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

Constitutional Alteration (Aboriginal and Torres Strait Islander Voice) 2023

14 April 2023

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Thank you for the opportunity to make a submission to the Joint Select Committee on the Constitution Alteration (Aboriginal and Torres Strait Islander Voice Referendum) 2023. We make this submission as members and associates of the Indigenous Law Centre (ILC), UNSW. The ILC's close involvement with the Regional Dialogues, the Uluru Statement from the Heart, and the proposed wording for the constitutional amendment are detailed in the Attachment. We are solely responsible for the views and content in this submission.

Primary submission

We submit that the wording of proposed section 129 in the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 (the Bill) is technically sound, gives appropriate effect to the call for constitutional recognition in the Uluru Statement from the Heart, and should be passed by the Parliament, for consideration by the people at a referendum.

To elaborate on why Parliament should pass the Bill, this submission identifies the Bill's key components, sets out some necessary context by reference to the Uluru Statement from the Heart, and explains why the Bill is technically sound and gives appropriate effect to the Uluru Statement.

The provisions of the Bill

There are five key components of the Bill:

1. The provision for a Voice will, if approved at referendum, appear as section 129 in a new Chapter IX of the Constitution.
2. The chapter title and the opening words (or chapeau) of section 129 designate the Voice as the form by which this alteration to the Constitution will recognise Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia.
3. Subsection (1) provides for the establishment of the Voice as a new constitutional entity with words intended to guarantee its continued existence.
4. Subsection (2) spells out the core function of making representations to the Parliament and Government of the Commonwealth.
5. Subsection (3) confers broad legislative power on the Parliament to make laws relating to the Voice.

The Uluru Statement from the Heart and a constitutionally enshrined Voice

This Bill is the culmination of a 16-year national discussion of constitutional recognition, at the centre of which is the Uluru Statement from the Heart delivered to the Australian people on 26 May 2017. It also has deep roots in generations of advocacy by First Nations people, who have long demanded the rectification of Indigenous disempowerment and a Constitution

that makes no reference to societies that have occupied Australia for more than 60,000 years. A proper appreciation of that context provides Parliament with a strong, rational basis for approving the Bill.

In 2007, Prime Minister John Howard initiated the contemporary discussion about recognising Aboriginal and Torres Strait Islander peoples in the Constitution. In 2010, an Expert Panel was convened by then Prime Minister Julia Gillard. The Panel presented a package of proposals for constitutional recognition to the Australian Government in January 2012, but it did not gain traction.

The establishment in 2015 of the Referendum Council to advise the Prime Minister and the Leader of the Opposition implicitly acknowledged that the discussion of constitutional recognition had both lost momentum and lost sight of the views of those to be recognised. The Council's Indigenous Steering Committee devised a model for consultations that could advance the debate. The format and content of the resulting Regional Dialogues was road-tested and refined through planning meetings in Broome, the Torres Strait and Victoria and a trial dialogue in Melbourne.

Ultimately, between December 2016 and May 2017, deliberative Dialogues were held in 12 locations around Australia, with an additional meeting in the ACT. Each Dialogue brought together around 100 men and women, drawn in fixed proportions from traditional owner groups, regional organisations and significant individuals.

By then, some work had been done on a new idea for constitutional recognition. The intention was that it address the urgent need for First Nations people to have a greater say in decisions affecting their daily lives, while focusing on Australia's existing processes of parliamentary government rather than the courts. The Regional Dialogues were an opportunity for careful deliberation upon the merits of this Voice proposal as a form of constitutional recognition. But the Voice was by no means the exclusive focus of the Dialogues; it was one of several options to be considered, including a statement of acknowledgement, a constitutional prohibition on racial discrimination, and treaty. For three days, Dialogue participants in each location immersed themselves in intensive discussion of constitutional civics, the situation of disempowerment confronting their communities, and the worries people had for the future and especially their young people.

