A modest voice can define and unite us.

Louise Clegg[1]

I am grateful to Uphold and Recognise for holding this conference and especially for holding this important session. The work of Uphold & Recognise has been essential to the Indigenous recognition project. I commend you for the dedication and integrity with which this has been pursued over many years.

I know that I have ruffled a few feathers in my advocacy around the Voice. But I come with my own truth telling. I laughed when I read Professor Brennan's tale about the pastoralist. Country people can be direct. Forgive me my directness in what follows.

I also come from middle Australia, where I live near Goulburn, and before that where I grew up in Western New South Wales, not that far from where some of the worst-off Indigenous Australians live. I have lived for more than half my life in places where referenda fail. We simply must not go through a referendum on indigenous recognition which is divisive, or worse still, sets the future up to fail. For six months I have been saying to anyone who would listen that the current Garma amendment is headed for failure because, well, to put it colloquially, it is simply too big and too radical. I have also come to realise I am also in a unique position. If I were living in Sydney and practising in the way I used to, with a mostly Commonwealth government administrative law practice, and hoping for briefs from large law firms, I simply could not speak out. So I do this in the very best tradition of the bar which has probably seen better days.

I also come with my own proposed amendment, with which some of you are familiar. It offers up a smaller voice. But it is substantive, real and not merely symbolic. That said, it is more modest than Professor Brennan's, which is itself a whole lot more modest than what is currently on the table. So my proposal will excite no-one in this room. But history shows that an abject lack of excitement – and instead, something which makes plain common sense to almost everyone – is what is required to succeed in a referendum.

The Garma amendment is radical and will likely end badly

This session is mostly about alternative constitutional amendments. So at the outset it is important to establish why another path is needed. It is needed because the Prime Minister's Garma amendment presents an unknowable risk that will change our country and probably end badly.

Why? Because it sets up a new repository of power exercised exclusively by Indigenous people which provides privileged access to other repositories of power in respect of matters that affect all of us – but with no accountability to the rest of us. In other words, it is a privileged voice on everything.

This will not be well tolerated in a modern democracy already struggling with increasing polarisation and populism.

A transformative institution of State operating as a new arm of government

On constitutional characterisation it is hard to go past that advanced by those who designed the Garma amendment. We are being asked to insert an entirely new chapter in the Constitution,[2] which is unprecedented here or anywhere in comparable countries. An architect of the Garma amendment says it supports a new "foundational institution of State". It will "provide an important reordering of the hierarchy of the State" [and] ...

[1] Barrister, PG Hely Chambers. This paper underpinned an address at the forum "Indigenous Constitutional Recognition through a Voice" hosted by Uphold & Recognise in Sydney on 28 February 2023.

[2] This is significant because of the critical importance of text and structure to the historical and ongoing coherence of Australian constitutional jurisprudence. If a new foundational institution of State is inserted into the Constitution to join with the existing institutions of State (the Parliament, the Executive, and the Courts) it will infuse a lot of future constitutional jurisprudence, and over the course of time it will necessarily recalibrate and adjust the current constitutional order.

"provide[s] a form for the transformation in Australia's established constitutional institutions."[3] This is entirely correct. While strictly speaking it does not take away anything from any individual, or from existing institutions,[4] that is beside the point. The insertion of a new group right which has a very extensive remit will seriously alter the Constitution and our system of governance. It is designed to do that.

The No case says the Garma Voice will be a "shadow government"[5], but this is an understatement. The new institution of State will operate as an entirely transparent new advisory arm of government.[6] It has been said that Chapter IV with its now defunct Interstate Commission was envisaged by the founders as a fourth arm of government.[7] It is in this context that Professor Appleby compared the Voice to the Interstate Commission but pointed to how the Voice could learn from its failures."[8] Again, this is correct, but it is worth noting that the Interstate Commission's remit was confined to trade and finance, whereas the remit of the Garma Voice, like the Parliament and the executive government, extends to everything.

Political power with no guardrails or accountability

Given its character and novelty, we must consider whether the Garma amendment is as 'constitutionally sound'[9] as its proponents claim.

