Law Council
OF AUSTRALIA

Indigenous Voice Co-Design Process

National Indigenous Australians Agency

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About the Law Council of Australia

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The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

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

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- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful to the Law Institute of Victoria, Law Society of New South Wales, Law Society of South Australia, and Queensland Law Society, as well as its expert advisory Indigenous Legal Issues Committee, for assistance in the preparation of this submission.

Executive Summary

1. The Law Council thanks the National Indigenous Australians Agency (**NIAA**) for the opportunity to respond to the second stage of the Australian Government's Indigenous Voice Co-Design Process (**the Co-Design Process**).

2. The Law Council restates its strong and continuing support for a First Nations Voice to Parliament enshrined in the Australian Constitution, as called for in the Uluru Statement from the Heart and the recommendations of the Referendum Council, and further canvassed in the work of the Joint Select Committee.

3. The Co-Design Process does not include fundamental aspects of this prior work: first, that the Voice be organised around the individual First Nations and, second, that the Voice be constitutionally enshrined. This fundamentally changes the proposition put forward at the Uluru Convention, compromising the Voice's intended purpose and efficacy. On this basis, the Law Council cannot offer its support for the proposals put forward through the Co-Design Process.

4. Consultation that was undertaken through the regional dialogues that led to the Uluru Convention asked and permitted First Nations to consider the most fundamental and fulsome engagement possible with the Australian people. That process provided the clear statement that the issues of First Nations representation, treaties and truth telling were the objectives for engagement.

5. The Co-Design Process stands apart from those regional dialogues and the Uluru Statement from the Heart, particularly in its engagement with the individual First Nations. The Law Council recommends that the Australian Government significantly reframe the Co-Design Process, refocusing on First Nations empowerment and committing to constitutional entrenchment of a First Nations Voice, with a referendum as soon as practicable, and, importantly, prior to legislating.

6. The Law Council takes the view that this process and its results must have the objective of providing representation for First Nations for the coming decades.

7. Should this approach not be accepted, the Law Council makes the following comments, aimed at reframing the direction of the Co-Design Process going forward:

    - noting that the exercise of self-determination through a representative voice is best facilitated through a structure or structures that are comprised of and accountable to First Nations:
        - consideration be given to a tiered approach when designing Local and Regional Voices, whereby the order of priority in identifying existing structures begins with First Nations;
        - the design of the National Voice engage in greater detail with protecting the rights and status of First Nations, and membership being primarily derived from the authority to speak for country; and
        - there be no ministerial appointments to the National Voice;
    - consideration be given to the types of services and the resourcing that will be required to garner the greatest participation of Aboriginal and Torres Strait Islander peoples in the membership selection process, with the models put forth informed by direct and indirect barriers to participation and representation;
    - First Nations views be sought on the legal form of the National Voice;

- further consultation, including on the strengths and weaknesses of past bodies, occur before managing funding and undertaking program evaluations are automatically excluded from the functions of the National Voice;
- the National Voice be supported by a sufficient and guaranteed budget to ensure it can properly perform its functions;
- the wording of the National Voice's role be amended to better reflect the purpose of First Nations representation, as follows: '*On behalf of First Nations, the National Voice would have a responsibility and right to advise the Parliament and Australian Government on matters of significance to First Nations and First Nations people*';
- close consideration be given to drafting the scope of the National Voice's core function, in order to ensure the National Voice's present and future purposes are not unintentionally foreclosed by the imposition of strict legal thresholds;
- the obligation to consult not be limited to proposed laws which are exclusive to Aboriginal and Torres Strait Islander peoples, as many laws of seemingly general application have disproportionate or particular impacts on Aboriginal and Torres Strait Islander peoples;
- the triggers of the obligation to consult be expanded to include:
  - proposed laws affecting any right articulated or protected by the UNDRIP, or, alternatively, under an international human rights instrument to which Australia is a signatory; and
  - proposed laws that are inconsistent with the RDA, rather than only those that explicitly seek to suspend it; and
- consideration be given to imposing a duty upon the relevant Minister to respond to the advice of the Voice within a particular timeframe, compliance with which could then be reviewable by courts and tribunals.

8. The Indigenous Voice Co-Design Process must emphasise self-determination, independence and First Nations control, and must present options that would have real influence over decisions on legal and policy outcomes for First Nations people.

Background Context

9. This submission engages with the proposals put forward in the *Indigenous Voice Co-Design Process Interim Report to the Australian Government* dated October 2020 (**Interim Report**)[1] and *Indigenous Voice Discussion Paper* dated February 2021 (**Discussion Paper**).[2]

10. In responding to these two documents, the Law Council is informed by the Uluru Statement from the Heart, and draws upon the work of the most recent consultations on this issue, including the Referendum Council's Final Report published in June 2017,[3] and the Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples' (**the Joint Select Committee**) Final

[1] Commonwealth of Australia, National Indigenous Australians Agency, *Indigenous Voice Co-Design Process Interim Report to the Australian Government* (October 2020) <https://voice.niaa.gov.au/sites/default/files/2021-01/indigenous-voice-codesign-process-interim-report-2020.pdf> ('**Interim Report**').
[2] Commonwealth of Australia, National Indigenous Australians Agency, *Indigenous Voice Discussion Paper* (February 2021) <https://voice.niaa.gov.au/sites/default/files/2021-02/indigenous-voice-discussion-paper.pdf> ('**Discussion Paper**').
[3] Referendum Council, *Final Report of the Referendum Council* (30 June 2017) <https://www.referendumcouncil.org.au/sites/default/files/report_attachments/Referendum_Council_Final_Report.pdf> ('**Referendum Council, Final Report**').

Report published in November 2018,[4] as well as its previous submissions to these bodies.

11. The Law Council also notes the numerous reports and inquiries preceding this work, including those produced by the 2015 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples and the 2012 Expert Panel on Constitutional Recognition of Indigenous Australians.

12. Further, in accordance with its policies,[5] the Law Council is guided by relevant international laws and standards, in particular in this context the terms of the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**),[6] which informs the way governments across the globe should engage with and protect the rights of Indigenous peoples.[7] Australia formally announced its support for the UNDRIP on 3 April 2009.

13. The UNDRIP is not a treaty and therefore it does not itself create legally binding obligations. However, many, if not all, of its provisions have been recognised as reflecting customary international law.[8] Its articles also echo many of the rights articulated in legally binding human rights treaties, but with a specific focus on indigenous peoples.[9] Insofar as the UNDRIP relies on and elaborates well-established human rights obligations in international treaty and customary law, it is binding on Australia.

14. As the United Nations Human Rights Council has explained:

> *The UNDRIP represents an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of international human rights law. The product of a protracted drafting process involving the demands voiced by indigenous peoples themselves, the Declaration reflects and builds upon human rights norms of general applicability, as interpreted and applied by United Nations and regional treaty bodies, as well as on the standards advanced by ILO Convention No 169 and other relevant instruments and processes.*
>
> *The Declaration does not attempt to bestow indigenous peoples with a set of special or new human rights, but rather provides a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of indigenous*

[4] Commonwealth of Australia, Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, Final Report (November 2018) <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024213/toc_pdf/Finalreport.pdf;fileType=application%2Fpdf> ('**Joint Select Committee, Final Report**').
[5] Law Council of Australia, *Policy Statement: Indigenous Australians and the Legal Profession* (February 2010) 3; Law Council of Australia, *Policy Statement on Human Rights and the Legal Profession: Key Principles and Commitments* (May 2017) 6.
[6] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/61/295 (2 October 2007) annex ('**UNDRIP**').
[7] Australian Government, Attorney-General's Department, 'Right to Self-Determination: Public Sector Guidance Sheet' (website, undated) <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-self-determination>.
[8] International Law Association, *Rights of Indigenous Peoples*, 75th Conference, ILA Resolution No 5/2012 (30 August 2012); Federico Lenzerini, 'Implementation of the UNDRIP Around the World: Achievements and Future Perspectives' (2019) 23 *International Journal of Human Rights* 51. See also Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights* (Oxford University Press, 2011) 456.
[9] Attorney-General's Department, 'Right to Self-Determination: Public Sector Guidance Sheet' (website, undated) <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-self-determination>.

> *peoples. The standards affirmed in the Declaration share an essentially remedial character, seeking to redress the systemic obstacles and discrimination that indigenous peoples have faced in their enjoyment of basic human rights. From this perspective, the standards of the Declaration connect to existing State obligations under other human rights instruments.*[10]

15. The Law Council endorses the importance of the UNDRIP, and emphasises the significance of the right to self-determination in article 3, which is the fundamental principle underpinning the instrument, as follows:

> *Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*

16. The right to self-determination has been articulated as involving an 'ongoing process of choice',[11] reflecting 'the idea that Indigenous people should have some control over the decisions that are made about their lives'.[12] The Attorney-General's Department indicates that, at a minimum, the right to self-determination entails the entitlement of peoples to have control over their destiny and to be treated respectfully.[13]

17. Article 3 of the UNDRIP reaffirms, in the specific context of the rights of indigenous peoples, common article 1 of the *International Covenant on Civil and Political Rights* (**ICCPR**)[14] and the *International Covenant on Economic, Social and Cultural Rights* (**ICESCR**)[15] 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'.[16] The ICCPR and ICESCR are binding international agreements, which must be applied 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.[17]

18. Article 4 of the UNDRIP expands on the right to self-determination:

> *Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.*

19. Also related to this idea are articles 18 and 19 of the UNDRIP. Article 18 upholds Indigenous peoples' rights to participate in decision-making through their chosen representatives and to maintain their own decision-making institutions. Article 19 requires States to consult and cooperate in good faith in order to obtain the free, prior

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[10] 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].
[11] Australian Human Rights Commission, 'Right to Self-Determination' (website, 30 April 2013) <https://www.humanrights.gov.au/our-work/rights-and-freedoms/right-self-determination>.
[12] Megan Davis, 'To Bind or not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On' (2012) 19 *Australian International Law Journal* 17.
[13] Australian Government, Attorney-General's Department, 'Right to Self-Determination: Public Sector Guidance Sheet' (above).
[14] *International Covenant on Civil and Political Rights,* opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('**ICCPR**').
[15] *International Covenant on Economic, Social and Cultural* Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('**ICESCR**').
[16] ICCPR, art 1(1); ICESCR, art 1(1).
[17] ICCPR, art 2(1); ICESCR, art 2(2).

