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CASTAN  
CENTRE FOR  
HUMAN RIGHTS  
LAW

# **Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum**

*Submission to the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum*

## **Prepared by**

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(a full list of endorsements is appended to this submission)***

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## Part 1: Submission Summary

Our submission on the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 (the **Constitution Alteration**) to insert a new s 129 into the *Constitution* (the **proposed Voice clause**) is, in summary that:

1. The proposed Voice clause fulfils the goals of the independent work on constitutional recognition that has preceded the introduction of the Constitution Alteration to the Parliament. In particular, it gives expression to the findings of the Referendum Council, the Indigenous Voice Co-Design Process, and the Uluru Dialogues as represented in the *Uluru Statement from the Heart* (**Uluru Statement**) and the *Yarrabah Affirmation*.
2. The proposed Voice clause affords recognition of the status of First Nations peoples in Australia both symbolically, and substantively.
3. The proposed Voice clause meets threshold obligations under international human rights law, which recognise particular rights owed by states to Indigenous peoples.
4. The proposed Voice clause upholds Parliamentary supremacy and the efficient functioning of the Executive. It is appropriate that the proposed Voice reserves to the Parliament the power to determine structures, powers, limits, and funding arrangements for the Voice.
5. In terms of the mechanism of a consultative body, we observe that there are currently successful manifestations of Indigenous consultative models in a number of States in Australia, including in Victoria. These models illustrate the viability of the proposal as a constitutionally enshrined institution.

## Part 2: Background

### 2.1 About the Castan Centre for Human Rights Law

The [Castan Centre for Human Rights Law](#) (**Castan Centre**), based in the Faculty of Law at Monash University in Australia, is a research, education and policy centre which aims to create a more just world where human rights are respected, protected and fulfilled, allowing all people to flourish in freedom and dignity.

The Castan Centre has a long history of defending and promoting the realisation of human rights in Australia, and has a strong commitment to research and advocacy on the rights of First Nations peoples. The Castan Centre was founded in 2000 by a group of academics and human rights advocates and was named in honour of the world-renowned human rights advocate, [Ron Castan AM QC](#). Associate Professor Kate Galloway of the Griffith University Law School collaborates with the Castan Centre as part of our ongoing research and advocacy on the rights of First Nations peoples.

### 2.2 A note on perspective

We are a group of non-Indigenous lawyers and legal academics whose research interests include the law affecting First Nations peoples. We do not purport to speak for First Nations people. Rather, we

speak concerning the capacity of the law to deliver justice for First Nations people and rebalance the systemic barriers First Nations people face across all areas of society.

We acknowledge that we work and research on the lands of the Wurundjeri and Bunurong people of the Kulin Nation (Monash University Clayton and Law Chambers campus) and the Jagera and Turrbal people (Griffith Law School). We pay our respects to their Elders past and present and acknowledge their ongoing right and responsibility to care for Country, land that was taken and not ceded.

## **Part 3: Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023**

The Constitutional Alteration represents a constitutionally and legally sustainable and sound response to the question of constitutional recognition through:

- a) Fulfilling the goals of constitutional recognition;
- b) Fulfilling the requirements of international human rights law;
- c) Upholding Parliamentary supremacy and efficient operation of Executive government; and
- d) Coherence with other models of Indigenous consultative bodies.

### **3.1 Fulfilment of the goals of constitutional recognition**

The proposed Voice achieves constitutional recognition according to the priorities of First Nations people.<sup>1</sup>

The form of the Constitution Alteration is the culmination of a lengthy body of independent work on constitutional recognition, including the work of the Referendum Council,<sup>2</sup> the Uluru Dialogues,<sup>3</sup> and the Voice Co-Design Process.<sup>4</sup> This work brought together First Nations people and non-Indigenous experts to express a consensus position of First Nations people as to the form and goals of constitutional recognition.

First, the proposed Voice clause overcomes the *Constitution's* silence by acknowledging Aboriginal and Torres Strait Islander peoples as the First Peoples of this land. This type of recognition has been described as 'symbolic' recognition in that on its own, it does not afford substantive rights. Instead, it affirms the status of Aboriginal and Torres Strait Islander peoples within the context of the State. However, Aboriginal and Torres Strait Islander people have always rejected merely symbolic recognition, and instead have advocated for substantive recognition to address 'the torment of our

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<sup>1</sup> We refer to the submission of Mr Noel Pearson and Dr Shireen Morris on this point: Noel Pearson and Shireen Morris, Submission No 21 to Joint Select Committee on Aboriginal and Torres Strait Islander Voice Referendum, *Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum* (14 April 2023) 1-4.

<sup>2</sup> See, Referendum Council, *Final Report* (30 June 2017) ('*Final Report*').

<sup>3</sup> See, *Uluru Statement from the Heart* (2017) ('*Uluru Statement*'); Yarrabah Affirmation (2022).

