SUBMISSION TO THE JOINT SELECT COMMITTEE ON THE ABORIGINAL AND TORRES STRAIT ISLANDER VOICE REFERENDUM

G.A.F. CONNOLLY[1]

(1) My submission is made in answer to the proposed alteration of our Constitution, pursuant to s.128, to entrench the Aboriginal and Torres Strait Islander Voice (***Voice***) in a new s.129, which will be the only section in a new Chapter IX:

> *Chapter IX—Recognition of Aboriginal and Torres Strait Islander Peoples*
>
> *129 Aboriginal and Torres Strait Islander Voice*
> *In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia:*
> *(i) there shall be a body, to be called the Aboriginal and Torres Strait Islander Voice;*
> *(ii) 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;*
> *(iii) 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.*

(2) I will limit my criticism of this disordered referendum process to this:

(a) section 128 confers on the elected Parliament the responsibility for devising and approving proposed alterations of our Constitution. That so much of the work on the Voice has been done so far by '*working groups*' - and not by the elected Parliament - has been a disgraceful abdication of the Parliament's constitutional duty; and

(b) this Committee's existence was only announced on or about 30 March 2023 and submissions to it close on 21 April 2023 – a very brief period that is occupied, as Committee members must know, by Jewish Passover and Christian Easter. Committee members who agreed to such a short period for submissions, knowing many interested Australians have competing religious and family duties, did so with appalling bad faith.

PROBLEMS WITH THE PROPOSED VOICE ALTERATION

(3) The proposed wording for the Voice alteration poses several problems for our Constitution. The schema of our monarchical and federal Constitution is to divide the Commonwealth's own legislative, executive, and judicial, powers among, respectively, the Parliament (Chapter I), the Crown and Executive Government (Chapter II), and the Judicature (Chapter III). The Voice, to be sited in a new Chapter IX, will have an enduring constitutional existence that is rivalled only by the Monarch, the Parliament, and the High Court of Australia.

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[1] https://ebc44.com/home/barristers/connolly-graham/
Barrister-at-Law of the Supreme Court of New South Wales & the High Court of Australia.
Lecturer in Australian Constitutional Law, Law Extension Committee of the University of Sydney.
Examiner in Australian Constitutional Law, Legal Profession Admission Board of New South Wales.
All opinions expressed in this Submission are mine alone.

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(4) For over a century, the High Court has, most commendably, interpreted our Constitution's text in its "*natural meaning*"[2], "*in its ordinary and natural sense*"[3], and its "*ordinary and natural meaning*".[4] The High Court will, thus, rightly, give this newly added s.129 its full operation, especially as the Voice's power to make representations is entrenched by (ii) – whereas the Parliament's power to make laws in respect of the Voice's composition, functions, powers, and procedures, in (iii) is expressed as "*...subject to this Constitution*" – which, here, means the Parliament's laws are always subject to (ii)'s operation. While no one knows who will constitute future High Court benches, one can be sure that future Courts will not restrict or qualify the operation of a constitutional alteration that entrenches a new body into a new Chapter of our Constitution. This is why it is crucial that the precise siting and wording of any proposed alteration is constitutionally sound.

<u>The fundamental structural problem of the proposed Voice model</u>

(5) The fundamental structural problem of this Voice model is best understood by looking at the plain words of s.61 of our Constitution:

> *The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.*

(6) Section 61 reflects the Monarch's most solemn duty under our Constitution: protection of our foundational law. Thus, the Governor-General, as the Monarch's representative, has power in s.5 to prorogue the Parliament and dissolve the House of Representatives, and, similarly, has power in s.64 to terminate Ministers who serve at the Governor-General's pleasure. These powers ensure the Crown can protect the constitutional order and that disputes, especially between Parliament and Executive Government, if they go unresolved, as, for example, in November 1975, will be resolved by the Australian people at a general election, as in December 1975.[5]

(7) The Voice, erected in a new Chapter IX, will exist outside and beyond both the Parliament's power to abolish and the Executive government's power to direct. The Voice will be a new fourth constitutional '*locus*' if not a fourth branch of government. It is difficult to see how any Governor-General could perform their s.61 duty as s.129 is now drafted.

<u>The specific problems of the proposed Voice model</u>

(8) While not an exhaustive list, the Voice has these specific problems:

(a) *Preamble*: I supported in 1999 the failed proposed amendment which included these words: "*...honouring Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the*

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[2] *Engineers* (1920) 28 CLR 129 at 149 per Knox CJ, Isaacs, Rich, and Starke, JJ.
[3] *Engineers* (1920) 28 CLR 129 at 162 per Higgins J.
[4] *Re Canavan* (2017) 263 CLR 284 at 299 [19], 301 [27], and 307 [46]-[47], per the Court.
[5] See the Statement by the Governor-General, Sir John Robert Kerr, AK, GCMG, GCVO, QC, of 11 November 1975.

