

Voice Secretariat  
Reply Paid 83380  
CANBERRA ACT 2601

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

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### **Submission: The imperative of constitutional enshrinement**

We write as a group of academics working in constitutional law and other areas of public law. At its core, public law is concerned with the transparency, accountability, effectiveness and quality of government decision-making and the institutional structures that govern our society. We welcome the opportunity to respond to the *Interim Report to the Australian Government on Indigenous Voice Co-Design Process* (October 2020).

The terms of reference for the co-design process specifically excluded making recommendations about constitutional recognition. However, it is our strong and unanimous view that for the Voice to have legitimacy, to achieve its objectives and perform its functions, it must be constitutionally enshrined. In this respect, this submission speaks to the following issues that are discussed in Chapter 2 of the Interim Report: the Voice’s objectives, its functions, its interface with Parliament and the government, and its form.

In this submission we explain the reasons behind our consensus view that the Voice be constitutionally enshrined, and that the government commit to a referendum to enshrine the First Nations Voice in the Australian Constitution after the current design process is concluded.

What we mean by “constitutionally enshrined” is that the existence and core function of the Voice should be included in the written text of the Constitution, alongside a power enabling the Commonwealth Parliament to determine its composition, additional functions, powers and procedures in legislation. As the former Chief Justice of the High Court of Australia, the Hon. Murray Gleeson AC QC, explained, this is a model of the Voice that would be “constitutionally entrenched but legislatively controlled”.<sup>1</sup> In this way, the detail of the Voice’s design, including its membership and governance structure, would be contained in legislation passed after constitutional enshrinement, allowing the Voice to be adapted to future circumstances.

Constitutional enshrinement of a First Nations Voice is not only necessary for the reasons outlined below – it is a proposal that is consistent with our constitutional traditions. Most importantly, as Gleeson explained, the proposal for a constitutional Voice is congruent with the parliamentary system of democracy established in the Constitution. Rather than limiting the law-making powers of Parliament through a legally enforceable set of rights, it is a Voice *to* Parliament. It assists the Parliament in the performance of its functions, helping it to

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<sup>1</sup> [Murray Gleeson, ‘Recognition in Keeping with the Constitution: A Worthwhile Strategy’ \(Uphold and Recognise, 2019\)](#).

develop better laws and policies that relate to Aboriginal and Torres Strait Islander people. It is not a new institution *within* the Parliament, itself exercising legislative power or limiting it in any way.

Constitutional enshrinement is essential for **four** reasons:

**1. #Constitutional enshrinement of the Voice is the only form of constitutional recognition that has been collectively endorsed by First Nations people themselves.**

Constitutional recognition of Aboriginal and Torres Strait Islander peoples is widely supported by people across the political spectrum, among non-Indigenous Australians as well as First Nations.<sup>2</sup> Constitutional enshrinement of a First Nations Voice would meet the widespread desire among Australians for the Constitution to properly reflect Australia's history and values, acknowledge the country's deep Indigenous past and commit to respecting First Nations' distinct status in an enduring way.

Successive processes, including the Expert Panel on Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution, the Referendum Council and the 2018 Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, have emphasised how important it is that the form of recognition accord with the wishes of Aboriginal and Torres Strait Islander people. A constitutionally enshrined Voice is the only reform which satisfies this requirement.

The delegates who were locally selected to participate in the Regional Dialogues that culminated in the Convention at Uluru were drawn from First Nations communities across vast and differing regions throughout Australia. They were intentionally selected to represent people who are often politically forgotten by government and parliament. Delegates included Elders, Traditional Owners, community representatives, youth and other First Nations representatives from local and regionally based organisations. The experiences of this diverse range of delegates meant that the reforms in the Uluru Statement provided an unprecedented insight into the wishes and needs of First Nations communities across the country.

A First Nations Voice was unequivocally the sole constitutional reform approved in the Uluru Statement from the Heart at the end of that exhaustive deliberative process. No other form of constitutional recognition has garnered the collective endorsement of Aboriginal and Torres Strait Islander peoples themselves, and as such no other constitutional reform can be said to respect the wishes of Aboriginal and Torres Strait Islander peoples. Further, this reform was sought as a matter of national urgency, to address the acute social disadvantage that First Nations people face, and to precede and facilitate national agreement making and truth-telling.