In good faith deliberation, participants worked through the differing proposals for constitutional recognition that the Prime Minister and Leader of the Opposition, via the Referendum Council, had asked them to consider and respond to. At the end of each gathering, participants approved a record of meeting and selected delegates to a First Nations Constitutional Convention at Uluru.

Delegates arrived at the Uluru Convention carrying the views from their region, and after several days of intensive discussions, they endorsed a reform agenda expressed in the Uluru Statement from the Heart. The Statement called for constitutional enshrinement of a First Nations Voice and a Makarrata Commission to oversee a national process of agreement-making and truth-telling. The delegates at the Uluru Convention, and the Dialogue participants who sent them there, were determined to do something about 'the structural nature' of their

problem, 'the torment of our powerlessness'. They advocated 'substantive constitutional change' that would alter the status quo. They called for empowerment through a Voice that could speak to both Parliament and Government, and could evolve as needs change over the decades to come.

The Referendum Council recognised the power of the Uluru Statement from the Heart and the legitimacy it drew from the careful process that preceded it. The Council recommended the Government and the Parliament proceed with a referendum for a representative Voice in the Australian Constitution.

That proposal has not had an easy path to acceptance in Canberra since May 2017. But throughout those politically challenging times, the Voice has continued to win wider community support – something that is highly relevant to Parliament as it considers whether to pass this Constitution Alteration and put the YES/NO question to more than 17 million voters. For six years, polling has showed consistently high levels of support amongst Aboriginal and Torres Strait Islander people and non-Indigenous Australians for a constitutionally enshrined Voice.[1] That is mirrored by countless pledges of support from individual Australians and from organisations that span all facets of economic, cultural, sporting, religious, professional and civic life in Australia.

A technically sound proposal

Authors of this submission and the ILC have devoted six years of attention to the question of what wording for a Voice amendment to the Constitution should be put to the people at referendum. Many considerations have been discussed and debated, internally and with leading constitutional experts in the legal profession and at universities around Australia.[2] A paramount concern at all times was the need for a proposal that is legally sound. Parliament and the voters of Australia can be confident that the provision negotiated by the Prime Minister on behalf of the government with representatives of the Referendum Working Group and contained in the Bill is technically sound and has benefited from the input of dozens of constitutional law experts and practitioners from around Australia.

Opening words of recognition

The opening words of recognition in the proposed section 129 appropriately make clear that amending the Constitution to enshrine the Voice is an exercise in *recognition* of Aboriginal

[1] See, eg, most recently, the Newspoll published in *The Australian* on 4 April 2023 (54% in favour of a Voice and 38% opposed with majority support in five of six States, sample 4756); the *2022 Australian Reconciliation Barometer* (2022) 3 ('79% of the general community and 87% of Aboriginal and Torres Strait Islander people believe it is important to protect an Indigenous Body within the Constitution, so it can't be removed by any government'; First Nations sample 532, general community sample 2522); and a poll of Western Australians regarding a Yes/No vote on the actual wording contained in the Bill published in *The West Australian* on 28 March 2023 (60% support, 40% opposed; sample 1052).

[2] For more information on the constitutional drafting history, see Gabrielle Appleby, Sean Brennan and Megan Davis, 'A First Nations Voice and the Exercise of Constitutional Drafting' (2023) *Public Law Review* (forthcoming) https://ssrn.com/abstract=4346447 or http://dx.doi.org/10.2139/ssrn.4346447.

and Torres Strait Islander peoples as the First Peoples of the country that is now called Australia.[3] These words accurately reflect that, through the deliberative processes that produced the Uluru Statement, Aboriginal and Torres Strait Islander peoples have confirmed that a First Nations Voice enshrined in the Constitution is a meaningful form of constitutional recognition for them.