Consider this. When the founders embraced the Westminster institutions of government in our 1901 rulebook, those repositories of power came to us embedded with conventions, guardrails and checks and balances developed over centuries. Each of them came with their own unique built-in accountability to the public, calibrated with each other. The relative certainty about how those institutions operated and continue to operate has contributed to our political stability for more than a hundred years.

Mr French says the Garma Voice is a "big idea" "but low risk".[10] It sure is big, but it's not clear at all why it is safe, when he acknowledges that its "real power lies in the democratic imperative, [its] political power..."[11] Professors Appleby and Williams admit they have no idea how it plays out: "None of this gives us particularly exact predictive capacity about the success and nature of the constitutional relationships that will develop around the Voice."[12] They too propose that its success as a constitutional entity will depend on the strength of its political constituency.[13].

This should raise alarm bells. The Garma amendment's most thoughtful proponents accept that its constitutional relationship with other repositories is unclear, and its success depends on political power. These are serious defects in in the context of any constitutional reform, let alone one that proponents say will transform the constitutional hierarchy, and which by its explicit design has no accountability whatsoever to the broader Australian

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[3] Gabrille Appleby and Eddie Synot, 'Constitutional conversation, institutional listening and the First Nations Voice', 4 March 2021 https://www.auspublaw.org/blog/2021/03/constitutional-conversation-institutional-listening-and-the-first-nations-voice

[4] Constitutional Expert Group, in Communique for the Referendum Working Group, 13 December 2022, Attachment at [4]. Communique for the Referendum Working Group - December 2022 | Aboriginal and Torres Strait Islander Voice (niaa.gov.au)

[5] Gary Johns, 'Why the Indigenous voice is a bad idea on so many levels', *The Weekend Australian*, (online at 25 February 2023).

[6] The other arms are the Parliament (Chapter I), the Executive (Chapter II) and the Courts (Chapter III).

[7] Stephen Gageler, 'Chapter IV : the Inter-State Commission and the regulation of trade and commerce under the Australian Constitution',(2017) 28(3) *Public Law Review*, 205 at 209, 217. See also Michael Coper, 'The Second Coming of the Fourth Arm: The Present Role and Future Potential of the Inter-State Commission', (1989) 63 *Australian Law Journal*, 731.

[8] Appleby and Williams, 'The First Nations Voice: An Informed and Aspirational Constitutional Innovation', Indigenous Constitutional Law blog, 25 March 2021, https://www.indigconlaw.org/home/the-first-nations-voice-an-informed-and-aspirational-constitutional-innovation, accessed 24 February 2023.

[9] n 4. The Constitutional Expert Group stated: "The Expert Group agreed that there could be – and gave consideration to – different policy and process approaches to key features of the draft [Garma] constitutional amendment. The Group advised that the draft amendment is constitutionally sound in providing a strong basis on which to conduct further consultation."

[10] Robert French, 'The Voice — A Step Forward for Australian Nationhood', Exchanging Ideas Symposium, Judicial Commission of New South Wales New South Wales Bar Association and New South Wales Law Society by Sydney, 4 February 2023, par 40. See also at par 50: "The Voice [will be] a significant institution in our representative democracy."

[11] Robert French, unpublished remarks provided during delivery of a short paper given at the Gilbert & Tobin Constitutional Law Conference 2023, 10 February 2023. Recorded in Session 5 at https://youtu.be/hwIlGO51GEU at 59.40.

[12] Appleby and Williams, n 8.

[13] Appleby and Williams, n 8.

public. With credit to Donald Rumsfeld, it raises the spectre of countless "*known unknowns"* and likely a few *"unknown unknowns*" too.

While some professionals, CEOs, academics and even retired Chief Justices are comfortable with big, abstract ideas, it is unlikely that non-Indigenous middle Australia is looking for a freewheeling politically charged transformative fourth arm of government in its constitutional relationship with Indigenous Australians.

A political body will behave politically

What do we know about the day-to-day operation of the Garma amendment?

Most here today would be familiar and very comfortable with the vision in the Langton-Calma Indigenous Voice Co-design Process Final Report.[14] However the average Australian has no idea what is in store. There is no way of knowing how the Voice will finally emerge, because the government cannot be bound now or in the future as to how the Voice will operate. But as the Prime Minister has said, we can get a sense of what the Garma Voice *might* look like.