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<sup>2</sup> See further [Francis Markham and Will Sanders, 'Support for a Constitutionally Enshrined First Nations Voice to Parliament: Evidence from Opinion Research Since 2017' \(Working Paper No 138, Centre for Aboriginal Economic Policy Research, ANU, 2020\).](#)

**2. &Constitutional enshrinement provides the Voice the best possible chance of being effective because it gives the Voice *legitimacy*.**

The success of the Voice in representing and advocating for First Nations will depend in large part on how seriously Parliament and the government engage with the Voice. The Voice's standing with Parliament and government will in turn depend on the perceived legitimacy and authority of the Voice among the Australian public.

Constitutional enshrinement will confer legitimacy on the Voice in two ways. *First*, popular legitimacy will come from the *process* of constitutional enshrinement: that is, a constitutional amendment approved by the people voting in a referendum. A referendum will both educate the public about the Voice's importance and, if successful, obtain their endorsement for it. By contrast, if the Voice is established by legislation alone, there will inevitably be far less public education about the Voice, public participation in its establishment and public approval for its ongoing role in our system of government. A legislated Voice will therefore lack the popular legitimacy of a constitutionally enshrined Voice and be at much greater risk of being ignored or even abolished by Parliament. The popular legitimacy conferred on the Voice through constitutional enshrinement would also help ensure that parliamentary control of the design of the Voice is exercised in a manner consistent with the spirit in which the Voice is endorsed by the public.

*Second*, legitimacy will come from the *status* conferred by constitutional enshrinement. The Constitution is a document that establishes the foundational institutions of Australian government. Including the Voice in the Constitution would signal to the Australian people that the Voice is a foundational institution within Australia's constitutional system, and thereby help to establish its legitimacy with the public into the future. By contrast, establishing the Voice only in legislation signals to the public that it has no special importance. Having no constitutional status will diminish the Voice's legitimacy and thereby minimise its ability to be an effective representative of and advocate for Aboriginal and Torres Strait Islander peoples.

**3. #Constitutional enshrinement gives the Voice the best possible chance of being effective because it gives the Voice *stability and certainty, while allowing for flexibility in design*.**

In order to effectively represent and advocate for First Nations, the Voice will require the stability and certainty that only constitutional protection can provide. The history of Australia's experience with Aboriginal and Torres Strait Islander representative bodies – creation through executive or legislative action followed by eventual abolition – demonstrates the inadequacy of non-constitutional means in establishing the Voice's ongoing viability. Without constitutional enshrinement, there is a very well-founded risk that a future parliament would abolish the Voice. Without constitutional enshrinement, there is also a considerable risk that the Voice, facing the on-going possibility of abolition, would be restricted in its capacity to speak necessary truths to government and parliament and to properly represent the views of Aboriginal and Torres Strait Islander peoples. This was at the forefront of delegates' minds during the deliberative process that led to the Uluru Statement.

All serious proposals for constitutional amendment have recognised that it is desirable for the design of the Voice to be open to variation and improvement by Parliament from time to time. We endorse this. Constitutional enshrinement allows for the correct balance to be struck between stability and certainty on the one hand and flexible adaptation on the other. In this respect, the constitutional enshrinement of the Voice would be similar to many other constitutional institutions, including the Parliament itself and the High Court of Australia. Each of these institutions is established and given core functions in the Constitution, but much of the detail of their design and functions is found in ordinary statute and amended from time to time.

Given that constitutional enshrinement would still afford the Parliament considerable latitude in the design of the Voice's detail, there is no need for the Voice to be established in legislation prior to its constitutional enshrinement. Indeed, initial legislative establishment of the Voice is not only unnecessary; it is undesirable. Legislating first would dissipate the current popular momentum for constitutional enshrinement of the Voice. Given the importance of constitutional enshrinement for the Voice's effectiveness, any actions that diminish the ability to achieve constitutional enshrinement should be avoided.