Subsection (1)

Subsection (1) of proposed section 129 is straightforward and transparent. If the people vote at referendum to include section 129 in the Constitution, Parliament would be democratically obliged to legislate for the establishment of the Voice, after appropriate engagement with First Nations communities about its design, membership and other details. Popular endorsement at a referendum will give the Voice the authority, stability and independence it will need in order to shift the political dynamic in Indigenous law and policy. Once Parliament legislates to establish the Voice, subsection (1) secures the continued existence of the Voice, as a law to abolish it could not reasonably be seen as consistent with the words in the Constitution mandating that 'there shall be' such a body.[4] This understanding accords with the view expressed in the Explanatory Memorandum, which refers to the 'constitutionally guaranteed existence' of the Voice in subsection (1).[5]

Subsection (2)

Subsection (2) expresses the core function of the Voice in simple and direct language. It empowers the Voice to make representations, and by using the word 'may', appropriately vests discretion in the Voice to determine when it will exercise that function. By empowering the Voice to carry out this function in a proactive way, rather than imposing obligations on the Parliament and Government to respond in a particular way, it focuses on political participation aimed at influencing law and policy, not legal duties to be enforced through the courts.

The wording of the representation-making function also avoids imposing undue restrictions on its scope. The phrase 'matters relating to Aboriginal and Torres Strait Islander peoples' is sufficiently broad to encompass both Indigenous-specific measures, as well as laws and policies that apply to the general community but have a particular effect on First Nations people. The scope of this provision is appropriate. Aboriginal and Torres Strait Islander people are not only affected by laws and policies expressly targeted at them. Indeed, the laws and policies that have the greatest impact on Aboriginal and Torres Strait Islander people may well be those of general application, such as laws and policies concerning health, education,

[3] See further Megan Davis, 'Competing Notions of Constitutional "Recognition": Truth and Justice or Living "Off the Crumbs that Fall Off the White Australian Tables"' (Papers on Parliament No 62 October 2014); Megan Davis, 'The Long Road to Uluru: Walking Together: Truth before Justice' (2018) 60 *Griffith Review* 27.
[4] And note the key differences between the Voice and Inter-State Commission: Gabrielle Appleby and John Williams, 'The First Nations Voice: An Informed and Aspirational Constitutional Innovation' (25 March 2021) on INDIGCONLAW.org <https://www.indigconlaw.org/home/the-first-nations-voice-aninformed-and-aspirational-constitutional-innovation>.
[5] Explanatory Memorandum, Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 12.

employment, criminal justice, land use and social security. Providing the Voice with a remit that covers such matters is essential if the Voice is to be an adequate vehicle for both Indigenous self-determination and closing the gap.

Any attempt to narrow the scope of this core function – for instance, by limiting it to laws passed under s 51(xxvi) or to 'matters *directly affecting* Aboriginal and Torres Strait Islander people' – would both reduce its effectiveness and undermine its legal soundness. Narrowing the matters about which the Voice could make representations would reduce the Voice's effectiveness by diminishing its capacity to act as a vehicle for Indigenous self-determination and by potentially removing from its remit many matters (such as general laws and policies on health, education and criminal justice) that are essential to closing the gap.

Narrowing the Voice's representation-making function would also undermine subsection (2)'s legal soundness by introducing greater uncertainty into the provision. It would inevitably lead to difficult line-drawing exercises – for instance, about whether a particular law has been passed under s 51(xxvi) or some other head of power, or over which matters are those that 'directly affect' Aboriginal and Torres Strait Islander people and which do not. As a result, narrowing the scope of the representation-making function would likely generate significantly more litigation in the courts.

Under the current wording of subsection (2), the phrase 'matters relating to Aboriginal and Torres Strait Islander peoples' puts an appropriate outer legal boundary around the core function of making representations and then sensibly leaves it to the Voice to determine its priorities for making representations within this boundary. Even within this boundary, the Voice's representation-making function will not be unlimited: the Voice will have to make choices about when to make representations by taking account of the policy climate at the time, as well its own resource limitations, public scrutiny, and the need to be accountable for its work back to its First Nations constituents.

