

Law Council of Australia

# Guide for the legal profession – Referendum for an Aboriginal and Torres Strait Islander Voice

20 June 2023



Law Council  
OF AUSTRALIA

# Table of Contents

<b>Introduction.....</b>	<b>3</b>
<b>1. The origins of the Voice.....</b>	<b>3</b>
Constitutional history.....	3
Formative consultation processes in the development of the Voice.....	4
<b>2. The Law Council’s position on the Voice.....</b>	<b>6</b>
Decision to support the Voice.....	6
The compelling case for a Voice.....	6
Constitutional recognition and enshrinement.....	6
A mechanism for substantive change.....	8
Selfdetermination.....	9
<b>3. The proposed Constitutional amendment.....</b>	<b>10</b>
The proposed amendment.....	11
Introductory wording.....	11
Section 129(i).....	11
Section 129(ii).....	12
‘May make representations’.....	12
‘To Parliament and Executive Government of the Commonwealth’.....	13
‘On matters relating to Aboriginal and Torres Strait Islander peoples’.....	14
Section 129(iii).....	15
<b>4. Position on key legal issues raised in public discourse.....</b>	<b>17</b>
No Veto on Parliament.....	17
Level of detail.....	17
Special rights and racial discrimination.....	17
Justiciability.....	19
Justiciability of representations to Parliament.....	20
Justiciability of representations to the Executive.....	21
Aboriginal and Torres Strait Islander Sovereignty.....	22

# Introduction

1. This is a Guide in relation to the referendum to amend the *Australian Constitution* (the **Constitution**) to provide for an Aboriginal and Torres Strait Islander Voice to the Parliament and the Executive Government of the Commonwealth (**Voice**).<sup>1</sup>
2. On 19 June 2023, Parliament passed the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 (Cth) (the **Constitution Alteration**), which contains the proposed amendment to the Constitution to provide for the Voice. A referendum on that amendment is expected to be held in the second half of 2023.
3. This Guide is intended to be used by Law Council of Australia staff, Directors and Executive, and its Constituent Bodies, Sections and advisory committees to inform:
  - a common understanding of the historical context which led to the referendum and the legal issues arising from the referendum; and
  - advocacy and public comment, which give effect to the Law Council's established position in support of a constitutionally enshrined Voice.
4. This Guide sets out: the origins of the Voice; the rationale for the Law Council's support for the Voice; a description of the proposed Constitutional amendment; and a position on key legal issues raised in public discourse about the Voice. The Law Council considers that the Constitutional amendment as proposed is constitutionally orthodox, just, and legally sound.

## 1. The origins of the Voice

### Constitutional history

5. The original Constitution in 1901 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 which explicitly excluded Aboriginal and Torres Strait Islander peoples from the Commonwealth's law-making power<sup>2</sup> and from being counted as part of the Australian population.<sup>3</sup>
6. 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 provided for Aboriginal and Torres Strait Islander people to be counted as part of the Australian population.<sup>4</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>5</sup>

---

<sup>1</sup> While the Uluru Statement from the Heart refers to a 'First Nations Voice', the present draft Constitutional amendment to the Constitution adopts the language of an 'Aboriginal and Torres Strait Islander Voice' and 'Aboriginal and Torres Strait Islander peoples'. In this light, the Law Council uses those terms within this Guide.

<sup>2</sup> See, original version of s 51 (xxvi) of the Constitution.

<sup>3</sup> See, repealed s 127 of the Constitution.

<sup>4</sup> Through amend amendment to s 51 (xxvi) of the Constitution and by repealing s 127.

<sup>5</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

7. 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>6</sup>
8. It follows a long public consultation process, extending across a number of inquiries and reports, directed towards determining the best means to provide for that recognition.
9. The narrative underlying the trajectory of these inquiries, discussed in detail at **Appendix A**, illustrates the comprehensive consultation that has occurred in developing the proposal for a Voice. 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>7</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>8</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>9</sup>; [Progress Report](#) (October 2014)<sup>10</sup> and a [Final Report](#) (June 2015).<sup>11</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>12</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

---

<sup>6</sup> The Uluru Statement, ‘History’ (Web page), <https://ulurustatement.org/the-statement/history/>.

