



**Law Council**  
OF AUSTRALIA

*Office of the President*

**21 April 2023**

Senator Nita Green  
Chair  
Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum  
Parliament House,  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

By email: [jscvr@aph.gov.au](mailto:jscvr@aph.gov.au)

Dear Senator Green,

**Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum**

The Law Council of Australia is grateful for the opportunity to provide a submission to the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum on its inquiry into the Aboriginal and Torres Strait Islander Voice Referendum.

The Law Council's submission is **attached**.

The Law Council acknowledges its Voice Referendum Working Group (which consists of a range of experts including members of its Indigenous Legal Issues Committee), and its National Human Rights Committee, as well as the Law Society of New South Wales, the New South Wales Bar Association, and the Law Society of South Australia for assistance in the preparation of this submission.

Please contact Ms Claire Paton, Policy Lawyer, on [REDACTED] in the first instance, should you require further information or clarification.

Yours sincerely

[REDACTED]

**Mr Luke Murphy**  
**President**

**Enc.**



**Law Council**  
OF AUSTRALIA

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

**Joint Select Committee on the Aboriginal and Torres Strait Islander  
Voice Referendum**

**21 April 2023**

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## About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level, speaks on behalf of its Constituent Bodies on federal, national and international issues, and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2023 are:

- Mr Luke Murphy, President
- Mr Greg McIntyre SC, President-elect
- Ms Juliana Warner, Treasurer
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member
- Ms Tania Wolff, Executive Member

The Chief Executive Officer of the Law Council is Dr James Pople. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is [www.lawcouncil.asn.au](http://www.lawcouncil.asn.au).

## Acknowledgement

The Law Council is grateful to its Voice Referendum Working Group (which consists of a range of experts including members of its Indigenous Legal Issues Committee), its National Human Rights Committee, as well as the Law Society of New South Wales (**LSNSW**), the New South Wales Bar Association (**NSW Bar**) and the Law Society of South Australia for assistance in the preparation of this submission.

## Executive Summary

1. The Law Council of Australia thanks the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum for the opportunity to respond to its inquiry into the provisions of the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 (the **Constitution Alteration**).
2. The Law Council supports a constitutionally enshrined Aboriginal and Torres Strait Islander **Voice** and has advocated in support of this position since October 2017,<sup>1</sup> including through submissions to the numerous Government inquiries and processes established concerning constitutional recognition of Aboriginal and Torres Strait Islander peoples since 2017.<sup>2</sup>
3. The Law Council submits that there are three core grounds constituting the compelling case for a constitutionally enshrined Voice. These are that the Voice will provide:
  - (a) on their own terms, for constitutional recognition of Aboriginal and Torres Strait Islander peoples as the first peoples of Australia, through a Voice specifically enshrined within the Constitution;
  - (b) a vehicle for substantive change for Aboriginal and Torres Strait Islander peoples; and
  - (c) a means to give effect to the right to self-determination for Aboriginal and Torres Strait Islander peoples.
4. The Law Council supports the Constitution Alteration being passed in its present form, as an appropriate means to provide for the Constitutional enshrinement of the Voice. It considers that the constitutional amendment, as proposed, is just and legally sound.
5. The proposed amendment is 'just' as it properly gives effect to the grounds listed above underpinning the Voice, and responds to the invitation to the Australian public for constitutional reform in the **Uluru Statement** from the Heart.

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<sup>1</sup> Law Council of Australia, '[Law Council throws support behind referendum on the creation of new Indigenous representative body - Law Council of Australia](#)' (media release, 24 October 2017).

<sup>2</sup> See, Law Council of Australia '[Constitutionally enshrined Voice to Parliament a must](#)' (29 June 2018); Law Council of Australia, '[Uluru Statement should be respected - Law Council of Australia](#)' (media release, 1 November 2019); Law Council of Australia '[47th Parliament must move swiftly toward referendum on Voice to Parliament](#)' (media release 26 May 2022); Law Council of Australia, '[47th Parliament must move swiftly toward referendum on Voice to Parliament](#)' (media release 26 May 2022); Law Council of Australia [Submissions to the Referendum Council](#), Discussion Paper on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (19 May 2017); Law Council of Australia, Submissions to the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples Law Council of Australia, [Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples](#), (15 June 2018); [Submission to Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples](#), Interim Report on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples (28 September 2018); [Law Council of Australia Submission to the National Indigenous Australians Agency on the Indigenous Voice Co-Design Process](#) (30 April 2021) <<https://www.lawcouncil.asn.au/publicassets/ad0ba076-01ae-eb11-943c-005056be13b5/3996%20-%20Indigenous%20Voice%20Co-Design%20Process.pdf>>.

6. Further, the proposed amendment is legally sound in that the amendment, in concise and simple terms, appropriately:
  - (a) establishes a body with power to make representations, but not a power to veto any law;
  - (b) enables the Voice to make representations on matters ‘relating to Aboriginal and Torres Strait Islander peoples’—a function with suitable breadth, which will enable representations to be made on matters of general application, which nonetheless affect Aboriginal and Torres Strait Islander peoples in a different or unique way;
  - (c) provides the Voice with discretion to make representations to both Parliament and the Executive, which allows for the Voice to inform the development of law and policy at multiple stages effectively; and
  - (d) provides Parliament with the power to legislate with respect to matters relating to the Voice—this ensures that Parliament is able to provide for the detail of the Voice’s operation, subject to democratic processes.
7. The Law Council’s submission sets out: the origins of the Voice; the compelling case for a constitutionally enshrined Voice; an analysis of the meaning and consequence of the proposed amendment; and responses to frequently raised concerns pertaining to the proposed amendment.

## The origins of the Voice

### Constitutional history

8. Upon its inception in 1901, the original *Australian Constitution* (the **Constitution**) did not acknowledge Aboriginal and Torres Strait Islander peoples as the original custodians of the land and as Australia’s first peoples. In fact, it contained provisions that explicitly excluded Aboriginal and Torres Strait Islander peoples from the Commonwealth’s law-making power<sup>3</sup> and from being counted as part of the Australian population.<sup>4</sup>
9. The amendments to the Constitution in 1967, in effect, permitted the Commonwealth to ‘make special laws’ with respect to Aboriginal and Torres Strait Islander people and for Aboriginal and Torres Strait Islander people to be counted as part of the Australian population.<sup>5</sup> However, the Constitution still does not recognise Aboriginal and Torres Strait Islander peoples, a failure which has been described as ‘longstanding and unfinished business for the nation’.<sup>6</sup>

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<sup>3</sup> See, original version of s 51 (xxvi) of the Constitution.

<sup>4</sup> See, repealed s 127 of the Constitution.

<sup>5</sup> Through amend amendment to s 51 (xxvi) of the Constitution and by repealing s 127.

<sup>6</sup> Commonwealth of Australia, Referendum Council, *Final Report of the Referendum Council*, (Report, 30 June 2017) (**Referendum Council Final Report**) [https://www.referendumcouncil.org.au/sites/default/files/report\\_attachments/Referendum\\_Council\\_Final\\_Report.pdf](https://www.referendumcouncil.org.au/sites/default/files/report_attachments/Referendum_Council_Final_Report.pdf), iii.