<sup>4</sup> See, Indigenous Voice Co-Design Process, *Final Report to the Australian Government* (Final Report, July 2021).

powerlessness'.<sup>5</sup> Of note, the Australian people have also rejected merely symbolic recognition in the 1999 constitutional referendum.<sup>6</sup>

Secondly, and importantly in light of the rejection of merely symbolic recognition, the Voice provides *substantive* recognition by creating and entrenching an *advisory* institution that directly addresses the systemic barriers facing First Nations people. It brings the experience of First Nations people into Australian governance through empowering Indigenous people to make representations to Parliament and the Executive. As with other representational institutions such as law reform commissions, advisory commissions, royal commissions and parliamentary inquiries, Voice enhances good governance by embedding informed institutional processes of representation.

### 3.2 Fulfilment of the requirements of international human rights law

International human rights law recognises that Indigenous peoples have particular rights as Indigenous peoples. Key among these are the right to self-determination and the right to free, prior and informed consent. These rights are recognised in the *United Declaration on the Rights of Indigenous Peoples (UNDRIP)*.<sup>7</sup> In 2009 Australia formally endorsed the UNDRIP, and, as a declaration of the UN General Assembly, it forms part of the body of international law to which Australia is a party.

The rights UNDRIP affirms are grounded in binding international treaties, such as the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). Australia has both signed and ratified these Covenants, notably in relation to Indigenous peoples, the rights articulated in common Article 1 regarding self-determination.<sup>8</sup>

While the Uluru Statement does not make explicit links to the UNDRIP in its call for a Voice, its text is imbued with UNDRIP principles and rights.<sup>9</sup> The Constitution Alteration recognises these rights in three key ways.

First, the proposed Voice clause recognises in the chapeau that Aboriginal and Torres Strait Islander peoples are the First Peoples of Australia. Invoking the UNDRIP,<sup>10</sup> these words recognise the status of Aboriginal and Torres Strait Islander peoples as indigenous peoples within the fabric of Australia's constitutional framework.

Secondly, the Voice manifests the self-determination of First Nations peoples,<sup>11</sup> providing an institutional mechanism through which First Nations people can:

<sup>5</sup> Uluru Statement (n 3) (emphasis changed). For a summary of the dialogue process and outcomes, see, Referendum Council, *Final Report* (n 3) 9-35.

<sup>6</sup> Constitution Alteration (Preamble) 1999 schedule.

<sup>7</sup> See, *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) art 3, 4 and 19 ('UNDRIP').

<sup>8</sup> Article 1: '1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'

<sup>9</sup> Castan Centre for Human Rights Law, Submission No 14 to Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Inquiry into the United Nations Declaration on the Rights of Indigenous Peoples* (October 2022) 7-8.

<sup>10</sup> UNDRIP (n 3) preamble para 6.

<sup>11</sup> See further, Melissa Castan, 'Constitutional Recognition, Self-Determination and an Indigenous Representative Body' (2014) 8(19) *Indigenous Law Bulletin* 15.

- a) exercise autonomy in matters relating to Indigenous affairs;<sup>12</sup> and
- b) 'participate in decision-making in matters which would affect their rights' through representatives they have chosen for their own Indigenous decision-making institutions.<sup>13</sup>

Through this institution, the Australian State might meaningfully consult in good faith with First Nations people 'to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them'.<sup>14</sup>

Finally, the process leading to the Constitution Alteration—including the Uluru Dialogues and the *Uluru Statement*—is itself an exercise of self-determination by First Nations peoples. Indeed, as Wamba Wamba academic Eddie Synot notes, the 'explicit example of self-determination' embodied in the dialogues leading to the Uluru Statement is itself an expression of self-determination as recognised by the UNDRIP.<sup>15</sup> Importantly, the proposal is not generated by government. It arises from the express invitation of First Nations people themselves.

### 3.3 Upholds Parliamentary supremacy and efficient functioning of the Executive

Importantly for the integrity of Australia's system of government, in accordance with the limitations of UNDRIP principles, the Voice operates within the nation state.<sup>16</sup> As a matter of law and on textual interpretation of the provision, this proposal presents no challenge or threat to territorial integrity or established norms of governance.<sup>17</sup>

The power of the Voice as proposed is to *make representations*: it is a permanent advisory body.<sup>18</sup> This is evident in the plain language of the bill, and the supporting explanatory memorandum and second reading speech. In this way, the Bill proposes 'a form of constitutional recognition that is practical and substantive' and which is called for by First Nations people in the Uluru Statement.<sup>19</sup>

The proposal in the Constitution Alteration does not have the power of a House of Parliament, such as the ability to initiate, pass or reject Bills. Thus the Voice maintains Parliamentary supremacy and the efficient functioning of the Executive government. As an institutional response to the powerlessness of First Nations people, the Voice creates an 'institutional relationship between governments and First Nations'.<sup>20</sup>

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<sup>12</sup> UNDRIP (n 3) arts 3 and 4.

<sup>13</sup> Ibid art 18.

<sup>14</sup> Ibid art 19.

<sup>15</sup> Eddie Synot, 'The Universal Declaration of Human Rights at 70: Indigenous Rights and the Uluru Statement from the Heart' (2019) 73(4) *Australian Journal of International Affairs* 320, 323-4.

