STONE, Professor Adrienne, Director, Centre for Comparative Constitutional Studies, Melbourne Law School, University of Melbourne

CHAIR: We will reconvene the committee. Welcome. There are some technical things I need to do before we get underway. Thank you for meeting with the committee today. The committee has been asked by the Commonwealth parliament to look into constitutional recognition relating to Aboriginal and Torres Strait Islander peoples. The resolution of appointment outlines in more detail the aspects for the committee's consideration. As co-chairs of the committee, we have made statements expressing our wish to hear more from First Nations peoples as we start our work. We've also explained that we will continue to receive submissions and hear more views around Australia in coming months.

We need to ensure that everyone present is aware of procedural considerations. Today the committee is taking a *Hansard* record of the proceedings, but it is not being broadcast. Microphones aren't broadcasting or amplifying your words in the room. They are likely to be on and recording at any given time. The committee may wish to make the *Hansard* record public at a later date, but we will seek your views on this before doing so. If you feel very strongly that you don't want your views recorded in any way, we'll give consideration to that.

When you provide information to a committee, you are covered by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage you on account of the evidence given, and such action may be treated by the parliament as a contempt. It is also a contempt for you to give false or misleading information. If you make an adverse comment about another individual or organisation, that individual or organisation will be made aware of the comment and given a reasonable opportunity to respond to the committee.

Would you like to make a brief statement?

Prof. Stone: Sure. Perhaps I should say what I take to be my purpose here today. It is not to make a submission to the committee; it is rather to provide as much useful background from the perspective of a constitutional lawyer as I can to you as you begin your deliberations. I really propose to work through what have been the major proposals that have come forward in this long process and talk about what might be their advantages and disadvantages from a constitutional lawyer's perspective. In doing so, I realise it's a little difficult for me to gauge how much detail and how much background to assume.

Ms BURNEY: A fair bit.

Prof. Stone: Yes, I would think so. I'm most willing either to be sped up or to be slowed down and asked more questions, and so that's what I propose to do.

CHAIR: I should apologise for the co-chair's non-presence today and that of our other members and senators.

Prof. Stone: Of course. I will go through it.

As a matter of background, the way I view this as a constitutional lawyer is that this process is responding, if we take a large perspective, to three rather unusual features of the Australian Constitution. They are, first of all, that it contains provisions, well known to all of you, I would think, that are, frankly, relics of 19th-century racial attitudes that most Australians would no longer identify with. Those are found in particular in sections 25 and 51(xxvi). The second thing that is unusual about the Australian Constitution, viewed comparatively, is that, unlike the constitutional systems of our closest constitutional cousins like New Zealand, Canada and the United States and unlike other major democratic constitutions that deal with Indigenous peoples such as those of the Scandinavian countries, the Australian Constitution alone does not contain any provision that recognises or accords special status to the rights of Aboriginal people. So there's an exceptional element of the Australian Constitution there. The third exceptional or unusual feature of the Australian Constitution is that, consistent with the absence of constitutional rights, there is no either prohibition on discrimination or guarantee of equality. I think those three things combine together to create a case for some kind of change.

I want to deal with what's been proposed in two groups, because I think they're quite different. I think I can deal together with the expert panel report in 2012 and the 2015 joint select committee report, because what has come out of those, I think, are essentially three classes of proposal that vary a little bit in detail but have a lot in common. First, let me deal very quickly—because I think it's the least complicated and least controversial—is simply the removal of section 25. Section 25, as I think you would know, is a section that seems to proceed on the basis that states might legally enact racial exclusion from their franchise. The section actually operates as a mild kind of disincentive to doing so, but I think the fact that it's there should give us some reason for concern, not least because of the way in which it might interact with the Racial Discrimination Act. You would ordinarily assume that the Racial Discrimination Act might prevent states enacting a racial exclusion from the franchise, but in light of section 25 it might be possible to make a kind of legal argument that limited the operation of the Racial Discrimination Act in those cases. I would hope that the circumstances that would give rise to that kind of

argument would simply never arise in Australian democracy, but I think it's a matter of concern that it's sitting there in the Constitution.