## Formative consultation processes in the development of the Voice

10. The Law Council emphasises that the forthcoming referendum to provide for a Voice to Parliament and the Executive Government of the Commonwealth in the Constitution will be the culmination of decades-long advocacy by Aboriginal and Torres Strait Islander peoples for constitutional recognition.<sup>7</sup>
11. It follows a long public consultation process, extending across a number of inquiries and reports, directed towards the best means to provide for that recognition. The narrative underlying the trajectory of these inquiries, set out briefly at **Appendix A**, illustrates the comprehensive consultation that has occurred in developing the proposal for a Voice.
12. Critically, a constitutionally enshrined Voice was called for in the Uluru Statement, which was the result of extensive consultation conducted by the Referendum Council through Regional Dialogues and the National Constitutional Convention at Uluru.<sup>8</sup>
13. The Uluru Statement is ‘an invitation to the Australian people from Aboriginal and Torres Strait Islander Australians ... to walk together to build a better future’<sup>9</sup> by establishing a Voice to Parliament enshrined in the Constitution, and a Makarrata Commission for the purpose of treaty making and truth-telling.

## The compelling case for a Voice

### Constitutional recognition and enshrinement

14. The proposal to amend the Constitution provides important and long-awaited recognition of Aboriginal and Torres Strait Islander peoples in the Constitution. This is valuable for the following reasons:
  - it will address the ‘longstanding and unfinished business for the nation’<sup>10</sup> by ensuring that Australia’s supreme law substantially recognises Aboriginal and Torres Strait Islander peoples as the original custodians of the land;
  - all Australians ‘own’ the Constitution and the proposed alteration will reflect the history of this land, and at last include all its peoples, when it recognises Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia; and
  - a successful referendum will have significant value as a symbol of recognition and unity between Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians.

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<sup>7</sup> The Uluru Statement, ‘History’ (Web page), <https://ulurustatement.org/the-statement/history/>.

<sup>8</sup> Referendum Council Final Report, 9.

<sup>9</sup> The Uluru Statement (summary), <https://ulurustatement.org/the-statement/>.

<sup>10</sup> Commonwealth of Australia, Referendum Council, *Final Report of the Referendum Council*, (Report, 30 June 2017) [https://www.referendumcouncil.org.au/sites/default/files/report\\_attachments/Referendum\\_Council\\_Final\\_Report.pdf](https://www.referendumcouncil.org.au/sites/default/files/report_attachments/Referendum_Council_Final_Report.pdf), iii.



15. The Explanatory Memorandum for the Constitution Alteration,<sup>11</sup> highlights that ‘constitutional recognition in the form of a Voice brings together two long-standing calls from Aboriginal and Torres Strait Islander peoples—for an enduring representative body and to be recognised in the Constitution’.<sup>12</sup> The Law Council agrees with the Explanatory Memorandum’s statement that:

*By addressing the need for such an institution, this proposed constitutional amendment provides a form of recognition that is practical and substantive. It both ensures that the Constitution reflects the historical truth of Aboriginal and Torres Strait Islander peoples’ long-standing and continuing place in Australia, and provides for an institution to improve their lives.*<sup>13</sup>

16. It is important to amend the Constitution to provide for the Voice, as opposed to providing for a Voice through legislation only.<sup>14</sup> This is because:

- it was the means chosen by Aboriginal and Torres Strait Islander people, through the Uluru Statement, and after careful and longstanding deliberation on the options available, to recognise and empower them and is thus an expression of self-determination;
- constitutional enshrinement of the Voice would provide it with an enduring mandate and distinguish it from previous advisory bodies, such as the Aboriginal and Torres Strait Islander Commission, which were able to be established and dissolved and were consequently subject to the changing political landscape;<sup>15</sup> and
- the exercise of popular sovereignty at the referendum and then the constitutional status of the Voice will also be part of its success. The Voice will have no veto and rely on its political power and authority only.

## A mechanism for substantive change

17. It is intended, and expected, that a Voice will deliver a substantive mechanism for change in the circumstances of Aboriginal and Torres Strait Islander peoples, in terms of the everyday issues they experience, over which Parliament and the Executive have power.

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<sup>11</sup> The Explanatory Memorandum, along with the Minister’s second reading speech, the parliamentary debate, opinions on the proposed amendment by the Solicitor-General and Crown Law Officers and the official Yes and No cases, may be relevant to potential future High Court interpretation of the proposed amendment. See, Prof Anne Twomey, Submission 17 to the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, *Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum*, (13 April 2023); *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 361 [29]-362 [31] (Gaudron J); 382 [91]- 383 [94] (Gummow and Hayne JJ); 401 [132] and 406 [142]-408 [146] (Kirby J); see also Stephen Donaghue KC, ‘SG No. 10 of 2023, In the Matter of Proposed Section 129 of the Constitution’ (19 April 2023), (**‘Solicitor-General’s opinion’**) [38] attached to the Hon Mark Dreyfus KC MP, Submission to the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, *Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum* (21 April 2023).

<sup>12</sup> Explanatory Memorandum, Constitution Alteration, 4.

<sup>13</sup> *Ibid*, 3.

<sup>14</sup> Such legislation may be established, for example, under the ‘race power’ (the Constitution s 51 (xxvi))

<sup>15</sup> See, Aboriginal and Torres Strait Islander Commission (in Cape York Institute for Policy and Leadership, ‘A First Nations Voice in the Constitution, Report to the Referendum Council’ (Report, June 2017) <

<https://apo.org.au/sites/default/files/resource-files/2017-07/apo-nid117216.pdf>>; Harry Hobbs, ‘Consultation and a First Nations Voice: Building on the Aboriginal and Torres Strait Islander Commission’ *Australian Public Law* (Online, 5 March 2021) <<https://www.auspublaw.org/blog/2021/03/consultation-and-a-first-nations-voice-building-on-the-aboriginal-and-torres-strait-islander-commission>>

18. Aboriginal and Torres Strait Islander peoples and communities often experience multiple forms of disadvantage—this is a product of a history of dispossession and a legacy of systemic social, political and legal discrimination.<sup>16</sup> Power imbalances embedded since (and beyond) the establishment of the Constitution have enabled entrenched dispossession and discrimination, including ‘laws denying Indigenous people the vote, denying equal wages, removing their children, controlling where they could live and who they could marry’.<sup>17</sup> In turn, such policies have ‘caused continuing disadvantage’.<sup>18</sup>
19. Aboriginal and Torres Strait Islander peoples comprise approximately 3.8 per cent of the Australian population,<sup>19</sup> a minority which means that they ‘struggle to be heard through ordinary democratic processes’.<sup>20</sup> Consequently, and with no assured means to provide advice to policy and law-makers,<sup>21</sup> Aboriginal and Torres Strait Islander peoples are often disproportionately and detrimentally impacted by legal and policy decisions in which they have had little say.
20. The kinds of matters that affect Aboriginal and Torres Strait Islander people specifically or disproportionately are wide ranging and include: social security policies,<sup>22</sup> access to housing<sup>23</sup> and disability supports,<sup>24</sup> education, health, family violence, and environmental and cultural heritage protection laws. The destruction of 46,000-year-old caves at the Juukan Gorge in the Pilbara region of Western Australia and the failures in Australia’s cultural heritage protection laws and Northern Territory intervention are illustrative examples of the importance of listening to Aboriginal and Torres Strait Islander Voices concerning policy and law reform.<sup>25</sup>
21. This context reinforces the importance of Aboriginal and Torres Strait Islander peoples having a voice to represent their views as to how policies, programs and laws would affect them.

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<sup>16</sup> See, Law Council of Australia, ‘Aboriginal and Torres Strait Islander people’, *The Justice Project Final Report* (August 2018), 7 citing Christine Coumarelos et al, Law and Justice Foundation of New South Wales, Legal Australia-Wide Survey (2012), 335 (‘LAW Survey’); Chris Cunneen and Melanie Schwartz, University of NSW, The family and civil law needs of Aboriginal people in NSW: final report (2008); Boyd Hunter, ‘Indigenous social exclusion: insights and challenges for the concept of social exclusion’ (2009) 82 Family Matters, 52–61.