The wording of subsection (2) also clarifies that the Voice may make representations to the Parliament and to the Executive Government of the Commonwealth. This wording makes clear that the Voice can address government officials and Ministers and not just the Parliament. Providing the Voice with the capacity to address all parts of the Executive Government is necessary to give Aboriginal and Torres Strait Islander peoples a *meaningful* say in the laws, policies and decisions that affect them, since the actions of all parts of the Executive Government have an enormous impact on Aboriginal and Torres Strait Islander peoples. Giving Aboriginal and Torres Strait Islander peoples a meaningful say over the government actions that affect their lives is the central purpose of section 129. Omitting reference to the Executive Government, or narrowing the range of Executive Government officials to whom the Voice can make representations, would therefore undermine the purpose of the provision. The quality and effectiveness of laws and policies will only improve if the expertise of First Nations people is capable of being brought to bear at the earliest stage, when Ministers and government officials seek to identify the existence and nature of a policy problem and begin to canvass the range of options which might exist to deal with it. Importantly, the function of the Voice in subsection (2) is to make representations, with a view to improving decisions, policies and laws, and does not dictate outcomes to these officers.

It is important to address exaggerated claims that have been made about the likelihood of the High Court imposing constitutional obligations on the Parliament or Executive Government as a result of subsection (2). Should a litigant seek to put such an argument, the Court will see that the words of the subsection have been carefully chosen to empower the Voice to make representations in a proactive way, rather than to impose obligations on Parliament or the Government. There is no basis in the text of the provision for claiming the existence of an express constitutional obligation. Claims that Parliament would be under an implied constitutional obligation to consider or act on the views of the Voice are at odds with the longstanding constitutional principle that the High Court does not tell the Parliament how to conduct its internal operations. Claims that the Executive Government would be under an implied constitutional obligation to consider or act on the Voice's views are likewise unpersuasive. There is no resemblance between the broad and general language empowering the Voice to make representations to the Executive on a wide variety of matters and the specific statutory contexts in which courts have been prepared to find that a decision-maker must take certain considerations into account in order to make a decision. Parliament, in exercising its broad power under subsection (3), can specify by legislation situations where obligations attach to the making of a representation by the Voice.[6]

These submissions accord with the extrinsic materials potentially relevant to the interpretation of subsection (2), namely, the Explanatory Memorandum to the Bill and the Attorney-General's Second Reading Speech that accompanied its introduction to the Parliament.

Subsection (3)

The conferral on the Parliament of broad legislative power in subsection (3) to make laws with respect to matters relating to the Voice means that Parliament is in a position to determine the details of what the Voice looks like and how it will operate. Consistent with the entire purpose of the Voice, and the Attorney-General's Second Reading Speech,[7] that power comes with the responsibility to work closely with Aboriginal and Torres Strait Islander peoples in developing the legislation. Once the legislation is enacted, the Voice would thereafter exercise its constitutional function in relation to any amendments or policy relating to the Voice.

Subsection (3) reflects an appropriate legal distinction between the Constitution and legislation, and is tailored to the respective strengths of the voters and the Parliament as constitutional actors. The Australian people will be asked to determine the key question of principle – whether or not constitutional recognition of Aboriginal and Torres Strait Islander peoples should take

[6] See further Robert French, 'The Voice: Facts and Issues' (Speech, Piddington Society, 23 March 2023) https://www.youtube.com/watch?v=o5JObBZJ2BE; Scott Stephenson, 'Justiciability and the Voice' (2023) *Public Law Review* (forthcoming) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4347586; Michael Pelly, 'Top silk Bret Walker attacks "doomsday" take on Voice', *Australian Financial Review* (online, 10 March 2023) https://www.afr.com/politics/top-silk-bret-walker-attacks-doomsday-take-on-voice-20230310-p5cqzd; Anne Twomey, 'What happens if the government goes against the advice of the Voice to Parliament?', *The Conversation* (online, 28 February 2023) https://theconversation.com/what-happens-if-the-government-goes-against-the-advice-of-the-voice-to-parliament-200517.

