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Dear Voice Secretariat,

Submission: The Voice Must be Constitutionally Enshrined

Thank you for the opportunity to provide this submission in response to the *Interim Report to the Australian Government on Indigenous Voice Co-Design Process* (October 2020). I write as an academic and human rights lawyer with two decades experience working in public international law nationally and internationally. I am a Senior Lecturer at the Macquarie Law School in Sydney and I teach constitutional law and child law. Prior to becoming an academic I worked as a senior child rights lawyer for UNICEF Pacific and various other international non-government organisations. My research focuses on Indigenous children's right to participate in all matters affecting them in accordance with article 12 of the *Convention on the Rights of the Child* (CRC), including in the development of child related law and policy. This is outlined in my soon to be released book *Indigenous Children's Right to Participate in Law and Policy Development* (Routledge, 2021) — the doctrinal and qualitative research my book contains informs this submission. The book examines the Australian Government's duty to seek and listen to Indigenous children's voices and details a group of young Aboriginal people's views about the Northern Territory Intervention setting out their recommendations for how governments can engage them in law and policy development about relevant matters, such as a First Nations Voice to Parliament.

Why is the Uluru Statement from the Heart important? Why is it important to enshrine the Voice to Parliament in the Constitution, rather than include it only in legislation?

As a constitutional law and human rights scholar, it is my view that the ‘Uluru Statement from the Heart’¹ (Uluru Statement) is a ‘gift to the Australian people’² as it presents a ‘a roadmap to peace’³ by calling for ‘Voice. Treaty. Truth’⁴ — including a constitutional amendment to enshrine a First Nations Voice in the Australian Constitution and for the establishment of a Makarrata Commission to oversee a process of ‘agreement-making’ and of ‘truth-telling’ between Aboriginal and Torres Strait Islander peoples and government.⁵ The Uluru Statement was shaped after extensive consultations with Aboriginal and Torres Strait Islander peoples across Australia in a series of Regional Dialogues and calls for ‘constitutional reforms to empower our people and take *a rightful place* in our own country’.⁶

My submission focuses on the matters discussed in Chapter 2 of the Interim Report regarding the First Nations Voice’s functions, objectives and form. This submission is written with a focus on the benefits the Voice could have in Australia’s modern democracy, specifically in relation to the role it would play in the advancement of Aboriginal children and young people’s human rights.

It is my view that for the Voice to have legal and social legitimacy it must be constitutionally enshrined. Taking the Voice proposal to the Australian population to vote on in a referendum to alter the text of the Constitution is a necessary and important way to secure an ongoing and legally entrenched means by which Indigenous representation to Parliament can be embedded within the Australian legal landscape. This means that the existence of the First Nations Voice and its core function must be written into the text of the Australian Constitution along with a provision that enables the Commonwealth Parliament to develop legislation to ascertain the Voice’s composition, powers and functions. Thus, the Voice would be provided for by the Constitution and Federal legislation would govern the Voice’s operation. Constitutional provision and assurance for the Voice is vital given the Australian Constitution’s weak human rights provisions; the provisions it contains that anticipate and permit racial discrimination (s 51(xxvi): known as the race power and s25 which permits the disqualification of persons of any race from voting); and the fact that the text of the Constitution does not refer to, nor acknowledge, Australia’s First Peoples’ in any way.

¹ Referendum Council, ‘Uluru Statement from the Heart’ (Statement, First Nations National Constitutional Convention, 26 May 2017) (‘Uluru Statement’).

² ‘Voice’ (Webinar, UNSW Indigenous Law Centre, Uluru Dialogue NAIDOC Seminar Series, 22 October 2020) (‘Voice: Uluru Dialogue Seminar Series’). This was stated by the Chair of the proceedings, Patricia Anderson, who delivered the opening statement.

³ Megan Davis, ‘The Long Road to Uluru: Walking Together: Truth Before Justice’ (2018) 60 *Griffith Review* 13, 13.

⁴ ‘Uluru Statement’ (n 1). See also Jesse John Fleay and Barry Judd, ‘The Uluru Statement’ (2019) 12(1) *International Journal of Critical Indigenous Studies* 1.

