THE VOICE REFERENDUM

Compelling case for the Voice

The Aboriginal and Torres Strait Islander Voice to the Parliament and the Executive Government (**Voice**) will be the culmination of decades long advocacy by Aboriginal and Torres Strait Islander peoples for constitutional recognition.

The Law Council has supported a constitutionally enshrined Voice since 2017, recognising it as a necessary and important step towards Aboriginal and Torres Strait Islander peoples' self-determination and an appropriate means of constitutional recognition.[1]

The Law Council has identified three core elements which constitute the compelling case for the Voice:

Constitutional recognition and enshrinement

The amendment to the Constitution would provide important and long-awaited recognition of Aboriginal and Torres Strait Islander peoples in the Constitution.

The opening words to section 129 provide for express recognition of Aboriginal and Torres Strait Islander peoples as Australia's first peoples:

This has *symbolic* value, as the completion of 'unfinished business' in the Australian legal system and society.

- All Australians 'own' the Constitution. New section 129 of the Constitution will reflect the history of this land, and at last include all peoples in Australia's supreme law, when it recognises Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia.
- A successful referendum will have significant value as a symbol of recognition and unity between Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians.

The amendment also orients the Voice as part of a substantive act of recognition – it is not merely symbolic – given that:

- the enshrinement of the Voice is part of recognising the unique status and rights of Aboriginal and Torres Strait Islander peoples as Australia's Indigenous Peoples;
- the Voice is the means chosen by Aboriginal and Torres Strait Islander peoples, through the Uluru Statement, and after careful and longstanding deliberation of the options available, to recognise and empower them and is therefore an expression of self determination; and

- constitutional enshrinement of the Voice would provide for an enduring mandate to represent the views of Aboriginal and Torres Strait Islander peoples to Australia's policy and law-making arms of government.

A mechanism for substantive change

The Voice will lead to substantive change by providing practical and informed recommendations to Parliament and the Executive in relation to matters that affect Aboriginal and Torres Strait Islander peoples.

It is uniquely important that Aboriginal and Torres Strait Islander peoples are empowered to provide input into matters that relate to them.

This flows from the right to self-determination of Aboriginal and Torres Strait Islander peoples, as Australia's first peoples, discussed in the next section.

It is also critical to address the social and political disempowerment of Aboriginal and Torres Strait Islander peoples and communities who frequently experience multiple forms of disadvantage. This is a product of a history of dispossession and a legacy of systemic social, political and legal discrimination.

Aboriginal and Torres Strait Islander peoples comprise approximately 3.8 per cent of the Australian population, and are consequently often disproportionately and detrimentally impacted by legal and policy decisions in which they have had little say.

This reinforces the importance of Aboriginal and Torres Strait Islander peoples having a Voice to represent their views as to how policies, programs and laws would affect them.

A Voice which makes representations to Parliament and the Executive will lead to more informed decision-making, including by advising how Commonwealth funds can be spent beneficially and effectively when addressing First Nations issues.[2]

In this way, the Voice will facilitate the structural change necessary to, to cite the Uluru Statement, address the 'torment of the powerlessness' experienced by Aboriginal and Torres Strait Islander peoples.

Example: Destruction of 46,000 year old caves at the Juukan Gorge

The Law Council considers that too often the voices of First Nations persons appear to go unheeded amidst the formal, complex and time-critical processes of lawmaking and implementation. This can, and does, have disastrous consequences. The destruction of the 46,000 year old caves at the Juukan Gorge is one illustration of this problem.

The failure to effectively incorporate the views of Aboriginal and Torres Strait Islander peoples in the development or implementation of the legislation purporting to protect cultural heritage, has led to state, territory and Commonwealth legislative frameworks which do not, as recognised by a bipartisan parliamentary committee, 'adequately encompass the complexity of Indigenous heritage which is living and evolving and is connected not just through historical artefacts, but through songlines, storylines, landscapes and waters'.[3]

Departmental evidence provided to the inquiry into the destruction at the Juukan Gorge indicated that of 541 applications received since the advent of federal cultural heritage protection laws, just seven had resulted in long-term declarations being made to protect culturally significant areas. Neither the design nor the application of these laws was fit for purpose.[4]

This example reinforces the importance of First Nations peoples having a representative and accountable Voice to participate in decision-making which affects them.