and informed consent of Indigenous peoples before adopting legislative or administrative measures that may affect them. In full, these articles read as follows:

> *Article 18*
>
> *Indigenous peoples have the right to participate in decision-making in 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.*
>
> *Article 19*
>
> *States shall 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.*

Law Council's Previous Submissions on this Issue

20. The Law Council has long contextualised proposals for a Voice as consistent with the above-stated international right to self-determination. As the Law Council submitted to the Referendum Council's Discussion Paper on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples almost four years ago:

> *Exercising the right to self-determination can encompass a range of different actions. In the Law Council's view, one aspect is the capacity for Aboriginal and Torres Strait Islander peoples to determine their own political future. Being provided with a role when Parliament and Government make laws and policies about Indigenous affairs is integrally linked to pursuing their political status and freely pursuing their economic, social and cultural development as outlined in Article 1 of ICESCR and Article 1 of ICCPR.*[18]

21. In this submission, which was provided to the Referendum Council on 19 May 2017, the Law Council supported the creation of 'an advisory body or role' that:

> *[E]nsures that Indigenous Australians are consulted about decisions that affect their rights. This includes a voice in political decisions that affect them and the development of a structure that allows Aboriginal and Torres Strait Islander people to exercise their right to self-determination.*[19]

22. The Referendum Council's First Nations Regional Dialogues leading to the Uluru Statement from the Heart then occurred with unprecedented representation of Aboriginal and Torres Strait Islander peoples. The dialogue process engaged:

> *1200 Aboriginal and Torres Strait Islander delegates – an average of 100 delegates from each Dialogue – out of a population of approximately 600,000 people nationally. This is the most proportionately significant consultation process that has ever been undertaken with First Peoples. Indeed, it engaged a greater proportion of the relevant population than the*

[18] Law Council of Australia, Submission to Referendum Council, *Discussion Paper on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples* (19 May 2017) 14, [43] <https://lawcouncil.asn.au/resources/submissions/discussion-paper-on-constitutional-recognition-of-aboriginal-and-torres-strait-islander-peoples>.
[19] Ibid, 14-15, [44].

constitutional convention debates of the 1800s, from which First Peoples were excluded.[20]

23. The Referendum Council provided its Final Report to the Prime Minister and Leader of the Opposition on 30 June 2017. The primary recommendation of the Referendum Council was:

> *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.*[21]

24. On 24 October 2017, the Law Council publicly endorsed the Referendum Council's primary recommendation, via a media release beginning:

> *The Law Council of Australia has given its "full and unqualified" support to the Referendum Council's recommendation for a referendum to be held on the creation of a representative body that gives Aboriginal and Torres Strait Islander First Nations a Voice to the Australian Parliament.*
>
> *"The Law Council considers the constitutional reforms recommended by the Referendum Council to be a necessary and important step towards Aboriginal and Torres Strait Islander peoples' self-determination," Law Council of Australia President, Fiona McLeod SC, said.*
>
> *"The right to self-determination is a fundamental and non-derogable principle of international law. …*
>
> *"We are now calling for genuine commitment from all Federal Parliamentarians to implement the Referendum Council's recommendations swiftly. … "*[22]

25. In its subsequent submission to the Joint Select Committee on 28 September 2018, the Law Council reaffirmed that it 'publicly provided its full and unqualified support for the recommendations of the Referendum Council'.[23] It further stated, 'the Law Council reiterates that there is no legal impediment to making provision for such a body in the Constitution and continues to support such measures'.[24]

26. The Law Council has continued to publicly provide its support for a First Nations Voice to Parliament enshrined in the Constitution in the time since.[25]

27. The Law Council responds to the proposals put forward in the Interim Report on the basis of this background, and thanks the NIAA for the opportunity.

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[20] Referendum Council, Final Report, 10.
[21] Ibid, 2.
[22] Law Council of Australia, 'Law Council throws support behind referendum on the creation of new Indigenous representative body' (media release, 24 October 2017) <https://www.lawcouncil.asn.au/media/media-releases/law-council-throws-support-behind-referendum-on-the-creation-of-new-indigenous-representative-body>.
[23] Law Council of Australia, 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) 5, [6].
[24] Ibid, 6.
[25] Law Council of Australia, 'Uluru Statement should be respected' (media release, 1 November 2019) <https://www.lawcouncil.asn.au/media/media-releases/uluru-statement-should-be-respected>.

Indigenous Voice Co-Design Process

Terms of References of the Co-Design Groups

First Nations Engagement

28. The Minister for Indigenous Australians announced the Co-Design Process on 30 October 2019.[26] Terms of References providing for three Co-Design Groups, referred to as the Senior Advisory Group, the National Group and the Local & Regional Group, were then released on 13 March 2020. The Terms of References presupposed that an Indigenous Voice would be comprised of two levels, with both a National Voice and Local & Regional Voices.[27] These bodies were to be developed in a manner that considered 'linkages' between the two levels but did not allow 'design of options for a national voice' within the scope of the Local & Regional Group.[28] Moreover, the Terms of Reference for the Senior Advisory Group, in referring to 'both the design and consultation stages of the co-design process',[29] conceptualised 'co-design' as a two-stage process wherein 'design' by the discrete Co-Design Groups preceded 'consultation' with the wider Aboriginal and Torres Strait Islander population – and, in particular, with First Nations.

29. In the first stage of the Co-Design Process, the National Group and Local & Regional Group were charged with developing the core content of proposals for the National Voice and the Local and Regional Voices, respectively, under the guidance of the Senior Advisory Group, which was to provide advice, support and ministerial liaison work.[30] The final proposals of the Co-Design Groups were put forward in the Interim Report dated October 2020, which was released to the public in January 2021.[31] The second stage of the Co-Design Process was formally launched on 9 January 2021, with the Minister inviting the public to provide comments on the proposals and beginning a round of meetings with communities in different parts of Australia.[32]

30. The Terms of Reference for the Senior Advisory Group required that members of the Senior Advisory Group be appointed at the invitation of the Minister and that:

> *The Senior Advisory Group will have a majority of Indigenous Australians who have a spread of skills and experience, and those with extensive experience and ability to work strategically across the co-design process. Consideration will also be given to achieving a balance of: gender; representation across jurisdictions; and the urban, regional and remote spectrum, as much as possible. The Senior Advisory Group will comprise around 20 members as determined by the Minister.*[33]

31. The National Co-Design Group and Local & Regional Co-Design Group were established in a similar manner, with members to be invited by the Minister following consultation with the Senior Advisory Group.[34] However, the Terms of Reference

[26] Interim Report, 18.
[27] Ibid, Appendix B.
[28] Ibid.
[29] Ibid.
[30] Ibid.
[31] Ibid, 18-20.
[32] The Hon Ken Wyatt AM MP, 'Have Your Say On Indigenous Voice Proposals' (Media Release, Minister for Indigenous Australians, 9 January 2021).
[33] Interim Report, Appendix B, 177.
[34] The Terms of Reference for the National Group required that: 'The non-government members of the National Group will comprise a majority of Indigenous Australians. Consideration will also be given to

required that these groups have one government Co-Chair, this being a senior official from the NIAA, as well as one Co-Chair who is Indigenous and not from government.

32. The Law Council notes that provision for 'a majority of Indigenous Australians' to participate in decisions affecting Aboriginal and Torres Strait Islander peoples is a basic minimum requirement for government consultation processes. However, Indigenous peoples have the right to be consulted and participate in decision-making *through their chosen representatives* under articles 18 and 19 of the UNDRIP. As Professor Tom Calma AO suggested to the Joint Select Committee in 2018, it is crucial that representatives are 'acceptable to ordinary Aboriginal and Torres Strait Islander people'.[35]

33. The Law Council further notes that concepts of 'jurisdictions; and the urban, regional and remote spectrum' and 'regional leaders' are Western concepts, which do not necessarily align with how mob organise their own population and geographic boundaries and the structures that have authority and legitimacy to Aboriginal and Torres Strait Islander peoples.

34. The Law Council considers the importance of the Co-Design Process having authenticity and legitimacy through representation of First Nations. In its submission to the Joint Select Committee in 2018, the Law Council noted that:

> *Without authority properly derived from Aboriginal and Torres Strait Islander peoples there is the possibility that any new organisation will be the subject of criticism that it is not truly representative and therefore lacks legitimacy. Accordingly, it is important to get the foundational principles right and to allow for the design and leadership to be driven by Aboriginal and Torres Strait Islander communities.* ***The process as much as the outcome must be aimed at having a distinct, representative and authentic First Nations Voice****.*[36]

35. The Law Council further stated in this same submission:

> *[E]mphasis should be placed on developing an appropriate mechanism for allowing* ***those who are able to legitimately represent*** *and negotiate with government on behalf of Aboriginal and Torres Strait Islander peoples to give effect to the proposals arising from the Uluru Statement and the Referendum Council* ***through design and leadership****.*
>
> *To be clear, the submissions that follow are premised on the basis that the structure, content and role of the Voice are matters for* ***First Nations*** *to determine with government. …*

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achieving a balance of: gender; representation across jurisdictions; and the urban, regional and remote spectrum; as much as possible. The National Group will comprise up to 20 members, (inclusive of one government co-chair and one Indigenous non-government co-chair) as determined by the Minister.' (Interim Report, Appendix B, 180). The Terms of Reference for the Local & Regional Group required that: 'The non-government members of the Local & Regional Group will comprise a majority of Indigenous regional leaders and others with expertise relevant to Indigenous regional governance and decision-making. Consideration will also be given to achieving a balance of gender, representation across jurisdictions, and the urban, regional and remote spectrum, as much as possible. The Regional Group will comprise up to 20 members, (inclusive of one government co-chair and one Indigenous non-government co-chair) as determined by the Minister.' (Interim Report, Appendix B, 183).

[35] Joint Select Committee, Final Report, 62, quoting Professor Tom Calma AO, *Proof Committee Hansard*, Canberra, 18 October 2018, 3 (emphasis added).

[36] Law Council of Australia, 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) 6, [11].

