

SUBMISSION REGARDING INDIGENOUS VOICE CO-DESIGN PROCESS INTERIM REPORT TO THE AUSTRALIAN GOVERNMENT

Russell Kennedy is pleased to submit its response to the invitation to all Australians to provide feedback on the proposals contained in the Indigenous Voice Co-Design Process Interim Report to the Australian Government, October 2020 (**Interim Report**).

Russell Kennedy is a law firm practising on the land of the Bunurong Boon Wurrung and Wurundjeri Woi Wurrong Peoples of the Eastern Kulin Nation (Melbourne) and the land of the Gadigal People of the Eora Nation (Sydney).

We are committed to diversity and inclusion in all forms and we acknowledge the particular importance of recognising First Nations people and contributing to a conversation about greater recognition and visibility of First Nations people and their culture within our society and legal system.

Russell Kennedy was one of the 18 law firms that issued a joint public statement in 2019 in support of the Uluru Statement from the Heart, and the establishment of a constitutionally enshrined First Nations Voice. Russell Kennedy continues to support the Uluru Statement.

We are dedicated to contributing to meaningful reconciliation, as a process of truth-telling, sharing stories and building community in the space between First Nations and other people. We are in the process of developing a Reconciliation Action Plan, led by our RAP working group and with input from all areas of our firm, including our Pro Bono Practice (which, amongst other work, has a partnership with the Victorian Aboriginal Legal Service) and our Diversity & Inclusion Committee.

It is critical that non-indigenous Australians listen to the experiences and voices of First Nations People and acknowledge the truth of Australia's history. Furthermore, the voices of First Nations people need to be heard in forums where decisions are made that affect them. The Indigenous Voice proposal provides concrete opportunities for Aboriginal and Torres Strait Islanders at a local, regional and national level, to contribute to discussions and decision-making that impact them. It provides a significant opportunity for our nation.

The Uluru Statement from the Heart campaign, in its response to the Interim Report, identifies three key submission points. First, the importance of Indigenous Voice being effected by constitutional change. Second, that this constitutional change occurs before enabling legislation is enacted. Third, that Indigenous Voice be representative of the diversity of Aboriginal and Torres Strait Islander people.

Russell Kennedy supports these key submission points, as elaborated further below.

1 That the Australian Government honours its election commitment to a referendum once a model for the Voice has been settled.

The Uluru Statement from the Heart represents substantial consensus of the Aboriginal and Torres Strait Islander people and provides a clear statement:

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

In order for this statement to be actioned, the Australian Government has indicated a commitment to a referendum once a model for the Voice has been settled.¹ By honouring

¹ Interim Report to the Australian Government: Indigenous Voice Co-Design Process January 2021, From the Heart Submission No 1, 21 January 2021 p 10.

this commitment, the Australian Government recognises the importance of a meaningful and protected voice for First Nations people.

We submit that in order to give a meaningful and protected voice to First Nations people, the Indigenous Voice must be enshrined in and protected by the Constitution. The Constitution is the foundational document for the structure of our nation's legal system and governance. It is appropriate that a voice for First Nations People be recognised and protected by the Constitution. Furthermore, a referendum provides an opportunity for all Australians, through voting, to acknowledge and support the Indigenous Voice.

Simply passing legislation to create the Indigenous Voice will not effect the structural reform that is vital for transformative change. There is a risk that a legislated Voice will be repealed if it is "successful." First Nations people have long been vulnerable to the State and excluded from the law-making process. An Indigenous Voice protected by the Constitution ensures certainty, and ensures that the rights of Indigenous people to be heard and to influence decisions that affect them, are not subject to the whim of politics.

Critically, an Indigenous Voice to Parliament ensures that reconciliation has a foundation that is more than a symbolic gesture, and one which can underpin lasting and impactful change.

2 That enabling legislation for the Voice must be passed after a referendum has been held in the next term of Parliament.

It is critical for legislation implementing the form of the Voice to follow a referendum and constitutional reform. Implementing legislation prior to a referendum may jeopardise the success of meaningful constitutional reform as the impetus for constitutional reform may be diluted if enabling legislation precedes that reform.

It may also limit the scope of the referendum by establishing a Voice based on assumptions of how any future constitutional reform would be applied and any political adjustments required to pass the bill through Parliament. While any prior legislation could be amended following a successful referendum, the status quo represented by such legislation would likely affect the public's interpretation of the referendum, and create unnecessary confusion over process and effectiveness if the constitutional reform was different to the existing legislation. In this way, prior legislation risks undermining the direct democratic process envisaged in the use of referendums for constitutional change. The better approach is to accept that the constitutional reform and enabling legislation must be treated holistically, and be developed, and consulted on, in tandem.

The referendum can also act as a signal to political parties of the will of the Australian people and the mandate to introduce the enabling legislation.

We submit that a referendum should be held, as indicated by the Australian Government, to provide an opportunity for constitutional change to be effected. The referendum should be based on an exposure draft of both the enabling legislation and the constitutional amendment, to ensure all Australians are fully informed of the proposed changes as is appropriate for such a significant step forward.

3 The membership model for the National Voice must ensure previously unheard Aboriginal and Torres Strait Islander people have the same chance of being selected as established leadership figures.

In order to add legitimacy and credibility to the National Voice, the membership model must ensure that the membership is genuinely representative of First Nations People. It should

provide opportunities for ‘frontline and community-focused people to be directly involved in national-level deliberations’.²

We submit that the models proposed by the Interim Report, comprising of a National Voice with an advisory and consultative role to Parliament and the Australian Government and a Local and Regional Voice providing connection with the diversity of indigenous communities, provide an appropriate mechanism for ensuring that the National Voice is representative of First Nations People.

The Constitutional recognition of an Indigenous Voice, endorsed by referendum by the Australian people, represents a significant opportunity and step towards meaningful reconciliation, recognition and unity with First Nations People. It is our privilege to contribute to this discussion in support of a voice for First Nations people that is enshrined in and protected by the Constitution.

Russell Kennedy Lawyers
30 April 2021

² Above n 1 p 6.