

**Submission in response to
Interim Report to the Australian Government:
Indigenous Voice Co-Design Process**

Summary:

- (a) Voice to Parliament must be constitutionally enshrined to ensure longevity, resolution and legitimacy.
- (b) Legislation must follow referendum.

1. I am a non-Indigenous lawyer and legal academic whose research interests include the law affecting First Nations peoples. I do not purport to speak for the Traditional Owners of the land, nor for First Nations peoples. I speak rather concerning the capacity of the law to deliver justice.

2. Constitutional enshrinement of Voice to Parliament

2.1. Unlike other nations colonised by the British, Australia has not established proper legal relations with First Nations peoples inhabiting this continent. The absence of recognition through legal process of the standing of First Nations peoples has resulted in the inability of government to resolve longstanding injustices imposed upon First Nations.

2.2. Consideration of a Voice is part of a broader context that seeks to resolve the underlying relationship between First Nations and the wider Australian polity. The legal mechanism for creating Voice is therefore central to this context.

2.3. Three matters arise from this reality.

2.3.1. **Longevity:** Legislating Voice without constitutional enshrinement does not resolve the question of relations more broadly between First Nations and the broader Australian polity. As a creature of legislation alone, such an institution can be repealed at the pleasure of the Parliament. That is, a legislated Voice fails to reflect the status of First Nations as integral to the Australian institutional framework and serves only a short-term attempt to right existing wrongs.

2.3.2. **Resolution:** To legislate a Voice on the premise that future constitutional enshrinement will occur, fails to account for the conservatism attendant on proposals for institutional change. After decades of inquiries and reports into constitutional recognition of First Nations, culminating in the *Uluru Statement from the Heart* as the consensus position of First Nations peoples themselves, the appetite for further campaigning will wane if this opportunity is lost. Suggestions by proponents for a legislated voice assuming later constitutional change, must therefore be assumed to be against constitutional enshrinement altogether. The public momentum exists now to resolve these longstanding questions and this opportunity must be taken without delay to avoid the risk of losing it.

2.3.3. **Legitimacy:** Constitutional enshrinement affords legitimacy to Voice amongst both First Nations communities and the broader Australian polity through the mechanism of referendum. This will afford confidence in the institution that is lacking in a legislated body alone.

2.4. Importantly, constitutional enshrinement allows both for symbolic and substantive change as a reflection of a national consensus. Legislation alone will not achieve this, reflecting only the will of Parliament. However, with a constitutionally enshrined Voice, the Parliament retains the power—correctly,

in accordance with Australian norms of governance—to legislate to establish the Voice and its mode of governance.

3. Legislation must follow referendum

- 3.1. I endorse the submission of *From the Heart* (Submission #19, 21 January 2021) as to the requirements for legislation following referendum (recommendation 3).
 - 3.2. This recommendation works together with the need for constitutional enshrinement (clause 2 above).
4. The imperative to set right relations between government and First Nations, with Voice one of three measures recommended by the *Uluru Statement from the Heart*, demands a courageous step to establish a constitutional institution without devolving into the lawyers’ tendency towards only perceiving risk. I speak with the authority and experience of a lawyer when I say that this tendency can too often lead to paralysis when what is needed is progress. To the contrary, this submission contends that the real risk for Australia lies in failing to embrace the opportunity provided by the Uluru Statement and a constitutionally enshrined Voice.

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