The second is the reform of section 51(xxvi). Again I assume the background is well known to you, but I really am happy to talk about it in more detail if necessary. Section 51(xxvi), of course, is the races power: the power for the Commonwealth to make laws for the people of any race for whom it's deemed necessary to make special laws. It's the one that was amended in 1967 to remove the words ' other than the aboriginal race in any State' and to make clear that it's a power over all people of any race, including the Aboriginal people. One quick response you might have to the races power is, 'Why not just treat it like section 25 and just remove it?' because there's no provision like this anywhere in any other constitution in a democratic country in the world. The problem, as will be well known especially to some of you, is that it provides the Commonwealth with power to do some very important things, including providing the legislative backing for the native title regime and providing laws for the protection of Aboriginal and Torres Strait Islander heritage. The proposals seem to take this into account.

In general, what is being proposed has not been the removal of section 51(xxvi) but its amendment in a way that makes its adverse use not possible. Two kinds of amendments have been proposed. One is to commence the section with words that contain a recognition of the special legal and, I think, moral status of Indigenous people in the Australian polity. You'll see words like 'recognising that the first peoples of Australia were the traditional owners of these lands' et cetera. The inclusion of those words, I think, has sought to do two things. It provides some basis on which to limit the use of the power. If the power is expressed in light of an understanding of the special nature of Aboriginal people then it's likely to be interpreted in a way that would be used to their benefit rather than to their detriment. It also responds, I think, to the desire among some people to have an important symbolic statement in the Constitution. It's hard in the Australian Constitution for us to get it into the preamble, for technical reasons, and so it's put in this section, where it serves a double purpose.

So those are those words. The second thing that is often proposed with section 51(xxvi) is to limit the power in some way. It's currently just expressed as a power to make laws. You commonly see in these proposals—and there are numbers of them—that it is a power to make laws but it doesn't extend to making racially discriminatory laws. This puts a limitation in the power itself. Alternatively, sometimes you see it proposed—although I don't think any of these were ultimately adopted—that it might be a power to make laws for the advancement of Aboriginal and Torres Strait Islander peoples. That's another possibility.

I just mentioned that some proposals suggest that it ought to be made clear that the new section, if it were called section 51(xxvi)(a) or whatever, couldn't be used in a racially discriminatory manner. There's another proposed provision which could be used instead of or in addition to that limitation, which would be to have a separate, freestanding provision that provides a prohibition on racial discrimination in the Constitution. These are two very distinct ways of proceeding. They would have very different effects.

A limitation internal to the new races power or whatever we begin to call that would affect only those circumstances where the Commonwealth is relying upon the races power in order to enact laws. It would not prevent the use of other powers in racially discriminatory ways that would be dealt with by other legal mechanisms.

By contrast, a distinct non-discrimination clause would operate in a much more expansive fashion and would limit the Commonwealth's law-making power generally so that it would not be in a position to use any of its legislative powers to enact racially discriminatory laws. Depending on how the clause was framed, it may limit Commonwealth executive power. It may affect the interpretation of the common law. It may limit, in other words, the exercise of judicial power.

In other words, a prohibition on racial discrimination that is proposed as a separate and freestanding one would be in some ways a bit of a break from our constitutional tradition. I'm trying to find a neutral word because I don't want to suggest that a break from our constitutional tradition is a problem; it may or may not be. But let me just highlight the fact that it would insert into the Australian Constitution a provision limiting governmental power in the name of rights and would in my view be the first such provision. Some people take the view that somehow the provisions already operate in that way. I don't, but even those people who take that view would acknowledge that they're very limited. This would be a significant step in that direction.

