fight about what is and is not within scope.

The submission also misleadingly suggests that this formulation of words would fulfill the so-called "Indigenous guarantee", in that it would empower the Voice to advise on "matters with respect to Indigenous people", including laws enacted under s 122, the territories power. This is clearly wrong.

Wyatt says Indigenous Voice to Parliament must be allowed to advise ministers' *ABC News* 11 April 2023: https://www.abc.net.au/news/2023-04-11/ken-wyatt-quit-liberal-party-indigenous-voice-referendum/102210228.

[14] Pg 11.

[15] Pg 11.

Under Uphold & Recognise's proposed drafting, there would be no guarantee that the Voice could advise on laws enacted under 122 (which is not an Indigenous specific power), for example with respect to the Northern Territory. Laws of general application enacted under the territories power would not be included in the proposed constitutional guarantee. Under these proposed words, a future Northern Territory Intervention (which was enacted under s 122) could enliven litigation about whether this is a matter in relation to which the Voice has a constitutionally guaranteed ability to provide advice. Only the High Court could resolve this question. Such controversies do not arise under the far superior drafting presented in the Bill. The Uphold & Recognise proposal would prompt litigation – the very result a constitutional Voice was intended to avoid.

As Twomey has cogently explained, keeping clause 2 broad ensures the question of scope is political. It takes arguments about whether or not the Voice is allowed to advise on a particular matter out of the courts, so that it becomes a political judgement on the part of the Voice. The Voice has broad discretion to advise Parliament and the Executive for this reason: to avoid unnecessary litigation. However, the Voice will need to exercise political and practical judgment in determining which matters to provide advice on. If it gives silly or irrelevant advice it will lose credibility and influence and may incur political consequences. If the Voice gives silly or irrelevant advice, that advice will be ignored, because it is non-binding. This is what we mean by keeping the scope issue in the domain of politics. Rushed attempts to narrow the scope of clause 2 create many legal problems, encourage litigation and should be rejected. Such attempts create problems without solving any.

Third, the suggestion that constitutionally guaranteed advice to the Executive should be limited to Ministers of State should be rejected. This again enlivens uncertainty and potential litigation. Does the Voice have a constitutionally guaranteed ability to make representations to Minister's staffers or their departments? Would it prevent the Voice from partnering with government departments on policy development? If disputes arose, these questions would need to be resolved by the High Court. Why not keep the constitutional imprimatur broad so that legislation can set out processes for partnership in policy development? The constitutionally guaranteed ability for the Voice to work with departments on policy development is where the most practical benefit can be gained from this constitutional amendment. But if the ability to advise departments is not constitutionally guaranteed, it will not happen. It is clear from the current political debate that many in power would prefer that policymakers do not have to deal with Indigenous communities when making policy about them. The constitutional commitment is needed to enable cultural change, propelling a shift to a culture of partnership rather than 'we know best'. This commitment should not be watered down, especially given narrowing it enlivens possibilities for litigation.

The inelegance of Uphold & Recognise's proposed change to clause 2 is self-evident. Their proposed revised wording reads:

> The Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the Ministers of State for the Commonwealth on proposed laws and matters with respect to Aboriginal and Torres Strait Islander peoples and to the Parliament and the Executive Government of the Commonwealth on such other matters as the Parliament provides;

Not only is this a very long sub-section 2, it is difficult to understand. It also creates wide scope for litigation that is not present under the much simpler clause 2 set out in the Bill. Some questions arising are:

- Does the Voice have a constitutional mandate to give advice on existing laws, or only proposed laws? Does this mean there is no constitutionally guaranteed ability for the Voice to advise proactively on improvements to the Native Title Act? If this role is not enabled by legislation, there could be litigation about this. This uncertainty does not arise under the current drafting in the Bill, because it is clear existing laws are within scope. This is appropriate, because to deliver practical outcomes, the Voice needs to be able to advise on existing laws and policies that may not be working as well as they could be.
- Does the Voice have a guaranteed ability to advise on Closing the Gap measures, or suicide prevention measures in Indigenous communities, or alcohol management measures in certain areas, or laws on environmental management that might impact economic development on Indigenous land? It is unclear which of these measures is a law "with respect to" Indigenous people. This issue can only be legally resolved by the High Court. These questions would tie the Voice up in endless litigation, almost every time it wants to give advice on a matter important to Indigenous communities. These problems do not arise under the current broad scope of clause 2, as reflected in the Bill.
- If a future Parliament wanted to undercut the influence of the Voice by keeping the Voice's remit tightly confined, such that it could advise only on matters prescribed by the Uphold & Recognise constitutional amendment, this would again prompt litigation about whether or not a matter the Voice wanted to advise on was within or outside its constitutional scope.

