

Our reference  
GM/HR/CORR4394-9038443-01

567 Collins Street, Melbourne VIC 3000, Australia  
GPO Box 9925, Melbourne VIC 3001, Australia  
Tel +61 3 9672 3000  
Fax +61 3 9672 3010  
[www.corrs.com.au](http://www.corrs.com.au)

**CORRS  
CHAMBERS  
WESTGARTH**

Sydney  
Melbourne  
Brisbane  
Perth  
Port Moresby

26 April 2021

National Indigenous Australians Agency  
Voice Secretariat  
PO Box 2191  
Canberra ACT 2600

**Contact**  
Heidi Roberts (03) 9672 3562  
Email: [heidi.roberts@corrs.com.au](mailto:heidi.roberts@corrs.com.au)

Dear Sir/Madam

## **Submission – Indigenous Voice Co-design Process Interim Report**

Thank you for the opportunity to provide comments on the Indigenous Voice Co-design Process Interim Report (**Interim Report**), which considers the proposals for a National Voice and Local and Regional Voices that, together, form an Indigenous Voice to the Commonwealth Parliament and the Australian Government (**the Voice**).

### **About Corrs Chambers Westgarth**

Corrs Chambers Westgarth (**Corrs**) is Australia's leading independent law firm. With more than 175 years of history and a talented and diverse team of over 1000 people, we pride ourselves on our client-focused approach and commitment to excellence.

Our clients include organisations and individuals that we assist on a commercial or pro bono basis – including organisations with an Aboriginal and Torres Strait Islander focus, Aboriginal and Torres Strait Islander individuals, owned and operated businesses, charities and non-governmental organisations.

We are committed to advancing reconciliation and closing the social and economic gap between Aboriginal and Torres Strait Islander peoples and the broader Australian community. Corrs has a long history of reconciliation activities which have been formalised in our Reconciliation Action Plans, the first of which was launched in 2014.

We acknowledge the First Peoples of Australia and their custodianship of Australian lands. Corrs hears and supports the call of the First Nations of Australia to establish the Voice enshrined in the *Commonwealth of Australia Constitution Act* (**The Constitution**).

## Summary of our submission

We welcome the opportunity to provide our comments on the Interim Report. In summary, we submit that:

- (a) the Voice should be enshrined in the Constitution to:
  - (i) act on the call of the First Nations of Australia;
  - (ii) enhance the legitimacy of the Voice and signify the importance of the opinions of Aboriginal and Torres Strait Islander peoples;
  - (iii) ensure that the Voice is stable and enduring; and
  - (iv) fulfil Australia's commitment to the human rights of Aboriginal and Torres Strait Islander peoples;
- (b) the legal form of the National Voice must guarantee independence; and
- (c) the advisory function of the Voice preserves parliamentary sovereignty.

### 1 The Voice should be enshrined in the Constitution

We acknowledge that the Senior Advisory Group's Terms of Reference for the co-design process specifically excluded making any recommendation on constitutional recognition, including determining referendum questions or when a referendum should be held.<sup>1</sup> Nonetheless, we make the following submissions in respect of constitutional enshrinement on the basis that embedding the Voice in the Constitution is essential to act on the call of the First Nations of Australia and to ensure that the Voice can effectively perform its function to advise the Commonwealth Parliament and Government.

#### *Act on the call of the First Nations of Australia*

The consensus of Aboriginal and Torres Strait Islander peoples, through the Uluru Statement of the Heart, was unequivocal:<sup>2</sup>

*We call for the establishment of a First Nations Voice enshrined in the Constitution.*

Corrs, together with 17 other leading Australian law firms, endorsed the call of the First Nations of Australia in a joint public response in support of the Uluru Statement of the Heart.<sup>3</sup> We continue to support the call for the establishment of a First Nations Voice enshrined in the Constitution and for a referendum as a national priority.

The Uluru Statement's call for the Voice to be enshrined in the Constitution is practical, achievable and legally sound. Acting on the call will further our nation's reconciliation with Aboriginal and Torres Strait Islander peoples by creating a mechanism to listen to their voices, which have historically been neglected or disregarded.