<sup>16</sup> UNDRIP (n 1) art 46.

<sup>17</sup> See, George Williams, Submission No 5 to Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, *Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum* (6 April 2023); Anne Twomey, Submission No 17 to Joint Select Committee on Aboriginal and Torres Strait Islander Voice Referendum, *Inquiry into the Aboriginal and Torres Strait Islander Voice Referendum* (13 April 2023).

<sup>18</sup> See, Commonwealth, *Parliamentary Debates*, House of Representatives, 30 March 2023 (Mark Dreyfus, Attorney-General) ('Constitution Alteration Second Reading Speech').

<sup>19</sup> Ibid.

<sup>20</sup> Megan Davis and George Williams, *Everything You Need to Know About the Uluru Statement from the Heart* (NewSouth Publishing, 2021) 151-2.

Representations to the Executive Government at the early stages of the development of a bill or policy, and representations suggesting legislative or policy reform, enhance governance in two ways.

First, representation to the Executive Government permits the opportunity to consider representations and to enhance the policy or legislative response before a Bill is finalised and introduced.

Secondly, much of what is relevant to Aboriginal and Torres Strait Islander people occurs through policy and its implementation. Representations from the Voice to Executive Government provides the opportunity for improvement of service delivery and outcomes according to identified needs of the relevant communities.

Affording the discretion to the Voice to decide on representations will ensure that matters of priority according to First Nations people themselves, will feature in representations to Parliament and Executive Government. Not only does this achieve the purpose of the Voice, it enhances efficiency of governance processes by identifying areas of focus. Through deciding which matters 'relating to Aboriginal and Torres Strait Islander peoples' warrant the making of a representation, the Voice will exercise rights of self-determination recognised in international law.

In construing the Voice in terms of self-determination, the scope of these representations is limited to matters reflecting a clear connection, directly or indirectly, with Aboriginal and Torres Strait Islander peoples because:

- a) the recognition of Aboriginal and Torres Strait Islander peoples as First Peoples affirms their status as such;
- b) the nature of self-determination inherently bounds rights to those relating to indigenous peoples' identity as such;
- c) the right to representation operates within the broader framework of the nation state and existing governance affecting citizens more broadly.

### **3.4 Coherent with other successful manifestations of Indigenous consultative models in other Australian jurisdictions**

In considering the mechanism for affording Indigenous consultation, the Voice proposal is coherent with successful manifestations of Indigenous consultative models in a number of other Australian jurisdictions.

Victoria and South Australia each have recently established representative First Peoples consultative bodies through the First Peoples' Assembly in Victoria,<sup>21</sup> and the Voice to South Australian Parliament.<sup>22</sup> Several other jurisdictions in Australia are working towards establishing such bodies. The Victorian First

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<sup>21</sup> See, *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) pt 2.

<sup>22</sup> *First Nations Voice Act 2023* (SA).

Peoples' Assembly is the longest established of these bodies and is an independent, democratically elected body which represents Traditional Owners of Country and Aboriginal and Torres Strait Islander peoples in Victoria.<sup>23</sup>

While they operate in different contexts, notably in terms of the constitutional framework, these State-based bodies provide an important reference point in considering the effect of the Constitution Alteration. Importantly, the Victorian model in particular shows the capacity of Parliament to utilise legislation to define the structures, powers, limits, and funding arrangements for Indigenous consultative bodies that are established outside of ordinary legislation. For example, the Victorian Treaty Authority, a body established through agreement with the First Peoples' Assembly and the State of Victoria is given legal personhood through legislation and its funding and other matters are also determined by Parliament through legislation, although the existence of the body is outside of legislation.<sup>24</sup>

## **Part 4: Conclusion**

This Constitution Alteration is a legitimate, effective and legally coherent means of responding to the *Uluru Statement*.

It fulfils the requirements of international human rights law, recognising, in particular, the right to self-determination and right to free, prior and informed consent of First Nations peoples. The proposed amendment to the *Constitution* also fulfils the goals of the independent work on constitutional recognition leading up to this moment, including the work of the Referendum Council, the Indigenous Voice Co-Design Process, and the Uluru Dialogues. The Voice upholds Parliamentary supremacy and the efficient functioning of the Executive. It is a representative body which maintains the role and powers of the Parliament, and which does not create any veto or other powers on the Voice. Finally, the Joint Select Committee can observe that there already exists in other Australian jurisdictions successful Indigenous consultative modes, including in Victoria.

We urge the Joint Select Committee to recommend that the Constitution Alteration be passed in its current form and be put to the Australian people at a referendum.

We would be pleased to appear before the Joint Select Committee to further discuss our submission and answer any questions. We would also be in a position to provide any additional material that may be of assistance to the Joint Select Committee.

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<sup>23</sup> 'About', *First Peoples' Assembly of Victoria* (Web Page) <<https://www.firstpeoplesvic.org/the-assembly/>>.

<sup>24</sup> See, *Treaty Authority and Other Treaty Elements Act 2022* (Vic).

## Endorsements

*This submission is endorsed by the following leading human rights and constitutional law academics:*

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