> ***Self-governance in some form is likely to be one of the primary goals of all Aboriginal and Torres Strait Islander peoples. Given the desire for that outcome and the likelihood that the separate First Nations will be the entity through which that outcome will most likely be achieved, it is important that the structure of the Voice be built around those First Nations.*** *If there are to be local voices, then those voices should be the local First Nations. Any political empowerment of an Aboriginal and Torres Strait Islander voice on a different basis would undermine the effectiveness of First Nations and potentially set up entities in opposition to those voices. …*
>
> *[T]he structure of a First Nations Voice necessarily involves a determination of whose voice is to be heard. … [T]here is no existing national body from which the First Nations Voice could be drawn. …* ***Any process for determining the form and structure of the First Nations Voice should be directed by the First Nations****.*[37]

36. The Law Council maintains these submissions and position today. This position is built on the purpose and premise of the Uluru Statement from the Heart, with regard to which the above submission also stated, 'the Law Council confirms its commitment'.[38] The Uluru Statement from the Heart was clear in calling for a 'First Nations Voice'. In elegant and intelligent language, it expressed sovereignty as a 'spiritual notion' sourced in the 'ancestral tie' between land and people and possessed under 'laws and customs'. It identified 'Aboriginal and Torres Strait Islander tribes' as 'the first sovereign Nations of the Australian continent and its adjacent lands' and linked the aim of 'substantive constitutional change and structural reform' with the purpose of ensuring 'this ancient sovereignty can shine through'. On this basis, the Law Council continues to support a Co-Design Process that clearly recognises that the aim of the Voice is to empower First Nations.

37. An example of a practice that has been acknowledged as working well in engaging First Nations in design and leadership is the dialogue process that led to the Uluru Statement from the Heart (the Referendum Council's First Nations Regional Dialogues). Under the dialogue process:

> *Delegates to each regional dialogue were selected according to the following criteria:* ***60% from First Nations/traditional owner groups****, 20% from community organisations and 20% involving key individuals.*[39]

38. Stakeholders involved in the dialogue process explained to the Joint Select Committee the level of importance placed in ensuring representation from the ground up:

> *It was an Indigenous-designed and Indigenous-led model of community deliberation that offered genuine participation and informed participation, and that resulted in strong ownership of the outcome.*[40]
>
> *We tried to ensure that peak organisations that have ongoing access to parliament, parliamentarians and other entities with skin in the game were*

[37] Ibid, 8, [20]-[21]; 9, [23], [27]-[28] (emphasis added).
[38] Ibid, 8, [22].
[39] Referendum Council, Final Report, 10 (emphasis added).
[40] Joint Select Committee, Final Report, 67, quoting Dr Gabrielle Appleby, *Proof Committee Hansard*, Canberra, 11 September 2018, 3.

> *restricted in dialogues to ensure those who do not normally have a voice in communities could participate fully.*[41]

39. Upon being asked by the Joint Select Committee to compare the dialogue process to an earlier consultation process that led to the establishment of a different body, Professor Megan Davis emphasised that the latter:

> *[W]as dominated by many people involved in peak organisations, universities and bureaucratic structures. To that end, I think you can distinguish the dialogue process which engaged local communities to identify those people.*[42]

40. The Prime Minister's Indigenous Advisory Council described the dialogue process as 'leading practice in Aboriginal and Torres Strait Islander consultation and consensus making'.[43]

41. The Law Council considers that the current Co-Design Process more closely resembles the earlier consultation process than the Referendum Council's dialogue process, with the Terms of References prioritising individual representation over First Nations representation, and purporting to base authenticity and legitimacy in 'individual experience' rather than connection to and authority to speak for country.

42. The Law Council has also been unable to find information on the numbers of Aboriginal and Torres Strait Islander peoples in attendance at each face-to-face discussion in the second stage, or the representation of First Nations. It has heard reports from its constituent bodies and expert advisory groups that to date there has been low engagement from mob. It suggests that conceptualising the aim of the process as being about First Nations empowerment would increase the legitimacy of the process among Aboriginal and Torres Strait Islander peoples before pushing ahead.

43. In addition, the Law Council considers, within this discussion of the design and consultation process, issues around accessibility. On the NIAA's Indigenous Voice webpage, under each event, it is suggested that 'to get the most out of the consultation session [attendees] are strongly encouraged to review the proposals ahead of the session'.[44] It may be difficult for people without a high school level education, or indeed a legal or policy background, to engage with the proposals without support. The Discussion Paper is 11 pages and the Interim Report is 239 pages of text, and the graphics used in these documents are also text based, meaning engagement requires relatively strong comprehension skills. The Law Council does note that the Interim Report anticipated 'public relations outreach to Indigenous and mainstream media and social media', as well as 'engagement with radio media, particularly to access remote communities … including in language where needed'.[45] Similarly, resources such as the videos and animations on the NIAA's website appear to be positive initiatives.[46]

44. The Law Council's recent Justice Project, overseen by a Steering Committee chaired by the Hon Robert French AC, highlighted some key features of effective community

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[41] Ibid, 66, quoting Ms Patricia Anderson AO, *Proof Committee Hansard*, Canberra, 11 September 2018, 2-3.
[42] Ibid, 71, quoting Professor Megan Davis, *Proof Committee Hansard*, Canberra, 11 September 2018, 6.
[43] Ibid, 67, quoting Prime Minister's Indigenous Advisory Council, *Submission 419*, 14.
[44] See, eg, Australian Government, 'Indigenous Voice, Events, Ngukurr Community Consultations' (website, undated) <https://voice.niaa.gov.au/events/ngukurr-community-consultations>.
[45] Interim Report, 149.
[46] Australian Government, 'Indigenous Voice, Resources' (website, undated) <https://voice.niaa.gov.au/resources>.

legal education (**CLE**) for First Nations peoples which may also be relevant in this context. These included that CLE delivery must be culturally competent, and informed by the different cultural experiences of communities and individuals. By incorporating elders and community leaders into its design and delivery, CLE is most likely to overcome distrust of the legal system, engage people more effectively and provide information in the language of non-legal stakeholders.[47] 'Two-way learning' approaches are also valuable, as they allow service providers to become familiarised with cultural perspectives, communities' legal literacy needs and conceptions of the law. The Justice Project highlighted relevant examples of two-way learning such as the North Australia Aboriginal Justice Agency's CLE programs for remote communities which incorporated principles of adult learning, traditional Aboriginal and Torres Strait Islander learning styles, bilingual education and intercultural communication. A key finding was that 'how' the project was delivered was as important as 'what' was being developed.[48] The Co-Design Process may wish to consider deploying similar initiatives to ensure appropriate engagement and representation of Aboriginal and Torres Strait Islander peoples.

Constitutional Enshrinement

45. The Uluru Statement from the Heart was clear in calling for a First Nations Voice to Parliament enshrined in the Constitution. The Referendum Council was specifically established by the Prime Minister and Leader of the Opposition to 'lead the process for national consultations and community engagement about constitutional recognition'.[49] Delegates at the Referendum Council's First Nations Regional Dialogues and the convening of the National Constitutional Convention considered other options for constitutional recognition and reform, but consensus remained on a priority call for a referendum proposal on the Voice.[50] 'The Voice was the most endorsed singular option for constitutional alteration'.[51] It was identified as the only option other than agreement-making that could fulfill all requirements identified as non-negotiable by delegates, including that change must advance self-determination and be meaningful not merely symbolic.[52] As the Referendum Council concluded in its Final Report:

> *In consequence of the First Nations Regional Dialogues, the Council is of the view that the only option for a referendum proposal that accords with the wishes of Aboriginal and Torres Strait Islander peoples is that which has been described as providing, in the Constitution, for a Voice to Parliament.*[53]

46. The Joint Select Committee also acknowledged a First Nations Voice as the clear new direction in constitutional recognition and reform:

> *Acknowledging the significant shift in the ongoing discussions about constitutional change and recognition represented by the Statement from the Heart, which was announced only 10 months before the Committee was appointed, the Committee came to the view that its primary task was to expand on the detail of the proposal for a First Nations Voice.*

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[47] Law Council of Australia, 'People – Building Legal Capability and Awareness', *Justice Project* (Final Report, August 2018) 21-23.
[48] Ibid.
[49] Referendum Council, Final Report, 3, citing the Terms of Reference.
[50] Ibid, 15.
[51] Ibid, 14.
[52] Ibid, 29.
[53] Ibid, 2.

> *While The Voice has been the Committee's focus, the Committee has also considered the proposals for truth-telling and agreement making arising from the Statement from the Heart, as well as other proposals for constitutional change and recognition.*[54]

47. The Law Council reiterates there is no legal impediment to making provision for a First Nations Voice to Parliament in the Constitution and continues to strongly support such measures.[55] The Law Council has previously clarified that 'two former chief justices of the High Court, Murray Gleeson AC, QC and Robert French AC had addressed concerns that a constitutionally-enshrined Voice to Parliament would be a "third chamber"'.[56] 'It is a Voice to Parliament, not a Voice in Parliament.'[57]

48. In the Law Council's view, it is important that momentum generated from the Uluru Statement is not lost.[58] The Law Council urges the Australian Government to clearly commit to constitutional entrenchment of the Voice, with a referendum as soon as practicable and, importantly, prior to legislating the Voice. The Law Council notes the concerns of its constituent bodies that legislating as the first step may dampen community motivation for a referendum.

49. There is an opportunity to provide further clarity on planning regarding constitutional entrenchment of the Voice. In its pre-election policy platform published on 15 May 2019, *Our Plan to Support Indigenous Australians*, the Liberal Party stated:

> *We are listening to the recommendations of the bi-partisan Joint Select Committee … We are committed to recognising Aboriginal and Torres Strait Islander Australians in the Constitution … But there needs to be more work done on what model we take to a referendum and what a voice to parliament would be – which is why we are funding a consultation process with Aboriginal and Torres Strait Islander Australians. This process will develop up a question for a referendum and what a referendum will deliver … the Morrison Government is providing $7.3 million for a comprehensive co-design of models to improve local and regional decision making and options for constitutional recognition.*[59]

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[54] Joint Select Committee Final Report, 1-2, [1.5]-[1.6].
[55] Law Council of Australia, 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) 6.
[56] Law Council of Australia, *Uluru Statement Should Be Respected* (media release, 1 November 2019) <https://www.lawcouncil.asn.au/media/media-releases/uluru-statement-should-be-respected#:~:text=%E2%80%9CThe%20whole%20point%20of%20the,impact%20upon%20First%20Nations%20peoples.>.
[57] Ibid. See also, Anne Twomey, 'Why an Indigenous Voice would not be "third chamber" of Parliament', Sydney Morning Herald (online, 28 May 2019) <https://www.smh.com.au/national/why-an-indigenous-voice-would-not-be-third-chamber-of-parliament-20190526-p51r7t.html>; Mark Leibler, 'Clear voice without the repercussions of a third chamber', *The Australian* (Online, 20 July 2019) <https://www.theaustralian.com.au/inquirer/clear-voice-without-the-repercussions-of-a-third-chamber/news-story/8c95e16b6d9f5d4951b65c95d83504b5>.
[58] See Law Council of Australia, 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) 6, [8].
[59] Liberal Party, *Our Plan to Support Indigenous Australians*, 15 May 2019, 4 <https://parlinfo.aph.gov.au/parlInfo/download/library/partypol/6725182/upload_binary/6725182.pdf;fileType=application%2Fpdf#search=%22support%20indigenous%20australians%20Liberal%22>. It further noted: 'A referendum will be held once a model has been settled, consistent with the recommendations of the Joint Select Committee. And we have allocated $160 million in the Budget to run a referendum, with funding remaining in the Contingency Reserve until a referendum model has been determined.' (Ibid, 5).