Given the practical requirement to assemble in Canberra, a twenty-four member Langton Calma model will likely operate out of a renovated Parliament House, or a new building on the Lake, appropriate for a foundational institution of the State. The Voice will set up its own committee,[15] possibly by establishing a permanent Joint Standing Committee,[16] and will engage with other parliamentary committees.[17] It has been suggested by Garma Voice architects that the body should have Senate estimates style inquisitorial power to compel people, including Ministers, and senior public servants, to attend hearings and for documents to be produced at hearings.[18] The Langton Calma report makes clear the Voice will require its own significant bureaucracy.[19] However an enormous new bureaucracy will be required in the Westminster repositories to help law makers and Ministers who will be required to meet consultation standards[20] in respect of any policy area nominated by the Voice, to prepare impact statements on bills and regulations.[21] It is expected that the Garma Voice will advise the National Cabinet,[22] and the Garma Voice might have a seat at the table of the National Cabinet.[23] It is anticipated by some that members of the Voice will have parliamentary style offices and half a dozen support staff, and conduct business in a new chamber just like Westminster politicians. And why wouldn't they, as members of a new institution of State with so much work to do?

Yet it surely must be questioned whether a Voice where its members look and behave a lot like politicians is to anyone's benefit. It would be fair to say that Australians might initially be cynical to see doorstop interviews with members of the Voice on parliamentary sitting days. Ordinary people would be unimpressed to witness bickering over whether the Voice has been sufficiently listened to on things that also matter to them. They would likely grow tired of members' appearances on current affairs programs about the hot button topics of the day. They would be furious to see the inevitable horse-trading between members of the Voice deploying their political power and Westminster politicians about laws that apply to all of us. In other words, ordinary Australians would grow angry if they were to see another political body and its members behaving politically. There will also be the inevitable

[14] Indigenous Voice Co-design Process Final Report to the Australian Government, July 2021. (**LC Report**)
[15] Ibid 172, 178,
[16] French, n 11, at 55:12.
[17] n14, 169.
[18] Ibid, 172. The LC Report recommends the Voice should not possess inquisitorial powers based on concerns about an adversarial stance. However in March 2021 ANTaR submitted the Voice should be given access to Ministers and senior public servants through an 'estimates' process a direct accountability mechanism. In April 2021 a number of architects of the Garma amendment, Professor Gabrielle Appleby, Professor Megan Davis, Associate Professor Sean Brennan, and Dr Dylan Lino made a similar submission.
[19] Ibid 181.
[20] Ibid 159 -166.
[21] Ibid 159 -166. See also French, n 11, at 55:20.
[22] 'Indigenous voice not in national cabinet, says Linda Burney', *The Australian*, (online at 7 February 2023).
[23] Ibid. Minister Burney clarified that there would be no "permanent seat' in the National Cabinet, apparently leaving the door open to members of the Voice attending some meetings of National Cabinet. See also 'Door left open to national cabinet to be advised by Indigenous voice', *The Australian*, (online at 6 February 2023).

temptation for actors external to the Voice, elected and unelected, to whip up resentment against the Voice for their own political interests.

Of course, there will be many benefits for Indigenous and non-Indigenous Australians from a Voice of any kind. In some quarters it would bring a sense of healing and of being listened to. The Parliament, the government and the bureaucracy would unquestionably obtain useful advice from the Voice, and the Voice would have media support and backing from across the political spectrum.

However, this vision of a big, powerful Voice embedded both constitutionally and in practice in all aspects of national law and policy making is surely a recipe for endless political disputation. It is naïve to suggest that the immense political power derived from a referendum which carried the Garma amendment will not be deployed. A polarised response by Australians is a serious prospect.

I am compelled to say, in the end, no good can come of this. A huge reservoir of goodwill for Indigenous Australians exists and continues to grow in the Australian community. As Mr French said in his swearing in speech as Chief Justice in 2008, "our awareness and recognition of [Indigenous] history is becoming, if it has not already become, part of our national identity."[24] This is truer now than it was then. While we still have no answers to the terrible suffering of our very worst off Indigenous people, permanent, constitutionalised conferral of a privilege to a small group in our society is surely not the way forward.