I'll just say a couple of words on them and then I might stop in case there's anything further you'd like me to say. I do want to say that I think they're all technically sound. I think the expert panel concluded that and the joint committee concluded that. There is no reason why the Australian Constitution could not be amended in these days. I think the proposal to remove section 25 is pretty hard to disagree with. I think the proposals to amend section 51(xxvi) are charting a difficult course between trying to keep the power to enable it to continue to provide the Commonwealth with important sources of power for native title and heritage protection and trying to

prevent discrimination. I think the most ambitious of them, which may be a good or a bad thing, depending on your perspective, is the proposal for a racial non-discrimination clause.

I'm happy to go on and talk to what I think is a separate set, which is the Uluru process, if there's nothing you want me to elaborate on.

CHAIR: You might want to just touch on this notion that if there was an entrenchment of the voice—subject to the words; we don't know what those words would be; a head of power would be created that enables the parliament to set up a voice for the First Nations—that would lead to the creation of a third chamber of the parliament.

Prof. Stone: My short answer to that is that it doesn't; it depends on what it would say, but I don't think there is any reason we need to think it would be. I will turn to the Uluru process and the proposal. The reason I have separated them out is that, as a constitutionalist, what stands out for me is how very different the context is for the proposals that come out of the Uluru statement and the final report of the Referendum Council.

Ms McGOWAN: Could you say that again.

Prof. Stone: It's a very different context than the expert panel in 2012 or the 2015 report; it is a different context in ways that are constitutionally significant. So the process is entirely different because of the consultative nature of it, which was very broad based and involved the First Nations regional dialogues process. Viewing it as a comparison that looks worldwide at constitutional reform and law-making processes, it responds to what is practically a universal consensus that constitutional reform needs to be done in highly participatory ways. It is, of those processes, the one that best seems to give effect to that idea.

The second thing that really stands out about it is the level of consensus that was achieved through the First Nations regional dialogues. Constitution making always occurs in circumstances of disagreement. It is inevitable in complex societies that people disagree. To have a level of consensus is, at least, unusual.

The third thing that really stands out is the modesty of the proposal that seems to come out from here. As a constitutional lawyer, I view this as quite a modest proposal in most ways. Most significantly, as far as I can see, it abandons two things. It abandons the idea that there ought to be in the Constitution a broadly framed statement of recognition and values about Aboriginal and Torres Strait Islander people and it abandons the proposal for a racial non-discrimination clause—which, as I have already said to you, I think would have been quite a big break from our constitutional past. So I view it is very modest.

There are three elements. The first one is the voice, which I will come to in a moment. The second one is the makarrata commission, which would supervise agreement and treaty making and also facilitate the truth telling. And the third one is truth telling. So we have 'Voice. Treaty. Truth.' The treaty-making and truth-telling elements are not proposed to involve constitutional amendment, as I understand it. They require legislative backing. So, really, the constitutional proposal is the proposal for the voice. As I understand it, that is for a body—the existence of which would be enshrined in the Constitution—which would be consulted by parliament but have no binding powers of the parliament. As I understand it, the proposal is to have no power to veto proposals that would come out of parliament. That seems to me to be a proposal that is quite consistent with our constitutional tradition.

The Australian constitutional tradition, viewed comparatively, has a number of distinctive features. One is that Australians are very pragmatic and practical people who have a distaste for pure symbolism. One of our High Court judges, Patrick Keane, has written an interesting piece about the Australian Constitution. He describes it as a small brown bird compared to the grand American eagle. We don't regard our Constitution as the place in which we make grand and symbolic statements of national value; we have never done that. So I think this proposal responds to what I think is a little bit of a distaste for pure symbolism in the Constitution.

It also responds to what I think is an Australian preference to work out our differences through procedures rather than through rights. So, contrary to providing a statement that says the parliament may not do the following things, it invites a new voice into the parliament—although one that leaves the essential structures of the parliament, as it currently functions, intact. So I think it responds to a preference for substance over symbolism, procedures over rights and statements of value.