Self-determination

The Voice will provide a means to give effect to the right to self-determination for Aboriginal and Torres Strait Islander peoples.

The right to self-determination is a fundamental principle of international law, to which Australia has committed as a signatory to the International Covenant on Civil and Political Rights,[5] and the International Covenant on Economic, Social and Cultural Rights.[6] Article 1 of each of these treaties recognises that 'all peoples have the right of self-determination', by virtue of which 'they freely determine their political status and freely pursue their economic, social and cultural development'.

The right of First Nations peoples to self-determination is also the fundamental principle underpinning United Nations Declaration on the Rights of Indigenous Peoples.[7]

The Law Council emphasises that the process of Regional Dialogues, which resulted in the Uluru Statement and the invitation to the Australian people for a constitutional reform by way of a constitutionally enshrined Voice, was an expression of self-determination.

Furthermore, the Voice itself provides a means to support the exercise of self-determination for Aboriginal and Torres Strait Islander peoples – by creating an enduring mechanism for political participation through which Aboriginal and Torres Strait Islander peoples are able to make representations on matters that relate to them.

The Voice as a mechanism that will give effect to the human rights of Aboriginal and Torres Strait Islander peoples has been recognised by multiple international human rights bodies and experts, including the United Nations Permanent Forum for Indigenous Issues,[8] the UN Special Rapporteur on the Rights of Indigenous Peoples,[9] and the United Nations Committee on the Elimination of Racial Discrimination.[10]

As well as having its foundation in the right of self-determination, the Voice also gives effect to other fundamental human rights accorded to Aboriginal and Torres Strait Islander peoples, such as the right to equality and non-discrimination,[11] and the right to take part in public affairs.[12]

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1 Law Council of Australia, 'Law Council throws support behind referendum on the creation of new Indigenous representative body' (Media release, 24 October 2017).

2 See, Fiona Stanley, et al, 'Australian First Nations response to the pandemic: A dramatic reversal of the 'gap'' (2001) 57(12), *Journal of Paediatrics and Child Health,* 1853; Harvard Kennedy School, 'Project on Indigenous Government and Development' (Webpage) <https://indigenousgov.hks.harvard.edu/home>,

3 Joint Standing Committee on Northern Australia, 'A Way Forward Final report into the destruction of Indigenous heritage sites at Juukan Gorge' (October 2021) <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024757/toc_pdf/AWayForward.pdf;fileType=application%2Fpdf> [1.6].

4 Australian Government, Department of Agriculture, Water and the Environment, Submission No 23 to the Joint Standing Committee on Northern Australia, Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia (July 2020) 9.

5 *International Covenant on Civil and Political Rights*, Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976), Article 1.

6 *International Covenant on Economic, Social and Cultural Rights*, Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), Article

7 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (13 September 2007), Article 5 and 18.

8 United Nations Permanent Forum for Indigenous Issues*, Permanent Forum on Indigenous Issues Report on the twenty-first session*, UN Doc E/2022/43-E/C, (25 April–6 May 2022) [45].

9 Special Rapporteur on the Rights of Indigenous Peoples, *Report of the Special Rapporteur on the Rights of Indigenous Peoples on Her Visit to Australia*, UN Doc A HRC/36/46/Add.2 (8 August 2017) [107].

10 Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Eighteenth to Twentieth Periodic Reports of Australia,* UN Doc CERD/C/AUS/CO/18-20 (26 December 2017) [20].

11 International Covenant on Civil and Political Rights, 8 Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (ICCPR) arts 2 and 25; International Covenant on Economic, Social and Cultural Rights, Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), art 2(2); International Convention on the Elimination of all Forms of Racial Discrimination, Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965. Entry into force 4 January 1969 (CERD) art 5.

12 ICCPR art 25; CERD art 5(c).