



Law Council
OF AUSTRALIA

Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples

Joint Select Committee on Constitutional Recognition relating to Aboriginal and
Torres Strait Islander Peoples

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933 and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
- Mr Arthur Moses SC, President-Elect
- Mr Konrad de Kerloy, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of the Law Society of New South Wales, the Law Society of South Australia, the Victorian Bar, the New South Wales Bar Association and the Law Society Northern Territory in the preparation of this submission.

The Law Council is also appreciative of the input received from its advisory committees, most notably its Indigenous Legal Issues Committee, National Human Rights Committee, and the Constitutional Law Committee of the Federal Litigation and Dispute Resolution Section.

Background and context

1. The Law Council welcomes the opportunity to make a submission to the Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples 2018 (**Joint Select Committee**).
2. This submission draws on previous submissions of the Law Council on the topic of constitutional recognition, most notably the Law Council's submission in response to the Referendum Council's Discussion Paper on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples,¹ and its submission to the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Australians.²
3. This submission is also informed by the previous reports and inquiries that have taken place on the issue of constitutional recognition, including the 'Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel',³ the 'Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples',⁴ and most recently, the report of the Referendum Council and the Uluru Statement from the Heart.
4. The Law Council is further guided by relevant international human rights law, in particular the terms of the *United Nations Declaration on the Rights of Indigenous Peoples (the Declaration)*.⁵ The Declaration recognises the urgent need to respect and promote the rights of Indigenous people affirmed in treaties, agreements and other constructive arrangements with States. This includes measures such as constitutional recognition and are discussed later in this submission.

Direction to be guided by Aboriginal and Torres Strait Islander peoples

5. From the outset, the Law Council wishes to express its reluctance in making submissions about matters which should be essentially the subject of dialogue between a duly mandated Aboriginal and Torres Strait Islander body or bodies and the Australian Government. To this end, the Law Council notes the importance of consultation and co-design of options for constitutional reform with Aboriginal and Torres Strait Islander communities and organisations throughout this process.
6. It remains the Law Council's view that respecting the principle of self-determination and its manifestation in practice by empowering communities and individuals is critical. Exercising the right to self-determination can encompass a range of different actions. In the Law Council's view, one aspect is the capacity for Aboriginal and Torres Strait Islander peoples to determine their own political future. In this regard the Law Council notes article 19 of the Declaration which states:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their

¹ Law Council of Australia submission 'Discussion Paper on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples' (19 May 2017).

² Law Council of Australia submission 'Constitutional Recognition of Aboriginal and Torres Strait Islander Australians' (6 October 2011).

³ Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel (January 2012).

⁴ Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples 2015.

⁵ United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN Doc A/RES/61/295 (13 September 2007).

free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

7. The Declaration provides a comprehensive basis for the full participation of Indigenous peoples in the broader society in which they live or by which they may be governed, as well as a mandate for self-determination. The Declaration also places the responsibility on States to 'provide effective mechanisms for prevention of, and redress for any action which has the aim or effect of depriving First Nations peoples of their integrity as distinct peoples or ethnic identities, or of their cultural values'.⁶
8. The principle of self-determination requires meaningful Indigenous participation in decision making, and as such, the Joint Select Committee is urged to be guided by the wishes and aspirations of Aboriginal and Torres Strait Islander representatives when deliberating on this critical issue.

Outcomes of the Uluru Statement from the Heart

9. The Uluru Statement from the Heart (**Uluru Statement**) was the product of an extremely comprehensive and considered consultation process, and one of the most significant consultations of Aboriginal and Torres Strait Islander peoples in Australia's history.
10. The Uluru Statement calls for the 'establishment of a First Nations Voice enshrined in the Constitution' and seeks 'a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history'. The Law Council regards the Uluru Statement as providing an important and unique opportunity to reset the nation's relationship with Aboriginal and Torres Strait Islander peoples in Australia and provides direction for a more unified and reconciled nation.
11. The Law Council notes that the Uluru Statement is not overly prescriptive in its call for a First Nations Voice to be enshrined in the Constitution, only that there be a mechanism for representation of Aboriginal and Torres Strait Islander peoples within the Constitutional framework.
12. The National Constitutional Convention at Uluru adopted Guiding Principles that may assist the Joint Select Committee in the development of the reforms going forward. These Guiding Principles state that reform proposals should only proceed if it:
 - does not diminish Aboriginal sovereignty and Torres Strait Islander sovereignty;
 - involves substantive, structural reform;
 - advances self-determination and the standards established under the United Nations Declaration on the Rights of Indigenous Peoples;
 - recognises the status and rights of First Nations;
 - tells the truth of history;
 - does not foreclose on future advancement;
 - does not waste the opportunity of reform;
 - provides a mechanism for First Nations agreement-making;
 - has the support of First Nations; and
 - does not interfere with positive legal arrangements.

⁶ Ibid, article 8.

13. The Law Council urges the Joint Select Committee to have regard to these Guiding Principles throughout the inquiry process.