[7] Commonwealth, *Parliamentary Debates*, House of Representatives, 30 March 2023, 4 (Mark Dreyfus, Attorney-General) (proof).

place through the establishment of an enduring representative body that empowers them to have a say on the laws and policies affecting their daily lives. If the answer is YES then the Parliament will move to legislate the details, within the constitutional parameters endorsed by the voters.

It would potentially mislead voters and impair the constitutional function of the referendum to present a detailed model of the Voice prior to the question of principle being resolved. Voters may think they are voting on the detail of the model, and not the constitutional provision which is pitched at a much higher level of generality and principle. Perversely, this might operate de facto to entrench the original version as presented before a referendum, making future parliaments reluctant to amend the model. That would undermine one of the key objectives of the constitutional amendment – to provide flexibility for the model to evolve, as it adapts to changing needs and circumstances.

The Bill adopts the far preferable approach of first defining the basic outlines of an institution in the Constitution and then empowering the Parliament to determine the details later in legislation. The Australian colonies did this in referendums held between 1898 and 1900, when section 71 of the Constitution enshrined the High Court as a key feature of the Australian system of government. The Court came fully to life two years later, once the detail of the institution was spelt out in the *Judiciary Act 1903* (Cth).

Another legal strength of the proposed provision is that the broad conferral of legislative power in subsection (3) is not intended to detract from the constitutionally guaranteed existence of the Voice in subsection (1) and representation-making function in subsection (2), as confirmed in the Explanatory Memorandum.[8]

Subsection (3) also makes appropriate legal provision for Parliament to confer functions on the Voice that are additional to the core constitutional function of making representations to the federal Parliament and Government. This could include, for example, the Voice making representations to State and Territory parliaments and governments to improve the quality of law and policy making at those levels of the federation as well.[9] Like all aspects of the Voice, any such change would be required to go through ordinary legislative processes.

Placement in a separate Chapter IX

The Bill involves a constitutionally sound decision to locate section 129 in a new Chapter of the Constitution, as placement elsewhere would sow legal confusion and thus potentially give rise to unintended interpretations, or introduce incoherence to the Constitution. Placing the provision in Chapter I (The Parliament) would not accurately capture the full constitutional function of the Voice, which may also make representations to the Executive Government. Placing the provision in Chapter II (The Executive Government) would involve a similar misalignment. The Voice is not a judicial body and thus appropriately stands outside Chapter III (The Judicature). Avoiding Chapters I to III also avoids interfering with the constitutional implications that the High Court has derived from that structural arrangement of the

[8] Explanatory Memorandum, Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 12.
[9] For examples of when that might occur, see Stephen McDonald, 'Federalism and a First Nations Voice' (2023) *Public Law Review* (forthcoming) https://ssrn.com/abstract=4346475 or http://dx.doi.org/10.2139/ssrn.4346475.

constitutional text. None of Chapters IV, V, VI and VIII is relevant as they deal, in turn, with Finance and Trade, The States, New States and Alteration of the Constitution. Placing the provision in Chapter VII, on Miscellaneous matters, would fail to adequately reflect the fundamental symbolic significance of constitutionally recognising the peoples whose ancestors have occupied this continent and islands for more than 60,000 years.

The creation of a new and distinctive constitutional body to recognise Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia will open a new chapter in Australian constitutionalism. To do so literally as well, through the creation of a new Chapter IX, represents the most appropriate legal choice.

Consistency with human rights

Proposed section 129 is not only consistent with human rights; it is a measure that positively advances human rights, in particular the human rights of Aboriginal and Torres Strait Islander peoples.