The Garma amendment risks depleting the goodwill, undermining the new identity, and reversing the precious progress we have made in recent years.

An amendment must adhere to the principles of the Referendum Council/Gleeson

The Referendum Council 2017 is the most recent government appointed body comprised of different experts from across the political spectrum to address constitutional issues with respect to indigenous recognition. The Garma proposal is light years away from anything envisaged by the Referendum Council.

In its final report, the Referendum Council made a single recommendation for Constitutional amendment:

> "That a referendum be held to provide in the Australian Constitution for a representative body that gives Aboriginal and Torres Strait Islander First Nations a Voice to the Commonwealth Parliament. One of the specific functions of such a body, to be set out in legislation outside the Constitution, should include the function of monitoring the use of the heads of power in section 51 (xxvi) and section 122. The body will recognise the status of Aboriginal and Torres Strait Islander peoples as the first peoples of Australia".[25] [emphasis added]

The final report also contained the following passage explaining the recommendation:

> "The constitutional description of the function of the body and its relationship to the parliamentary process is obviously of central importance. The concept of providing advice on certain matters requires definition of the relevant matters. For example, it would not be realistic to provide advice on all matters 'affecting' Aboriginal and Torres Strait Islander peoples because most laws of general application affect such peoples. On the other hand, it may be too narrow to limit the subject matters to laws with respect to Aboriginal and Torres Strait Islander peoples because some laws of general application have particular impact on or significance to such peoples."[26] [emphasis added]

In mid-2019 former Chief Justice Murray Gleeson, who had been a member of the Referendum Council, delivered a landmark speech at Gilbert & Tobin.[27] It is required reading for anyone interested in this issue. Mr Gleeson said:

[24] n 10 at par 3, citing swearing in speech in 2008.
[25] Final Report of the Referendum Council 2017, 2 and 38.
[26] Ibid 36.
[27] Murray Gleeson, 'Recognition in keeping with the Constitution: a worthwhile project', Uphold and Recognise, Sydney 2019.

> "There is nothing new about the idea of a body to represent Indigenous people. …. It is difficult to see any objection in principle to the creation of a body to advise Parliament about proposed laws relating to Indigenous affairs, and specifically about special laws enacted under the race power which, in its practical operation, is now a power to make laws about Indigenous people. If such a body can be designed to the satisfaction both of Parliament and of Indigenous people, then, logically, the question is whether such a body should be given constitutional status, as an appropriate form of Indigenous recognition."[28] [emphasis added]
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> ……
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> "In our constitutional development we have arrived at the situation in which the Constitution confers on the Parliament a power to make special laws for the people of a certain race, and that power, supplemented by the Territories power, is used in practice as a power to make special laws for Indigenous people. A proposal that the Constitution should provide for Parliament to design, establish, and determine from time to time the make-up and operations of a body to represent Indigenous people, with a specific function of advising about the exercise of that power, hardly seems revolutionary.
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> It has the merit that it is substantive, and not merely ornamental. It is not aimed at assuaging the sensibilities of some non-Indigenous people. It would give Indigenous people a constitutionally entrenched, but legislatively controlled, capacity to have an input into the making of laws about Indigenous people or Indigenous affairs."[29] [emphasis added]

Mr Gleeson appears to suggest the statutory body should be designed first, and then and only then, should the nation address the question of whether the body should be afforded constitutional status for recognition purposes. Given the magnitude of what is now on the table, this approach has even more appeal than it had in 2019.

The Garma amendment exceeds in numerous respects what could be taken to be the express and implied limits on a constitutional amendment that were contained in the Referendum Council's final report, and especially in Mr Gleeson's speech.

Those limitations are:

1. in terms of subject matter, the entrenchment itself should be confined to Indigenous affairs and/or special laws for Indigenous people. In other words, it must not extend to laws of general application: and
2. in terms of government activity within the above subject matter, the entrenchment should only extend to proposed laws, and not executive action.