**4. #Constitutional enshrinement is the highest expression our political system can give to an Australian identity based on an increasingly respectful relationship between First Nations and the Australian polity.**

While the Constitution establishes the institutions of government, it also acts as an important cultural document that reflects the basic identity, values, culture and aspirations of the people that it governs. In Australia, in certain aspects the Constitution already performs this function. It captures the nation's deep commitment to democratic participation in government and the foundational commitment to the rule of law. The involvement of the Australian people in referendums to achieve constitutional amendment highlights the Constitution's status as reflecting the aspirations of the nation. Establishing the Voice heralds a cultural shift in Australia. By committing to hear the views of Aboriginal and Torres Strait Islander people before legislating and making decisions that affect them, the Australian polity changes its relationship with the First Nations who have occupied this continent for 65,000 years. A constitutionally enshrined Voice will develop and sustain a respectful relationship between First Nations peoples and others in Australian society based on respect for equal dignity where, in the past, lack of that respect has contributed to their exclusion and disempowerment. This profound shift should be marked through a referendum of the Australian people and reflected in the words of the Constitution, not left to legislation alone.

Yours sincerely,

Rebecca Ananian-Welsh, Senior Lecturer, University of Queensland

Gabrielle Appleby, Professor, UNSW

Elisa Arcioni, Associate Professor, University of Sydney  
Narelle Bedford, Assistant Professor, Bond University  
Kevin Bell AM QC, Director, Castan Centre for Human Rights Law, Monash University  
Sean Brennan, Associate Professor, UNSW  
A J Brown, Professor of Public Policy & Law, Griffith University  
Peter Burdon, Associate Professor, University of Adelaide  
Anne Carter, Senior Lecturer, Deakin University  
Melissa Castan, Associate Professor, Monash University  
Jonathan Crowe, Professor, Bond University  
Fergal Davis, Reader, Kings College London  
Megan Davis, Professor, Balnaves Chair in Constitutional Law, and Pro Vice Chancellor (Indigenous), UNSW  
Jacob Deem, Lecturer, Central Queensland University  
Rosalind Dixon, Professor, Director of the Gilbert + Tobin Centre of Public Law, UNSW Law  
Heather Douglas, Professor, University of Melbourne  
Andrea Durbach, Professor, UNSW  
Kate Galloway, Professor, Griffith University  
Caitlin Goss, Lecturer, University of Queensland  
Ryan Goss, Associate Professor, ANU  
Susan Harris Rimmer, Professor, Griffith University  
Paul Kildea, Senior Lecturer, UNSW  
Danielle Ireland-Piper, Associate Professor, Bond University  
Dani Larkin, Director of HDR and Nura Gili, PVC (Indigenous), UNSW  
Ron Levy, Associate Professor, ANU  
Dylan Lino, Senior Lecturer, University of Queensland  
Lucas Lixinski, Professor, UNSW  
Andrew Lynch, Professor, UNSW  
Dan Meagher, Professor, Deakin University  
Justine Nolan, Professor, Director of the Australian Human Rights Institute, UNSW  
Sarah Murray, Professor, University of Western Australia  
Katie O'Bryan, Lecturer, Monash University  
Anna Olijnyk, Senior Lecturer, University of Adelaide

Graeme Orr, Professor, University of Queensland

Alexander Reilly, Professor, University of Adelaide

Sophie Rigney, Senior Research Associate, UNSW

Kim Rubenstein, Professor, University of Canberra

Kristen Rundle, Professor, Co-Director of the Centre for Comparative Constitutional Studies,  
University of Melbourne

Ed Synot, Research Associate, Indigenous Law Centre, UNSW

Rayner Thwaites, Senior Lecturer, University of Sydney

Tamara Tulich, Senior Lecturer, University of Western Australia

Adam Webster, Associate Professor of Law and Public Policy, Oxford University

Murray Wesson, Senior Lecturer, University of Western Australia

George Williams, Professor and DVC (Planning and Assurance), UNSW

Matthew Zagor, Associate Professor, ANU