I also want to point out a couple of other things that I think are not often appreciated. One thing that arises out of the Australian preference for proceduralism, of which I am generally very enthusiastic, is flexibility. I think an advantage of the voice proposal is that it allows for the fact that Indigenous people might reasonably change their aspirations over time. After all, there was a time when we might have thought that the 1967 amendment represented the culmination of Indigenous constitutional aspiration—and now we see it as inadequate. If what we include is not a statement of value, which is rigid, or a right, which will be enforced by the courts, but a body

which gives voice, in a non-binding way, to Aboriginal people, we enable future generations to pursue their interests on their own terms. So I think it offers great benefits for those who might be concerned to preserve that degree of flexibility. That is all I have to say there.

CHAIR: The other matter you may or may not want to touch on is that it may be more political than it is legal—that is, why should the First Nations of this country have a separate base upon which to engage with the Parliament of Australia?

Prof. Stone: There are reactions that I could have that would just be driven by fundamental concerns about fairness, justice and inclusion, but let me put one that maybe has a more constitutional theme. The Australian Constitution is not a straightforward majoritarian democracy; we don't just have a parliament that gives voice to the majority. We have a federal parliament that also gives special voices to the states in quite unequal ways. What giving that voice to the states and the Senate does is recognise the prior political communities of the states. And one way to view the Australian Constitution is that it gives recognition and a voice to all of our prior political communities bar one—and that, of course, is the prior political community of the first peoples of Australia.

There is no proposal here to give the first peoples anything like, say, Tasmania has in the Senate. But I just want to notice that we sometimes forget that we are not a purely majoritarian democracy; we are one that recognises that, before Australia, there were other political communities here. In that light, I think it is appropriate to give a special voice to the so far neglected political community.

Mr SNOWDON: Have you turned your mind to what a voice might actually look like?

Prof. Stone: Only in preliminary ways because I think the question is very complex. There are some comparative examples you could look at if you are interested. In particular, there are indigenous parliaments, as they call them, in the Scandinavian countries and the Swedish one in particular has a more consultative and advisory role.

There is no reason in particular that the Constitution itself would need to specify the voice in full detail. It could, for example, simply provide that there shall be this body. It might want to specify a few really key features about it—for example, that its powers cannot be binding on parliament—and then confer a power on the parliament to make a law that then specified it in more detail. That seems to me, at least initially, to be a very important way to go.

Senator SIEWERT: My understanding is that that is what was envisaged out of the Referendum Council proposals—like a head power.

Prof. Stone: That's right. If I was drafting it, I would want to give consideration to specifying a few key features about it—at least some fundamental principles and not just a power to make laws. The second thing I think would be important in the way it is structured is that a lot of thought be given to the nature of the consultation and when it occurs. One thing that I think would not work well would be for the consultation to occur very late in the policy-making processes because at a certain point—and you don't need me to tell you this—decisions have been made, alliances have been formed and it becomes very difficult to move. You would want to make sure it has ongoing consultation activities that could start quite early in the policy process. But that is the sort of thing I would think would be dealt with in the legislative framework rather than in the constitutional framework.

Ms BURNEY: Thank you. That was very good and clear. One of the things we are going to be grappling with—and I'm not asking you to make a political observation, but an observation from your perspective as a constitutional lawyer—is that what has been suggested in a practical sense out of Uluru, the one proposal for constitutional reform, doesn't actually require constitutional reform to be done. What is the advantage of it being entrenched?

Senator SIEWERT: Good question.

Prof. Stone: Why do it in the Constitution? Practically, one reason is that it can't be abolished, full stop. If Indigenous people, through this extraordinary process, spoke in a unanimous voice—

CHAIR: Can I just get clarity on that. Are you saying a head of power enabling the parliament to set up a body couldn't just be abolished but that the parliament could change, or not enact, an entity by virtue of that power being entrenched in the Constitution?

Mr SNOWDON: Or not fund it.

CHAIR: Or not do anything with it; it just sits there.

