



Indigenous Voice Co-Design Groups  
Voice Secretariat  
[Co-designVoice@niaa.gov.au](mailto:Co-designVoice@niaa.gov.au)  
CANBERRA ACT 2601

29 April 2021

Dear Indigenous Voice Co-Design Groups

## **Submission by Herbert Smith Freehills (HSF) to the Indigenous Voice Co-Design Groups**

### **Why HSF is making this submission?**

The guiding principles that we work to at HSF in order to ensure cultural legitimacy in all of our actions in partnership with Aboriginal and Torres Strait Islander peoples are to:

- listen carefully to Aboriginal and Torres Strait Islander voices before we speak or act;
- speak out in support of Aboriginal and Torres Strait Islander led solutions and empowerment; and
- act always in partnership with Aboriginal and Torres Strait Islander individuals, organisations or communities.

We make this submission in accordance with those guiding principles, and based on an extensive history of representing Aboriginal and Torres Strait Islander client interests and the lessons that we have learnt in actively promoting reconciliation in Australia over more than a decade.<sup>1</sup>

We also draw upon the collective public support for the Uluru Statement from the Heart from across the legal and corporate sectors. In 2019, HSF along with 17 other leading law firms expressed our collective support for the Uluru Statement's call for the establishment of a First Nations Voice enshrined in the Constitution and for a referendum as a national priority.<sup>2</sup> In addition to the legal sector, Australia's professional services firms, philanthropists and various other organisations and executive officers have been public in their collective support for a constitutionally-enshrined First Nations voice to Parliament and a referendum.<sup>3</sup>

---

<sup>1</sup> HSF launched its first Reconciliation Action Plan (RAP) in 2011. In May 2015 HSF became the first law firm to receive ELEVATE leadership status for its RAP, the highest possible level of leadership endorsement by peak body Reconciliation Australia. HSF launched a subsequent ELEVATE RAP in September 2018 which included a commitment to support the Aboriginal and Torres Strait Islander views and voices expressed with clarity, consistency and urgency in the Uluru Statement from the Heart.

<sup>2</sup> M Pelly, 'Law firms back Uluru Statement', *Australian Financial Review* (online) (22 March 2019) <<https://www.afr.com/companies/professional-services/law-firms-back-uluru-statement-20190320-h1cm9x>>; J Power, 'Gift to the nation: 14 organisations support referendum and reconciliation', *Sydney Morning Herald* (online) (29 May 2019) <<https://www.smh.com.au/national/gift-to-the-nation-14-organisations-support-referendum-and-reconciliation-20190528-p51s2f.html>>.

<sup>3</sup> E Fowler, 'Finance gets behind the Uluru statement', *Australian Financial Review* (online) (23 May 2019) <<https://www.afr.com/companies/financial-services/finance-gets-behind-the-uluru-statement-20190522-p51pxa>>; Philanthropy Australia, 'MEDIA RELEASE: Philanthropy responds to Uluru Statement', *Philanthropy Australia* (Web Page, 11 July 2019) <<https://www.philanthropy.org.au/tools-resources/news/>>.



This submission largely reiterates our support for the Uluru Statement and also provides additional observations in response to the Interim Report. Most importantly, our submission is informed by the views of First Nations staff at HSF who together identify and meet as a 'First Nations Collective'.

Our intention behind this submission is to amplify the perspectives and voices of Aboriginal and Torres Strait Islander clients and colleagues.

### **Indigenous Voice Co-design: Membership and the Local and Regional Voice**

We acknowledge that many of the design issues noted in the Interim Report, especially those regarding membership, are issues that can and should be decided only by Aboriginal and Torres Strait Islander peoples themselves.<sup>4</sup>

Through our long-standing partnerships with Aboriginal and Torres Strait Islander clients, we have observed first-hand that community-designed and community-led local and regional governance structures are highly effective in identifying and achieving community objectives and outcomes. We have seen how Aboriginal-led structural reforms, founded upon genuine shared responsibility between community and government, serve to facilitate social and economic progress. We have also observed how community-led, place-based and data-driven justice reinvestment strategies can strengthen and have a measurable impact for communities.

Based on our observations and experience, we support the proposal to promote community-designed and community-led local and regional governance, recognising that the specific governance structures will and should differ between regions, according to what works best for different communities.