The most authoritative and comprehensive statement of the human rights of Indigenous peoples is the *United Nations Declaration on the Rights of Indigenous Peoples*, which the Commonwealth Government endorsed in 2009. As noted by Professor James Anaya, the former Special Rapporteur on the Rights of Indigenous Peoples, '[t]he Declaration does not attempt to bestow Indigenous peoples with a set of special or new human rights, but rather provides a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of Indigenous peoples.'[10]

The key human right advanced by section 129 is the right of self-determination. Recognised in the very first article of both the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, the right of self-determination is a collective human right enjoyed by all peoples, including Indigenous peoples. Its application to Indigenous peoples is confirmed in Art 3 of the *Declaration* and further elaborated in other parts of the *Declaration*.

Section 129 will help to ensure that Australia fulfils the right of Aboriginal and Torres Strait Islander peoples to self-determination and their associated rights to political participation.[11]

The consistency of the Voice proposal in section 129 with human rights has been confirmed by human rights institutions at the national and international levels. At the national level, the Australian Human Rights Commission has made clear that section 129 is consistent with human rights principles and Australia's obligations under human rights treaties.[12] Internationally, several eminent human rights bodies have called on Australia to implement the constitutional reforms contained in the Uluru Statement from the Heart, which is the origin of

[10] See further James Anaya, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN Doc A/HRC/9/9 (11 August 2008) 24 [86].
[11] See especially Arts 4, 5, 18 and 19 of the *Declaration*.
[12] Australian Human Rights Commission, 'Commission Welcomes Constitutional Alteration Bill' (Media Release, 30 March 2023) <https://humanrights.gov.au/about/news/media-releases/commission-welcomes-constitutional-alteration-bill>.

section 129. These bodies include the United Nations Committee on the Elimination of Racial Discrimination,[13] the United Nations Committee on Economic, Social and Cultural Rights[14] and the United Nations Special Rapporteur on the Rights of Indigenous Peoples.[15]

Contrary to the claims made by Human Rights Commissioner Lorraine Finlay, the proposed section 129 is not inconsistent with the rights of all Australians to equality and to be free from racial discrimination.[16] The consistency of the proposed Aboriginal and Torres Strait Islander Voice with rights to equality and non-discrimination is confirmed by the fact that it has been expressly endorsed by the Committee on the Elimination of Racial Discrimination, the leading authority worldwide on human rights protections against racial discrimination. As the Committee made clear in its General Recommendation No 32, the distinct rights of Indigenous peoples are not illegitimate 'separate rights' based on race but are legitimate permanent rights 'accepted and recognized by the international community to secure the existence and identity' of Indigenous peoples.[17] The High Court of Australia has consistently upheld the consistency of distinct Indigenous rights (such as statutory land rights and native title) with the *Racial Discrimination Act 1975* (Cth).[18]

Far from being an illegitimate form of racial discrimination, the Voice would help Australia to fulfil its international obligations to protect Aboriginal and Torres Strait Islander peoples from racial discrimination. By creating an Aboriginal and Torres Strait Islander Voice through section 129, the proposed constitutional amendment would help ensure that First Nations peoples can effectively participate in public life and that they are at least guaranteed the ability to make representations about (but not exercise a veto over) decisions affecting their rights and interests.

Post-referendum process for designing the Voice

While proposed section 129 appropriately leaves many of the details of the Voice's composition and operation to be determined by the Commonwealth Parliament after the referendum, it is essential that First Nations peoples are at the centre of the post-referendum process for designing the Voice. The basic idea underpinning the proposal for a Voice – that Aboriginal and Torres Strait Islander peoples should have a say about government decisions affecting their lives – applies equally to the process for designing the Voice itself. We note and commend the intention of the Commonwealth Government to include 'a strong focus on