50. While the Australian Government's initial objective was that 'this process will develop up a question for a referendum',[60] the Co-Design Groups are unable to consider constitutional options. Each of the Terms of Reference states that 'making recommendations as a Group through this co-design process on constitutional recognition, including determining the referendum question or when a referendum should be held' is 'out of scope' for the Co-Design Groups.[61]

51. In the 2020 Closing the Gap Speech, however, the Prime Minister did not discount the importance of enshrining the Voice in the Constitution, saying:

> *The [Joint Select Committee] did not make recommendations as to the legal form of the Voice – constitutional or legislation. It recommended considering this matter after the process of co-design is completed, and that is what we are doing. We support finalising co-design first.*[62]

52. The Law Council has previously stated that the Co-Design Groups 'should be allowed to consult on an option that will allow the Voice to be constitutionally enshrined',[63] and continues to maintain this position of support for constitutional enshrinement. Polling and analysis between 2017 and 2020 have suggested a strong level of support amongst the Australian public for a First Nations Voice to Parliament enshrined in the Constitution,[64] particularly if proposals are supported through bipartisan leadership and civic education.[65]

53. The Law Council considers that a clear commitment to constitutional enshrinement of the Voice may help to focus the efforts of stakeholders, by assuring them that their efforts will lead to a concrete outcome and providing 'confidence in the process and longevity of the establishment'.[66] For the sake of clarity, it restates its above call that

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[60] Ibid.
[61] Interim Report, Appendix B, 177, 180, 183. See also statements of parliamentarians in the news media: 'Morrison kills off "third chamber"', *The Daily Telegraph* (online, undated) <https://www.dailytelegraph.com.au/news/national/scott-morrison-to-veto-proposal-for-an-indigenous-voice-to-advise-parliament/news-story/1c2019f9aca2414d5be379bfdee89f36>; Amy Remeikis, 'Peter Dutton rules out voice to parliament, labelling it a "third chamber"', *The Guardian* (online, 12 July 2019) <https://www.theguardian.com/australia-news/2019/jul/12/peter-dutton-rules-out-voice-to-parliament-labelling-it-a-third-chamber>; Daniel McCulloch, 'Most voters support Indigenous recognition', *Canberra Times* (online, 12 July 2019) <https://www.canberratimes.com.au/story/6270284/most-voters-support-indigenous-recognition/>; 'Voice to Parliament "mischievously characterised" as third chamber', *Sky News* (online, 18 July 2019) <https://www.skynews.com.au/details/_6060798545001>.
[62] Commonwealth, *Parliamentary Debates*, House of Representatives, 12 February 2020, 974 (Scott Morrison, Prime Minister) <https://fromtheheart.com.au/wp-content/uploads/2020/06/Scott-Morrison-Closing-the-Gap-Speech-2020.pdf>.
[63] Law Council of Australia, *Uluru Statement Should Be Respected* (media release, 1 November 2019) <https://www.lawcouncil.asn.au/media/media-releases/uluru-statement-should-be-respected#:~:text=%E2%80%9CThe%20whole%20point%20of%20the,impact%20upon%20First%20Nations%20peoples.>
[64] See, eg, Katherine Murphy, 'Essential poll: majority of Australians want Indigenous recognition and voice to parliament', *The Guardian* (online, 12 July 2019) <https://www.theguardian.com/australia-news/2019/jul/12/essential-poll-majority-of-australians-want-indigenous-recognition-and-voice-to-parliament>: Polling by Essential in 2019 found 66% of respondents supported the proposal that originated in the Uluru Statement from the Heart. See also 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, Working Paper No 138, 2020) 15 <https://caepr.cass.anu.edu.au/sites/default/files/docs/2020/11/CAEPR_WP_no_138_2020_Markham_and_Sanders_final.pdf>: The Reconciliation Barometer General Population Sample found 77% of respondents specifically endorsed constitutional entrenchment of the Voice.
[65] See 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, Working Paper No 138, 2020) 20 <https://caepr.cass.anu.edu.au/sites/default/files/docs/2020/11/CAEPR_WP_no_138_2020_Markham_and_Sanders_final.pdf>.
[66] Interim Report, 158.

the Australian Government undertake a referendum as soon as practicable, prior to legislating the Voice, noting the concerns of its constituent bodies that legislating as the first step may dampen community motivation for a referendum.

Recommendations

- **The Australian Government commit to a First Nations Voice to Parliament enshrined in the Constitution.**
- **The Australian Government reframe the Co-Design Process, refocusing on the original promise and purpose of the Uluru Statement from the Heart of the empowerment of First Nations.**

Indigenous Voice Proposal in the Interim Report

Approach

54. The Law Council approaches the Interim Report with the view that the legal and policy settings of the Indigenous Voice proposed in the Interim Report need to be judged from the basis of the essential nature of what was advocated in the Uluru Statement from the Heart and the Final Report of the Referendum Council. These documents articulate the outcome of the First Nations Regional Dialogues and the National Constitutional Convention, which were detailed and successful, the largest representation of Indigenous people ever in Australia.[67]

55. 'The Interim Report has its genesis in the Uluru Statement':[68] the Joint Select Committee, as mentioned above, recognised the Uluru Statement as a 'significant shift in the ongoing discussions about constitutional change',[69] noting that 'not only did it bring a new element, the voice, into the debate, but it rejected much that had gone before in terms of proposals for constitutional recognition'.[70]

56. The principles distilled from the Regional Dialogues and governing the assessment by the National Constitutional Convention of reform proposals were that an option should only proceed if it:

- does not diminish Aboriginal sovereignty and Torres Strait Islander sovereignty;
- involves substantive, structural reform;
- advances self-determination and the standards established under the UNDRIP;
- recognises the status and rights of First Nations;
- tells the truth of history;
- does not foreclose on future advancement;
- does not waste the opportunity for reform;
- provides a mechanism for First Nations agreement-making;
- has the support of First Nations; and
- does not interfere with positive legal arrangements.[71]

[67] Referendum Council, Final Report, 10.
[68] Megan Davis, 'Our Indigenous voice is just waiting to be heard', *The Australian* (online, 16 January 2021).
[69] Joint Select Committee, Final Report, 1.
[70] Ibid, viii. See also Megan Davis, 'Our Indigenous voice is just waiting to be heard', *The Australian* (online, 16 January 2021).
[71] Referendum Council, Final Report, 22.

57. As it submitted to the Joint Select Committee, the Law Council considers that development of the final shape of the Voice ought to be guided by the above principles.[72]

58. Of course, this can only occur in practice within the Co-Design Process to the extent permitted by the Terms of References of the Co-Design Groups. Recognising that the Co-Design Groups cannot work outside their Terms of References, the Law Council accepts that the proposals put forward by the Co-Design Groups in the Interim Report have been developed within certain limitations. The Law Council comments on some of these limitations above. In this section, the Law Council engages with the Interim Report proposals within the Terms of References set.

59. To be clear, the comments that follow are premised on the principle that the membership, form and functions of the Voice are matters for First Nations to determine with the Government.[73] The Law Council responds in terms intended to assist deliberations as far as possible, noting, however, that it is not a First Nations representative body.[74]

Overview

60. The Interim Report proposes an 'Indigenous Voice' with two levels, these being:

- the 'National Voice', 'an advisory body to the Parliament and Australian Government', which 'would provide advice on behalf of Aboriginal and Torres Strait Islander peoples, to ensure their views are considered in legislation and policy development';[75] and
- the 'Local and Regional Voices', which would adhere to a 'principles-based framework', allowing for 'place-based approaches' and 'community-led design of specific arrangements tailored to community context' rather than 'any approach applying a specific, uniform model across the country',[76] and which 'would undertake community engagement, provide advice to governments, undertake and facilitate shared decision making with governments and engage with the National Voice'.[77]

61. The proposals in the Interim Report also 'outline what the National Voice and Local and Regional Voice are not. They will not deliver programs or manage funding, nor make parliamentary decisions'.[78]

Local and Regional Voices Proposal

62. The Law Council supports the direction and tenor of the Local and Regional Voices proposal, which emphasises 'a self-determination approach', with 'community-led design' and recognition of 'local context, history and culture' and 'cultural leadership'.[79]

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[72] Law Council of Australia, 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) 7, [16].
[73] This follows the position taken in the Law Council's submission to the Joint Select Committee: 8.
[74] Ibid.
[75] Interim Report, 32.
[76] Ibid, 65-66.
[77] Ibid, 68.
[78] Ibid, 14.
[79] See, eg, ibid, 75-83.

63. Previously, the Law Council 'submitted that two important principles apply to regional and local structures: first there must be flexibility and, second, there must be authentic self-government'.[80]

64. The commitment of the Local & Regional Group to 'flexibility' is welcome and important. It takes account of the Law Council's earlier concern 'that there are very real dangers in using a "cookie cutter" approach to representation because it may cut across traditional organisation or well-established governance which already exists'.[81]

65. Regarding policy setting in general, 'community-led design' and 'place-based approaches' are increasingly being recognised as best practice. Previous government 'portfolio and departmental structures' have largely worked from a 'top down or centrally led' perspective, an approach which can 'often miss opportunities and issues that are influenced by local contexts'.[82] This approach tends to generalise when identifying problems and proposing solutions, and assumes one homogenous perspective that cannot take account of how issues interlock or the fact problems seemingly the same at the macro level might have multiple and varying root causes at the micro level, producing ineffective policies and programs. Place-based approaches, by contrast, recognise that 'communities can face multiple issues that intersect in a local area and require holistic responses that leverage the knowledge and skills of local people'.[83]

66. In the context of issues affecting Aboriginal and Torres Strait Islander peoples, a place-based approach to policy assumes an added significance. This is because traditional laws, customs and polities are tied to place, and ideas of governance and authority are wielded at a more localised level or within different boundaries than occurs across general government programs and approaches. A place-based approach is likely better able to accommodate recognition of the traditional or most authentic organisational structures of Aboriginal and Torres Strait Islander peoples. Governance arrangements should be reflective of this reality, rather than contrived to fit an ideal; they should be authentic – that is, properly representative of the social, cultural, economic and political diversity of Aboriginal and Torres Strait Islander peoples through Australia – and capable of evolution.