<sup>7</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>8</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>9</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>10</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>11</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>12</sup> Referendum Council Final Report, Appendix B: Terms of Reference.

potential complementary legislative measures,<sup>13</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>14</sup> produced two reports: the [Interim Report](#) (Oct 2020) and the [Final Report](#) (July 2021).

10. 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>15</sup> On 6 July 2015, Aboriginal and Torres Strait Islander leaders issued the Kirribilli Statement<sup>16</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>17</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>18</sup>
11. 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>19</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.
12. 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>20</sup> by establishing a Voice to Parliament enshrined in the Constitution, and a Makarrata Commission for the purpose of treaty making and truth--telling.
13. 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>21</sup>

---

<sup>13</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>14</sup> National Indigenous Australians Agency, ‘Indigenous Voice Co-design Process – Final Report to the Australian Government’ (July 2021), Appendix B: Terms of Reference.

<sup>15</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>16</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>17</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>18</sup> Referendum Council Final Report, Appendix B: Terms of Reference.

<sup>19</sup> Ibid 10.

<sup>20</sup> The Uluru Statement (summary), <https://ulurustatement.org/the-statement/>.

<sup>21</sup> Referendum Council Final Report, Appendix B: Terms of Reference 2.

## 2. The Law Council’s position on the Voice

### Decision to support the Voice

14. In October 2017, with the advice of its Indigenous Legal Issues Committee, the Directors of the Law Council approved the Law Council’s support for a referendum to be held to amend the Constitution to provide for a representative body that gives Aboriginal and Torres Strait Islander peoples a Voice to the Commonwealth Parliament. The Law Council published a media release announcing this support.<sup>22</sup>
15. Since 2017, the Law Council has advocated in support for the Voice through media releases, submissions to government inquiries, as well as speeches by the Law Council President and other media opportunities.<sup>23</sup> In 2022, with its constituent bodies, the Law Council supported the UNSW Indigenous Law Centre (ILC) to conduct seven workshops with eminent legal experts on the legal issues raised by proposed wording of the Constitutional amendment to provide for the Voice in the Constitution. These workshops assisted to inform the Constitutional drafting process, including through a briefing to the Australian Government’s Constitutional Expert Group.

### The compelling case for a Voice

16. The Law Council considers that there are three core grounds constituting the compelling case for a constitutionally enshrined Voice. These are that the Voice will provide:
  - (a) for constitutional recognition of Aboriginal and Torres Strait Islander peoples, on their own terms, 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.

### Constitutional recognition and enshrinement

17. 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:

---

<sup>22</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>23</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) ([Law Council Co-Design submission](#)) < <https://www.lawcouncil.asn.au/publicassets/ad0ba076-01ae-eb11-943c-005056be13b5/3996%20-%20Indigenous%20Voice%20Co-Design%20Process.pdf>>.

- it will address the ‘longstanding and unfinished business for the nation’<sup>24</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.

18. The Explanatory Memorandum for the Constitution Alteration 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>25</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>26</sup>

19. It is important to amend the Constitution to provide for the Voice, as opposed to providing for a Voice through legislation only.<sup>27</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>28</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 power only.

<sup>24</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.

<sup>25</sup> Explanatory Memorandum, Constitution Alteration, 4.

<sup>26</sup> *Ibid*, 3.

<sup>27</sup> Such legislation may be established, for example, under the ‘race power’ (the Constitution s 51 (xxvi))

<sup>28</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>.

## A mechanism for substantive change

20. 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.
21. 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>29</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>30</sup> In turn, such policies have ‘caused continuing disadvantage’.<sup>31</sup>
22. Aboriginal and Torres Strait Islander peoples comprise approximately 3.8 per cent of the Australian population,<sup>32</sup> a minority which means that they ‘struggle to be heard through ordinary democratic processes’.<sup>33</sup> Consequently, and with no assured means to provide advice to policy and law-makers,<sup>34</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.
23. The kinds of matters that affect Aboriginal and Torres Strait Islander people specifically or disproportionately are wide ranging and include: social security policies,<sup>35</sup> access to housing<sup>36</sup> and disability supports,<sup>37</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 the Northern Territory intervention, are

---

<sup>29</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>30</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>31</sup> Ibid.

