



Australian
Bar Association

**Submission to the Joint Select Committee on Constitutional Recognition Relating to
Aboriginal and Torres Strait Islander Peoples**

1. The Australian Bar Association (**ABA**) is the peak body for the State and Territory Bar Associations of Australia. We draw upon the experience and knowledge of our members to effectively represent the profession and advance public debate on law reform and legal policy issues. The ABA has five policy committees representing its priorities including the Indigenous Affairs Committee.
2. On 1 March 2018 the Commonwealth Houses of Parliament established the Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples (**the Select Committee**). The Select Committee is currently receiving submissions with respect to matters identified particularly in [1] of its resolution of appointment. It is intended that an interim report be made to Parliament by 30 July 2018 with a final report by 29 November 2018.
3. The establishment of the Select Committee to inquire into and report on matters relating to constitutional change appropriate for the recognition of Australia's First Nations peoples represents the continuation of a process within the Australian Parliament, the latest iteration of which began in 2010 with the establishment of the Expert Panel on the Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples.¹ A national process of consultation with First Nations communities culminated in the May 2017 'Uluru Statement from the Heart' (the **Uluru Statement**).

¹ Earlier parliamentary initiatives regarding consultation with First Nations peoples such as the *Council for Aboriginal Reconciliation Act 1991 (Cth)* came into effect on 2 September 1991 and ceased to be in force on 1 January 2001. Historically, First Nations peoples have called for recognition by the Parliament in the Bark Petitions of 1963, the Barunga Statement of 1988, the Eva Valley Statement of 1993, the Kalkaringi Statement of 1998, the report on the Social Justice Package by ATSIC in 1995 and the Kirribilli Statement of 2015 being the outcome of a meeting at Kirribilli House between 40 Indigenous leaders, the Prime Minister and the Leader of the Opposition.



Australian
Bar Association

The Uluru Statement calls for a 'First Nations Voice to Parliament' to be included in the Constitution of Australia and the establishment of a Makarrata Commission to help pursue agreements between First Nations peoples and governments and to enable 'truth telling' about the history of First Nations peoples.

4. The ABA regards the Uluru Statement and particularly the call for a Voice in the Constitution as providing a historic opportunity for Australia to recognise the place that First Nations peoples have in the Australian nation. It also provides an important way by which the nation can recognise that First Nations peoples occupied the Australian continent for millennia before the British arrived and remedy the omission of First Nations peoples from the Constitution, their exclusion from the creation of the Australian state and the passage of its founding document. The ABA acknowledges that the Uluru Statement derives from both thorough consultation and a coalescence of a First Nations voice. It provides a focus and new impetus for organisations, such as the ABA, to support recognition of Australia's First Nations and their peoples and to contribute to a lasting change to the Australian polity.
5. The ABA supports the principle of a First Nations Voice to be included in the Constitution for the following reasons:
 - a. it has been adopted by the representatives of First Nations at Uluru;
 - b. the Voice is proposed to operate within the current constitutional structure and not against it;
 - c. there will be continuing dialogue to develop any proposed constitutional amendment to recognise the role and position of the First Nations peoples; and
 - d. following any appropriate amendment of the Constitution the Voice might be implemented in a number of ways outside the Constitution so as to provide



Australian
Bar Association

both institutional flexibility and longevity for First Nations peoples and the Commonwealth of Australia.

6. The ABA proposes to briefly address in this submission some of the key recommendations made by various Parliamentary Committees and the Expert Panel, the importance of consultation with First Nations, the proposal for including a Voice for First Nations peoples in the Constitution and what the Voice might look like.