Prof. Stone: Section 101 of the Constitution says that there shall be an interstate commission—and there is not. There was. Maybe that is what they meant—that there had to be one at one time. And now there isn't one

anymore. In that sense, if there is no political will to back a body of this sort, a parliament could not establish it, or establish it and not fund it, or establish it, fund it and not take any notice of it. It is in the nature of this kind of proposal that there has to be some political will behind it. However, think what it would take to get it into the Constitution. It would take a referendum and the creation of a high level political consensus among the Australian people. So if we do have a rare constitutional amendment to include a requirement for a constitutional voice, my sense is that there would be, at least in the short term, the political will. We can't guarantee it over the long term, but that is no different than any other aspect of the Constitution. So that's right: it could be defunded or it could be not established. But it couldn't be abolished without, at least, a government being prepared to disregard the Constitution in some way—and I think governments generally prefer not to do that and give it a firmer footing.

Senator SIEWERT: So just say that it was in the Constitution and a government came in that said it was going to take away its funding et cetera—that it was not going to populate it, for example, essentially making it non-functioning. What action could be taken legally? Could you do that—and then either one Aboriginal body, or a combination of a lot of them across the country, wants to challenge that.

Prof. Stone: Could you front up to the High Court and say, 'Look, they haven't created this'?

Senator SIEWERT: Yes, that's essentially my question.

Prof. Stone: I think that is difficult to do consistently with the way our Constitution works. It is generally regarded as a charter of government that operates negatively, so that, ordinarily, what you can do is prevent government from acting in ways inconsistent with—

Senator SIEWERT: I'm thinking of the Williams case, which relied on the Constitution, that that was—

Prof. Stone: That's right. They had entered into contracts which shouldn't have been entered into without parliamentary approval.

Senator SIEWERT: That's the example of a negative thing the government is doing.

Prof. Stone: And we don't typically regard the Constitution—and, in this respect, our Constitution is different from many others, but not all—as empowering the courts to direct the government to enact certain kinds of legislation. We don't typically regard it as doing so. That is not to say you couldn't, if you chose, fashion it in a way that provided for some kind of judicial remedy. But that would be a break with our tradition.

Senator SIEWERT: Traditions are sometimes meant to be broken.

Prof. Stone: That's fine; I'm perfectly happy with that.

Senator SIEWERT: So, in theory, you could do it.

Prof. Stone: Yes, in theory you could. And I don't want to say now exactly how you would do it because it's a complex question, but you would need to take into account that, if you say nothing about it, my view is it would not be regarded as something that the High Court could then order the parliament to do.

Senator SIEWERT: You'd have to build that into the wording.

Prof. Stone: Yes, that's my view, considering this now for the first time.

Senator SIEWERT: Because, into the future, people may say, 'Well, we don't want that anymore.' So, if you did build something in, say, in 50 years time, everybody agreed that it's not serving a purpose or that we don't need it for whatever reason, it doesn't mean that they would have to do it. That provision would only enable people to take action if there was a clash, and there wasn't consensus—

Prof. Stone: Disagreement, yes.

Senator SIEWERT: about not proceeding with it anymore.

Prof. Stone: A lot would depend on exactly how it was done. But, if there is a widespread concern that even with an express constitutional requirement that there shall be such a body and a power to make laws, it still might not be acted upon by Australian governments, you would need to build in a third element. Without more time to consider it, I don't think I would want to speculate too precisely, but I have confidence it could be done if you wanted to go in that direction, yes.

CHAIR: It would be a terrible fetter on the sovereignty of parliament, would it not?

Prof. Stone: It would be a fetter. Whether it's terrible or not depends on what you're trying to achieve.

CHAIR: I'm thinking more politically, and that's the sort of mentality we have to deal with if we're going to get a process for a referendum up. The no case would certainly be developed around this being a terrible fetter on the sovereignty of parliament.

Prof. Stone: Let me just say, though, if the Australian people adopted such a provision, are you really going to say that we think it's okay for parliament not to bring into existence a body that the Australian people have, through a referendum process, inserted a requirement that there should be? I, for one, think it's terrible that there is no interstate commission, both for reasons that I think it could actually offer some unique expertise—

CHAIR: It would improve our railway system.