This demonstrates the perverse consequences of trying to tightly confine the scope of the Voice's ability to give advice. In scrambling to appease those raising spurious and exaggerated concerns, Uphold & Recognise has cobbled together constitutional suggestions that would inflame far more potential litigation than the present drafting provided in the Bill – or for that matter, the drafting they co-created in 2014. In rushing to try to cut political deals, they are inadvertently abandoning careful and considered legal thinking and their own constitutionally conservative commitments in the process.

Fourth, the fact that the submission suggests removal of Executive Government as an acceptable option for consideration[16] demonstrates that there is no genuine attempt to reconcile the fact that Wyatt and Gordon have said they want to keep the constitutional reference to Executive government. This is not a submission that genuinely seeks common ground between Indigenous aspirations and current concerns about the reference to Executive Government. This is a submission that seeks to water down the amendment to appease those raising spurious and exaggerated concerns. But it doesn't even achieve that. The suggestions floated are full of unintended consequences that would be litigated in the High Court.

Fifth, the suggestion to insert "additional words in the proposed s 129 explicitly giving the Parliament power to make laws about the legal effect of representations made under subsection" is unnecessary, because the expansion of Parliament's power under the recently revised clause 3 includes the power to control the legal effects of the Voice's representations. The Explanatory Memorandum makes this clear, the Solicitor General's advice makes this clear, and this has also been affirmed by Twomey. Constitutional conservatives should prefer the even broader conferral of power that is now expressed in the revised clause 3. This gives Parliament power broad discretion to manage all "matters relating to" the Voice, including managing the legal effects of its representations. This proposal has always intended to keep Parliament in charge. The refinement to

[16] Pg 15.

clause 3 confirms this beyond doubt. Any person who values parliamentary supremacy should prefer this over a narrow extra power to manage "legal effects".

Sixth, the suggestion to insert "in s 77 of the Constitution a new subsection (iv) giving the Parliament power to make laws about the application of s 75(v) to the body established in s 129(1)"[17] is inelegant, unwieldy and complicated and seeks to fix a non-existent problem. This suggested change is unnecessary, because jurisdictional error under s 75(v) generally arises in relation to provisions in a statute, where the statute sets out matters that must be considered by a decisionmaker in making a decision.[18] It will be for Parliament to determine whether the Voice's advice is a mandatory consideration in a given matter. Tinkering with s 75(v) is unnecessary, and would head in the direction of the failed republic referendum which involved multiple changes to multiple parts of the Constitution. This suggestion over-complicates the constitutional change to address spurious and exaggerated concerns.

The suggestion also smacks of bad faith, which will attract opposition from Indigenous Australians. Why should ordinary legal standards and procedures that are available to all Australians under the Constitution, not be available to Indigenous Australians in the ordinary way? Under the current drafting, Parliament can already regulate whether the Voice's advice is a mandatory consideration in particular matters, which affects whether s 75(v) has a relevant role to play. Further prompting Parliament to exclude the Voice from the operation of s 75(v), which currently applies to all Australians, is not only legally unnecessary – the suggestion could be perceived as racially discriminatory. Like the misguided suggestion to include in s 129(3) an explicit prompt for Parliament to legislate to curtail the "legal effects" of the Voice's representations, this suggested change to s 75(v) would actively invite future Parliaments to legislate to undermine the basic respect and dignity that we hope will be accorded to the Voice via legislated procedures. The Voice is intended to create a fairer relationship and a culture of true partnership and mutual respect. This intent should not be undermined in misguided efforts to address exaggerated concerns.

The suggestions made by Uphold & Recognise in their submission are rushed and ill-advised. They create more problems than they solve and would not be supported by Indigenous Australians. They should be rejected.

