Voice Secretariat
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Thank you for considering this submission to the Public Consultation on the Voice Co-Design Interim Report. I am a non-Indigenous woman from nipaluna/Hobart. I have trained as an international lawyer with a particular specialisation in post-conflict justice, state violence, and Indigenous interactions with international law. I am currently employed at the Indigenous Law Centre at the University of New South Wales, working on the 'Recognition after Uluru: What next for First Nations?' research project. Prior to this, I have worked, researched, taught, and volunteered in international law, human rights advocacy, and law reform, for two decades. I hold a PhD from the Melbourne Law School. I make this submission in my personal capacity.

A Voice to Parliament, entrenched in the Australian Constitution, will be a unifying, practical, and empowering legal reform. My submission makes the following points:

- Constitutional entrenchment of the Voice is important, as the current Co-Design process has emerged from more than a decade of discussions on Constitutional Recognition and cannot be separated from that national conversation;
- The view of the Uluru Dialogues and National Conference must be respected, particularly regarding the place of the Voice in the Australian Constitution; and
- A Referendum must be held before enabling legislation for the Voice is passed.

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The Interim Report on Voice Co-Design is the latest step in a process that has been ongoing for two decades. This is the discussion on whether and how to recognise Aboriginal and Torres Strait Islander peoples in the Constitution. Any attempt to de-couple the Voice from its Constitutional place is not acceptable, and disregards this longstanding national conversation.

To be clear: the current process of Co-Design did not emerge from nowhere. It is one step in a long journey, which has moved from symbolic Constitutional recognition to meaningful and substantive law reform.

The national conversation has engendered a widespread sense that Australia's foundational legal and political text is flawed. The Voice is proposed as the answer to that flaw. In particular, in setting out an obligation for consultation on matters related to s. 51 (xxvi) and s. 122, as well as the *Racial Discrimination Act*, the Voice would provide a balance to parts of the Constitution that permit discrimination against Indigenous peoples. The Voice is a Constitutional solution to a Constitutional problem; and as such, it must be placed within and protected by the Constitution.

The view of the Uluru Dialogues and National Conference must be respected, particularly regarding the place of the Voice in the Australian Constitution

Any proposals on the design of the Voice must adhere to the wishes of participants at the Uluru Dialogues and National Convention. These wishes were unequivocal: the Voice must be enshrined in the Constitution.

In 2015, when Indigenous leaders met with political leaders at Kirribilli, the previous emphasis on 'symbolic recognition' shifted to a more Indigenous-centred and substantive movement for law reform. The design and implementation of the Regional Dialogues and National Convention evidenced this move to greater Indigenous participation in what Constitutional Recognition can, and should, look like.

The Regional Dialogues and the National Convention at Uluru engaged 1200 Indigenous people nationwide: it was the 'proportionately significant consultation process that has ever been undertaken with First Peoples'.[1] Participants were deliberately invited in order 'to represent people who are often politically forgotten by government and parliament'[2] – including elders, traditional owners, representatives of communities or local organisations.[3] This provided 'an unprecedented insight into the wishes and needs of First Nations communities across the country'.[4]

[1] Referendum Council, *Final Report of the Referendum Council*, 30 June 2017, 10.
[2] Public Lawyers, 'Submission: The imperative of constitutional enshrinement: Submission to the Voice Secretariat', 20 January 2021, 2.
[3] See Megan Davis, 'The Long Road to Uluru', *Griffith Review* 60 (2018), 13-32, 41-45.
[4] Public Lawyers, 'Submission', 2.

The Dialogues were designed to be a deliberative, participatory and self-determined process. They were carefully constructed to avoid 'group think' and to have Indigenous participants reach their own conclusions and suggested ways forward.[5] This is in line with the principle of free, prior and informed consent, and the principle of participation in Indigenous political decision-making.

The process that led to the Uluru Statement from the Heart – the Dialogues and Convention – was unprecedented in Australia; both in terms of number and type of participants, and the design of process, ensuring Indigenous authorship. For all these reasons, the Statement's call for a Constitutionally-enshrined Voice is especially strong, and should not be ignored. The proposals suggested in the Interim Report must be considered in light of the Uluru process and the Statement issued, and cannot be separated from this: any proposals must rightly be understood as coming through an overarching requirement of constitutional entrenchment, as called for at Uluru and as legitimised by a process that prioritised Indigenous participation.

A Referendum must be held before enabling legislation for the Voice is passed

A referendum on the Voice should be held as a matter of priority, and before legislation is passed. To legislate first would be to take the momentum out of the current push for Constitutional entrenchment, and to dismiss the voices of those at Uluru who gave the invitation for a Constitutionally-enshrined Voice. The Voice has emerged from the national conversation regarding Constitutional recognition as the only law reform option that has the collective endorsement of Aboriginal and Torres Strait Islander peoples.

A Constitutionally-enshrined Voice enjoys significant Indigenous and non-Indigenous support.[6] This is true even ahead of any concerted campaign, which shows the significant potential for this support to grow to a landslide result in any referendum. Importantly, recent research demonstrates that more Australian voters support a Constitutionally-enshrined Voice than a legislated one.[7] The Australian public are aware of need to link the Voice with the

[5] Megan Davis, 'The Long Road to Uluru'. See also Referendum Council, 10.
[6] See, e.g., Reconciliation Australia, 'Reconciliation Support Grows But More Needs to be Done – Latest Australian Reconciliation Barometer', 11 February 2019, available <www.reconciliation.org.au/reconciliation-support-grows-but-more-needs-to-be-done-latest-australian-reconciliation-barometer/>; F Markham and W Sanders, *Support for a Constitutionally Enshrined First Nations Voice to Parliament: Evidence from Opinion Research since 2017* (Centre for Aboriginal Economic Policy Research, 2020).
[7] See Jacob Deem, A J Brown, and Susan Bird, 'Most Australians support First Nations Voice to parliament: survey', *The Conversation,* 9 April 2021.

Constitution. Those calling for legislation first, due to a fear that a referendum might fail, are underestimating this popular support and its nuanced appreciation of law reform.

While there is a suggestion that Australian voters will want to 'try before they buy', there is no evidence for this – indeed, there is evidence for the reverse (that more voters support entrenchment before legislation). Moreover, the Voice has had a number of antecedents; this is not unchartered territory.

A Referendum on the Voice will provide all Australians with an opportunity to participate in the Constitutional moment of reforming the relationship between the state and Indigenous peoples. This is crucial: popular participation of this sort will provide the Voice with authority and legitimacy. At the same time, it will educate all Australians on the Constitution, Australia's history, and the potential for a better and more hopeful future.

Conclusions

I agree with the recommendation of the Referendum Council:

> That a referendum be held to provide in the Australian Constitution for a representative body that gives Aboriginal and Torres Strait Islander First Nations a Voice to the Commonwealth Parliament. One of the specific functions of such a body, to be set out in legislation outside the Constitution, should include the function of monitoring the use of the heads of power in section 51(xxvi) [the power to make special laws for the people of any race] and section 122 [the Territories power]. The body will recognise the status of Aboriginal and Torres Strait Islander peoples as the first peoples of Australia.

The Voice must be enshrined in the Australian Constitution and a referendum must be held before any enabling legislation passed. This reform is practical, has the support of the Australian people, and is the only option collectively endorsed by Aboriginal and Torres Strait Islander people. The reform will - if placed in the Constitution - have authority and legitimacy, as well as will engage the Australian people in education about the relationship between the state and Indigenous peoples. This is the time for Constitutional change to empower Indigenous people in the decisions that affect their lives.

Yours Sincerely,

Dr Sophie Rigney