<sup>17</sup> Shireen Morris, Julian Morris and William Partlett, ‘Australia’s Constitutional Answer to Structural Racism’, University of Melbourne *Pursuit* (online), undated, <<https://pursuit.unimelb.edu.au/articles/australia-s-constitutional-answer-to-structural-racism>>.

<sup>18</sup> *Ibid*.

<sup>19</sup> Australian Bureau of Statistics, ‘Estimates of Aboriginal and Torres Strait Islander Australians’ (Web page, June 2021), <<https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/estimates-aboriginal-and-torres-strait-islander-australians/jun-2021>>.

<sup>20</sup> Shireen Morris, Julian Morris and William Partlett, ‘Australia’s Constitutional Answer to Structural Racism’, University of Melbourne *Pursuit* (online), undated, <<https://pursuit.unimelb.edu.au/articles/australia-s-constitutional-answer-to-structural-racism>>.

<sup>21</sup> Commonwealth of Australia, Referendum Council, *Final Report of the Referendum Council*, (Report, 30 June 2017) <[https://www.referendumcouncil.org.au/sites/default/files/report\\_attachments/Referendum\\_Council\\_Final\\_Report.pdf](https://www.referendumcouncil.org.au/sites/default/files/report_attachments/Referendum_Council_Final_Report.pdf)> 14; Law Council of Australia, Submission to the Referendum Council, ‘Discussion Paper on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples’ (19 May 2017), <<https://lawcouncil.asn.au/publicassets/06719cb6-0141-e711-93fb-005056be13b5/3290%20-%20Discussion%20Paper%20on%20Constitutional%20Recognition%20of%20Aboriginal%20and%20Torres%20Strait%20Islander%20Peoples.pdf>>, [47]-[48].

<sup>22</sup> Law Council of Australia, ‘Aboriginal and Torres Strait Islander people’, *The Justice Project Final Report* (August 2018) 84-93.

<sup>23</sup> *Ibid* 93-94.

<sup>24</sup> *Ibid* 94-95.

<sup>25</sup> Law Council of Australia, Submission to the Joint Standing Committee on Northern Australia, ‘Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia’ (21 August 2020 [11] <<https://www.lawcouncil.asn.au/publicassets/24891840-2ef3-ea11-9434-005056be13b5/3864%20-%20Juukan%20Caves%20Submission.pdf>>

22. A Voice which makes representations to Parliament and the Executive should lead to more informed decision-making, including by advising how Commonwealth funds can be spent beneficially and effectively when addressing First Nations issues. Professor Anne Twomey emphasises this point:<sup>26</sup>

*It is hard to imagine that anyone would argue that it is better for Parliament to be ignorant and ill-informed, its laws ineffective and its expenditure wasteful. There can be no harm in listening to the views of others and using them to improve outcomes.*

23. Importantly, while this is a substantive change, it is nevertheless modest. The Parliament is not bound by the representations of the Voice and can decide how the Executive can engage with them.

## Self-determination

24. The Uluru Statement, and its call for a constitutionally enshrined Voice, represents an advancement of self-determination.<sup>27</sup>
25. The right to self-determination is a fundamental principle of international law, to which Australia has committed as a signatory to the *International Covenant on Civil and Political Rights*,<sup>28</sup> and the *International Covenant on Economic, Social and Cultural Rights*.<sup>29</sup> Article 1 of each of these treaties recognises that ‘all peoples have the right of self-determination’, by virtue of which ‘they freely determine their political status and freely pursue their economic, social and cultural development’.<sup>30</sup>
26. The right of Aboriginal and Torres Strait Islander peoples to self-determination also underpins the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*<sup>31</sup> and is expressed in Article 3. Australia formally announced its support for the UNDRIP on 3 April 2009<sup>32</sup> and since this time it has reiterated its support for the rights and principles articulated in the UNDRIP.<sup>33</sup>

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<sup>26</sup> Anne Twomey, ‘Why an Indigenous Voice would not be ‘third chamber’ of Parliament’, Sydney Morning Herald (28 May 2019) <<https://www.smh.com.au/national/why-an-indigenous-voice-would-not-be-third-chamber-of-parliament-20190526-p51r7t.html>>.

<sup>27</sup> See, Law Council of Australia, submission to the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, (15 June 2018), <<https://www.lawcouncil.asn.au/publicassets/f500a374-2986-e811-93fb-005056be13b5/3458%20-%20Constitutional%20Recognition%20relating%20to%20Aboriginal%20and%20Torres%20Strait%20Islander%20Peoples.pdf>> 5.

<sup>28</sup> Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>29</sup> Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

<sup>30</sup> ICCPR art 1(1); ICESCR art 1(1).

<sup>31</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (13 September 2007).

<sup>32</sup> Minister for Families, Housing, Community Services and Indigenous Affairs, ‘Statement on the United Nations Declaration on the Rights of Indigenous Peoples’ (media release, 3 April 2009) <<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F418T6%22;src1=sm1>>.

<sup>33</sup> See Department of Foreign Affairs and Trade, Submission No 7 to the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Inquiry into the application of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in Australia*, (undated); Australian Government, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21 – Australia*, A/HRC/WG.6/37/AUS/1 (28 December 2020) [54], <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/356/20/PDF/G2035620.pdf?OpenElement>; Australian Government, *Report of the Working Group on the Universal Periodic Review – Australia – Addendum – Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review*, A/HRC/47/8/Add.1 (2 June 2021) [15]-[16].

27. Articles 5 and 18 of the UNDRIP further recognise the right of Indigenous peoples to participate fully in the political, economic, social and cultural life of the State and in decision-making in matters which affect their rights, through representatives chosen by themselves in accordance with their own procedures, while maintaining their own decision-making institutions of that kind.<sup>34</sup> The exercise of self-determination has been authoritatively described as ‘an ongoing process in which institutions of decision-making are devised that enable indigenous peoples to make decisions related to their internal and local affairs and to participate collectively in external decision-making processes’.<sup>35</sup>
28. In this way, not only was the process which resulted in the Uluru Statement an expression of self-determination, but the change it called for—the Voice—provides a means to support the exercise of self-determination for Aboriginal and Torres Strait Islander peoples in the future.
29. Due to the significance of a constitutionally enshrined Voice as an expression of the international human rights principles outlined above, multiple international human rights bodies and experts have endorsed constitutional enshrinement of the Voice in Australia. These include the United Nations Permanent Forum for Indigenous Issues,<sup>36</sup> the UN Special Rapporteur on the Rights of Indigenous Peoples,<sup>37</sup> and the United Nations Committee on the Elimination of Racial Discrimination.<sup>38</sup>

## The proposed constitutional amendment

### The proposed amendment

30. The proposed constitutional amendment is as follows:

#### ***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.*

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<sup>34</sup> The UNDRIP is not itself a treaty which creates legally binding obligations but has been described as representing ‘an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples’: United Nations Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN Doc A/HRC/9/9 (11 August 2008) [85]-[86].

<sup>35</sup> UN Expert Mechanism on the Rights of Indigenous Peoples, *Efforts to Implement the United Nations Declaration on the Rights of Indigenous Peoples: Indigenous Peoples and the Right of Self-determination*, 48th Session, Agenda Item 2 and 5, A/HRC/48/75 (13 September 2021) [19].