Frank Brennan proposals

Professor Frank Brennan has led the push against constitutional advice to the Executive. But it must be remembered that Brennan has been a longstanding opponent of a constitutional Voice, preferring merely symbolic constitutional change. In 2015, Brennan declared "it would be impossible to design a constitutional provision for a Council which was technically and legally sound, being non-justiciable and ensuring the untrammelled sovereignty of parliament".[19] This prompted Twomey to publish the Voice drafting agreed with constitutional conservatives to prove Brennan wrong.[20] Brennan's claim was directly contradicted by former Chief Justice Murray Gleeson who noted in his

[17] Pg 15.

[18] Scott Stephenson, 'Is the Voice Too Uncertain or Risky?', *AusPubLaw:* https://www.auspublaw.org/first-nations-voice/is-the-voice-too-uncertain-or-risky/.

[19] Frank Brennan, 'Slow progress in Constitutional recognition for Indigenous Australians', *Eureka Street,* 19 May 2015: https://www.eurekastreet.com.au/article/slow-progress-in-constitutional-recognition-for-indigenous-australians.

[20] Anne Twomey, 'Putting Words to the Tune of Indigenous Constitutional Recognition', *The Conversation* (online, 20 May 2015) <https://theconversation.com/putting-words-to-the-tune-of-indigenous-constitutional-recognition-42038>.

seminal 2019 speech that Twomey's original Voice drafting "demonstrated that a constitutionally entrenched voice can be achieved without legal derogation from parliamentary supremacy."[21]

In his 2015 book, *No Small Change*, Brennan dismissed the idea of a constitutionally guaranteed Indigenous Voice as politically unviable,[22] instead recommending a legislated solution together with a symbolic constitutional acknowledgement and reformulation of the Race Power to become power make laws with respect to the "culture, language and heritage" of Indigenous peoples "and their continuing relationship with their traditional lands and waters". The problem with Brennan's attempts at constitutional minimalism, however, is that his proposed amendments do not respect parliamentary supremacy. They enliven uncertain judicial interpretation that would enable the High Court to strike down Parliament's laws – the very problem a constitutional Voice was designed to avoid.

Brennan has proposed many alternative amendments since 2015, each suffering from serious legal deficiencies. Perhaps most confusing were his attempts to turn the Voice constitutional amendment into a justiciable constitutional right to be consulted, that would enable the High Court to invalidate laws[23] – the very outcome the Voice amendment as currently set out in the Bill successfully avoids. These proposals are not legally sound. By contrast, the drafting in the Bill creates no constitutional "right to be consulted". Clause 2 provides only that the Voice "may make representations" to Parliament and the Executive Government on matters relating to Indigenous peoples. "May" indicates representations are not compulsory. There is no requirement that the Voice must be consulted before laws or policies are made, and no laws could be invalidated for failure to consult in their making.

Brennan proposed a constitutional "right to be consulted" in 2022. In a letter to *The Australian* on 26 January,[24] he proposed a power to make laws with respect to "Aborigines and Torres Strait Islanders for whom it is deemed necessary to make special laws after consultation with them". Brennan argued this amendment showed it is possible to "design the right constitutional hook for the voice without undermining parliamentary sovereignty". In fact, this is a constitutional right to be consulted. It is a justiciable qualification within the conferral of law-making power to Parliament. Laws enacted in contravention of consultation requirements would be ultra vires – beyond power – and could be invalidated by the High Court. It would even give the Voice a possible veto – because the Voice could just refuse to be consulted and Parliament's power would be un-exerciseable. It was a not a workable proposal.

Then in August 2022, after the Government released its draft amendment at Garma, Brennan proposed another alternative: "There shall be an Aboriginal and Torres Strait Islander voice with

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[21] Murray Gleeson, 'Recognition in keeping with the Constitution: A worthwhile idea', *Speech delivered at Gilbert & Tobin*, 18 July 2019: https://www.acu.edu.au/about-acu/institutes-academies-and-centres/pm-glynn-institute/projects-and-programs/recognition-in-keeping-with-the-constitution-a-worthwhile-project

[22] Frank Brennan, *No Small Change* (UQP, 2015) 275.