A modest proposal conforming to the Constitution and our culture

A new Aboriginal and Torres Strait Islander clause

Guided by these principles, my proposal is to wholly reconstruct s 51(xxvi) as follows:[30]

> "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:
>
> ……..

[28] Ibid 9.
[29] Ibid 11.
[30] A number of amendment proposals have been located in s 51(xxiv). For example, in 2020 Professor Anne Twomey published a possible amendment which is a worthwhile option, but lacks any reference to a representative body: "(xxvi): *Aboriginal and Torres Strait Islander affairs; and in relation thereto, the interaction between Aboriginal and Torres Strait Islander peoples and the Parliament and Government of the Commonwealth*", https://theconversation.com/there-are-many-ways-to-achieve-indigenous-recognition-in-the-constitution-we-must-find-one-we-can-agree-on-142163

(xxvi) Aboriginal and Torres Strait Islander people for whom it is deemed necessary to make special laws after the Parliament has received representations about proposed laws from a body which represents Aboriginal and Torres Strait Islander people.

This solution, which could go hand in hand with either a new preamble or nationwide statutory Statements of Recognition,[31] rebuilds s 51(xxvi) to better reflect its actual function. It provides new balance and fairness. It accords with reality in that it reflects what is already being done.

Such an amendment would provide a substantive group right which is still unprecedented by comparable democracy standards. It provides recognition for Aboriginal and Torres Strait Islander people at the same time. By constraining the group right within section 51(xxvi), it stays in a well-travelled, familiar lane. It is not transformative and could not be said to be a fourth arm of government or a third chamber of the parliament. It accords with the text and structure of the constitution. It reflects our political culture. It might satisfy the pub test.[32]

Activities beyond advising the parliament on proposed special laws, such as the provision of advice to Parliament and the government about proposed laws of general application, and policies of any kind, can be regulated by statute. There would likely be significant political debate, and over time appropriate experimentation around how these policy objectives could be fulfilled.

An elegant feature of this amendment is that the entrenched representative body has work to do only for as long as special laws for Indigenous people are required. In that way it could be hoped that the operative part need not actively live on in our constitution forever. But the recognition will always be there.

Needless to say, a body referenced in a new s 51(xxvi) Aboriginal and Torres Strait Islander head of power could not possibly be characterised as a foundational institution of State. It would not provide the necessary political imprimatur for any iteration of an advisory body to be permanently located in Parliament House, for instance. That is partly a reflection of its text, its location in s 51, and because as a practical matter the s 51(xxvi) body would likely only have constitutional work to do on the relatively infrequent occasions when special laws are proposed.[33]

Some have raised questions about the so-called justiciability of my proposed amendment.[34] Courts could not entertain s 75(v) judicial review applications under this amendment, because s 75(v) applies to only executive decision making and not to laws made by the Parliament. Any other kind of constitutional litigation is likely untenable because by employing the phrase 'proposed laws' in the second part of the placitum there is a clear signal to the Courts that this part is intended to be non-justiciable.[35] In any event, given the relatively infrequent occasions upon which s 51(xxvi) is invoked to make special laws, even if I am wrong about this, the prospect of floodgates litigation under this amendment is zero.

Political words do not belong in the Constitution

The primary difference between my proposal and Professor Brennan's is its location, and the fact that I cannot endorse the inclusion of the word "Voice" in any amendment. This word, and the words "There shall be…"[36] cannot realistically be accommodated in s 51. The word 'Voice' as either a common or proper noun has no legal meaning,