<sup>36</sup> United Nations Permanent Forum for Indigenous Issues, *Permanent Forum on Indigenous Issues Report on the twenty-first session*, UN Doc E/2022/43-E/C, (25 April–6 May 2022) [45].

<sup>37</sup> Special Rapporteur on the Rights of Indigenous Peoples, *Report of the Special Rapporteur on the Rights of Indigenous Peoples on Her Visit to Australia*, UN Doc A/HRC/36/46/Add.2 (8 August 2017) [107].

<sup>38</sup> Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Eighteenth to Twentieth Periodic Reports of Australia*, UN Doc CERD/C/AUS/CO/18-20 (26 December 2017) [20].

31. The Law Council provides an analysis of the meaning and consequence of the proposed wording below.

### Introductory wording

*'In recognition of Aboriginal and Torres Strait Islander Peoples as the First Peoples of Australia.'*

32. The introductory wording provides for express recognition of Aboriginal and Torres Strait Islander peoples as Australia's first peoples. This has symbolic value, as the completion of 'unfinished business' in the Australian legal system and society. It also orients the Voice as part of a substantive act of recognition—it is not merely symbolic—which is right and appropriate because Aboriginal and Torres Strait Islander peoples *are* Australia's First Peoples. It is also an important statement that, as is explained below, the enshrinement of the Voice is part of recognising the unique status and rights of Aboriginal and Torres Strait Islander peoples as Australia's Indigenous Peoples.

### Proposed section 129(i)

*'There shall be a body, to be called the Aboriginal and Torres Strait Islander Voice'*

33. Section 129(i) provides there shall be a body to be called the Aboriginal and Torres Strait Islander Voice. The Explanatory Memorandum for the Constitution Alteration suggests that the term 'body' is used to indicate the nature of the Voice as an entity with a basis in the Constitution.<sup>39</sup> The amendment does not guarantee its existence automatically—an act of Parliament is required to give it substantive manifestation.
34. The Law Council understands the term 'Aboriginal and Torres Strait Islander Voice' is considered to be an appropriate term that was supported by the Referendum Working Group, and is likely to be widely recognised and understood by Aboriginal and Torres Strait Islander persons themselves and the Australian public.

### Proposed section 129(ii)

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

35. Section 129(ii) provides for the core function of the Voice—namely to 'make representations' to the Parliament and Executive 'on matters relating to Aboriginal and Torres Strait Islander peoples'. Section 129(ii) performs an important role, by identifying, and therefore providing a constitutional guarantee for the core function of the Voice. At the same time, it is restrained by the limitation to making 'representations'. Without section 129(ii), the Voice's purpose would be less certain and the power in section 129(iii) significantly less bounded.
36. With regard to this subsection, further discussion is provided below in relation to the question of the justiciability of the relationships between the Voice and the Executive and Parliament under the heading 'Justiciability'.

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<sup>39</sup> Explanatory Memorandum, Constitution Alteration 'Notes on clauses' [9].

### 'May make representations'

37. The making of a representation is a self-directed function, exercised at the discretion of the Voice itself.
38. The Law Council notes that the power provided to the Voice is to make representations. Section 129(ii) is not framed as a duty to consult the Voice.<sup>40</sup>
39. The Explanatory Memorandum describes a representation to be 'a statement from the Voice to the Parliament or to the Executive Government, or both ... [which] would communicate the Voice's view on a matter relating to Aboriginal and Torres Strait Islander peoples'.<sup>41</sup>
40. The former Chief Justice of the High Court of Australia, the Hon Robert French AC, has suggested a representation could cover 'submissions or advice about existing or proposed laws and administrative policies and practices'.<sup>42</sup>
41. The Indigenous Law Centre has also explained the likely extent of the term 'representations' to supplement that of Mr French:

*[M]aking representations' captures the role of the Voice in developing genuinely representative and informed views, and also possibly presenting facts, evidence, opinions and other relevant information.*<sup>43</sup>

### 'To Parliament and Executive Government of the Commonwealth'

42. The function of making representations to Parliament and the Executive could include, respectively, representations on matters relating to Aboriginal and Torres Strait Islander peoples:
- **to Parliament**—on draft bills and existing laws and Parliamentary committees as well as delegated instruments;<sup>44</sup>
  - **to the Executive**—in the context of 'law reform, policy development, decisions made under specific legislation, and other matters of government administration ...'.<sup>45</sup>
43. The Explanatory Memorandum states that 'the term "the Executive Government of the Commonwealth" has the same meaning as elsewhere in the Constitution'.<sup>46</sup>

<sup>40</sup> Solicitor-General's opinion, [18]-[19].

<sup>41</sup> Explanatory Memorandum, Constitution Alternation 'Notes on clauses' [12].

<sup>42</sup> The Hon Robert French AC, 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 (4 February 2023), [https://www.judcom.nsw.gov.au/wp-content/uploads/2023/02/French\\_R\\_Exchange-Ideas-Syposium-4-February-2023-3.pdf](https://www.judcom.nsw.gov.au/wp-content/uploads/2023/02/French_R_Exchange-Ideas-Syposium-4-February-2023-3.pdf) (Hon Robert French AC February 2023 Symposium Address) [44].

<sup>43</sup> Indigenous Law Centre, 'Issues Paper 1 – The Constitutional Amendment' (September 2022) <<https://static1.squarespace.com/static/602f123f11087d603fa92730/t/631a73c9700b2b4827cff5a7/1662677963921/ILC+Issues+Paper+%231+-+The+constitutional+amendment.pdf>>.

<sup>44</sup> Explanatory Memorandum, Constitution Alternation 'Notes on clauses' [16].

<sup>45</sup> Ibid [19]; see also, Law Council of Australia, Submission to Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples (28 September 2018) [32]-[33] <<https://www.lawcouncil.asn.au/publicassets/1a41f130-27d3-e811-93fc-005056be13b5/3517%20-%20Constitutional%20Recognition%20relating%20to%20Aboriginal%20and%20Torres%20Strait%20Islander%20Peoples.pdf>>.

<sup>46</sup> Explanatory Memorandum, Constitution Alternation 'Notes on clauses' [20].

44. The term is not defined in the Constitution. In *Hocking*,<sup>47</sup> the High Court suggests that the Executive Government of the Commonwealth ‘functionally exercise[es]’ the executive power of the Commonwealth, formally vested in the King, ‘within the framework of responsible government established by Ch II of the Constitution’.<sup>48</sup> It follows that representations may be made to entities which exercise the executive power of the Commonwealth under section 61 of the Constitution.<sup>49</sup>
45. The role of the Executive includes developing policies from which laws are created by Parliament, performing functions and powers under law, and, under delegation from Parliament, making laws. The Law Council supports the Voice having the ability to make representations to both Parliament and the Executive and thus have its views heard from the creation of laws and policies through to their enactment and operation.<sup>50</sup>
46. As the NSW Bar observes,<sup>51</sup> the purpose of the Voice includes advising decision-makers in the Executive Government of the Commonwealth of the potential impacts on local Aboriginal and Torres Strait Islander communities if public policy moves in a particular direction. In addition, proactive engagement by the Voice with those responsible for mainstream services and programs will ensure such services are appropriately tailored and delivered.