Prof. Stone: But it also is a very bad precedent for us, as a policy, saying, 'We don't care.' It's a terrible precedent. So I can understand why those worries are out there, but the idea that it's a fetter on parliament for it to have to do what the Constitution says it should do just doesn't ring true to me. I find it hard. You can argue against this body and argue that it shouldn't be adopted, but, once it is, surely there's no good rule of law respecting reason why parliament shouldn't therefore have to do what the Constitution says.

CHAIR: I suppose we're at a preliminary stage.

Prof. Stone: Sorry, I'm getting—

CHAIR: We'd need to get it past the hurdles before you get to the arguments that you'd want to put.

Prof. Stone: Sorry, I just get exercised when people start disobeying the Constitution.

CHAIR: It's a big thing. Are there any other questions?

Senator STOKER: Thank you so much for that. It makes everything that we've heard from a whole bunch of different groups fit into the bigger picture much more helpfully. That's really very useful. Have you had any thoughts about what the nuts and bolts of a voice body could or should look like? Noting that there should be a substantial consultation process about that, do you have any ideas about what form it should take?

Prof. Stone: No, not particularly, except what I have already said, which is really a lot of care needs to be given to the kinds of powers that it has. Because they are intrinsically quite weak, a power of consultation, you need to think about ways in which consultation can be most effective. One of the things that has occurred to me is that it needs to be an ongoing role that operates quite early in the policy formation process. That's one thing. And the second thing is that I think it would be best to proceed by way of relatively little in the Constitution—some fundamental statements and a power—and then to allow it to be fleshed out in the legislation.

Senator STOKER: In the legislative form.

Prof. Stone: That's all. And I just haven't got to that part of the proposal.

Senator STOKER: Your answer might be the same for this next question, and, if it is, that's okay. Do you have any thoughts about how we can go about ensuring that the model is truly representative of the diverse nature of this country and the people we're talking about?

Prof. Stone: It would need to be representative of the First Peoples. I don't know. People in this room may have a different view, but I can't help but be impressed by the First Nations' regional dialogues. In fact, my own view is that it's a model for constitutional reform in Australia generally—the careful way in which consensus was built up through the regional dialogues and the kind of discussion which seemed to me to have been balanced between being quite open but still producing some kind of view that then went to a national dialogue that then produced something else that then gets fleshed out. Incorporating elements of regional and national consultation seems to me to be ideal, but that's simply a hard question of institutional design that I would want to consider more fully.

Senator STOKER: If you wanted to consider it more fully and write something for us, you would be most welcome.

Prof. Stone: Thank you. If that's an area on which submissions eventually would be most useful, I certainly would like to, and I would pull in some expertise of other colleagues, because I'm not an institutional designer. But that's very helpful to know.

Ms LEY: Just picking up on your last point, the committee has heard a bit of evidence that the regional dialogue process, in fact, wasn't accurately reflected in that final report of the Referendum Council, although, arguably, maybe some aspects of it were. Do you have any comment on that?

Prof. Stone: I am not qualified to comment on whether the reality matches what's reported. I'm not Indigenous and I wasn't involved. All I would say is that, if you look at constitution making worldwide, you never get unanimity. You never get unanimity ever, and it's not realistic to expect it, precisely because we need constitutions because we disagree. That's why we have them. So there will always be disagreement going on, and I know, in the tremendously impressive South African constitution making process, they developed this concept of sufficient consensus to move forward, and I think that's as much as can be expected of anybody. Without

knowing the details that you have, whether there was sufficient consensus is maybe an open question, but I would say the existence of disagreement does not undermine what I take to be the constitutional authority necessarily. It would have to be something more than just mere disagreement amongst some people.

Ms LEY: And where do you see the dividing line between success in a constitutional referendum and the no case being able to hang its hat on issues that would generate negativity from the usual suspects in the community? I was interested in your observations about the disposition of Australian people.