⁵ ‘Uluru Statement’ (n 1).

⁶ ‘Uluru Statement’ (n 1) (emphasis in original).

It is of great political, social, cultural and legal concern that successive Australian Governments have rejected the ‘cry for change’⁷ the Uluru Statement sets out. Instead, they have, following the example set by the then-Prime Minister Malcolm Turnbull and his Government, who at the time of the Uluru Statement’s release in 2017, rejected its recommendation for a Voice to Parliament. Former Prime Minister Turnbull falsely claimed the Voice would create a ‘third chamber of Parliament’ and would set up a mechanism for one racial group to influence Parliament and thus undermine parliamentary democracy.⁸ Indigenous scholars and commentators Patricia Anderson, Noel Pearson, Megan Davis and Dani Larkin condemn ‘Turnbull in his absolute rejection of the Statement’⁹ and comment that Turnbull’s ‘actions back in 2017 will go down as one of the most disgraceful actions of a political leader in Australian history’.¹⁰ Former High Court Justice Michael Kirby said the Government’s claim that an Indigenous Voice would establish a third chamber of Parliament was misleading.¹¹ Constitutional law expert Professor Anne Twomey also refuted Turnbull’s claims — identifying that an Indigenous Voice to Parliament would not establish a third chamber of Parliament. Rather, an Indigenous Voice would operate similarly to how other advisory bodies such as the Productivity Commission, the Australian Law Reform Commission, the Australian Human Rights Commission and the Auditor-General operate — all of whom report directly to Parliament by tabling submissions to assist lawmakers with the enactment of laws.¹² The Parliament can then choose to adopt or reject these recommendations when enacting laws. The Voice could not initiate a Bill in the Parliament, vote on or veto the passage of legislation — and therefore would not constitute another chamber of Parliament.¹³ Importantly, a constitutionally enshrined Indigenous Voice to Parliament cannot be abolished by legislation like a statutory body can, as was the Aboriginal and Torres Strait Islander Commission (ATSIC) in 2005 under the Howard Government.¹⁴

Constitutional Law Students Views: Constitutionally Enshrine the Voice!

I would like to share my experience of teaching Constitutional Law to over 600 law students currently, which highlights broad support for constitutional enshrinement of a First Nations Voice to Parliament. In a recent research assessment, students were tasked with critically examining, and coming to their own views about Dani Larkin and Kate Galloway’s assertion that the Uluru Statement

⁷ ‘Voice: Uluru Dialogue Seminar Series’ (n 2). This was a comment made by the Chair, Patricia Anderson.

⁸ Angela Pratt and Scott Bennett, ‘The End of ATSIC and the Future Administration of Indigenous Affairs’ (Current Issues Brief No 4 2004–05, Parliamentary Library, Parliament of Australia).

⁹ ‘Voice: Uluru Dialogue Seminar Series’ (n 2). This was a comment made by the Chair, Patricia Anderson.

¹⁰ *Ibid.* This was a comment made by panelist, Noel Pearson.

¹¹ Michael Kirby, ‘Celebration of Volume 40: Sixty Years On!’ (2019) 40(1) *Adelaide Law Review* 15, 26.

¹² 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>>.

¹³ *Ibid.*

¹⁴ ATSIC (1990–2005) was established by the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) under the Labor Government led by the Hon Prime Minister Bob Hawke. It was the peak body through which Aboriginal and Torres Strait Islander peoples could engage with government about matters affecting their lives. The Hon Prime Minister John Howard announced the abolition of ATSIC on 24 March 2005.

‘offers an Indigenous-led legal, political, and cultural solution for bringing together Indigenous and non-Indigenous Australians’ and ‘represents a milestone of Australian law offering a vital opportunity to integrate Indigenous law into an otherwise settler legal system’.¹⁵ The overwhelming majority of students (97%, over 580 students) wrote in support of Larkin and Galloway’s assertion stressing the legal, cultural and societal importance of the proposals put forward by the Uluru Statement and further, in relation to the Voice proposal, detailed their strong support for the constitutional enshrinement of the Voice. Students expressed concerns that legislative provisions to establish the Voice is a weak legal mechanism because legislation can be overturned by subsequent parliaments.