#### **‘On matters relating to Aboriginal and Torres Strait Islander peoples’**

47. The phrase ‘matters relating to Aboriginal and Torres Strait Islander peoples’ is broad enough to allow for representations to be made on matters of general application, which nonetheless affect Aboriginal and Torres Strait Islander peoples in a different or unique way.<sup>52</sup>
48. Mr French has stated that:<sup>53</sup>

*The term ‘relating to’ can cover a broad range of matters. Its limits are likely to be defined by common sense and political realities. Laws, policies and practices relating to Aboriginal and Torres Strait Islander education and training, family and social welfare, health, remote community services, community policing, Aboriginal art, cultural and heritage protection, traditional ownership of land and waters, are well within that range.*

49. For example, legislation dealing with an environmental issue, may not relate specifically to Aboriginal and Torres Strait Islander peoples, but will likely impact them differently to non-Indigenous Australians. In the context of the Executive, representations could conceivably be made in relation to various kinds of Executive action, including policies, administrative decisions, and agreement making powers in areas such as social security, environmental and cultural heritage, family violence, intellectual property and protecting Indigenous Knowledge.

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<sup>47</sup> *Hocking v Director-General of the National Archives of Australia* (2020) 271 CLR; (2020) 379 ALR 395; HCA 19.

<sup>48</sup> *Ibid* [74] (Kiefel CJ, Bell, Gageler, Keane JJ).

<sup>49</sup> In *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, Gummow J held that this did not include a body corporate established under a Commonwealth statute at 458-460, 470-472. See also, *Austral Pacific Group Ltd v Airservices Australia* [2000] HCA 39 at [14]; see also Solicitor-General’s opinion, [12]

<sup>50</sup> *Ibid* [31]; Law Council Co-Design submission [99].

<sup>51</sup> In its submission to the Law Council for the purpose of this submission.

<sup>52</sup> Explanatory Memorandum, Constitution Alteration ‘Notes on clauses’ [24].

<sup>53</sup> Hon Robert French AC February 2023 Symposium Address [45].

50. The breadth of this function is appropriate. Given the intention of the Voice is to provide a mechanism for self-determination, it should include being capable of addressing all matters of ‘economic, social and cultural development’ impacting Aboriginal and Torres Strait Islander peoples in accordance with Article 3 of the UNDRIP.<sup>54</sup>
51. Allowing the Voice to determine how and when to make representations means that those representations will be made by those whose interests are directly affected. It will be a matter for the Voice to prioritise how this is achieved, within its realistic operational (including resourcing) constraints, and consistent with any laws made dealing with its functions and procedures under section 129(iii). In this way, the Voice can represent Aboriginal and Torres Strait Islander persons efficiently and effectively, noting that it will be ultimately accountable to them.

### Proposed section 129(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.’*

52. Under section 129(iii), Parliament would be empowered to make laws with respect to matters relating to the Voice itself—that is, the body referred to in section 129(i).
53. This power is discretionary: Parliament is not required under this proposed section to make any specific laws relating to the Voice. Nevertheless, it is expected that Parliament will make such laws initially, to give the Voice a substantive ‘body’ and provide for its composition and basic way of operating, and then may amend or add to these laws as it sees fit from time to time, subject to democratic Parliamentary processes.
54. This approach is appropriate and conventional. It is a ‘common constitutional technique’<sup>55</sup> to establish an enabling provision and defer detail to the Parliament (as expanded on below under the heading ‘Level of detail’).
55. This power is broad—section 129(iii) provides that a ‘matter relating to the [Voice]’ could ‘include[e] **its composition, functions, powers and procedures**’ [emphasis added]. This power would importantly include providing for the funding of the body, which, as the NSWLS notes,<sup>56</sup> will be critical to the Voice’s ability to function effectively. The Explanatory Memorandum provides examples of the kinds of matters which may fall within these topics including, with respect to the functions of the Voice, the power to make laws ‘both about the Voice’s constitutionally enshrined function of making representations to the Parliament and the Executive Government, and to confer other functions on the Voice, such as to make representations to state or territory parliaments or governments’.<sup>57</sup>

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<sup>54</sup> UNSW Indigenous Law Centre, Constitutional Enshrinement of a First Nations Voice, Issues Paper for Public Discussion, (September 2022), <<https://static1.squarespace.com/static/602f123f11087d603fa92730/t/631a73c9700b2b4827cff5a7/1662677963921/ILC+Issues+Paper+%231+-+The+constitutional+amendment.pdf>> 14.

<sup>55</sup> Lorena Allam, ‘A civil, mature conversation’: architects of the Uluru Statement make plea for consensus on referendum’ *The Guardian* (Online, 6 August 2022) <<https://www.theguardian.com/australia-news/2022/aug/06/a-civil-mature-conversation-architects-of-the-uluru-statement-make-plea-for-consensus-on-referendum>>.

<sup>56</sup> In its submission to the Law Council for the purpose of this submission.

<sup>57</sup> Explanatory Memorandum, Constitution Alteration ‘Notes on clauses’ [30].



56. The matters listed in section 129(iii) are not the only kinds of matters that could be the subject of laws made under this power—the word ‘including’ in the provision suggests a broader ambit. Different kinds of matters relating to the operations of the Voice could also be made under section 129(iii). The expression ‘matters relating to the [Voice]’ is also broad enough to address the Voice’s engagement with other entities, and, in particular the engagement of those other entities with it.<sup>58</sup> This includes the Parliament and the Executive Government of the Commonwealth.<sup>59</sup> The Explanatory Memorandum states:<sup>60</sup>

*Accordingly, the Parliament may make laws about any matters relating to the Voice, including how the Voice will operate, its relationships with other bodies and entities, and how those bodies and entities can respond to its representations. In particular, s 129(iii) would empower the Parliament to make laws establishing standard procedures to be followed for interactions between the Voice and the Executive Government or the Parliament. One aspect of that would be providing for the ways in which the Parliament and the Executive Government would receive representations from the Voice.*

57. In relation to the Executive, Parliament could make laws specific to the various arms of the Executive Government of the Commonwealth, including the Ministers exercising statutory or executive functions. It could also determine procedural matters, such as:

- categories of decision-making (or specific decisions) which might be the subject of representation;
- time limits within which representations might be made in advance of pending decisions or actions; and
- the manner and form in which representations might be made.

58. The Explanatory Memorandum and the Second Reading Speech for the Constitution Alteration confirm that the power granted to the Parliament under section 129(iii) includes ‘specifying whether or not, and if so in which circumstances, an Executive Government decision-maker has a legal obligation to consider the Voice’s representations’.<sup>61</sup>

59. This is reiterated by the Solicitor-General in his advice to the Government in relation to the Constitution Alteration,<sup>62</sup> as well as by Associate Professors Elisa Arcioni and Andrew Edgar, who have remarked of section 129(iii) that:

*While the Constitution guarantees the Voice can make representations, under these provisions, Parliament will have the capacity to determine the legal effect of any representations made by the Voice, including restricting judicial review of the consultation process. This power is key to understanding how the concerns around the impact of representations to the Executive are premature.*<sup>63</sup>

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<sup>58</sup> Solicitor-General’s opinion, [26]-[27].

<sup>59</sup> Ibid [27].

<sup>60</sup> Explanatory Memorandum, Constitution Alteration ‘Notes on clauses’ [27].

<sup>61</sup> Ibid, [21]; House of Representatives, *Hansard* (30 March 2023), 3.

<sup>62</sup> Solicitor-General’s opinion, [28], [32]-[40].

<sup>63</sup> Elisa Arcioni and Andrew Edgar, ‘The Voice and the Executive’, on AUSPUBLAW (31 March 2023), <<https://www.auspublaw.org/home/the-voice-and-the-executive>>.