67. In addition, if a place-based approach 'supports policy-makers to think differently about how government levers link and how we can bring together a different, more holistic, group of stakeholders',[84] it may be a helpful lens to utilise. That is, the Voice will look different to many of Australia's past arrangements between government and Aboriginal and Torres Strait Islander peoples. By employing concepts such as 'place-based approaches', 'community-led design' and 'cultural leadership', which are already within the government and policy-making lexicon (or emerging), stakeholders can support government and parliamentarians to properly understand what is meant, for example, by 'the right to self-determination'.

68. As the Australian Law Reform Commission has identified regarding a place-based approach: 'within this approach, there is potential in an Indigenous context to realise

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[80] Law Council of Australia, 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) 11, [37].
[81] Ibid.
[82] Victorian Government, Department of Premier and Cabinet, 'A framework for place-based approaches' (online, February 2020) <https://www.vic.gov.au/framework-place-based-approaches/print-all>.
[83] Ibid.
[84] Ibid.

principles of Indigenous self-determination and for application of Indigenous culture, authority and knowledge …'.[85]

69. This seems to be an approach through which the status of First Nations groups can be recognised and upheld within decision-making processes. That is, emphasising a place-based approach with community-led design of Local and Regional Voices is not necessarily inconsistent with the Law Council's view that 'if there are to be local voices, then those voices should be the local First Nations.'[86]

70. However, the Law Council considers that it might be necessary for the proposal to provide for greater protection of the status of First Nations in this process. Currently, the proposal seeks to prohibit Local and Regional Voice structures from displacing or duplicating existing structures and work already underway.[87] In many cases, this will not be an issue and will be sensible, taking advantage of existing practices, expertise, knowledge and legitimacy. Nevertheless, in situations, for example, where an existing structure is ineffective or does not have authority and legitimacy with ordinary Aboriginal and Torres Strait Islander peoples, where First Nations groups aspire to a distinct status, or where a minority group is not being properly represented within a large existing structure, then the Law Council suggests it would be necessary to create new Local and Regional Voice structures. For example, non-Indigenous members of the Law Council's expert advisory committees have identified that in some areas there are bodies that have been performing functions equivalent to those being proposed in the Interim Report for a Local or Regional Voice, such as the First Peoples' Assembly of Victoria formed in 2019, which may only need limited support to make any adaptations necessary to transition to the role of a Regional or Local Voice. However, Indigenous members of the Law Council's expert advisory committees have raised concerns as to how the proposal ensures that other First Nations bodies,[88] are enabled to maintain authority and participate in the process.

71. The Law Council suggests that consideration be given to whether a tiered approach to the establishment of Local and Regional Voices, which ensures the protection of the status of First Nations, could be implemented.

72. In its submission to the Joint Select Committee in 2018, the Law Council held that:

> *If there are to be local voices, then those voices should be the local First Nations. Any political empowerment of an Aboriginal and Torres Strait Islander voice on a different basis would undermine the effectiveness of First Nations and potentially set up entities in opposition to these voices.*[89]

73. It further noted:

> *In some regions, Aboriginal and Torres Strait Islander peoples may wish to acknowledge that there are existing community organisations that are controlled and operated by the First Nation, or that contribute to First Nation governance in a positive manner. There should be sufficient*

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[85] Australian Law Reform Commission, 'Justice Reinvestment in Action', *Pathways to Justice* (online, 2018) <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/4-justice-reinvestment/justice-reinvestment-in-action/>.
[86] Law Council of Australia, 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) 9, [23].
[87] Interim Report, 79.
[88] See, eg, Sovereign Yidindji Government, *Official Website* <https://www.yidindji.org/>.
[89] Law Council of Australia, 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) 9, [23].

flexibility in the system to allow Aboriginal and Torres Strait Islander peoples to draw on those relationships and those organisations to strengthen their local voice.[90]

74. In the specific context of cultural heritage legislative reform, the Law Council made comparative suggestions of a tiered approach to appointing a body with primary decision-making capacity (in its supplementary submission to the Joint Standing Committee on Northern Australia's inquiry into the destruction of caves at Juukan Gorge), as follows:

> *Determination of the Traditional Owners of a place or object of cultural heritage must be the primary starting point in ensuring cultural heritage protection. The process for establishing a PBC under the Native Title Act ensures that such bodies, where they exist, satisfy the criteria for a body appropriately representative of Traditional Owners, and are therefore well placed to control management of cultural heritage.*
>
> *That is, there must be a tiered approach to appointing the body with primary decision-making capacity on cultural heritage, with the order of priority of appointment correlating to representation of the appropriate Traditional Owners.*[91]

75. That is, the identification of Local and Regional Voice structures might employ an order of priority of appointment beginning with First Nations. The First Nations might choose to identify an existing community organisation that is controlled and operated by First Nations, or that contributes to First Nations governance in a positive manner. In situations where no First Nations or people with the right to speak for country exist, then other Aboriginal and Torres Strait Islander-led local and regional organisations might be engaged.

Recommendation

- **The Local and Regional Voices design consider a mechanism to ensure the rights and status of groups most appropriately placed to speak for country are protected, such as a tiered approach whereby the order of priority in identifying existing structures begins with First Nations.**

National Voice Proposal

76. The National Group put forward discussion and analysis of a number of key features for the proposed National Voice in the Interim Report, which the Law Council addresses in turn.

Selection of Membership to the National Voice

77. The National Group proposes two options for the selection of members to the National Voice.[92] The Law Council understands from the Interim Report that each option presents a principal selection method, as well as an alternative selection method drawing upon existing representative assemblies, should this be preferred by the

[90] Ibid, 11, [39].
[91] Law Council of Australia, Supplementary 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* (20 October 2020) 4.
[92] Interim Report, 34.

Aboriginal and Torres Strait Islander population in that state or territory or the Torres Strait Islands.

78. Under Core Model One, two[93] National Voice members from each state, territory and the Torres Strait Islands would be:

    (a) selected by representatives of Local and Regional Voices at a special meeting; or

    (b) selected by representative assemblies, provided:

        (i) these assemblies exist; and

        (ii) are formed by drawing on Local and Regional Voices; and

        (iii) the Aboriginal and Torres Strait Islander population agrees to this selection method; or

    (c) selected by a hybrid arrangement, whereby half of the relevant National Voice members are determined via (a) and half via (b).

79. Under Core Model Two, two[94] National Voice members from each state, territory and the Torres Strait Islands would be:

    (a) selected directly through state, territory and Torres Strait Island elections; or

    (b) selected by representative assemblies, provided:

        (i) these assemblies exist; and

        (ii) the Aboriginal and Torres Strait Islander population agrees to this selection method.

Core Model One

80. The Law Council emphasises the importance of Aboriginal and Torres Strait Islander peoples determining the membership of their own representative bodies. It defers to the views of Aboriginal and Torres Strait Islander contributors to the consultation should further or more detailed questions of membership arise, or should there be inconsistencies between the Law Council's views and others, noting the issue may raise important and complex matters of Aboriginal and Torres Strait Islander history and politics, on which the Law Council is not an authority.

81. The Law Council notes that Core Model One had the broadest level of support within the National Group.[95] The representativeness of this model depends on the extent to which the Local and Regional Voices are truly reflective of those who can speak for

[93] This would total 18 members of the National Voice. There is also an option in the Interim Report for one member from each the ACT and Torres Strait Islands, and two members from each of the other states and territories, totalling 16 members of the National Voice. Size of membership is discussed further below.
[94] This would total 18 members of the National Voice. There is also an option in the Interim Report for one member from each the ACT and Torres Strait Islands, and two members from each of the other states and territories, totalling 16 members of the National Voice. Size of membership is discussed further below.
[95] Interim Report, 35.

country, these being best articulated as First Nations.[96] If that representativeness is guaranteed, then it seems sensible to favour this model.

82. The National Group emphasises its consideration of membership models that 'are inclusive of different arrangements at the local and regional level, and do not seek to be prescriptive about how communities and regions organise their representation'.[97] The National Group identifies in the Interim Report:

> *The way members are selected is an important consideration. For a National Voice to have legitimacy, its members must be selected by Aboriginal and Torres Strait Islander peoples and as much as possible have a connection to the local community level.*[98]

83. The Law Council considers that the proposals for the appointment of membership to the National Voice might engage in greater detail, however, with protecting the rights and status of First Nations, and expressly engage with the issue of membership of the National Voice being primarily derived from the authority to speak for country – this is an ascending rather than descending scale of power whereby the National Voice has only the authority to speak for country extended to it by the agreement of the Local and Regional Voices.[99] This concept is discussed further below under the heading 'Core Function'.

84. In practical terms, First Nations ought to be empowered to form regions reflecting their own political, cultural and geographic circumstances. Each region could be represented on the National Voice, rather than the current proposal whereby membership is calculated by reference to the states and territories.

85. That is, the Law Council suggests that a key consideration in designing the Voice is how best to ensure that the authentic and legitimate representation achieved at the level of the Local and Regional Voices is not diluted or undermined in the appointment of membership to the National Voice.

86. The Law Council has previously suggested a middle structure existing between First Nations and a National Voice, such as a First Nations Representative Body – a deliberative structure or caucus at which First Nations can meet and determine a collective approach. As the Law Council submitted to the Joint Select Committee on behalf of the New South Wales Bar Association:

> *Such a body could in turn elect or appoint an executive which could comprise the Voice … which is then also appointed by the Governor General-in-Council on Ministerial recommendation, enshrined in statute.*

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[96] The Law Council notes the recent views of the Law Society of New South Wales that notions of readily defined and coherent 'First Nations' have been contested, and that there are also those who see the situation as fluid. The Law Council accepts that 'First Nations' is not the term that necessarily fits in all circumstances, but to the extent that 'First Nations' is intended to reflect the collection of those people who have the right to speak for country and in whose possession the assertion of sovereignty most comfortably sits, it is a concept well understood and utilised, such as in native title processes.

