



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: IIC:CBvk140423

14 April 2023

Dr James Popple
Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By e-mail: Claire.Paton@lawcouncil.asn.au

Dear Dr Popple,

Inquiry into the Aboriginal and Torres Strait Islander Voice

The Law Society thanks the Law Council for the opportunity to contribute to a submission to the inquiry into the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 (**Bill**). Our submission is directed at the text of the Bill in its current form. We are conscious of the fact that the Bill will be the subject of further Parliamentary debate after the conclusion of this inquiry.

The Law Society has a long held position in support of all elements of the Uluru Statement from the Heart, noting the comprehensive and consultative process that led to its finalisation. The Uluru Statement provides a practical way to achieve the goal of constitutional reform and nation building.¹ As a rule of law matter, implementation of the Voice, the first element of the Uluru Statement, is consistent with realising the right to self-determination.²

The Law Society does not object to the text of the Bill. In our view, the constitutional amendment proposed is a modest one that leaves all questions of design on its 'composition, functions, powers and procedures' up to Parliament (proposed s 129(iii)).

This approach would accommodate the need to allow for the Voice as a body to evolve and improve over time, and to respond to the issues of the day. It would be undesirable to entrench a particular form for the body in the Constitution.

However, from the perspective of guaranteeing an effective mechanism for consultation between the Voice, and Parliament and the Executive, we note there are limitations to this approach. We acknowledge the guidance provided by the Design Principles of the Aboriginal and Torres Strait Islander Voice,³ which address key matters such as selection of Voice members, but note that, ultimately, the Design Principles are non-binding.

¹ Law Society of NSW and NSW Young Lawyers, "Time for referendum on Uluru Statement from the Heart," media statement, July 2021, online <https://www.lawsociety.com.au/time-referendum-uluru-statement-heart>.

² Article 1 of the *International Covenant on Civil and Political Rights*, Article 1 of the *International Covenant on Economic, Social and Cultural Rights* and Article 3 of the *United Nations Declaration on the Rights of Indigenous Peoples*. We note that the Statement of Compatibility with Human Rights accompanying the Bill notes that the Bill is consistent with the realisation of the right to self-determination ([8]).

³ Referendum Working Group, Design Principles of the Aboriginal and Torres Strait Islander Voice, online <https://ulurustatement.org/education/design-principles/>.

THE LAW SOCIETY OF NEW SOUTH WALES

170 Phillip Street, Sydney NSW 2000, DX 362 Sydney
ACN 000 000 699 ABN 98 696 304 966

lawsociety.com.au

T +61 2 9926 0333 F +61 2 9231 5809
E lawsociety@lawsociety.com.au

Law Council
OF AUSTRALIA
CONSTITUENT BODY

For example, while the Bill requires the establishment of a Voice ('there shall be a body'), it is expressed in language that has not been followed by Parliament in the past. We note, by way of example, that while the Constitution provides for an Inter-State Commission, this body no longer exists. The proposed alteration to the Constitution also does not require that the Voice carry out its functions in any particular way. In this regard, we also note that 31 years after the 1967 referendum, the High Court held in *Kartinyeri v Commonwealth* (1998) 195 CLR 337, that the 1967 referendum amendment to the races power did not confine its use to the making of beneficial laws for Aboriginal and Torres Strait Islander people.

Notwithstanding, we acknowledge that these limitations necessarily arise out of the tension between matters appropriate for constitutional attention, and matters appropriate for Parliamentary consideration and decision, rather than from any deficiency in the Bill.

In respect of the scope of proposed s 129(ii), the Law Society has previously submitted in 2021⁴ (in the context of proposed legislation, rather than constitutional enshrinement, of a Voice) that the Voice ought to be consulted on matters that substantially or disproportionately affect Aboriginal and Torres Strait Islander people. The wording in proposed s 129(ii) that the Voice may make representations "on matters relating to Aboriginal and Torres Strait Islander peoples" captures this view. Noting that the representations of the Voice are non-binding, if it makes representations outside of those matters that substantially or disproportionately affect Aboriginal and Torres Strait Islander people, its views are unlikely to carry any particular political weight.

We do not object to the inclusion of the Executive Government in the text of s 129(ii), again noting the advisory and non-binding nature of the representations. In this regard, the Law Society's view in the 2021 submission was that:

...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.

Given that the timing of representations can be critical in respect of how effective that feedback can be, if the Executive Government is not included as a potential recipient of representations from the Voice, the effectiveness of the body may be significantly compromised.

Further, we are persuaded by the views of the Hon Robert French AC:

As to litigation, there is always the possibility that someone, someday will want to litigate matters relating to The Voice as can anybody who seeks recourse to the courts. That flows from the fact that Australia is governed by the rule of law which provides access to the courts where it is said that public officials have exceeded their power. That said, there is little or no scope for any court to find constitutional legal obligations in the facilitative and empowering provisions of the amendment. And if Parliament made a law which created unintended opportunities for challenges to executive government action, the law could be adjusted. There are many examples of that. A law providing that the Executive was required to take into account representations from The Voice as a condition of the exercise of

⁴ Law Society of NSW submission to the National Indigenous Australians Agency, *Indigenous Voice Co-Design Process Interim Report 2020*, 30 April 2021 (2021 submission).

executive power would, in all probability, be justiciable. For if Parliament imposed such a requirement, the Executive must be held to account if it does not comply with it. But in providing for representations to be made to the Executive, the law does not have to impose such a requirement. That is a matter for the Parliament.⁵

Finally, we note the effectiveness of the Voice will ultimately be subject to the level of funding allocated to it, and to the implementation of public policy devised as a result of consultation with it; matters that, inevitably, must be left to the Parliament of the day.

On balance, the Law Society is of the view that the Bill is an appropriate next step in putting the question of the Voice before the Australian people. In coming to this view, we have taken into account that some of our members have queried the necessity for Constitutional amendment in this regard, and have noted that a body like a Voice can already be established under legislation.

As always, in all matters that affect Indigenous peoples, the views of Indigenous peoples ought to be foremost, and we suggest that as they become available, the positions of Aboriginal controlled organisations, including Aboriginal Peak Organisations, should be considered. For example, in NSW, we understand that NSW Aboriginal Land Council, a member of the NSW Coalition of Aboriginal Peak Organisations, supports all elements of the Uluru Statement and supports a constitutionally enshrined Voice to Parliament.

Thank you again for seeking our views. Questions at first instance may be directed to Vicky Kuek, Head of Social Justice and Public Law Reform, at 02 9926 0354 or victoria.kuek@lawsociety.com.au.

Yours sincerely,



Cassandra Banks
President

⁵ Robert French 'The Voice - A step forward for Australian Nationhood' on AUSPUBLAW (20 February 2023) <https://www.auspublaw.org/first-nations-voice/the-voice-a-step-forward-for-australian-nationhood/>.