60. Mr French has also indicated that section 129(iii) as framed is broad enough to accommodate Parliament's power to determine the legal implications of representations made by the Voice.<sup>64</sup>

## Additional relevant considerations

61. The following section sets out the Law Council's position on several issues commonly raised in public discourse in relation to the Voice.

### No Veto on Parliament

62. The Voice is not intended to, and will not in fact under the proposed section 129, have any veto or law-making power or power to issue commands to Parliament, and could not be provided with such power by Parliament.<sup>65</sup>

63. The Voice will be an advisory body. Its function will be to 'make representations'—that is, provide views to Parliament in relation to proposed or existing laws or policies which relate to Aboriginal and Torres Strait Islander peoples. The extent of consideration given by Parliament to such representations is a matter for the Parliament to decide.

### Level of detail

64. The draft provisions are consistent with conventional constitutional drafting whereby:

- the Constitution contains an enabling provision, which sets the scope and limits of the powers of Parliament; and
- Parliament makes and amends laws under that enabling power.

65. This technique of deferral is said to involve 'a deliberate decision to place an issue within the constitutional domain—of basic or enduring principle—but also to leave aspects of its concrete meaning or application to later processes of judicial or legislative decision-making'.<sup>66</sup>

66. The deferral of detail to be developed through legislation balances the benefits of constitutional enshrinement discussed above, including its stability and legitimacy, with the benefits of enabling the Voice to be flexible and adaptable to future needs by allowing for potential amendment to the core design legislation.

67. While general principles relating to the form of the Voice have been released,<sup>67</sup> it is not appropriate to purport to provide the details of the model that Parliament may legislate prior to the referendum because the actual model to be implemented is yet to be determined. It should be determined through comprehensive consultation with Aboriginal and Torres Strait Islander people and subject to the democratic Parliamentary process.

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<sup>64</sup> Robert French, 'The Voice: Facts and Issues' (Speech, Piddington Society, 23 March 2023) <https://www.youtube.com/watch?v=o5JObBZJ2BE>.

<sup>65</sup> Solicitor-General's opinion, [17].

<sup>66</sup> Rosalind Dixon, 'Constitutional Design Deferred' Elgar Handbook on Comparative Constitution Making [2018] UNSWLRS 63, <<http://www5.austlii.edu.au/au/journals/UNSWLRS/2018/63.pdf>>.

<sup>67</sup> 'Design Principles of the Aboriginal and Torres Strait Islander Voice' (published 23 March 2023) <<https://voice.niaa.gov.au/sites/default/files/2023-03/design-principles-aboriginal-torres-strait-islander-voice.pdf>>.

## Special rights and racial discrimination

68. The proposed amendment does not create special rights for Aboriginal and Torres Strait Islander peoples, nor discriminate based on race. Nor does it amount to a 'special measure' under the International Convention on the Elimination of all Forms of Racial Discrimination (**CERD**).<sup>68</sup> Its foundation is in the right of self-determination of peoples,<sup>69</sup> rather than distinction on the basis of race. The Voice also gives effect to other fundamental human rights accorded to Aboriginal and Torres Strait Islander peoples, such as the right to equality and non-discrimination<sup>70</sup> and the right to take part in public affairs.<sup>71</sup>
69. As such, the Voice should be understood, as Professor Simon Rice has written, to be 'a clear statement of [Aboriginal and Torres Strait Islander] peoples' human rights'.<sup>72</sup> This is also emphasised by Professor Ben Saul who writes that:

*These rights do not create inequality, or discriminate, between Indigenous peoples and other Australians. International law recognises simply that the distinctive collective identity of Indigenous peoples, and their history of severe disadvantage, justify taking steps to ensure their views and interests are properly heard by our mainstream political institutions.*<sup>73</sup>

70. Meanwhile, Mr French states that:

*The Voice ... rests upon the historical status of Aboriginal and Torres Strait Islanders as Australia's indigenous people. It does not rest upon race. It accords with the United Nations Declaration on the Rights of Indigenous Peoples for which Australia voted in 2009. It is consistent with the International Convention on the Elimination of all Forms of Racial Discrimination. Suggestions that it would contravene that Convention are wrong.*<sup>74</sup>

71. Specifically, in relation to special measures, the United Nations Committee on the Elimination of Racial Discrimination states that:<sup>75</sup>

*The obligation to take special measures is distinct from the general positive obligation of States parties to the Convention to secure human rights and fundamental freedoms on a non-discriminatory basis to persons and groups subject to their jurisdiction; this is a general obligation flowing from the provisions of the Convention as a whole and integral to all parts of the Convention.*

*Special measures should not be confused with specific rights pertaining to certain categories of person or community, such as, for example ... the rights of indigenous peoples, including rights to lands traditionally occupied by them ... Such rights are permanent rights, recognized as such in human rights*

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<sup>68</sup> Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965. Entry into force 4 January 1969, in accordance with Article 19.

<sup>69</sup> ICCPR Article 1; ICESCR Article 1.

<sup>70</sup> ICCPR Articles 2 and 25; ICESCR Article 2(2); CERD Article 5.

<sup>71</sup> ICCPR Article 25; CERD Article 5(c).

<sup>72</sup> Professor Simon Rice, 'The international legal community will applaud the Indigenous Voice to Parliament' (4 February 2023) <<https://www.simonrice.net.au/the-international-legal-community-will-applaud-the-voice/>>.

<sup>73</sup> Ben Saul, 'The Voice is not revolutionary or threatening. Only its opponents say it is' *Sydney Morning Herald* (opinion piece, online) <<https://www.smh.com.au/by/ben-saul-p4yw8x>>.

<sup>74</sup> Hon Robert French AC February 2023 Symposium Address [40].

<sup>75</sup> United Nations Committee on the Elimination of Racial Discrimination, *General recommendation No. 32 The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination*, CERD/C/GC/32 24 September 2009 [14]-[15].

*instruments ... States parties should carefully observe distinctions between special measures and permanent human rights in their law and practice.*

72. The Constitutional Expert Group provided advice to the Australian Government that:

*The Voice does not confer “rights”, much less “special rights”, on Aboriginal and Torres Strait Islander peoples. Nor would the Voice change or take away any right, power or privilege of anyone who is not Indigenous.*<sup>76</sup>

73. Additionally, as raised above, multiple international human rights bodies and experts have endorsed constitutional enshrinement of the Voice in Australia<sup>77</sup>, illustrating the Voice does not conflict with international human rights obligations.

## Justiciability

74. The High Court has original jurisdiction in all matters arising under the Constitution or involving its interpretation.<sup>78</sup> However, judicial review is ‘not a remedy for correcting all governmental error’<sup>79</sup> and ‘many issues in government are not suitable for evaluation by judicial method.’<sup>80</sup> The principle of justiciability has been developed by the courts to identify whether a question is considered appropriate or fit for judicial determination.

75. For example, with respect to the exercise of federal judicial power, there must be a ‘matter’ which is capable of judicial determination or justiciable.<sup>81</sup> The High Court has emphasised that this concept does not embrace a purely advisory opinion.<sup>82</sup>

76. The concept of a matter can be said to arise under a federal law if the right or duty in question in the matter owes its existence to federal law or depends on federal law for its enforcement.<sup>83</sup> There must be a direct and immediate consequence for the legal rights or interests of a party.<sup>84</sup> Whether a claim is justiciable may also depend on whether the decision relies on ‘legal standards’ rather than ‘political considerations’.<sup>85</sup>

77. A further requirement is that legal proceedings can only be commenced by a person or entity with standing—that is, an entitlement to commence proceedings to resolve an immediate dispute<sup>86</sup> about rights or interests by a person or entity aggrieved who can show a special interest’ in the subject matter of the action.<sup>87</sup> The rights or interests affected may be legal, reputational, social, economic or cultural.<sup>88</sup> Standing for

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<sup>76</sup> Department of Prime Minister and Cabinet ‘Communiqué for the Referendum Working Group’ (Web page) <<https://ministers.pmc.gov.au/burney/2022/communique-referendum-working-group-0>>.