<sup>32</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>33</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>34</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>35</sup> Law Council of Australia, ‘Aboriginal and Torres Strait Islander people’, *The Justice Project Final Report* (August 2018) 84-93.

<sup>36</sup> Ibid 93-94.

<sup>37</sup> Ibid 94-95.



illustrative examples of the importance of listening to Aboriginal and Torres Strait Islander Voices concerning policy and law reform.<sup>38</sup>

24. 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.
25. 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>39</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.*

26. Importantly, while this is a substantive change, it is nevertheless modest. As discussed later in this Guide, the Parliament is not bound by the representations of the Voice and can decide how the Executive can or must engage with or consider them.

### Self-determination

27. The October 2017 decision of Law Council Directors to provide full and unqualified support for the recommendation of the Referendum Council was reached in the context of an understanding that the Uluru Statement, and its call for a constitutionally enshrined Voice, represents an advancement of self-determination.<sup>40</sup>
28. 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>41</sup> and the *International Covenant on Economic, Social and Cultural Rights*.<sup>42</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>43</sup>
29. 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>44</sup> and is expressed in Article 3. Australia formally announced its support for

---

<sup>38</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>>.

<sup>39</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>40</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>41</sup> Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>42</sup> Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

<sup>43</sup> ICCPR art 1(1); ICESCR art 1(1).

<sup>44</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (13 September 2007).

the UNDRIP on 3 April 2009<sup>45</sup> and since this time it has reiterated its support for the rights and principles articulated in the UNDRIP.<sup>46</sup>

30. Articles 5 and 18 of the UNDRIP 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>47</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>48</sup>
31. 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.
32. 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>49</sup> the UN Special Rapporteur on the Rights of Indigenous Peoples,<sup>50</sup> and the United Nations Committee on the Elimination of Racial Discrimination.<sup>51</sup>

### 3. The proposed Constitutional amendment

---

<sup>45</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>46</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].

<sup>47</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>48</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>49</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>50</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>51</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].

## The proposed amendment

33. On 30 March 2023, the Australian Government introduced the Constitution Alteration, which contains the following proposed amendment to the Constitution:

### **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:*

- 1) *There shall be a body, to be called the Aboriginal and Torres Strait Islander Voice.*
- 2) *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.*
- 3) *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.*

34. The amendment and question were agreed to by the Referendum Working Group and the Government.<sup>52</sup> The proposed referendum question is as follows:

#### **Referendum Question:**

*A Proposed Law: to alter the Constitution to recognise the First Peoples of Australia by establishing an Aboriginal and Torres Strait Islander Voice. Do you approve this proposed alteration?*

35. As noted, on 19 June 2023, Parliament passed the Constitution Alteration.

36. The following passages provide an overview to the function of this text.

## Introductory wording

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

37. 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.

## Section 129(i)

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

38. 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

---

<sup>52</sup> Australian Government, ‘Next step towards Voice Referendum: Constitutional Alteration Bill’ (Joint Media Release, 23 March 2023), <<https://ministers.ag.gov.au/media-centre/next-step-towards-voice-referendum-constitutional-alteration-bill-23-03-2023>>

that the term ‘body’ is used to indicate the nature of the Voice as an entity with a basis in the Constitution.<sup>53</sup> The amendment does not guarantee its existence automatically—an act of Parliament is required to give it substantive manifestation.

39. 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.

## 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’*

40. 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. Without section 129(ii), the Voice’s purpose would be less certain and the power in section 129(iii) significantly less bounded.
41. Without section 129(ii), the power in section 129(iii) would be vast, enabling the constitutional body established under section 129(i) to be empowered in any way Parliament determines.<sup>54</sup> Parliament may, for example, provide the Voice with functions which go well beyond ‘making representations’. On the other hand, it may provide the Voice with minimal functions at all, rendering it insignificant. The ability to make representations to Parliament and the Executive Government of the Commonwealth would not be assured by the Constitution as an enduring core function, and the Voice’s functions would be left at the whim of Parliament.
42. With regard to this section, 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’.