Recommendations of the Referendum Council

14. As noted above, the Uluru Statement is the product of a comprehensive consultation and consideration process. The Referendum Council supervised the First Nations Regional Dialogues and the National Convention at Uluru. The Referendum Council endorsed those aspects of the Uluru Statement that involved amendment to the Constitution, consistent with their terms of reference. The Referendum Council made what the Law Council considers to be relatively conservative yet well-measured recommendations that again are not overly prescriptive in terms of the form or design of the Voice.

15. The Referendum Council report is the product of extensive and comprehensive dialogue with Aboriginal and Torres Strait Islander peoples and has presented community-led and supported conclusions. The Referendum Council states:

*The Council emphasises the uniqueness of the First Nations Regional Dialogue process – designed by, owned by, and adopted by the Indigenous Steering Committee after extensive consultations with Aboriginal and Torres Strait Islander traditional owners, leaders, elders and organisations.*⁷

16. The first recommendation of the Referendum Council calls for a referendum to be held to provide in the Australian Constitution for a representative body which has a function of providing advice to Parliament – an Aboriginal and Torres Strait Islander First Nations Voice to the Commonwealth legislature. Notably, the Referendum Council has pointed out that of all the proposals that were referred to in its earlier published Discussion Paper, the only one to emerge as being in accordance with the wishes of the Aboriginal and Torres Strait Islander peoples is the First Nations Voice to Parliament.⁸ The significance of this fact should not be underestimated.

17. The Law Council has publicly provided its full and unqualified support for this recommendation of the Referendum Council,⁹ and considers the creation of a representative body providing a Voice to the Parliament to be a unique opportunity to recognise and respond to the will of Aboriginal and Torres Strait Islander Australians. However, like the recommendations from the previous Joint Select Committee of Parliament and the Expert Panel, the recommendations of the Referendum Council appear to have been rejected, an outcome that the Law Council has described as 'profoundly disappointing'.¹⁰ The role of this current inquiry is, in essence, to revisit the apparent rejection by the Australian Government of the Referendum Council's recommendations.

18. The Law Council submits there is no legal impediment to making provision for such a body in the Constitution. This proposal is consistent with parliamentary sovereignty and seeks to give Aboriginal and Torres Strait Islander peoples a Voice to the Australian Parliament, not *in* the Australian Parliament. It does not call for decision-making power to be afforded to the proposed representative body. Contrary to Government's response

⁷ *Final Report of the Referendum Council* (30 June 2017), 36.

⁸ *Ibid.*

⁹ Law Council of Australia 'Law Council throws support behind referendum on the creation of new Indigenous representative body' (24 October 2017), <www.lawcouncil.asn.au/media/media-releases/law-council-throws-support-behind-referendum-on-the-creation-of-new-indigenous-representative-body>.

¹⁰ Law Council of Australia 'Referendum rejection profoundly disappointing, constitutional reform must advance' (1 November 2017), <www.lawcouncil.asn.au/media/media-releases/referendum-rejection-profoundly-disappointing-constitutional-reform-must-advance>.

to the recommendations of the Referendum Council, the proposal would not affect the structure or operation of a bi-cameral parliament.

19. Indeed, the proposal for an Aboriginal and Torres Strait Islander First Nations Voice to the Parliament could be implemented by statute without the need for constitutional change, although the preference for amendment of the Constitution as expressed in the Uluru Statement must be given substantial weight. In this regard, the significance of constitutional status is unparalleled in its ability to provide for the sustained existence of the representative body in the Australian parliamentary landscape, with the referendum process offering a mandate for its existence as well as holding significant symbolic value. Perhaps most importantly however, constitutional entrenchment has emerged as the preferred pathway for Aboriginal and Torres Strait Islander peoples, a position that must be respected as the question of implementation is discussed.
20. Consistent with the recommendation of the Referendum Council, the Law Council understands the structure and functions of the representative body, to be set out in legislation rather than be constitutionally entrenched, would be to comment upon the use by the Australian Parliament of its legislative powers under sections 51 and 122 of the Constitution so far as they were relevant to Aboriginal and Torres Strait Islander peoples. The Regional Dialogues decided that this would be the preferred approach to amending the race power and a non-discrimination clause.
21. This power to comment could also be broadened to allow the representative body to advise on all aspects of Australian governance that it deems relevant to Aboriginal and Torres Strait Islander peoples. Such an approach would appear consistent with abovementioned article 19 of the Declaration as it relates to the need for good faith consultation and cooperation with Indigenous peoples in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.
22. The Law Council therefore considers the constitutional reform recommended by the Referendum Council to be an important step towards Aboriginal and Torres Strait Islander peoples' self-determination. The ability for Aboriginal and Torres Strait Islander peoples to have a central role when Parliament makes laws and policies about Aboriginal and Torres Strait Islander affairs is integrally linked to freely pursuing their political status and freely pursuing their economic, social and cultural development.
23. The opportunity now presented enables the Joint Select Committee to support the development of a national First Nations Voice which can speak for itself as to the detail of how it wishes to engage with the Australian Government in the future, guided by the mandate provided by the Uluru Statement and subsequent recommendations of the Referendum Council.