<sup>77</sup> See, United Nations Permanent Forum for Indigenous Issues, *Permanent Forum on Indigenous Issues Report on the twenty-first session*, UN Doc E/2022/43-E/C, (25 April–6 May 2022) [45]; Special Rapporteur on the Rights of Indigenous Peoples, *Report of the Special Rapporteur on the Rights of Indigenous Peoples on Her Visit to Australia*, UN Doc A/HRC/36/46/Add.2 (8 August 2017) [107]; Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Eighteenth to Twentieth Periodic Reports of Australia*, UN Doc CERD/C/AUS/CO/18-20 (26 December 2017) [20].

<sup>78</sup> *Judiciary Act 1903* (Cth) s 30(a).

<sup>79</sup> Robin Creyke, Matthew Groves, John McMillan, Mark Smyth, *Control of Government Action: Text, Cases and Commentary* (2018), 6<sup>th</sup> ed, 123.

<sup>80</sup> *Ibid.*

<sup>81</sup> *CGU Insurance Pty Ltd v Blakely* (2016) 259 CLR 339, at [26] (French CJ, Kiefel, Bell and Keane JJ).

<sup>82</sup> *Ibid.*

<sup>83</sup> *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 154 (Latham CJ).

<sup>84</sup> *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 75 ALR 218.

<sup>85</sup> *Stewart v Ronalds* (2009) 232 FLR 331; see Solicitor-General’s opinion, [39].

<sup>86</sup> *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 35 (French CJ), 68 [152] (Gummow, Crennan and Bell JJ).

<sup>87</sup> *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493.

<sup>88</sup> Aronson and Groves, *Judicial Review of Administrative Action* 5<sup>th</sup> edition Law Book Co 2013 [11.30], p 722.

Aboriginal peoples regarding government action that affects them was established by the High Court in *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27.<sup>89</sup>

78. The Law Council considers that the majority of instances in which the Voice may make representations—such as regarding the development of policies, programs and bills—will not be justiciable: for example, because there is no ‘matter’ of controversy requiring the adjudication of rights and interests.
79. However, consistent with the principle of the rule of law, legal challenges may be made arguing that that a law made, or administrative action taken, is inconsistent with the new section 129 of the Constitution<sup>90</sup> or inconsistent with a law made under subsection 129(iii), and therefore was beyond power.
80. If litigation did arise, it would be the role of the High Court to consider and interpret the Constitution and settle the relevant principles of law as required. The Law Council considers that the Australian public should have trust in the High Court to perform this function, as with all matters of constitutional law.
81. A particular debate has arisen about whether, with respect to representations made by the Voice, there would be an obligation on Parliament or the Executive to consider or respond to those representations. In addressing this issue below, it is necessary to consider matters of justiciability in relation to representations made by the Voice to Parliament and the Executive separately.

### **Justiciability of representations to Parliament**

82. The actions of Parliament concerning its relationship with the Voice would, in the above context, be considered non-justiciable. The constitutional amendment provides for the Voice to make representations to the Parliament—as noted by Mr French and others, it does not create an explicit, nor an implied, obligation on Parliament to consider or respond to those representations.<sup>91</sup>
83. Additionally, under existing principles of constitutional law, the High Court has held that the exercise by Parliament of its own law-making procedures is non-justiciable.<sup>92</sup> Therefore, if the Parliament were to create internal procedures relating to how it receives the Voice’s representations, such procedures would not be justiciable.
84. Former Justice of the High Court, the Honourable Kenneth Hayne AC KC, has underlined that the High Court has shown deference towards Parliament by not interfering with Parliament’s exercise of its own procedures, described as ‘intramural activities’,<sup>93</sup> and has expressed the view that ‘litigation about what parliament does or does not do in relation to representations would fail’.<sup>94</sup>

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<sup>89</sup> Elisa Arcioni and Andrew Edgar, ‘The Voice and the Executive’, on AUSPUBLAW (31 March 2023), <<https://www.auspublaw.org/home/the-voice-and-the-executive>>.

<sup>90</sup> Solicitor-General’s opinion, [30].

<sup>91</sup> Hon Robert French AC February 2023 Symposium Address [53]; see also, Tony McAvooy SC, ‘Some Legal Issues arising from Proposed Constitutional Reform to Recognise Aboriginal People and Torres Strait Islanders’, (Article, Uphold and Recognise Forum, 28 February 2023); Kenneth Hayne, ‘Fear of the voice lost In the lack of legal argument’, *The Australian*, (Online, 28 November 2022); UNSW Indigenous Law Centre, *Issues Paper for Public Discussion: the Constitutional Amendment* (Issues Paper, September 2022), 15; Solicitor-General’s opinion, [18].

<sup>92</sup> *The State of Western Australia v The Commonwealth* (1995) 183 CLR 373, [140].

<sup>93</sup> *Ibid.* Solicitor-General’s opinion, [18(b)].

<sup>94</sup> Kenneth Hayne, ‘Fear of the voice lost In the lack of legal argument’, *The Australian*, (Online, 28 November 2022) <[https://abl.sfo2.cdn.digitaloceanspaces.com/public/Scanned-Articles-/20221126\\_The-Aus\\_Hayne\\_Fear-of-the-voice-lost-in-the-lack-of-legal-argument.pdf](https://abl.sfo2.cdn.digitaloceanspaces.com/public/Scanned-Articles-/20221126_The-Aus_Hayne_Fear-of-the-voice-lost-in-the-lack-of-legal-argument.pdf)>.

### Justiciability of representations to the Executive

85. As discussed, the power provided to the Voice under proposed subsection 129(ii) is to make representations. It is not framed as a duty on the Executive (or Parliament) to consult the Voice.<sup>95</sup>

86. The success of any challenge to Executive action based on a representation by the Voice to the Executive will depend primarily, if not entirely, on the laws that are made by the Parliament. Proposed subsection 129(iii) means that Parliament can determine the legal effect of any representations made, including restricting judicial review of any consultation process.<sup>96</sup> As noted by Arcioni and Edgar:

*Concerns about litigation in relation to the consultation process are matters which can be considered and effectively managed when drafting the Voice legislation. It should therefore not be a reason for concern that the Voice may make representations to the Executive.*<sup>97</sup>

87. Parliament has the power under proposed subsection 129(iii) to make laws creating obligations or procedures relating to the Executive's handling of representations in relation to the Voice. This may include, for example, legislation requiring the Executive to consider representations in relation to making certain decisions or exercising certain powers that affect First Nations peoples. This means that Parliament can decide whether and when a representation by the Voice must be considered by the Executive.<sup>98</sup>

88. Parliament has a range of options available for how it might require the Executive to consider representations made by the Voice. Arcioni and Edgar identify that these options range from discretionary provisions that can be scrutinised by parliaments and cannot be challenged in courts, to mandatory consultation provisions for which failure to consult can be challenged and remedied by the courts.<sup>99</sup>

89. There is a further and more fundamental point. The role of the courts in declaring and enforcing the legal limits to the exercise of Executive power is not to be feared. Judicial review of administrative action is the application of the rule of law. The possibility of a challenge to Executive decision or action is not unusual within the Australian legal system.<sup>100</sup> Judicial review is available to correct errors of governments and government agencies which affect people's legal rights and contravene existing law. As stated by Brennan J in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35–36:

*The duty and jurisdiction of the courts to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the [decision-maker's] power.*

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<sup>95</sup> Solicitor-General's opinion, [18]-[19].