[23] Frank Brennan, 'Most Australians Are Tolerant and Inclusive, So Stop the Hectoring on Our National Day', The Australian, (online, 26 January 2022) https://www.theaustralian.com.au/commentary/letters/most-australians-are-tolerant-and-inclusive-so-stop-the-hectoring-on-our-national-day/news-story/5df6d8d9cce30994761c822899f19281; Frank Brennan, 'Why Their Voice Must Be Heard', The Australian (online, 20 August 2022) https://www.theaustralian.com.au/inquirer/why-their-voice-must-be-heard/news-story/bff90c222c1f769bb5035220d977b8ad.

[24] Frank Brennan, 'Most Australians Are Tolerant and Inclusive, So Stop the Hectoring on Our National Day', The Australian, (online, 26 January 2022) https://www.theaustralian.com.au/commentary/letters/most-australians-are-tolerant-and-inclusive-so-stop-the-hectoring-on-our-national-day/news-story/5df6d8d9cce30994761c822899f19281.

such structure and functions as the parliament deems necessary to facilitate consultation prior to the making of special laws with respect to Aborigines and Torres Strait Islanders."[25] There were several problems with this amendment, which echoed the language of the Race power, presumably to confine the operation of the Voice to that power. First, the word 'voice' is not defined so it creates ambiguity ripe for judicial interpretation. Second, the amendment requires consultation with Indigenous people 'prior to' special laws being made about them. Laws enacted in contradiction to this requirement could potentially be invalidated. Again, refusal to be consulted could give the Voice a veto over this law-making power. Third, only the High Court could determine whether a law was "with respect to" Indigenous people. In attempting to narrowly confine the Voice's remit, Brennan is proposing a provision that encourages High Court litigation. Fourth and most problematically, the Voice would have hardly anything to do. The race power only supports a handful of laws and gets used infrequently. What about closing the gap policies, or laws about youth detention, or the Northern Territory Intervention for that matter, which was enacted under s 122? Under Brennan's August draft, the Voice would have little to advise on, and Parliament might be prevented from conferring additional roles beyond the narrow role constitutionally prescribed.

A further Brennan proposal, released in his new book,[26] would enable Parliament to confer additional functions on the Voice. This was added after the weaknesses in his previous version were pointed out. But the constitutional guarantee is still too narrow. It could still enliven unnecessary litigation, because of its narrowness. And it still gives Indigenous people far too little – because it does not include constitutionally mandated advice on government policy, which is the bulk of important decision-making in Indigenous affairs.

In his submission to this Committee, Brennan proposes yet another variation to weaken the Voice constitutional amendment – this time to limit the Voice's ability to make representations to the Executive only to Ministers. We oppose that revision, for reasons explained in our previous submission and above.

We urge the Committee to have regard to Brennan's history in this debate when considering his advice. Brennan opposed a constitutional Voice from the start. Having originally declared in his 2015 book that a body empowering the voices of Indigenous Australians had no chance, he has sought to make his prophecy self-fulfilling by resisting it at every turn. Brennan has been the most consistent opponent of the Voice over the past decade. Even now that the Labor Government has introduced this Bill to give effect to a constitutional Voice, Brennan is leading the criticism against it. His alternative proposals, however, have not been as consistent as his opposition to a Voice. He has come up with numerous rushed alternatives, all of which suffer much more from the problems he says he is trying to avoid than the drafting he criticises: all of Brennan's proposals increase the potential of litigation before the High Court.

Conclusion

The above explanations show how attempts to remove or confine the Voice's constitutional ability to advise the Executive Government raise other problems of legal uncertainty and the derogation of parliamentary supremacy – the very problems this Bill elegantly and successfully avoids. There are

[25] Frank Brennan, 'Why Their Voice Must Be Heard', The Australian (online, 20 August 2022) https://www.theaustralian.com.au/inquirer/why-their-voice-must-be-heard/news-story/bff90c222c1f769bb5035220d977b8ad.

[26] Frank Brennan, *An Indigenous Voice to Parliament: Considering a constitutional bridge* (Garratt Publishing, 2023).

no genuine legal problems with the amendment as presently drafted, which started as a conservative proposal and has benefitted from 9 years of refinement.

As we have noted, and as experts agree, the recent adjustment to clause 3 makes it abundantly clear that Parliament has power to determine when and whether the Voice's advice must be considered. The expanded power confirms that Parliament would have the authority and discretion to confine or preclude any legal effects arising from the Voice's representations.

We would be pleased to discuss our supplementary discussion with the Committee at a hearing, if necessary.

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