This experience of teaching constitutional law students is relevant to this submission because this group of students is a large cohort of people who will soon enter the legal profession and who, after considering the proposals put forward by the Uluru Statement, and after assessing how the Voice could operate within the legal system, broadly and strongly support a constitutionally enshrined First Nations Voice to Parliament. This indicates strong support among Macquarie University law students, most of whom are young people, for a constitutionally entrenched Voice to Parliament.

Why is it important for Indigenous people to have a say in the matters that affect them?

The absence of an Indigenous Voice to the Australian Parliament is a significant deficit in the Australian legal landscape that undermines both the democratic process and the realisation of Indigenous peoples’ human rights. This deficit supports and contributes to the exclusion of Aboriginal and Torres Strait Islander peoples from governmental decision-making processes. Another significant deficit in Australia’s legal landscape, and one that differentiates Australia from other liberal democracies, is the absence of a comprehensive federal charter of rights. Constitutionally enshrining a First Nations Voice to Parliament would be a significant advance and represent a much-needed step toward incorporating Aboriginal and Torres Strait Islander people’s human rights and perspectives in public decision-making processes.

Under article 12 of the CRC all governments must seek, listen to and respond to the views of young people and the Voice proposal presents an opportunity to do exactly this, specifically to listen to young Indigenous Australians. This is not happening in Australia as successive state and federal governments have failed to listen to and engage young Indigenous people in law and policy making. During field research to produce the above-mentioned book, Aboriginal children and young people shared their exclusion from governmental processes in the following way, by saying:

¹⁵ Dani Larkin and Kate Galloway, ‘Uluru Statement from the Heart: Australian Public Law Pluralism’ (2018) 30(2) *Bond Law Review* 335, 335.

Government they don't ask us ... They do it secret. It makes us feel bad about that. They just make up rules on our land. We need to follow their rules.¹⁶

When asked during the research 'do you think the government should ask you before making important decisions about you?' three young people said:

Yes. Cause this is not their country, this is Aboriginal Country.

Yeah. It's very important. It's really important for you and your family and for culture.

Ask us ... This is our Country.¹⁷

These statements emphasise the willingness of young Aboriginal people to engage with government and the importance of a guaranteed, constitutionally enshrined First Nations Voice to Parliament, which would facilitate the incorporation of views such as these in public decision-making processes.

'The Imagination Declaration'

Many other young Aboriginal and Torres Strait Islander peoples are demanding their voices be heard and taken notice of in public life which strengthens the importance of a constitutionally enshrined Voice. In August 2019, two years after the Uluru Statement was released, a group of Indigenous young people gathered in East Arnhem Land for the Youth Forum at the 21st annual Garma gathering.¹⁸ The Youth Forum produced 'The Imagination Declaration' for the Australian Prime Minister and Education Ministers across Australia. The Declaration calls on the Prime Minister & Education Ministers across Australia to:

[I]magine what's possible and ... think differently ... With 60,000 years of genius and imagination in our hearts and minds, we can be one of the groups of people that transform the future of life on earth, for the good of us all. We are not the problem, we are the solution. We don't want to be boxed. We don't want ceilings. We want freedom to be whatever a human mind can dream. When you think of an Aboriginal or Torres Strait Islander kid, imagine what's possible. Don't define us through the lens of disadvantage or label us as limited. Test us. Expect the best of us. Expect the unexpected. Expect us to continue carrying the custodianship of imagination,

¹⁶ Holly Doel-Mackaway, "'Ask Us... This Is Our Country": Designing Laws and Policies with Aboriginal Children and Young People' (2019) 27(1) *International Journal of Children's Rights* 31, 48 (citing 16-year-old female, Northern Territory, 20 May 2014).

¹⁷ *Ibid*, 48 (citing 16-year-old female, 17-year-old male and 16-year-old male (respectively)).