### ‘May make representations’

43. The making of a representation is a self--directed function, exercised at the discretion of the Voice itself.
44. . Section 129(ii) is not framed as a duty to consult the Voice.<sup>55</sup>
45. 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>56</sup>

---

<sup>53</sup> Explanatory Memorandum, Constitution Alternation ‘Notes on clauses’ [9].

<sup>54</sup> Subject to express (eg, ‘subject to this Constitution’) and implied limitations.

<sup>55</sup> 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**) [18]-[19] 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>56</sup> Explanatory Memorandum, Constitution Alternation ‘Notes on clauses’ [12].

46. 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>57</sup>

47. The ILC 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>58</sup>

### ‘To Parliament and Executive Government of the Commonwealth’

48. 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>59</sup>
- **to the Executive**—in the context of ‘law reform, policy development, decisions made under specific legislation, and other matters of government administration ...’<sup>60</sup>

49. The Explanatory Memorandum states that ‘the term “the Executive Government of the Commonwealth” has the same meaning as elsewhere in the Constitution’.<sup>61</sup>

50. The term is not defined in the Constitution. In *Hocking*,<sup>62</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>63</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>64</sup>

51. The power to make representations to the Executive Government of the Commonwealth would also enable representations to be made directly to entities with responsibility for performing statutory functions and powers which affect Aboriginal and Torres Strait Islander peoples. Such entities may wish to seek a representation from

---

<sup>57</sup> The Hon Robert French AC and Professor Geoffrey Lindell, Submission 98 to the Joint Select Committee on Aboriginal and Torres Strait Islander Voice Referendum, *Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum* (19 April 2023) (**Hon Robert French AC Submission**) [45].

<sup>58</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>59</sup> Explanatory Memorandum, Constitution Alternation ‘Notes on clauses’ [16].

<sup>60</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>61</sup> Explanatory Memorandum, Constitution Alternation ‘Notes on clauses’ [20].

<sup>62</sup> *Hocking v Director-General of the National Archives of Australia* (2020) 271 CLR; (2020) 379 ALR 395; HCA 19.

<sup>63</sup> Ibid [74] (Kiefel CJ, Bell, Gageler, Keane JJ).

<sup>64</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].

the Voice to assist them in carrying out their functions fairly and effectively. These could include the:

- (a) Australian Electoral Commission, which manages an Indigenous Electoral Participation Program, the stated objectives of which 'are to increase enrolment, voter turnout, formality and employment of Aboriginal and Torres Strait Islander people in Australian election';<sup>65</sup>
- (b) Productivity Commission, which reviews progress on Closing the Gap;<sup>66</sup> and
- (c) Australian Law Reform Commission, which undertook an inquiry in 2016 about the incarceration rates of Aboriginal and Torres Strait Islander peoples.<sup>67</sup>

52. 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>68</sup> It is appropriate that the Voice can make representations across the breadth of the Executive, given the different roles that various parts of the Executive play in developing and reviewing policy, performing powers and functions and proposing laws.

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

53. 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>69</sup>

54. Mr French has stated that:<sup>70</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 education and training, family and social welfare, health, remote community services, community policing, Indigenous art, cultural and heritage protection, traditional ownership of land and waters are well within that range.*

55. For example, legislation dealing with an environmental issue, may not relate specifically to Aboriginal and Torres Strait Islander peoples, but may 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.

---

<sup>65</sup> Australian Electoral Commission, 'Indigenous Electoral Participation Program' (webpage, <https://www.aec.gov.au/indigenous/iepp.htm>) accessed on 4 May 2023.

<sup>66</sup> Productivity Commission, 'Closing the Gap Review – Terms of Reference' (7 April 2022) <https://www.pc.gov.au/inquiries/current/closing-the-gap-review/terms-of-reference>.

<sup>67</sup> Australian Law Reform Commission, 'Incarceration rates of Aboriginal and Torres Strait Islander peoples' (1 December 2016) <https://www.alrc.gov.au/inquiry/incarceration-rates-of-aboriginal-and-torres-strait-islander-peoples/>.

<sup>68</sup> Explanatory Memorandum, Constitution Alternation 'Notes on clauses' [31]; Law Council Co-Design submission [99].

<sup>69</sup> Explanatory Memorandum, Constitution Alternation 'Notes on clauses' [24].

<sup>70</sup> Hon Robert French AC Submission), [46].