Together with others across the corporate and legal sectors, HSF can provide support to assist communities in the implementation of the Voice structural reforms, and to increase their capacity for self-governance where required. We have deep experience in providing pro-bono legal and strategic advice and support at the invitation of, and in partnership with, Indigenous-led groups. We stand ready to provide ongoing assistance in a way that empowers and respects the self-determination of First Nations people.

### **The importance of the Uluru Statement from the Heart**

We recognise that the Terms of Reference for the current co-design process do not explicitly encompass the question of constitutional entrenchment of the voice to Parliament. However, we consider the question of constitutional enshrinement is inextricably intertwined with the question of co-design. Our submission therefore focuses on the continued importance and relevance of the Uluru Statement from the Heart.

We note that constitutional enshrinement of the voice to Parliament was explicitly called for in the Uluru Statement from the Heart, and enjoys the support of First Nations and non-Indigenous Australians across the political spectrum.<sup>5</sup>

Successive processes have emphasised how important it is that the form of recognition accord with the wishes of Aboriginal and Torres Strait Islander people. Through the process that led to the Uluru Statement, constitutional enshrinement is the only form of the Voice that has garnered the collective endorsement of Aboriginal and Torres Strait Islander peoples.

---

<sup>4</sup> See for example D Larkin, 'Membership models for an Indigenous voice: What does representation mean for First Nations?', *Indigenous Constitutional Law* (Web Page, 11 March 2021) <<https://www.indigconlaw.org/dani-larkin-membership-models-for-an-indigenous-voice>>.

<sup>5</sup> See F Markum and W Sanders, '*Support for a constitutionally enshrined First Nations Voice to Parliament: Evidence from opinion research since 2017*' (Working Paper No 138, Centre for Aboriginal Economic Policy Research, 2020); E Fowler, 'Uluru Statement backed by a 'real people's movement'', *Australian Financial Review* (online) (29 May 2019) <<https://www.afr.com/women-of-influence/women-of-influence-leader-megan-davis-says-uluru-gaining-momentum-20190528-p51ruv>>.



We hear significant and repeated concerns from Aboriginal and Torres Strait Islander clients and networks that a legislative voice to Parliament which is not enshrined in the Constitution would not have the same level of support, sustainability or consistency with the Uluru Statement as a constitutionally-enshrined Voice.

In this context, HSF reiterates its support for Uluru Statement from the Heart's call for a constitutionally-enshrined voice to Parliament. Consistent with this, we hear and amplify the calls of First Nations clients and colleagues for a referendum on the inclusion of a First Nations Voice as a national priority. The historic consensus reached at Uluru provides an invitation and a platform for *all* Australian people to walk together with First Nations people for a better future.

### **The significance of a referendum**

In a prior submission to the co-design process, more than 40 public law experts have argued that if Australia is serious about establishing a Voice to provide the views of Aboriginal and Torres Strait Islander peoples to the government and Parliament, it must commit to it being protected in the Constitution. Without constitutional enshrinement, the legitimacy of the Voice will be undermined:

*Constitutional enshrinement will require a referendum, which will educate Australians on the role of the Voice, and provide their endorsement of it. A Voice simply established by legislation, without this public support, runs the real risk of being ignored or abolished by parliament. Constitutional enshrinement also confers constitutional status on the Voice, which signals that it is a foundational institution, establishing its legitimacy into the future.*

*To perform its role, the Voice will also need constitutional protection to give it stability and certainty, while still allowing for flexibility in its design into the future. Constitutional protection is needed to prevent the parliament from abolishing the Voice. It also prevents chilling of its performance because it faces the on-going possibility of abolition.<sup>6</sup>*

We thank the Co-Design Groups for the opportunity to make a submission to this important process.

Yours sincerely

**HSF RAP Steering Committee**

**First Nations Collective**

Herbert Smith Freehills LLP and its subsidiaries and Herbert Smith Freehills, an Australian Partnership ABN 98 773 882 646, are separate member firms of the international legal practice known as Herbert Smith Freehills.

---

<sup>6</sup> G Appleby, 'An Indigenous 'Voice' must be enshrined in our Constitution. Here's why', *The Conversation* (online) (22 January 2021) <[theconversation.com/an-indigenous-voice-must-be-enshrined-in-our-constitution-heres-why-153635](https://theconversation.com/an-indigenous-voice-must-be-enshrined-in-our-constitution-heres-why-153635)>.