[97] Interim Report, 33.

[98] Ibid, 33.

[99] Indigenous members of the Law Council's expert advisory Indigenous Legal Issues Committee suggest this might be conceptualised in the same manner as Australia as a nation state participates in the Association of Southeast Asian Nations and the United Nations. These members note: the Interim Report appears to approach the issue of representation on the basis that there is a descending scale of power and authority starting with the national body and descending through the regional bodies to the local bodies. Of course, this cannot be so. The local bodies, asserting sovereign status in their own right have the power to do all things, the regional and national bodies only have those powers which the local First Nations extend to them, and therefore a decreasing subset of powers.

The Voice would in essence be the envoy to the Parliament, not a representative body itself.[100]

87. It was further submitted to the Joint Select Committee that this separation is important in order to distinguish between the conduit of information to the Australian Government and Parliament (the National Voice) and the self-government of First Nations (the First Nations Representative Body).[101] The Law Council notes that this conceptualisation of the National Voice as an 'executive' would maintain the preference of the National Group that the National Voice be a small group (eg 16 or 18 members), but would also ensure decision-making power primarily resides at a level where there is authority to speak for country and legitimacy.

88. In this context, the Law Council notes that the Referendum Council's Final Report similarly included the idea that the Voice's 'representation could be drawn from an Assembly of First Nations, which could be established through a series of treaties among nations', noting the importance that it 'not be comprised of handpicked leaders' without 'authority' or 'legitimacy'.[102]

89. The Law Council emphasises its serious concerns that failure to ensure representation and accountability directly to those who have the rights to speak for country will result in a First Nations Voice representative of entities and interests other than what it purports to be. Those concerns are enhanced by the past failures of organisations established without those accountabilities, as well as the need to ensure the Voice is a body that will stand the test of time and warrant inclusion in the Constitution.

Recommendations

- **Further consideration be given to protecting the rights and status of First Nations and the issue of membership of the National Voice being primarily derived from the authority to speak for country. The exercise of self-determination through a representative political voice is likely to be best facilitated through a structure or structures that are comprised of and accountable to First Nations.**

Core Model Two

90. Core Model Two, in contrast, removes the role of Local and Regional Voices in membership selection of the National Voice. This undermines the principle of First Nations representation and the right to speak for country. There is also a risk this model would be subject to the usual weaknesses of elections, including high cost and low voter turnout. It would also necessitate a significant administrative burden in terms of maintaining electoral rolls.

91. Should this model be pursued, imposing a significant administrative burden on states and territories could be mitigated through making use of existing electoral commissions. However, this method and its associated administrative processes could raise unique challenges vis-à-vis questions of voter eligibility.

[100] Law Council of Australia, 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) 9, [28].
[101] Ibid, 11, [36].
[102] Referendum Council, Final Report, 30.

92. As the Interim Report notes, 'challenges would exist if there was a need to confirm Indigeneity of voters as part of an election process'.[103] The National Group raises the potential for intra-community disagreement over questions of Indigeneity.[104] The Law Council suggests there would need to be consideration of the types of services and the resourcing that will be required to garner the most participation of First Nations people. This might include a range of mechanisms, such as funding 'link-up' services to facilitate First Nations people engaging with their Indigeneity, noting that for some, there may be barriers to doing so, given traumas such as child removals and stolen generations. Should Confirmation of Aboriginality letters be utilised in the context of an electoral roll for the National Voice, Indigenous-led organisations might need to be resourced to enable them to take on an expanded list of approvals. Remote communities would also need to be provided with voting assistance and mobile polling services.

Recommendation

- **Consideration be given to the types of services and the resourcing that will be required to garner the greatest participation of Aboriginal and Torres Strait Islander peoples in the membership selection process. The models put forth to Aboriginal and Torres Strait Islander populations to decide on should in advance be informed by direct and indirect barriers to participation and representation.**

Ministerial Appointments

93. For reasons of self-determination and independence, the Law Council supports a model that is entirely independent, rather than including Ministerial appointments. The Law Council notes the following passage from the Interim Report:

> *Initially the National Co-Design Group was strongly opposed to the notion of Ministerial appointments, but this view evolved over the course of the co-design process. Some National Co-Design Group members suggested appointments could be used to fill skill gaps and resolve issues of demographic balance, for example providing additional representation for remote areas if needed.*[105]

94. The Law Council appreciates the level of consideration of the issue undertaken by the National Co-Design Group, which recognised the 'real risk that appointees could be perceived as lacking credibility, and community or cultural authority',[106] and thus suggested the following conditions on appointments:

    (a) There would be a maximum of two appointees. This would ensure they were only a small proportion of the overall membership.

    (b) Appointments would only be made where needed, not by default, according to clear criteria, and importantly only made with the agreement of the National Voice members.

95. However, the Law Council considers that ministerial appointments, no matter the criteria through which they are regulated or the level of quality of individual appointees, would undermine the institution of the National Voice. For a

[103] Interim Report, 36.
[104] Ibid, 36.
[105] Ibid, 39.
[106] Ibid, 39.

representative body to have meaning and to operate effectively it must be seen as legitimate by the constituency it purports to represent. Ensuring the bipartisan independence of the National Voice, given its proposed role of providing advice to the Australian Government and the Parliament, is also important.

96. There are other mechanisms to address the potential inadequacies in any representative model, including permitting the National Voice itself to appoint additional members, or ensure in its procedures there are checks and balances to protect under-represented interests. If the concern is to fill skill gaps, the Law Council considers that this might be achieved, for example, through the delivery of support programs to members and through a secretariat working for members. Indeed, the National Group proposes significant options to fill skill gaps and provide policy and expert input without ministerial appointments, such as via a Panel of Experts – this being 'a panel of qualified experts for the National Voice to draw upon as required and constitute to undertake a specific inquiry or task',[107] which the Law Council supports. This would be more consistent with article 18 of the UNDRIP, under which Indigenous peoples have the right to participate in decision-making through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own decision-making institutions.

Recommendation

- **Membership of the National Voice should not include Ministerial appointments. If Ministerial appointments are pursued, the proposed conditions on appointments – that Ministerial appointments be capped to a small proportion of the overall membership and occur only with the agreement of the National Voice members – are sensible and should be upheld.**

Legal Form of the National Voice

97. The Law Council notes that discussion of the 'legal form' of the National Voice necessitates consideration at two levels.

98. The first is the level of constitutional or legislative legal form. As discussed above, the Law Council supports a First Nations Voice to Parliament enshrined in the Constitution. It appears to the Law Council, however, that there has always been general consensus among proponents for constitutional enshrinement that there must also be a legislative aspect to implementing the Voice. That is, the entire detail of the structure would not be enshrined in the Constitution. As noted in the Referendum Council's Final Report:

> *The proposed body should take its structure from legislation enacted by the Parliament of the Commonwealth. No one has suggested there be an attempt to enshrine in the Constitution provisions of the kind more appropriately left to Parliament. Legislation of the Parliament would deal with how the body is to be given an appropriately representative character and how it can properly and most usefully discharge its advisory functions.*[108]

99. In saying this, constitutional enshrinement is essential if certain conceptions of the Voice are to be achieved. The Law Council agrees with the National Group that the National Voice should be enabled to advise both the Parliament and the Australian

[107] Ibid, 55.
[108] Referendum Council, Final Report, 36.

Government. It notes, however, that the Voice cannot properly be considered a Voice to Parliament unless its existence is assured through constitutional enshrinement, otherwise it may be abolished by a parliamentary vote at any point.

100. The Law Council notes that the Law Institute of Victoria (**LIV**) has developed further views as to the drafting of constitutional amendments, including an alteration to section 51(xxvi) to oblige the Executive, when making laws under this head of power, to have regard to advice received from the Voice. These views were previously published as an appendix to the Law Council's submission to the Joint Select Committee.[109] In contrast, the Referendum Council recommended that monitoring the head of power under sections 51(xxvi) and section 122 be a function of the Voice but 'not by way of proposed alteration to the Constitution'.[110] The Law Council considers that First Nations must be closely consulted on the wording of any constitutional amendment, while recognising that ultimately, to pass a referendum, the wording must be supported to requisite levels by all Australians. However, this issue is currently outside the Terms of References of the Co-Design Groups and is not canvassed in further detail here.

101. The second level for consideration is how the structure that is the Voice would take legal form. The Interim Report proposes two alternatives: a Commonwealth body established in legislation; or a private corporate body with statutory functions.

102. The detail provided by the National Group on the two options is as follows:

> *Option 1: Commonwealth body*
>
> *A Commonwealth body could be established in legislation. The legislation would include strong provisions for independence, similar to existing bodies like the Torres Strait Regional Authority and the Australian Institute of Aboriginal and Torres Strait Islander Studies. The legislation would prohibit Ministerial direction regarding the performance of its functions or determination of membership. Ministerial powers would be limited to resourcing matters.*
>
> *Option 2: Private body corporate with statutory functions*
>
> *A corporation could be set up under either the Corporations Act 2001 or the Corporations (Aboriginal and Torres Strait Islander) Act 2006. If pursuing this option, the body would be 'recognised' under special legislation as the National Voice, giving the body a statutory function to give advice. This would be similar to the arrangements used for the First Peoples' Assembly of Victoria.*[111]

103. The Law Council agrees with the National Group's recommendation that the National Voice 'requires a high degree of independence' and therefore 'should be a fully separate structure, and not part of any existing body, nor should its administrative functions be provided by an existing entity'.[112]

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[109] Law Council of Australia, 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) 'Appendix A: additional input from the Law Institute of Victoria'.
[110] Referendum Council, Final Report, 37.
[111] Ibid.
[112] Interim Report, 58.

104. A private body corporate is an artificially created legal 'person', with a Board of Directors or Governing Committee, the members of whom are obliged to act in the interests of the body. The Law Council notes the views of its expert advisory committee members that this obligation precludes the members of the Board or Committee from having a role as representatives of the interests of a broader constituency of persons, meaning a private body corporate is unsuitable to perform the functions required of the National Voice.

105. Some of these Law Council committee members therefore see a Commonwealth body as the most appropriate option, as it can be identified in the statute as made up of persons who have a representative role and who may be nominated to represent the interests of local and regional groups.