56. 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>71</sup>
57. 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 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.

## 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’*

58. 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).
59. This power is discretionary: Parliament is not required under this 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’, 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.
60. This approach is appropriate and conventional. It is a ‘common constitutional technique’<sup>72</sup> to establish an enabling provision and defer detail to the Parliament (as expanded on in the following part).
61. 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 could include providing for the funding of the body, which, 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>73</sup>
62. 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 operation of the Voice could also be made under section 129(iii). The expression ‘matters relating to the [Voice]’ is also

<sup>71</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>72</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>73</sup> Explanatory Memorandum, Constitution Alteration ‘Notes on clauses’ [30].

broad enough to address the Voice's engagement with other entities, and, in particular the engagement of those other entities with it.<sup>74</sup> This includes the Commonwealth Parliament and the Executive Government of the Commonwealth. The Explanatory Memorandum states:<sup>75</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.*

63. In relation to the Executive, Parliament could make laws specific to the various arms of the Commonwealth Executive, including the Ministers exercising statutory or executive functions and statutory bodies. 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.

64. 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>76</sup>

65. This is reiterated by the Solicitor-General in his advice to the Government in relation to the Constitution Alteration,<sup>77</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>78</sup>*

66. Mr French has also indicated that section 129(iii) is broad enough to accommodate Parliament's power to determine the legal implications of representations made by the Voice.<sup>79</sup>

---

<sup>74</sup> Solicitor-General's opinion, [26]-[27].

<sup>75</sup> Ibid [27].

<sup>76</sup> Ibid, [21]; House of Representatives, *Hansard* (30 March 2023), 3.

<sup>77</sup> Solicitor-General's opinion, [28], [32]-[40].

<sup>78</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>79</sup> Robert French, 'The Voice: Facts and Issues' (Speech, Piddington Society, 23 March 2023) <https://www.youtube.com/watch?v=o5JObBZJ2BE>.



## 4. Position on key legal issues raised in public discourse

67. 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

68. 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>80</sup>

69. 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

70. 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.

71. 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>81</sup>

72. 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.

73. While general principles relating to the form of the Voice have been released,<sup>82</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.

### Special rights and racial discrimination

74. The Voice will 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>83</sup> Its foundation is in the right of self--determination of

---

<sup>80</sup> Solicitor-General's opinion, [17].

<sup>81</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>82</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>>.

<sup>83</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.

peoples,<sup>84</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>85</sup> and the right to take part in public affairs.<sup>86</sup>

75. 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>87</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>88</sup>

76. 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>89</sup>

77. Specifically, in relation to special measures, the United Nations Committee on the Elimination of Racial Discrimination states that:<sup>90</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 instruments... States parties should carefully observe distinctions between special measures and permanent human rights in their law and practice.*

78. 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>91</sup>

---

<sup>84</sup> ICCPR Article 1; ICESCR Article 1.

<sup>85</sup> ICCPR Articles 2 and 25; ICESCR Article 2(2); CERD Article 5.

<sup>86</sup> ICCPR Article 25; CERD Article 5(c).

<sup>87</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>88</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>89</sup> Hon Robert French AC Submission [40].

<sup>90</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].

<sup>91</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>>.

79. Additionally, as raised above, multiple international human rights bodies and experts have endorsed constitutional enshrinement of the Voice in Australia<sup>92</sup>, illustrating the Voice does not conflict with international human rights obligations.

## Justiciability

80. The High Court has original jurisdiction in all matters arising under the Constitution or involving its interpretation.<sup>93</sup> However, judicial review is 'not a remedy for correcting all governmental error'<sup>94</sup> and 'many issues in government are not suitable for evaluation by judicial method.'<sup>95</sup> The principle of justiciability has been developed by the courts to identify that a question is not considered appropriate or fit for judicial determination.

81. 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>96</sup> The High Court has emphasised that this concept does not embrace a purely advisory opinion.<sup>97</sup>

82. 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>98</sup> There must be a direct and immediate consequence for the legal rights or interests of a party.<sup>99</sup> Whether a claim is justiciable may also depend on whether the decision relies on 'legal standards' rather than 'political considerations'.<sup>100</sup>

83. 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>101</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>102</sup> The rights or interests affected may be legal, reputational, social, economic or cultural.<sup>103</sup> Standing for 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>104</sup>

84. 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.