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[31] n 25, 2. The Referendum Council also recommended "That an extra-constitutional Declaration of Recognition be enacted by legislation passed by all Australian Parliaments, ideally on the same day, to articulate a symbolic statement of recognition to unify Australians."
[32] n 25, 38 and 39. This accords with the Referendum Council's observations that an amendment be modest, substantial, reasonable, unifying and capable of attracting the necessary support. Specifically there is a suggestion at 39 that an amendment be "*single*, modest and *substantive*". [emphasis added].
[33] Section 51(xxvi) appears to have supported laws made by the Parliament on 16 occasions since the 1967 Referendum. See list of s 51(xxvi) laws passed by the Parliament provided by the Parliamentary Library in Andrew Bragg, 'The Indigenous Voice to Parliament – Five reasons why the Voice is right', at p 2 – 3, (undated, unpublished).
[34] Shireen Morris and Noel Pearson, 'Conservatives eat their own words on voice', *The Weekend Australian*, (online at 25 February 2023).
[35] See *Osborne v Commonwealth* (1911) 12 CLR 321, 336 (Griffths CJ), 352 (Barton J), 355 (O'Connor J) ; *Western Australia v Commonwealth* (1995) 183 CLR 373, 482 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ). Note that it is possible to tinker with the drafting to remove any imagined foothold, but this might necessitate the removal of a reference to a representative body which possesses the desired substantive group right. See for example Anne Twomey's 2020 amendment at n 30.
[36] These words strongly convey the establishment of an 'institution of State'. See for example see ss 62, 71, 72, and especially s 101 which has been particularly influential in the drafting of the Garma amendment.

and it is self-evidently not constitutional language. It is emotive and being used as a political catchcry or a kind of slogan. In *Adelaide Company of Jehovah's Witnesses v The Commonwealth*[37] when addressing the difficulties posed by ambiguity in the word 'free' in s 116, Chief Justice Latham lamented:

> "When a slogan is incorporated in a constitution, and the interpretation of the slogan is entrusted to a court, difficulties will inevitably arise."

Of course, the inclusion of 'the Voice' in the both the Garma and Brennan amendments create an unmistakable textual and emotive link to the Uluru Statement from the Heart. Beyond having the potential to cause ongoing problems in constitutional jurisprudence, it will distract and have adverse consequences for the referendum campaign. As a slogan it will be used by proponents and detractors for political leverage. It will appeal emotionally to some voters. But it will also permit detractors to link the proposal directly to what they regard as radical elements of the Uluru Statement: "Voice. Treaty. Truth."

Should "The Voice" nomenclature end up in the Constitution it will become a political foothold weaponised by friends and foe. It would be a regrettable step as the words in our Constitution have never been a political distraction. Taking the word out of the amendment does not mean that the body can't be referred to as a 'voice' to Parliament. A statutory body fulfilling broader advisory functions could, and initially almost certainly would, go by that name. But entrenching 'the Voice' leaves no flexibility for the future.

The way forward

I endorse Professor Brennan's comments about the self-evident defects in process that now have us hurtling towards a referendum on the Garma amendment. We have never conducted a public process to scrutinise the wording of the Garma amendment or any other proposal. It cannot possibly be said that the government's Constitutional Expert Group is performing this function.[38] A tit for tat debate in the national media is no substitute for the thoughtful, respectful work that needs to be done. The best option would be to slow things down and convene a new Constitutional Amendment Council, comprised of experts with genuine viewpoint diversity from across the political spectrum to address the question of a suitable amendment. Failing that, a public forum or Constitutional Convention with structured and open debate could be conducted so that interested Australians can judge matters for themselves. That could be followed by an advice from the Solicitor General on the pros and cons of realistic options. Only at that point can a parliamentary committee seriously grapple with the task of deciding which proposed amendment should be submitted to electors under s 128.

In conclusion, I say one thing. Words have consequences, and in constitutions words matter because they define societies.

And I would pose a single question for everyone, but especially the Garma amendment architects: do you want a revolution, or a solution?

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[37] *Adelaide Company of Jehovah's Witnesses v The Commonwealth* (1943) 67 CLR 116, 126.

[38] The Constitutional Expert Group is chaired by the Attorney General and Minister Burney and therefore not independent of government. The operations of the Constitutional Expert Group are not transparent. The Expert Group's output gives no indication that it is a body with any viewpoint diversity on the issues it addresses. The Expert Group does not provide the government or the public with conventional legal advice, but rather provides a series of unqualified and sometimes contestable conclusions and/or declarations. The Expert Group's first advice is at https://voice.niaa.gov.au/news/communique-referendum-working-group-december-2022 and the second advice is at https://ministers.pmc.gov.au/burney/2023/communique-referendum-working-group#attach