106. However, other members of the Law Council's expert advisory committees question the appropriateness of the National Voice being a Commonwealth body – if it is to be representative of First Nations, which by their existence assert a distinct political identity. These members suggest the National Voice have statutorily mandated functions, or, as canvassed above under the heading 'Core Model One', be a statutory committee to which a National Representative Body appoints National Voice members, which then acts as an advisory envoy to the Australian Parliament and Government.

107. In relation to funding, the Law Council has received views that past experiences, such as with the Aboriginal and Torres Strait Islander Commission, should be interpreted in their full context, wherein the majority of this body's budget was quarantined by government for spending on government programmes over which the body had no control and its reputation unfairly denigrated. On this basis, the functions of managing funding and undertaking program evaluations might be subject to public consultation before being precluded from the National Voice's remit altogether. Ultimately, regardless where the responsibility for managing funding lies, the National Voice 'must be supported by a sufficient and guaranteed budget' to ensure it can properly perform its functions.[113]

Recommendations

- **First Nations views be sought on the legal form of the National Voice.**
- **Further consultation, including on the strengths and weaknesses of past bodies, occur before managing funding and undertaking program evaluations are automatically excluded from the functions of the National Voice.**
- **The National Voice be supported by a sufficient and guaranteed budget to ensure it can properly perform its functions.**

Role of the National Voice

108. In the Interim Report, the National Co-Design Group articulates the following role for the National Voice:

> *On behalf of Aboriginal and Torres Strait Islander peoples, the National Voice would have a responsibility and right to advise the Parliament and*

[113] Referendum Council, Final Report, 30-31.

Australian Government on matters of national significance to Aboriginal and Torres Strait Islander peoples.[114]

109. The Law Council supports the articulation of the National Voice as an advisory body to the Parliament and the Australian Government. It can be drawn from the Uluru Statement from the Heart that an overriding rationale behind the Voice is to allow First Nations people to communicate with elected democratic representatives in a format that is not prejudiced by numerical disadvantage. The Voice is an opportunity for First Nations people, representing approximately only three per cent of the population but often disproportionately and detrimentally impacted by mainstream legal and policy positions, to 'be heard' regarding issues that affect them, and in some cases affect no other group of Australians. The Voice has never been proposed as a third chamber of parliament, or as changing the powers of the legislature or executive. It is uncontroversial that the National Voice will not be able to veto laws made by the Parliament or overturn decisions made by the Australian Government: as the Referendum Council's Final Report made clear, 'it is not suggested that the body should have any kind of veto power'.[115]

110. To better reflect the intention of the Uluru Statement from the Heart and the real power and purpose attached to First Nations representation, the Law Council suggests using the words 'First Nations' and 'First Nations peoples'. The Law Council also suggests changing 'national significance' to 'significance' as it may be appropriate for the National Voice to address issues that are of acute importance but confined to certain regions, further discussed in the paragraphs below. For example:

> *On behalf of First Nations, the National Voice would have a responsibility and right to advise the Parliament and Australian Government on matters of significance to First Nations and First Nations people.*

Core Function

111. The Interim Report goes on to provide the following advice to stakeholders:

> *The National Co-Design Group agreed the core function of a National Voice would be to:*
>
> ***Advise on matters of critical importance to the social, spiritual and economic wellbeing, or which has a significant or particular impact on Aboriginal and Torres Strait Islander peoples of national significance.***[116]

112. It is unclear from the Interim Report whether this is intended to be the proposed wording in legislation establishing the National Voice,[117] or whether this is merely how the National Co-Design Group is articulating the core function for the purpose of these consultations.

113. If the former, the Law Council agrees with the National Co-Design Group that 'there should be no restriction on the matters within the scope of the advisory role on which

[114] Interim Report, 43.
[115] Referendum Council, Final Report, 36.
[116] Interim Report, 44 (emphasis in original).
[117] The Law Council notes that 'drafting of legislation to establish a national voice' is 'out of scope' for the National Co-Design Group under its Terms of Reference: Interim Report, Appendix B, 180.

a National Voice could advise'.[118] The wording as proposed may not be broad enough to capture this intention.

114. The terms 'critical importance', 'significant or particular impact' and 'national significance' impose thresholds, which could leave the ability of the National Voice to consider certain issues open to challenge. For example, issues relating to cultural heritage or cashless welfare trials are acute issues, on which it would be highly relevant for the Parliament and Australian Government to receive advice from the National Voice, but are limited to specific local or regional areas, which may not fall within the meaning of 'national significance'.

115. The Law Council is also concerned that the wording is restricted to matters relevant to 'the social, spiritual and economic wellbeing' of Aboriginal and Torres Strait Islander peoples, and suggests inclusion in this phrase of the word 'political'. In the alternative, the Law Council suggests adding 'cultural and broader' wellbeing. This may be important if the National Voice is intended to be the proper institution to advise the Australian Parliament and Government, for example, on the establishment of a Makarrata Commission in future years.

116. The Law Council notes the possibility that exclusion of the word 'political' may have been a conscious choice by the National Group to give effect to the principles expressed at the Regional Dialogues leading to the Uluru Statement from the Heart that reform should not cede First Nations sovereignty or 'foreclose on future advancement' such as Statehood in the Northern Territory or Territory Status in the Torres Strait.[119] That is, the National Voice should be restricted from making certain agreements with the Australian Parliament or Government that would diminish the core legal rights and standing of First Nations.

117. However, if this carveout was intentional, it may have the broader effect of precluding the National Voice's function in other future advocacy, such as the ability to conclude treaties, agreements, and other constructive arrangements with the Australian Government, which is a right expressed under article 37 of the UNDRIP, and supported at the Regional Dialogues.[120]

118. This conundrum explains exactly why the National Voice must be representative of First Nations. Its ability to make decisions with authority and legitimacy, including on political issues – to be 'future-proofed' and able to evolve with changing political tides over many years – is derived from its membership aligning with those local entities known as First Nations, through which an ongoing sovereignty and authority by reason of traditional law is asserted.

Recommendations

- **The wording of the role of the National Voice be amended as follows:**

  On behalf of First Nations, the National Voice would have a responsibility and right to advise the Parliament and Australian Government on matters of significance to First Nations and First Nations people.

- **Close consideration be given to drafting the scope of the core function, in order to ensure the National Voice's present and future purposes are**

[118] Interim Report, 44.
[119] Referendum Council Report, 22-28.
[120] Ibid, 27.

not unintentionally foreclosed by the imposition of strict legal thresholds.

Requirements on the Australian Government and Parliament to Consult and Engage the National Voice

119. The National Group proposes a three-tiered framework for requirements on the Australian Government and Parliament to consult and engage the National Voice. This would include:

    (a) an obligation to consult and engage within a narrow clearly defined scope, this being limited to proposed laws which are exclusive to Aboriginal and Torres Strait Islander peoples;

    (b) an expectation to consult and engage more broadly 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) an unencumbered ability to consult and engage on any matter which is critically important or which has a significant or particular impact on Aboriginal and Torres Strait Islander peoples.[121]

Obligation to Consult

120. The Law Council considers that the obligation to consult should not be 'limited to proposed laws which are *exclusive* to Aboriginal and Torres Strait Islander peoples'.[122]

121. In defining the scope of the obligation to consult, the National Co-Design Group suggests three triggers, which would apply to both the Australian Government and Parliament:

    (a) laws proposed under section 51(xxvi) of the Constitution (commonly known as the 'races power', which refers to 'the people of any race for whom it is deemed necessary to make special laws');

    (b) proposed laws which are special measures under, or which seek to suspend the *Racial Discrimination Act 1975* (Cth) (**RDA**) where they specifically impact Aboriginal and Torres Strait Islander peoples; and

    (c) laws proposed under section 122 of the Constitution (commonly known as the 'territories power').[123]

122. The Law Council agrees that each of the above suggestions should be included as triggers on the obligation. However, it considers that this proposed scope should be broadened.

123. The Law Council notes the reflection of the National Co-Design Group that:

> *Many laws which have significant or particular impacts on Aboriginal or Torres Strait Islander peoples would not be covered by any of the triggers for an obligation to consult and engage.*[124]

[121] Interim Report, 51.
[122] Cf ibid.
[123] Interim Report, 52.
[124] Ibid, 53.

124. For example, legislation underpinning the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) could rely on the corporations power. Legislation in respect of marine parks and regulating fishing could have a devastating effect on native title rights, but could be enacted without reliance on any of the three proposed triggers. The domestic implementation of international instruments such as the Convention on the Rights of the Child (and possibly even the UNDRIP[125]) might rely on the external affairs power, while the Commonwealth Government has indicated it may seek to rely on the power conferred by section 51(xxvii) relating to 'immigration and emigration' to legislate to deport Aboriginal Australians who are 'non-aliens, non-citizens'.[126]

125. Further, there are laws that are not intended to specifically target Aboriginal or Torres Strait Islander people, but have a disproportionate (and adverse) impact on Indigenous peoples.

126. Such examples include social security legislation, such as the cashless debit card, and more recently, proposed consumer protection legislation that seeks to wind back responsible lending obligations.[127] As set out in the Law Council's submission regarding the cashless debit card, it is unlikely that this legislation could be characterised as a special measure.[128]

127. It would also be appropriate for a National Voice to be represented, for example, on the Joint Standing Committee on Northern Australia in regards to the inquiry into the destruction of the caves at Juukan Gorge, because the terms of reference of that inquiry include examination of federal legislation engaging Indigenous rights (*Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth)). The insufficient protection of this legislation to protect cultural heritage at the federal level has been a core focus of this inquiry.[129] The current inability of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) to do so has also been in its

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[125] See *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 224-225 and 234 (Mason J), including: 'I should not wish it to be thought from what I have said that the existence of a treaty is an essential prerequisite to the exercise of the power. That is certainly not my view. … Moreover, as Professor Zines points out in The High Court and the Constitution (1981), p. 230, "the reasoning in Burgess's case and Airlines [No. 2] would support an Australian law giving effect to an obligation arising under rules of customary international law". Further, it seems to me that a matter which is of external concern to Australia having become the topic of international debate, discussion and negotiation constitutes an external affair before Australia enters into a treaty relating to it.' See also *R v Burgess* (1936) 55 CLR 608, 644; *Walker v Baird* (1892) AC 491; *Tasmanian Dam Case* (1983) 158 CLR 1; Elise Edson, 'Section 51(xxix) of the Australian Constitution and "Matters of International Concern": Is There Anything to be Concerned About?' (2008) 29 *Adelaide Law Review* 269, 277 and 298; Sarah Murray, 'Back to ABC after XYZ: Should we be Concerned about "International Concern"?' (2007) 35(2) *Federal Law Review* 315 quoting *XYZ v Commonwealth* (2006) 227 ALR 495.