---

<sup>92</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>93</sup> *Judiciary Act 1903* (Cth) s 30(a).

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

<sup>96</sup> *CGU Insurance Pty Ltd v Blakely* (2016) 259 CLR 339, at [26] (French CJ, Kiefel, Bell and Keane JJ).

<sup>97</sup> *Ibid.*

<sup>98</sup> *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 154 (Latham CJ).

<sup>99</sup> *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 75 ALR 218.

<sup>100</sup> *Stewart v Ronalds* (2009) 232 FLR 331; see Solicitor-General's opinion, [39].

<sup>101</sup> *Pepe v Commissioner of Taxation* (2009) 238 CLR 1 at 35 (French CJ), 68 [152] (Gummow, Crennan and Bell JJ).

<sup>102</sup> *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493.

<sup>103</sup> Aronson and Groves, *Judicial Review of Administrative Action* 5<sup>th</sup> edition Law Book Co 2013 [11.30], p 722.

<sup>104</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>>.

85. 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>105</sup> or inconsistent with a law made under section 129(iii), and therefore was beyond power.
86. 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 executing this function, as with all matters of Constitutional law.
87. 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.
88. As a general principle, whether any constitutional implications are to be drawn in relation to the Voice and the provision of its representations to the Parliament or the Executive in relation to the Voice would be determined by the High Court by reference to:
- (a) primarily, the text or structure of the Constitution;<sup>106</sup>
  - (b) the context, including the apparent intent behind the constitutional amendment and drafting history;<sup>107</sup>
  - (c) the practicality or impracticality of drawing such implication.<sup>108109</sup>
89. In addressing the issue of whether any obligation exists more precisely 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

90. 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>110</sup>
91. Additionally, under existing principles of constitutional law, the High Court has found that the exercise by Parliament of its own law-making procedures is non-justiciable.<sup>111</sup>

<sup>105</sup> Solicitor-General's opinion, [30].

<sup>106</sup> Solicitor-General's opinion [33]-[34]; Professor Anne Twomey, Submission No. 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) 5-6 (**Professor Anne Twomey opinion**); Hon Robert French AC Submission [54].

<sup>107</sup> Solicitor-General's opinion [35]-[38]; Professor Anne Twomey opinion 6-7; Hon Robert French AC Submission [55].

<sup>108</sup> Professor Anne Twomey opinion 8. See also, Solicitor-General's opinion [39]-[40]; Hon Robert French AC Submission [554].

<sup>110</sup> Hon Robert French AC Submission [54]; see also, Tony McAvoy 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>111</sup> *The State of Western Australia v The Commonwealth* (1995) 183 CLR 373, [140].

Therefore, if the Parliament were to create internal procedures relating to how it receives the Voice's representations, such procedures would not be justiciable.

92. 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>112</sup> and has expressed the view that 'litigation about what parliament does or does not do in relation to representations would fail'.<sup>113</sup>

### **Justiciability of representations to the Executive**

93. As discussed, the power provided to the Voice under proposed section 129(ii) is to make representations. It is not framed as a duty on the Executive (or Parliament) to consult the Voice.<sup>114</sup>

94. The success of any challenge regarding a representation made by the Voice to the Executive will largely depend on the laws that are developed by Parliament following the referendum to deal with handling representations made by the Voice. 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>115</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>116</sup>

95. Parliament has the power under proposed section 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>117</sup>

96. 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>118</sup>

97. 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-making or action is not unusual within the Australian legal system.<sup>[OBJ]</sup> Judicial review is available to correct errors of

---

<sup>112</sup> Ibid; Solicitor-General's opinion, [18(b)].

<sup>113</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)>

<sup>114</sup> Solicitor-General's opinion, [18]-[19].

<sup>115</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>116</sup> Ibid.

<sup>117</sup> Solicitor-General's opinion, [19(b)], [36].