Prof. Stone: I think once you tell the Australian people what's in the Constitution, they accept that we need some change. As soon as they understand that it contains these colonial, racist elements, they think it needs some change, so the case for some kind of change is not hard. The case for this change, or any change, when you then talk about the positives in terms of, 'Do this,' is always difficult, but, as I have said, I think this proposal is a remarkable proposal in that it is modest, yet it offers a real, ongoing role for Indigenous people in the constitutional process. And, if I were thinking about the yes case, I would want to emphasise its consistency with our constitutional practice and remind the people what's been rejected. As I understand from this process, there was very little support for a racial non-discrimination clause, and that's remarkable to me since I think we're the only democratic constitution that doesn't have one or something that takes that role. I can't think of anywhere else that we would call a democracy that doesn't have a constitutional requirement that you don't discriminate on racial grounds. So for Indigenous people not to insist on that seems to me actually quite a big concession, frankly.

Ms LEY: Just quickly, because I know that other people want to ask questions, how separate would you see the amendments to the Constitution versus the legislative initiatives that came out of the council? Would they need to be tied together in the same argument—effectively, they are—or would they be put to the Australian people differently?

Prof. Stone: If you have a constitutional referendum process, it ought to focus on the amendments to the Constitution which would be for the voice. The legislative processes ought to be dealt with by the parliament, so the yes case and the no case ought to be focused on the voice. I think they ought to be dealt with in that sense quite separately, although there may be political links before them, and maybe that will be a political challenge, which will be to separate them.

CHAIR: If there was no change to 51(xxvi) and you proceeded to create a voice, in terms of the capacity of the parliament to do adverse things, from the Hindmarsh judgement, as the way that power can be exercised, what would be the impact on the parliament's capacity to do things adverse to the interest of the voice?

Prof. Stone: The really concerning thing about section 51(xxvi) is that, following the Hindmarsh Island case, the court declined to find that there was any legal limitation on the enactment of discriminatory laws under that section. Perhaps the worry, just so I understand you, is that, if the voice is not binding, this new Indigenous body has no capacity to bind the parliament, and you can imagine maybe a circumstance where it's consulted but its views are disregarded, and parliament goes ahead and enacts a racially discriminatory law under section 51(xxvi). So the hope is—and this is a very Australian hope—that proper processes lead to proper outcomes, and proper processes would prevent the outcome. And that's the way we've proceeded in our constitutional tradition. If you give people the right to participate, they'll vote to protect their rights. But let's assume we have a failure, which is entirely conceivable.

Then you go to the High Court, and it's invited to interpret section 51(xxvi), and one side might say, 'But you've already decided this in the Hindmarsh Island case.' The most secure legal argument would be to say, 'But then we enacted a new racial non-discrimination clause.' But, if you don't have that, I think it will still be legally significant to the High Court that section 51(xxvi) now exists within a framework in which Australian people have recognised the special status of Indigenous people through a voice, and it's at least a foothold for a legal argument. That might not be enough—and I don't want to get too technical in the detail—but the remarkable thing about the Hindmarsh Island case which, in many ways, I just detest, is that, although no judge was prepared to articulate clearly a limit, all of them say fairly vague things about, 'There would be circumstances in which we may well articulate a limit.' Justices Gummow and Hayne say that not all has been said about the rule of law. Justice Gaudron has a very particular view about discrimination. So I think there's a foothold for the court to find new limits on 51(xxvi) that arise out of the voice, but they're nowhere near as straightforward as a specific limitation either in section 51(xxvi) or in a racial non-discrimination clause. That has to be acknowledged to be a weakness of the voice proposal.

CHAIR: Leaving aside the politics, why wouldn't people support a new 51A, as was proposed by the expert panel, and a voice? Is it one or the other? Why wouldn't we try to do something about the race power—knowing full well that it has potentialities to be adverse to interests—and adopt the proposed 51A of the expert panel, and adopt the voice proposal?