<sup>1</sup> Commonwealth of Australia – National Indigenous Australians Agency, *Indigenous Voice Co-design Process Interim Report to the Australian Government* (October 2020) (**Interim Report**), Appendix B, Page 177.

<sup>2</sup> *Uluru Statement from the Heart* (2017).

<sup>3</sup> Allens, Arnold Bloch Leibler, Ashurst, Baker McKenzie, Clayton Utz, Corrs Chambers Westgarth, Dentons, DLA Piper, Fisher Dore, Gilbert + Tobin, Herbert Smith Freehills, Holding Redlich, Jackson McDonald, King & Wood Mallesons, Lander & Rogers, Minter Ellison, Norton Rose Fulbright and Russell Kennedy, *Joint public response in support of the Uluru Statement From the Heart* (March 2019).

### *Legitimacy and importance*

The Constitution is Australia's foundational legal document, which vests power in the Parliament, the Executive and the Judiciary and defines the relationship between the Commonwealth and the States. The terms of the Constitution define the powers and functions of our key institutions and prevail over all Commonwealth or State legislation and any variances in the common law.<sup>4</sup>

Enshrining the Voice in the Constitution will not only create the Voice that the First Nations of Australia have asked for, but it will also enhance its legitimacy and signify the importance of the opinions of Aboriginal and Torres Strait Islander peoples in the law and policy-making of this country.

### *Stability and endurance*

The Voice ought to be enshrined in the Constitution so that the voice of Aboriginal and Torres Strait Islander peoples is immune from repeal by an incumbent Government. The Constitution can only be amended by a law passed by Parliament that is approved by a majority of voters throughout the Commonwealth and by a majority of the voters in a majority of the States.<sup>5</sup> The Constitution has only been successfully amended eight times in more than 100 years.

While the structure and operations of the Voice must be sufficiently flexible to evolve to meet the ever-changing legal, political and social context, the existence of Voice should be stable and enduring so that it can empower Aboriginal and Torres Strait Islander peoples and establish a mechanism for meaningful engagement, consultation and systemic change into the future, whilst also being immune from the politics of the day.

A referendum on the Voice should be put to Australians before the National Voice and the Local and Regional Voices are created. While options have been proposed to establish the Voice through legislative or administrative instruments, including as a 'trial run', these options risk exposure to political pressure, without the security of tenure that Constitutional establishment would provide.

### *Fulfil Australia's commitment to the human rights of Aboriginal and Torres Strait Islander peoples*

Australia endorsed the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) in 2009, and in so doing, committed to a non-binding framework to recognise and promote the rights of Aboriginal and Torres Strait Islander peoples. The UNDRIP provides that:

- Indigenous Peoples have the right to participate in decision-making regarding matters which would affect their rights through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions;<sup>6</sup> and

<sup>4</sup> *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

<sup>5</sup> The Constitution, s 238.

<sup>6</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007) annex ('United Nations Declaration on the Rights of Indigenous Peoples') art 18.

- Australia should consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.<sup>7</sup>

Establishing a Constitutionally entrenched Voice is a unique opportunity to fulfil Australia's commitment to provide Aboriginal and Torres Strait Islander peoples with a platform to advocate on matters which affect their rights. The Voice would also substantially contribute towards Australia's commitment to consult with Aboriginal and Torres Strait Islander peoples about matters which affect them.<sup>8</sup>

The Constitution has never recognised the connection of Aboriginal and Torres Strait Islander peoples to this country, nor does it acknowledge that sovereignty was never ceded. The only references to Aboriginal and Torres Strait Islander peoples were discriminatory and in direct violation of the rights of Aboriginal and Torres Strait Islander peoples, such as the express exclusion of Aboriginal and Torres Strait Islander peoples from the census. These references were removed from the Constitution following the referendum in 1967. The establishment of the Voice in the Constitution would be a meaningful step towards redress of these historical wrongs.