<sup>118</sup> For example, 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>>.

governments and government agencies which affect people's legal rights and contravene existing law. As stated by Brennan J in *Quin* 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.*

## Aboriginal and Torres Strait Islander Sovereignty

98. Incorporating the Voice into the Constitution will not cede Aboriginal and Torres Strait Islander sovereignty.
99. There are separate claims to sovereignty:
- sovereignty asserted by the British Crown in the colonisation of Australia and now underpinning the Constitution; and
  - sovereignty or authority over land and waters and the exercise of culture asserted by Aboriginal and Torres Strait Islander people under their traditional law and custom.
100. The Uluru Statement proceeds from the starting point that Aboriginal and Torres Strait Islander peoples have not ceded their sovereignty, which is the position expressed in legal advice obtained by the Expert Panel on the Constitutional Recognition of Indigenous Australians.<sup>119</sup>
101. The purpose of the Voice is not to cede Aboriginal and Torres Strait Islander peoples sovereignty. Instead, the purpose of the Voice is to provide for recognition of Aboriginal and Torres Strait Islander peoples within the legal document that governs our post-colonial system of government. Dr Hannah McGlade emphasises that sovereignty can only be ceded through the agreement or consent of First Nations peoples, typically through treaty agreements.<sup>120</sup> The creation of a body in the Constitution that allows for First Nations to make representations to the Executive Government of the Commonwealth does not represent agreement or consent on behalf of First Nations peoples to cede their sovereignty.
102. The Final Report of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander People cites legal advice obtained by the Expert Panel from Bret Walker SC on the relationship between settlement and sovereignty, which relevantly affirmed:

*Given the previous presence of all the different indigenous inhabitants and owners of all the different countries now comprising the territory of the nation Australia, contemporary legal doctrine implies acceptance that the basis of settlement of Australia is and always has been, ultimately, the exertion of force by and on behalf of the British arrivals. They did not ask permission to settle. No-one consented, no-one ceded. Sovereignty was not passed from the*

---

<sup>119</sup> Referendum Council, *Final Report of the Referendum Council*, (30 June 2017), [www.referendumcouncil.org.au/sites/default/files/report\\_attachments/Referendum\\_Council\\_Final\\_Report.pdf](http://www.referendumcouncil.org.au/sites/default/files/report_attachments/Referendum_Council_Final_Report.pdf) 97.

<sup>120</sup> Dr Hannah McGlade, 'Voice will empower us, not undermine Sovereignty' *National Indigenous Times* (Online, 16 January 2023) <https://nit.com.au/16-01-2023/4736/voice-will-empower-us-not-undermine-sovereignty>; see also LexisNexis, *Halsbury's Laws of Australia*, (online at 14 March 2023) 215 Foreign Relations 'Territory and Jurisdiction' [215 -290]; *Oxford Public International Law* (online at 14 March 2023, 'Cession'.

*aboriginal peoples to the settlers by any actions of legal significance voluntarily taken by or on behalf of the former or any of them.*<sup>121</sup>

103. Mr French has pointed out that *Mabo*<sup>122</sup> demonstrates that:<sup>123</sup>

*Authority over land and waters within the First Nations legal framework and within the colonising legal framework are capable of co-existence just as traditional law and custom are capable of co-existence of the kind reflected in native title agreements.*

104. In relation to the Voice, he goes on to note that:<sup>124</sup>

*Importantly, constitutional recognition and the creation of The Voice does not involve any ceding of traditional authority over land and waters.*

105. The Australian Government's Constitutional Experts Group gave advice that the amendment wording 'would not affect the sovereignty of any group or body'.<sup>125</sup>

Authorised by the Law Council of Australia, 24 Lonsdale Street, Braddon ACT 2612.

---

<sup>121</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)> [7.18].

<sup>122</sup> *Mabo v Queensland* (No 2) (1992) 175 CLR 1.

<sup>123</sup> Hon Robert French AC Submission [35].

<sup>124</sup> *Ibid.*

<sup>125</sup> Australian Government, 'Communique for the Referendum Working Group - February 2023' (Communique, 2 February 2023) <<https://voice.niaa.gov.au/news/communique-referendum-working-group-february-2023>>.



Law Council  
OF AUSTRALIA

Level 1, MODE3,  
24 Lonsdale Street,  
Braddon ACT 2612  
+61 2 6246 3788  
[www.lawcouncil.au](http://www.lawcouncil.au)