Prof. Stone: And maybe get rid of section 25 while we're at it.

Senator SIEWERT: We're having our cake and eating it!

CHAIR: I agree with you about section 25 but—

Prof. Stone: But you don't care so much about that?

CHAIR: Section 25 is more universal in one sense. We're talking about recognition of the First Peoples.

Prof. Stone: If you amended the Constitution in that way there would be no technical reason why you couldn't have them working together. What I would say, just from the point of view of observing constitutional processes, is that the Uluru statement has a kind of authority, because of the participation that led up to it, that other proposals don't. I worry about departures from it and alterations to it—I don't want to use the word 'tinkering'—because I worry that doing that would undermine its authority. I regarded it as what we would probably call a constitutional moment, a really remarkable moment when people came together in an unprecedented way, and my inclination as a constitutionalist is to respect that rather than to alter it. I think it could considerably muddy the power of the case.

Mr SNOWDON: That's based on the assumption, it seems to me, that the process itself was acceptable and transparent.

Prof. Stone: Yes.

Mr SNOWDON: In fact, we've had evidence that it wasn't and that there wasn't a discussion about the exclusion of all other proposals in the dialogues around the country.

Prof. Stone: That's a matter for you. I don't have—

Mr SNOWDON: Yes, I understand, but my point is: the apex of the decision-making was this result; does it reflect accurately the dialogues that took place? Well, you don't know the answer to that question.

Prof. Stone: That's a matter for you, yes.

Mr SNOWDON: It's not even a matter for me; it's a matter for the world.

Ms McGOWAN: We've got to manage this, but in the report it says:

A statement of recognition or acknowledgement in the Constitution was rejected by the Dialogues.

Prof. Stone: Sorry?

Ms McGOWAN: It's on page 11. A statement of recognition or acknowledgement in the Constitution was actually rejected by the dialogues.

Ms LEY: We heard that yesterday as well.

Ms McGOWAN: So we've got to do a bit of work on that. It's not your business, Professor, to do it, but the actual process wasn't as pure as we would've liked.

Prof. Stone: When you say it was rejected by the dialogues, you don't accept that it was rejected; is that it?

Ms McGOWAN: No; I do accept it. We've got to do a bit more work yet but, just at face value, it's not as clean as we thought or hoped—the process and the actual outcome. We heard some strong evidence yesterday. Anyhow, that's not your area of expertise, but there's a bit of a shadow over the process and the outcome.

Prof. Stone: Just let me say, drawing on the expertise, that it doesn't surprise me that there are differences of opinion about the process. I think it's inevitable that there would be some degree of dissension, and can I encourage you to look for sufficient consensus rather than perfect consensus.

To put it most strongly, you could regard the Uluru process as an act of self-determination, and, if you take that view, then not to enact it or to enact something else is not recognition. If you've asked the subjects of recognition what they want and then you don't do it, you're not recognising them, in my view. I'm sure there are people with different views who want to undermine this process now, but that is a constant feature of constitution making processes everywhere: if you lose, try to get back into the process and win again. I'm not saying that's happening—I don't have those facts—but I would think the committee would need to be a little bit wary of demanding too much perfection from the process.

CHAIR: All right. I'm sure we could detain you for most of the day around this. Thank you for the insights that you've provided to us and the clarifications around some of these matters.

Ms LEY: Chair, without wanting to overload the secretariat, I would love it if we could transcribe the professor's evidence. I know it's all going to be written up somewhere, because Hansard is here.

CHAIR: In the goodness of time, yes.

Ms LEY: But it would just be a good background document for us to have, that information.

Prof. Stone: I have a centre, and we would be quite prepared to help the committee if there are specific questions within our expertise on comparative matters, constitutional matters. We'd be pleased to respond to questions that you might have. We will, of course, make a submission, but outside of that as well.

Ms LEY: Thank you.

CHAIR: Thank you very much for your appearance.