## 2 Independence of the National Voice

A well-considered and fit-for-purpose legal form is critically important to enable the National Voice to perform its functions and achieve its objectives. The Interim Report proposes two alternative legal forms for the National Voice:<sup>9</sup>

- (a) a 'Commonwealth body' which is a body created by enabling legislation with powers to advise Parliament and Government; and
- (b) a 'private body corporate with statutory functions' which is a corporation established under the *Corporations Act 2001* (Cth) or the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) vested with specific, legislated powers to advise Parliament and Government.

The legal form adopted must guarantee the National Voice's independence from Parliament and Government. Independence will enhance the legitimacy and transparency of the National Body and ensure that the voice of Aboriginal and Torres Strait Islander peoples is unfettered and immune from the incumbent Government and Parliament.

Both options, as proposed, establish an autonomous body that is separate to and distinct from existing bureaucratic structures and private entities. However, the independence of each option will largely be determined by the legislation that empowers the National Voice to perform its functions.

Whichever option is adopted, the enacting legislation (and, in circumstances where the second option is adopted, the body corporate's governing documents) should clearly define

---

<sup>7</sup> Ibid art 19.

<sup>8</sup> We note that, contrary to article 19 of the Declaration, the Voice will *not* require Parliament or Government to obtain the free, prior and informed consent of Aboriginal and Torres Strait Islander peoples. The function of the Voice is advisory which maintains parliamentary sovereignty (refer to Item 3 of our submission).

<sup>9</sup> Interim Report, p 58.

the separate relationship between the National Voice and Parliament and Government. In particular, it should prevent the incumbent Parliament or Government to influence the advisory role of the National Voice, whether directly through ministerial direction or indirectly through financing, ownership or other means.

### 3 Advisory function of the Voice preserves parliamentary sovereignty

The purpose of the National Voice is to give Aboriginal and Torres Strait Islander peoples a voice to advise Parliament and Government on 'nationally significant matters of critical importance to the social, spiritual and economic wellbeing of, or matters which have a significant or particular impact on Aboriginal and Torres Strait Islander peoples'.<sup>10</sup> The nature of the engagement and consultation between the National Voice, Parliament and the Government depends on the nature and content of the law or policy. The National Co-design Group has proposed that the Parliament and Government would be:<sup>11</sup>

- (a) **obliged** to consult and engage the National Voice on proposed laws which are exclusive to Aboriginal and Torres Strait Islander peoples;
- (b) **expected** to consult and engage the National Voice on particular issues and at multiple points of the legislation and policy processes on areas of significant impact on Aboriginal and Torres Strait Islander peoples; and
- (c) **unencumbered** to consult and engage the National Voice on any matter which is critically important or which has a significant or particular impact on Aboriginal and Torres Strait Islander peoples.

It is important to emphasise that the National Voice does not provide a veto power over government policy or legislation, nor does it amount to a 'Third Chamber of Parliament'.<sup>12</sup> Any requirement for the Parliament or Government to consult and engage with the National Voice would be non-justiciable, meaning that a failure to consult with the National Voice in respect of a particular law or policy could not be challenged in a court.<sup>13</sup>

The National Voice detailed in the Interim Report establishes a framework for engagement and consultation between future Parliaments, Governments and Aboriginal and Torres Strait Islander peoples, while preserving parliamentary sovereignty.

---

<sup>10</sup> Interim Report, p 8.

<sup>11</sup> Interim Report, p 51.

<sup>12</sup> Interim Report, p 32.

<sup>13</sup> Interim Report, p 51.

26 April 2021

National Indigenous Australians Agency

**Submission – Indigenous Voice Co-design Process Interim Report**

---

**CORRS  
CHAMBERS  
WESTGARTH**

We are grateful for the opportunity to comment on the Interim Report. If you have any questions in relation to the matters raised in our submission, please contact us.

Yours faithfully

**Corrs Chambers Westgarth**

**Heidi Roberts**

Partner Diversity and Inclusion

**Phoebe Wynn-Pope**

Head of Business and Human Rights