¹⁸ The Imagination Declaration was read out by one of the youth delegates, Sienna Stubbs, on 5 August 2019. Garma is an annual event coordinated and programmed by the Yothu Yindi Foundation (YYF). The Garma gathering brings together business leaders, national and international political leaders, academics and journalists to discuss the most pressing issues facing Australia. Garma seeks to strengthen Aboriginal culture and address the economic challenges and the steps needed to ensure economic opportunities for Aboriginal and Torres Strait Islander peoples.

entrepreneurial spirit and genius. Expect us to be complex. And then let us spread our wings, and soar higher than ever before.¹⁹

The drafters of this Declaration call upon federal and state governments to work with young Aboriginal and Torres Strait Islander people to ‘write a new story’ and to together design solutions and ‘unite around kindness’.²⁰ The Declaration asks the Australian government to listen to and take notice of young Indigenous peoples’ views — a duty the Australian government is bound to comply with under article 12 of the CRC.

Both the Declaration and the Uluru Statement call for similar reforms: namely, that governments listen and take notice of Aboriginal and Torres Strait Islander peoples, including children and young people. The Declaration envisages the engagement of Indigenous children and young people in the design of measures that will impact them, including in law and policy. Imagining the participation of Aboriginal and Torres Strait Islander children and young people in the formation of law and policy is insufficient; participation processes must become entrenched in democratic decision-making practices, and within the Voice’s operation, only then can ‘a new story’ be written.²¹

The Uluru Statement, together with the Declaration, sets out a template for the incorporation of Indigenous peoples’ voices into law and policy. The vision these appeals for Indigenous representation call for is being lived out in Victoria with the establishment of the First Peoples’ Assembly and provides an excellent roadmap for embedding a First Nations Voice federally.

The First Peoples’ Assembly of Victoria

The election of members to establish the First Peoples’ Assembly of Victoria (the Assembly)²² is a groundbreaking example of the inclusion of young Indigenous peoples in decision-making processes — one that adheres to children’s participation rights as set out in the CRC and to the *United Nations Declaration on the Rights of Indigenous Peoples*. The Assembly is independent of government and will act as the voice of Indigenous peoples of Victoria during the future treaty process. Members of the Assembly are working with the State of Victoria to prepare for treaty negotiations and work towards establishing an independent treaty authority. The Assembly is composed of a representative body of elected people from voting regions in Victoria and nominated representatives from each of

¹⁹ Youth Forum, ‘The Imagination Declaration’ (Declaration, Garma Festival, 5 August 2019) for the full text (this is significantly paraphrased) see <<https://www.youthplus.com.au/wp-content/uploads/2020/06/The-Imagination-Declaration.pdf>>.

²⁰ Ibid.

²¹ Ibid.

²² The First Peoples’ Assembly of Victoria is independent of government and is the voice of Indigenous peoples of Victoria during the future treaty and agreement-making process. It is a representative body of elected people from voting regions in Victoria and nominated representatives from each of the formally recognised traditional owner groups in Victoria. The role of the Assembly is to work with the Victorian Government to establish an independent treaty authority.

the formally recognised traditional owner groups in Victoria.²³ An election to establish members of the Assembly took place in 2019 and eligibility to vote was open to Aboriginal peoples who were 16 years old and over. This is the first time in Australian history that 16 and 17-year-old people have been enfranchised to vote in a state election. This demonstrates Indigenous innovation and commitment to incorporating young Aboriginal people's views in democratic processes — setting an excellent example for the Commonwealth Government to follow and a fabulous roadmap for how a First Nations Voice to Parliament could incorporate the voices of young Aboriginal people.

I appreciate the opportunity to express my view about the importance of a constitutionally enshrined Voice to parliament and welcome the opportunity to elaborate on any aspects of my submission, including further details about the information young Aboriginal people shared with me about their hopes and vision for contributing as vital agents of change in the public sphere.

Yours Sincerely

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²³ First Peoples' Assembly of Victoria, (Web Page, April 2021), <<https://www.firstpeoplesvic.org/>>.