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life of our country." Placing indigenous recognition at the very end of our Constitution in Chapter IX - and not in the Preamble – makes no sense, at all.

(b) *Scope of "representations" in (ii)*: It is doubtful that the Parliament could validly legislate or the Executive could validly act or decide, without, at the least, responding to Voice representations already made under (ii). The Voice will be a constitutional body with standing to approach the High Court for relief where the Voice considers it has received insufficient cooperation from Parliament and/or Executive to make an informed representation – or where its representation was ignored. Any High Court would give great deference to the Voice, an entrenched body, in respect of its constitutional power in (ii) to make representations - and rightly so.

(c) *Scope of clause (ii)*: Noting both the language of (ii) and that all of (ii) is beyond Parliament's power to regulate under (iii), no future High Court will restrict the Voice's operation by narrowly construing so general a phrase as "*...matters relating to Aboriginal and Torres Strait Islander peoples*". The "*matters relating to*" in (ii) includes, potentially, all matters within the Commonwealth's power and competence. It is absurd to pretend otherwise.

(d) *The s.75(v) issue*: Remedies are available in the High Court's original jurisdiction against "*officers of the Commonwealth*". Will members of the Voice be "*officers of the Commonwealth*"? If yes, as seems correct, then Voice members will be liable to orders against them for *mandamus*, prohibition, and injunction. This is lunacy.

My Proposed Solution

(9) My proposed solution is to site a constitutionally safe Voice in Chapter II as a body that advises the Executive Government:

Section 70A - The Aboriginal and Torres Strait Islander Voice

(i) There shall be a body, to be called the Aboriginal and Torres Strait Islander Voice (Voice), which shall be convened by the Governor-General in accordance with (ii) to advise the Executive Government of the Commonwealth on special laws, measures, and policies, that directly relate to Aboriginal and Torres Strait Islander people.

(ii) The Parliament shall have the exclusive power to legislate for the meetings, composition, structure, membership, duties, activities, powers, and procedures, of the Voice.

(iii) Members of the Voice are not officers of the Commonwealth for the purposes of s.75(v).

(iv) The States and Territories shall not create or maintain any entity that is similar in form to the Voice or that purports to exercise any functions and powers of the kind conferred by the Parliament on the Voice.

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(10) My model avoids, entirely, the problems of the current Voice model. Instead, the Voice sited in Chapter II is convened by the Governor-General to advise the Executive Government, which is where policy is made and proposed laws are originated, on laws and policies that directly relate to indigenous peoples. The Parliament in my model legislates, exclusively, for the Voice and its activities – and these laws can be amended as future circumstances require. The s.75(v) problem is, also, eliminated by my model. A Voice sited in Chapter II is both constitutionally safe and effective – and, also, ideally placed to negotiate any *Makarratta* or Treaty.

(11) A key result of the 1967 referendum was to ensure the Commonwealth has primacy in relation to legislating for Aboriginal and Torres Strait Islander peoples. My model intentionally denies capacity to the States and Territories to duplicate, complicate, and meddle in, the Voice's work as a national body.

Other Alternatives

(12) While not ideal for the reasons that I have outlined, the only other potentially safe (if less sensible) course is to delete (ii) altogether from the proposed s.129 and confer on the Parliament the exclusive power to legislate for the Voice.

Conclusion

(13) I remind this Committee that there are many Australians who wish to support (in my case, again) the constitutional recognition of our Aboriginal and Torres Strait Islander Peoples. I would support, with zeal, a Voice sited in Chapter II. Whatever else we may disagree on, the price of indigenous recognition cannot be – and must not be – a poorly drafted amendment that risks destabilising our Constitution.

(14) Australia's parliamentarians have the gravest moral and constitutional responsibilities to promote the common good, to preserve our national solidarity, and, especially, to avoid imposing on the Australian people the abominable choice of either voting for a potentially hazardous constitutional alteration or voting against their indigenous sisters and brothers. If you proceed down this malign path and do not improve the wording of the proposed Voice alteration, then rest assured that history will judge each of you harshly – and most deservedly so.

(15) I will speak further on this Submission if I am invited by this Committee to do so.

[redacted]

Thursday, 13th of April, 2023

G.A.F. Connolly