[13] 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].
[14] Committee on Economic, Social and Cultural Rights, *Concluding Observations on the Fifth Periodic Report of Australia*, UN Doc E/C.12/AUS/CO/5 (11 July 2017) [16(a)].
[15] 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(a)].
[16] Lorraine Finlay, 'Voting No to Voice Doesn't Mean You Reject Human Rights', *The Australian* (Sydney, 30 March 2023) 11.
[17] Committee on the Elimination of Racial Discrimination, *General Recommendation No 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms Racial Discrimination*, UN Doc CERD/C/GC/32 (24 September 2009) [26].
[18] See, eg, *Gerhardy v Brown* (1985) 159 CLR 70; *Mabo v Commonwealth* (1988) 166 CLR 186; *Western Australia v Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373, 483–4 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

engagement with Aboriginal and Torres Strait Islander peoples' in the process for designing the Voice after the referendum.[19] We also note that the Government has released a set of Design Principles to be followed in designing the Voice, which we commend and endorse.

Conclusion

Against the background of its extensive work with Aboriginal and Torres Strait Islander peoples and consultation with constitutional experts from across the country, the ILC strongly endorses the proposed constitutional provision in Chapter IX, section 129. It is a provision that:

- meets the aspirations for recognition and empowerment in the Uluru Statement from the Heart and its call for a First Nations Voice;
- allows for important dimensions of the Voice to be self-determined by Aboriginal and Torres Strait Islander people, including membership and the scope of its work;
- is legally sound and sufficiently flexible so as not to foreclose on future evolution and improvement of the Voice.

For the reasons above, we submit that the proposed amendment is one that will be able to achieve success at a referendum. The Uluru Statement from the Heart was issued to the Australian people and we strongly recommend that the Parliament enact the Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023 so that proposal for the Voice can finally be put to the voters.

[19] Commonwealth, *Parliamentary Debates*, House of Representatives, 30 March 2023, 4 (Mark Dreyfus, Attorney-General) (proof).

Attachment: The work of the ILC on constitutional reform

The Indigenous Law Centre (ILC), based at the University of New South Wales, is Australia's first and pre-eminent University-based Indigenous Legal Centre. Established in 1981, the ILC contributes to the recognition, protection and development of the legal rights and freedoms of Indigenous peoples both in Australia and internationally. It has played a long-standing role in supporting the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and has significant expertise on the UNDRIP in the Australian context. The Director of the ILC, Professor Megan Davis was, from 2017-2022, one of seven global experts on the UNDRIP serving on the United Nations Expert Mechanism on the Rights of Indigenous People (UNEMRIP).

Consistent with its founding objectives of working toward legal and structural reform to advance Aboriginal and Torres Strait Islander peoples, the ILC's work has been closely involved with efforts towards constitutional reform for well over a decade. As a member of the Referendum Council from 2015, Professor Davis designed and then co-led the First Nations Regional Dialogues. More recently, she has been a member of the current Government's Referendum Working Group and Constitutional Expert Group. Fellow experts from the ILC have been involved in supporting the Regional Dialogues, and then the First Nations Constitutional Convention that delivered the Uluṟu Statement from the Heart. The ILC continues this work in partnership with the Uluṟu Dialogue.

The Indigenous Law Centre has been working on the drafting of the proposed wording to constitutionally enshrine a First Nations Voice since the delivery of the Uluṟu Statement in May 2017. This included the submission of wording for a proposed Chapter IX, Section 129 to the Joint Select Committee on Constitutional Recognition in 2018. Since then, the Indigenous Law Centre has undertaken significant ongoing work on drafting of the constitutional provision, including conducting national workshops with relevant academic constitutional experts, the issue of a comprehensive Issues Paper on the amendment once the Prime Minister released his draft wording at Garma in 2022,[20] and nation-wide consultations with the legal profession in partnership with the Law Council of Australia and the Australian Association of Constitutional Law in the second half of 2022. The ILC presented the results of this work to the Constitutional Expert Group to assist it with its advice.

[20] Indigenous Law Centre, *Issues Paper 1: Constitutional Amendment* (2022) https://www.indigconlaw.org/s/ILC-Issues-Paper-1-The-constitutional-amendment.pdf.