Prohibition of racial discrimination

24. Law Council provides unqualified support for the recommendations of the Referendum Council and strongly suggests that the momentum and support behind those recommendations not be lost. The Law Council submits that the emphasis should remain on the realisation of the Uluru Statement and subsequent recommendations of the Referendum Council.
25. It is noted that the 2012 Expert Panel made a number of recommendations related to 'race' provisions within the Constitution and the possibility of a non-discrimination clause, including:

- repeal of sections 25 and 51(xxvi) of the Constitution;
- insertion of a new section recognising Aboriginal and Torres Strait Islander peoples as the first peoples of Australia and providing the power to the Commonwealth to make laws for the benefit of Aboriginal and Torres Strait Islander peoples; and
- insertion of a new section prohibiting racial discrimination by the Commonwealth, a State or a Territory.

26. These recommendations accorded with the Law Council's submission to the Expert Panel at the time and were reflected in the Law Council's submission to the Referendum Council. However, the Law Council notes that the proposal for a statement of recognition in the Constitution has since been rejected by First Nations Regional Dialogues, and these Regional Dialogues further revealed 'no significant appetite' to pursue amendment to section 51(xxvi) of the Constitution as well as mixed support for the insertion of a new section prohibiting racial discrimination.¹¹ Accordingly, these reform proposals do not accord with the decision making at the Regional Dialogues and the adoption of the Uluru Statement, and cannot be regarded as meaningful recognition.

27. The Law Council therefore remains conscious that priority should be given to the implementation of the formal recommendations of the Referendum Council as these represent the consensus support of Aboriginal and Torres Strait Islander peoples, most notably the First Nations Voice to Parliament which was identified as the most endorsed singular option for constitutional alteration across the Regional Dialogue process.¹²

Options for proceeding

28. In considering the establishment of a First Nations Voice to the Parliament it is worth noting that this public institution does not necessarily follow on from previous representative bodies particularly given its role in monitoring legislation passed under sections 51(xxvi) and 122 of the Constitution. The Law Council notes that since the abolition of the Aboriginal and Torres Strait Islander Commission in 2005, there has been a gap in the Commonwealth landscape of government supported and funded representative Aboriginal and Torres Strait Islander voices.

29. The National Congress of Australia's First Peoples was created in 2010. However, the National Congress' future has been unclear due to government funding uncertainties, and with constrained resources the National Congress has limited capacity to operate as a national voice despite its significant achievements in recent years. It is critical that the development of any new advisory body receives strong bipartisan support and commitment to ensure that it is properly resourced, has firm foundations to support continuance and is not jeopardised by future shifts in policy.

30. As noted above, the call for a Voice enshrined in the Constitution could be achieved under several different approaches but the approach discussed and endorsed by the dialogues and Uluru was that it is a First Nations body meaning First Nations have a seat at the table, and it monitors sections 51(xxvi) and 122. The final model adopted must have the support and endorsement of Aboriginal and Torres Strait Islander peoples and bipartisan political support to secure its longevity.

31. In relation to possible steps that could be taken to ensure a potential referendum has the best chances of success, the Law Council suggests that early and meaningful

¹¹ *Final Report of the Referendum Council* (30 June 2017), 11-13.

¹² *Ibid*, 14.

engagement with Aboriginal and Torres Strait Islander peoples and the broader community is required to build knowledge and understanding around the referendum and how it may contribute to a more unified and reconciled nation.

32. It is noted that a key reason for the initial dismissal of the Referendum Council's recommendations was that it 'provided no guidance as to how this new representative assembly would be elected or how the diversity of Indigenous circumstance and experience could be fairly or democratically represented'.¹³ This intentional absence of detail by the Referendum Council as to the form of the Voice provides the Joint Select Committee with the unique opportunity to consider how this end goal, represented through a clear statement of aspiration from Aboriginal and Torres Strait Islander peoples, can be best achieved.
33. Therefore, at this stage of the Joint Select Committee's inquiry, it is submitted that emphasis should be placed on developing an appropriate mechanism for engaging with those that are able to legitimately represent and negotiate with government on behalf of the Aboriginal and Torres Strait Islander First Nations to give effect to the proposals arising from the Uluru Statement and Referendum Council.
34. One such mechanism might involve building on the process previously undertaken by the Referendum Council in creating regional dialogues with relevant Aboriginal and Torres Strait Islander representative bodies, building to a national conference.

The role of the legal profession

35. Finally, it is submitted that the legal profession plays a critical supporting role in the realisation of the proposals that emerged from the Uluru Statement and subsequent recommendations of the Referendum Council.
36. Noting that a principal responsibility of the Law Council is to promote, protect and defend human rights, it is critical that the Australian legal profession plays a role in acknowledging the injustices of the past and contributes positively towards constitutional recognition.
37. The Law Council is therefore committed to constitutional change to meet the aspirations and wishes of Aboriginal and Torres Strait Islander peoples. As such, the Law Council welcomes the opportunity to constructively engage with the Joint Select Committee in supporting advancement of the objectives expressed in the Uluru Statement, the recommendations of the Referendum Council, and the views of those bodies that preceded it.

¹³ Prime Minister, Attorney-General, Minister for Indigenous Affairs 'Response to Referendum Council's report on Constitutional Recognition' (Media Release, 26 October 2017).