



THE LAW SOCIETY  
OF NEW SOUTH WALES

Our ref: IIC:JWvk300421

30 April 2021

National Indigenous Australians Agency  
Indigenous Voice Co-Design Process

By email: [Co-designvoice@niaa.gov.au](mailto:Co-designvoice@niaa.gov.au)

Dear Sir/Madam,

### **Indigenous Voice Co-Design Process Interim Report 2020**

The Law Society of NSW thanks the National Indigenous Australians Agency (NIAA) for the opportunity to contribute to the discussion in respect of the Indigenous Voice Co-Design Process. The Law Society's Indigenous Issues Committee contributed to this submission, which deals only with the proposals as they relate to the National Voice to Parliament ("Voice"). We provide this submission in our capacity as the peak body for 36,000 solicitor members in NSW.

#### **Matters for Indigenous communities**

As a threshold matter, the Law Society's view is that it is for Indigenous communities to determine issues in respect of the Local and Regional Voices. In our view, it is also a matter for Indigenous communities to determine issues of membership of the National Voice, and of Local and Regional Voices.

We understand that notions of readily defined and coherent "First Nations" are contested by many Aboriginal and Torres Strait Islander people across the country. We understand also that Aboriginal and Torres Strait Islander people see the situation as more fluid. Governance arrangements should be reflective of the reality, rather contrived to fit an ideal; they should be authentic (that is, properly representative of the social, cultural, economic and political diversity of First Nations throughout Australia) and capable of evolution.

#### **Constitutional entrenchment**

In our view, constitutional entrenchment of the National Voice to Parliament ("Voice") is of paramount importance.

The Regional Dialogues leading to the Uluru Statement were very detailed and successful, and were the largest consultation of Indigenous people ever carried out in Australia. The Uluru Statement represents what Aboriginal people have agreed to, which includes constitutional entrenchment of the Voice.

Constitutional change that entrenches a Voice would be a form of constitutional recognition of the history and place of First Nations people as well as a strong statement of their right to self-determination.

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Law Council  
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CONSTITUENT BODY

Constitutional entrenchment of the Voice should first be the subject of a referendum prior to the passage of legislation establishing the form of the Voice. If there was to be a legislated Voice prior to referendum, there is a real risk momentum would be lost for the referendum.

As there is no intention to give the Voice veto power, it will have to rely on its political power to create political tension and pressure. Constitutional entrenchment gives it legitimacy and status from which to build this power. Further, a successful constitutional referendum will give the Voice political momentum.

We note that the form of the Voice may evolve over time, and flexibility is required in this regard, together with the constitutional guarantee of continuity.

While we note that this issue was not included in the remit provided to the Indigenous co-design groups, in our view there should continue to be strong advocacy for the constitutional entrenchment of the Voice.

### **Obligation to consult**

In our view, the critical goal underlying the creation of all levels of the Voice is to give life to the right to self-determination (art 3, United Nations Declaration on the Rights of Indigenous Peoples - UNDRIP). We suggest that further proposals in respect of the Voice should explicitly reference the UNDRIP, and should expressly 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. We suggest that legislation implementing the Voice presents an opportunity to clarify the critical inconsistency that currently exists between the meaning and scope of special measures in Australia under the *Racial Discrimination Act 1979* (Cth) and what the international understanding requirements are, as a result of *Maloney v The Queen* [2013] HCA 28. That is, legislation establishing the Voice should require the “active participation”<sup>1</sup> of Indigenous peoples in matters that affect them, rather than mere “consultation”.

The three proposed triggers of the obligation to consult are, in our view, too limited. There are many issues that are likely to have a substantial impact or disproportionately affect Aboriginal and Torres Strait Islander people that would not be captured by the three proposed triggers (use of the Constitutional race or territories powers, or special measures specific to Aboriginal and Torres Strait Islander people under the *Racial Discrimination Act 1975* (Cth)).

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 the UNDRIP would likely rely on the external affairs power, as would, for example, laws affecting Indigenous alien non-citizens. 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.

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.

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<sup>1</sup> General Recommendation No 32, ‘The meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination’, CERD/C/GC/32 (24 September 2009) [18].

In our view, any proposed laws that are likely to substantially or disproportionately affect Aboriginal and Torres Strait Islander people should trigger an obligation to consult.

### **Additional mechanisms to support the intended role of the Voice**

The Law Society is concerned that there are a number of policy settings that could have a significant effect on how effective the Voice can be.

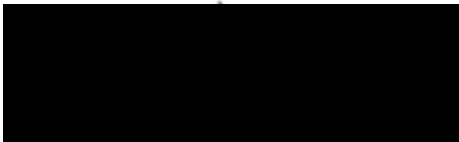
For example, as currently proposed, only advice requested from the Voice by Government must be tabled in Parliament. In the interests of greater transparency, we suggest that where advice is proffered at the instigation of the Voice, the Voice may elect that the advice be tabled and if the Voice so elects, the advice must be tabled in Parliament. If the Voice elects for the advice to be tabled, the proposed law or policy in question should attract the scrutiny of a parliamentary committee established to examine engagement and consideration of advice.

Further, if the Voice only has power to comment on proposed laws or policies once developed, the input will often be available far too late in the process to have substantive influence. 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 much as it is developed that the voice of Aboriginal and Torres Strait Islander peoples will be lost.

In our 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 people to the process, at all relevant times.

Thank you for the opportunity to make a submission. Questions at first instance may be directed to Vicky Kuek, at [victoria.kuek@lawsociety.com.au](mailto:victoria.kuek@lawsociety.com.au) or 02 9926 0354.

Yours sincerely,



Juliana Warner  
**President**