<sup>96</sup> Ibid, [27]; see also Elisa Arcioni and Andrew Edgar, 'The Voice and the Executive', on AUSPUBLAW (31 March 2023), < <https://www.auspublaw.org/home/the-voice-and-the-executive>>.

<sup>97</sup> Elisa Arcioni and Andrew Edgar ibid.

<sup>98</sup> Solicitor-General's opinion, [19(b)], [36].

<sup>99</sup> Elisa Arcioni and Andrew Edgar, 'The Voice and the Executive', on AUSPUBLAW (31 March 2023), < <https://www.auspublaw.org/home/the-voice-and-the-executive>>..

<sup>100</sup> Solicitor-General's opinion, [19,(c)].

## Appendix A—Consultation processes concerning Constitutional recognition of First Nations peoples

1. At a high level, since 2011, the following inquiries have been conducted in relation to the Constitutional recognition of Aboriginal and Torres Strait Islander peoples.
  - The **Expert Panel on the Recognition of Aboriginal and Torres Strait Islander Peoples in the Constitution**—published a [report](#) on possible options to give effect to Indigenous constitutional recognition in 2012.<sup>1</sup>
  - The **Aboriginal and Torres Strait Islander Act of Recognition Review Panel**—established under the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth), published its [report](#) in September 2014.<sup>2</sup>
  - The **Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples**—with the remit to address ‘possible options for constitutional change, including advice as to the level of support from Indigenous people and the broader community for each option’, produced an [Interim Report](#) (July 2014)<sup>3</sup>; [Progress Report](#) (October 2014)<sup>4</sup> and a [Final Report](#) (June 2015).<sup>5</sup>
  - The **Referendum Council**—appointed to advise on progress to recognition and the next steps towards a successful referendum to recognise First Nations peoples in the Constitution<sup>6</sup> produced a [Final Report](#) in June 2017.
  - The **Joint Select Committee on Constitutional Recognition**—established to consider the recommendation of the Referendum Council and previous similar processes, and to recommend options for constitutional change and any potential complementary legislative measures,<sup>7</sup> published an [Interim Report](#) (July 2018) and [Final Report](#) (November 2018).
  - The **Co-design process**—established to provide overarching guidance and advice on models for Local and Regional Voices and for a National voice (but did not consider a constitutionally enshrined Voice)<sup>8</sup> produced two reports: the [Interim Report](#) (Oct 2020) and the [Final Report](#) (July 2021).

<sup>1</sup> Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (January 2012) <https://www.indigenousjustice.gov.au/wp-content/uploads/mp/files/resources/files/12-01-16-indigenous-recognition-expert-panel-report.pdf>.

<sup>2</sup> The Hon John Anderson AO, Ms Tanya Hosch and Mr Richard Eccles, *Final Report of the Aboriginal and Torres Strait Islander Act of Recognition Review Panel*, (Report, September 2014), <https://apo.org.au/sites/default/files/resource-files/2014-09/apo-nid251996.pdf>

<sup>3</sup> Commonwealth of Australia, *Interim Report of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander People* (Report, July 2014) [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Former\\_Committees/Constitutional\\_Recognition\\_2018/ConstRecognition/Interim\\_Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Constitutional_Recognition_2018/ConstRecognition/Interim_Report)

<sup>4</sup> Commonwealth of Australia, *Progress Report of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander People* (Report, October 2014), [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/2015\\_Constitutional\\_Recognition\\_of\\_Aboriginal\\_and\\_Torres\\_Strait\\_Islander\\_Peoples/Completed\\_inquiries/2010-13/Progress\\_report/index](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/2015_Constitutional_Recognition_of_Aboriginal_and_Torres_Strait_Islander_Peoples/Completed_inquiries/2010-13/Progress_report/index)

<sup>5</sup> Commonwealth of Australia, *Final Report of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander People* (Report, June 2015), [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/2015\\_Constitutional\\_Recognition\\_of\\_Aboriginal\\_and\\_Torres\\_Strait\\_Islander\\_Peoples/Constitutional\\_Recognition/Final\\_Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/2015_Constitutional_Recognition_of_Aboriginal_and_Torres_Strait_Islander_Peoples/Constitutional_Recognition/Final_Report)

<sup>6</sup> Referendum Council Final Report, Appendix B: Terms of Reference.

<sup>7</sup> Commonwealth of Australia, Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Final Report* (November 2018) viii [1(a)].

<sup>8</sup> National Indigenous Australians Agency, ‘Indigenous Voice Co-design Process – Final Report to the Australian Government’ (July 2021), Appendix B: Terms of Reference.



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2. The Referendum Council process was particularly formative in relation to the proposal for a First Nations Voice. In September 2014 the Aboriginal and Torres Strait Islander Act of Recognition Review Panel recommended the establishment of a Referendum Council.<sup>9</sup> On 6 July 2015, Aboriginal and Torres Strait Islander leaders issued the Kirribilli Statement<sup>10</sup> to the then Prime Minister and Leader of the Opposition, calling for constructive engagement with Aboriginal and Torres Strait Islander peoples on the question of constitutional recognition.<sup>11</sup> Subsequently, a Referendum Council was appointed to advise on progress in relation to recognition and the next steps towards a successful referendum to recognise Aboriginal and Torres Strait Islander peoples in the Constitution.<sup>12</sup>
3. As part of its mandate to consult with Aboriginal and Torres Strait Islander peoples on their views of meaningful recognition, the Referendum Council conducted:
  - twelve *Regional Dialogues* held across the nation and one held in Canberra—described as the most proportionately significant consultation process that has been undertaken with Aboriginal and Torres Strait Islander peoples;<sup>13</sup> and
  - the *National Constitutional Convention* at Uluru, which resulted in the *Uluru Statement*—an articulation of the consensus position reached during the Regional Dialogues.
4. The Referendum Council's single recommendation in its final report in June 2017 was that 'a referendum be held to provide in the Australian Constitution for a body that gives Aboriginal and Torres Strait Islander peoples a Voice to the Commonwealth Parliament'.<sup>14</sup>

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<sup>9</sup> The Hon John Anderson AO, Ms Tanya Hosch and Mr Richard Eccles, *Final Report of the Aboriginal and Torres Strait Islander Act of Recognition Review Panel*, (Report, September 2014), <<https://apo.org.au/sites/default/files/resource-files/2014-09/apo-nid251996.pdf>>

<sup>10</sup> Statement presented by Aboriginal And Torres Strait Islander attendees at a meeting held with the Prime Minister and Opposition leader on constitutional recognition' (2015) 8(19) *Indigenous Law Bulletin*, 26 <<https://www.austlii.edu.au/au/journals/ILB/2015/37.pdf>>.

<sup>11</sup> 'Statement presented by Aboriginal And Torres Strait Islander attendees at a meeting held with the prime minister and Opposition leader on constitutional recognition' (2015) 8(19) *Indigenous Law Bulletin*, 26 <<https://www.austlii.edu.au/au/journals/ILB/2015/37.pdf>>.

<sup>12</sup> Referendum Council Final Report, Appendix B: Terms of Reference.

<sup>13</sup> *Ibid* 10.

<sup>14</sup> Referendum Council Final Report, Appendix B: Terms of Reference 2.