[126] See *Love v Commonwealth; Thoms v Commonwealth* [2020] HCA 3 (Kiefel CJ); Paul Karp and Calla Wahlquist, 'Coalition seeks to sidestep High Court ruling that Aboriginal non-citizens can't be deported', *Guardian* (online, 12 February 2020) <https://www.theguardian.com/australia-news/2020/feb/12/coalition-seeks-to-sidestep-high-court-ruling-that-aboriginal-non-citizens-cant-be-deported>.

[127] See, eg, Law Council of Australia, Submission to the Senate Community Affairs Legislation Committee, *Inquiry into the Social Security (Administration) Amendment (Continuation of Cashless Welfare) Bill 2020* (2 November 2020) <https://www.lawcouncil.asn.au/publicassets/b71571c3-2f1f-eb11-9435-005056be13b5/3910%20-%20Cashless%20Debit%20Card%20Bill%202020%20submission.pdf>; Law Council of Australia, Supplementary Submission to the Treasury, Consumer Credit Reforms (24 November 2020) <https://www.lawcouncil.asn.au/publicassets/36e5be68-8233-eb11-9437-005056be13b5/3926%20-%20SS%20Consumer%20Credit%20Reforms.pdf>.

[128] Law Council of Australia, Submission to the Senate Community Affairs Legislation Committee, *Inquiry into the Social Security (Administration) Amendment (Continuation of Cashless Welfare) Bill 2020* (2 November 2020) <https://www.lawcouncil.asn.au/publicassets/b71571c3-2f1f-eb11-9435-005056be13b5/3910%20-%20Cashless%20Debit%20Card%20Bill%202020%20submission.pdf> 19, [79]; 20, [82].

[129] Parliament of Australia, Joint Standing Committee on Northern Australia, 'Terms of Reference', *Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia* (online, undated) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Northern_Australia/CavesatJuukanGorge/Terms_of_Reference>.

sights[130] (as well as being a core focus of recommendations made by Professor Graeme Samuel AC in his recent review of this legislation[131]). These statutes rely on the High Court's interpretation of key heads of power – 'especially the external affairs power, the trade and commerce power, and the corporations power' – for their enactment.[132]

128. The Law Council therefore recommends an obligation to consult or engage with the National Voice arising when the Australian Government or Parliament is considering any law affecting any right articulated or protected by the UNDRIP. In the alternative, the reference could be to any law affecting any right articulated or protected under an international human rights instrument to which Australia is a signatory.

129. Consideration should also be given to proposed laws which are 'inconsistent' with the RDA, rather than only those which explicitly seek to suspend it. The Law Council's recent submission regarding the cashless debit card provides an example of a relevant law in this regard.[133]

130. The Law Council has also received views that the National Voice should be the body that is consulted by the Australian Government regarding the Closing the Gap Agreement. That is not to say that the Aboriginal and Torres Strait Islander peak bodies may not also have a role in the consultation and negotiation process. However, that should only be a matter for determination between the Voice and those peak bodies.

131. It has also been raised with the Law Council whether the scope of the National Voice should include a power to call for the repeal of existing laws, such as those inconsistent with the RDA. The Law Council notes that under the current proposals in the Interim Report, 'there should be no restriction on the matters within the scope of the advisory role on which a National Voice could advise' and 'the National Voice would be able to initiate advice'.[134] It appears the proposals would therefore confer the power raised, which the Law Council supports.

132. In addition, the Law Council notes the view of the Law Society of New South Wales that the proposals could refer to the UNDRIP, and articulate the expectation that the Australian Government would seek to obtain the free, prior and informed consent of Aboriginal and Torres Strait Islander peoples before implementing laws that substantially or disproportionately affect them.[135]

Recommendations

- **The obligation to consult not be limited to proposed laws which are exclusive to Aboriginal and Torres Strait Islander peoples, as many**

[130] Ibid.
[131] Professor Graeme Samuel, *Final Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)* (October 2020) <https://epbcactreview.environment.gov.au/resources/final-report>.
[132] Independent Review of the EPBC Act, *Scope of the EPBC Act* (20 November 2019) <https://epbcactreview.environment.gov.au/resources/scope-epbc-act>.
[133] Law Council of Australia, Submission to the Senate Community Affairs Legislation Committee, *Inquiry into the Social Security (Administration) Amendment (Continuation of Cashless Welfare) Bill 2020* (2 November 2020) <https://www.lawcouncil.asn.au/publicassets/b71571c3-2f1f-eb11-9435-005056be13b5/3910%20-%20Cashless%20Debit%20Card%20Bill%202020%20submission.pdf>.
[134] Interim Report, 44.
[135] See also Referendum Council, Final Report, 30: 'There was a concern that the proposed body would have insufficient power if its constitutional function was 'advisory' only, and there was support in many Dialogues for it to be given stronger powers so that it could be a mechanism for providing 'free, prior and informed consent'.'

laws of seemingly general application have disproportionate or particular impacts on Aboriginal and Torres Strait Islander peoples.

- **The triggers of the obligation to consult be expanded to include:**
  - **proposed laws affecting any right articulated or protected by the UNDRIP, or, alternatively, under an international human rights instrument to which Australia is a signatory; and**
  - **proposed laws that are inconsistent with the RDA, rather than only those that explicitly seek to suspend it.**

Justiciability

133. Under the proposals for the National Voice discussed in the Interim Report, the obligation to consult would be non-justiciable and the recommendations made by the National Voice would not affect the validity of any laws.[136] Members of the Law Council's expert advisory committees are of the view that if, as suggested, the obligation to consult is to be non-justiciable, then it is not an obligation in any legal sense and is rendered meaningless as a legal concept.

134. The LIV has submitted to the Law Council that in order to create an effective Voice to empower First Nations peoples, accountability through justiciable decisions is necessary. The LIV submits that the goals of the Voice may never be achieved unless there is in some form an enforceable requirement on Ministers to listen to the Voice.

135. The Law Council supports the LIV's proposition that there is an important distinction between placing an obligation on Ministers *to respond to* the National Voice's advice and an obligation on Ministers *to act in accordance with* the National Voice's advice.

136. As it submitted to the Joint Select Committee, the Law Council suggests 'that serious consideration should be given to imposing a duty upon the relevant Minister to respond to the comments of the Voice' within a certain timeframe.[137]

137. The Minister's compliance with the duty might then be reviewable by courts and tribunals.

138. The Law Council accepts the LIV's concerns that without such a mechanism, the obligation to consult may not differ in any substantial respect from the regular communication that stakeholders in this space are able to have with government. It restates that constitutional enshrinement is also essential to achieving this purpose.[138]

Recommendation

- **Consideration be given to imposing a duty upon the relevant Minister to respond to the advice of the Voice within a particular timeframe, compliance with which could then be reviewable by courts and tribunals.**

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[136] Interim Report, 51.

[137] Law Council of Australia, 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) 10, [35].

[138] See also Geoffrey Lindell, 'The relationship between Parliament and the Voice and the importance of enshrinement', *Indigenous Constitutional Law* (online, 2 March 2021) <https://www.indigconlaw.org/geoffrey-lindell-the-relationship-between-parliament-and-the-voice-and-the-importance-of-enshrinement>.

Other Transparency Measures

139. The Interim Report includes the following proposals, which might be characterised as additional transparency measures on the requirements that the Australian Government and Parliament consult and engage with the National Voice:

    (a) a requirement for relevant bills to include an explanatory statement of consultation, addressing engagement with the National Voice;

    (b) establishment of a new parliamentary committee to scrutinise engagement and consideration of advice; and

    (c) where an issue has been referred to the National Voice from Parliament, formal advice must be tabled in Parliament.

140. The Law Council supports these proposals, but provides the following additional comments concerning various elements.

141. It is not unusual for the explanatory memorandum accompanying a bill to have a statement of compatibility with certain criteria, such as human rights obligations. The Law Council considers that may be a readily adopted process in relation to legislation that triggers the obligation or expectation on the Australian Government or Parliament to consult with the National Voice. The detail provided might include the extent of the consultation, the advice provided, and the reasoning behind the government's decision in relation to the advice, which would align with the submissions above that there be a duty on the relevant Minister to respond to the advice of the National Voice. It is also common enough to establish a function of a parliamentary committee to scrutinise statements of compatibility. Scrutiny may also be a procedure which the Parliament may readily adopt if it chooses. The House of Representatives Standing Committee on Indigenous Affairs may be the appropriate body for this purpose, or a similar purpose body created such as occurred with the Joint Select Committee.

142. As currently proposed in the Interim Report, only advice on issues referred to the National Voice from Parliament must be tabled in Parliament. The Law Society of New South Wales has submitted to the Law Council that, in the interests of greater transparency, where advice is proffered at the instigation of the National Voice, the National Voice may elect that the advice be tabled and if the National Voice so elects, the advice must be tabled in Parliament. Further, if the National Voice elects for the advice to be tabled, the proposed law or policy in question should attract the scrutiny of the parliamentary committee established to examine engagement and consideration of advice.

143. The Law Council notes that the tabling of advice is not an uncommon procedure for statutory functionaries who provide advice or reports to the Parliament, such as the Commonwealth Ombudsman, the Auditor-General, or the Aboriginal and Torres Strait Islander Social Justice Commissioner. There is no reason why a National Voice should not table all of its reports in Parliament, given that its primary function is intended to be to provide advice and information to the Parliament.

144. Finally, the Law Council provides a note on the timing of advice. If the National Voice only has power to comment on proposed laws or policies once developed, the input will often be available too late in the process to have substantive influence. Conversely, however, if the opportunity for input arises only when the proposed laws or policies are being developed, there is a risk the law or policy will change so that the voice of Aboriginal and Torres Strait Islander peoples will be lost. In the Law Council's view, close consideration should be given to the timing of when the

obligation to consult is triggered in the legislative and policy process, with a view to ensuring that the Voice does in fact have the opportunity to substantively speak for Aboriginal and Torres Strait Islander peoples at all critical times in the process.

Recommendation

- **Further consideration be given to the timing of when the obligation to consult is triggered, with a view to ensuring the Voice of Aboriginal and Torres Strait Islander peoples is heard at all relevant times in the process of developing laws and policies.**