Process of consideration and recommendation leading to the Uluru Statement

7. Since 2010 Commonwealth Governments have established a number of bodies to assist with determining how best to recognise First Nations peoples in the Constitution. Those bodies have all engaged in detailed consultations and produced a number of reports and recommendations.² Those bodies and processes have been:
 - a. the Expert Panel on the Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples established in 2010 which reported to the Government in 2012;
 - b. the establishment of *Recognise* in 2012 to campaign for the recognition of First Nations peoples in the Constitution. The campaign was funded until 30 September 2017, but its objectives are now managed by Reconciliation Australia;
 - c. the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples established in November 2012 which reported to the Government in 2015;
 - d. the Referendum Council,³ jointly appointed by the Prime Minister and Leader of the Opposition in 2015 to advise the Prime Minister and Leader of the Opposition on progress and next steps towards constitutional reform, reported to the Government in 2017; and

² Others are best placed to set out in detail the reports and recommendations of these bodies.

³ Chaired by Pat Anderson AO with Mark Leibler AC and members Andrew Demetriou, Natasha Stott Despoja AM, Murray Gleeson AC, Noel Pearson, Professor Megan Davis, Kristina Keneally, Amanda Vanstone and Galarrwuy Yunupingu AM.



Australian
Bar Association

- e. the First Nations Regional Dialogues established by the Referendum Council which resulted in the National Constitution Convention held in Uluru in May 2017 and the Uluru Statement.
8. The ABA acknowledges that the Select Committee, established this year, has the benefit of the immense amount of research, advice, consideration and consultation which has occurred as well as the obligation to consider the reports and recommendations of those bodies.
 9. The recommendations of the previous Joint Select Committee in its final report of 2015 were, in summary:
 - to repeal section 25⁴ of the Constitution;
 - to repeal section 51(xxvi) (the 'race' power) but retain a 'persons power' so that the Commonwealth government may legislate for Aboriginal and Torres Strait Islander peoples. There were various possible forms of the persons power, which the Committee recommended be considered for referendum including whether the persons power should contain a prohibition on racial discrimination;
 - to amend the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) to include the UN *Declaration on the Rights of Indigenous Peoples* in the list of international instruments which comprise the definition of human rights under the Act;
 - to hold constitutional conventions as a mechanism for building support for a referendum and engaging a broad cross-section of the community;
 - to hold conventions made up of Aboriginal and Torres Strait Islander delegates, with a certain number of those delegates then selected to participate in national conventions;
 - to hold a referendum on recognising Aboriginal and Torres Strait Islander peoples in the Australian Constitution; and
 - to establish a parliamentary process to oversee the referendum progress.

⁴ Section 25 excludes persons of a particular race from being counted in reckoning the number of people in a State or the Commonwealth where excluded by State laws.



Australian
Bar Association

10. The above recommendations of the Joint Select Committee, and before it the Expert Panel, focussed on the removal of the racially discriminatory aspects of the Australian Constitution but recommended retention of the Commonwealth's power to make laws with respect to First Nations peoples. While the Expert Panel recommended the insertion of a prohibition on racial discrimination in the Constitution, the Joint Select Committee proposed the prohibition as an 'option'.
11. Implementing a recommendation of the Joint Select Committee, the Referendum Council, through its Indigenous Steering Committee, convened thirteen First Nations Regional Dialogues across Australia. The consultations sought the views of First Nations peoples as to Constitutional recognition, repeal of the race power, entry into treaty negotiations and a Makarrata, and the prohibition of racial discrimination in the Constitution. The attendees at the Regional Dialogues also nominated representatives to attend the convention at Uluru.
12. The Referendum Council drew attention to the scale of the consultations that were involved in the Dialogues:⁵

The Dialogues engaged 1200 Aboriginal and Torres Strait Islander delegates – an average of 100 delegates from each Dialogue – out of a population of approximately 600,000 people nationally. This is the most proportionately significant consultation process that has ever been undertaken with First Peoples. Indeed, it engaged a greater proportion of the relevant population than the constitutional convention debates of the 1800s, from which First Peoples were excluded.

13. The National Constitutional Convention was convened at Uluru in May 2017 comprising the nominated 250 Aboriginal and Torres Strait Islander delegates. The meeting was the culmination of the Regional Dialogues. The Uluru Statement is an agreed position accepted by the delegates who attended the National Constitutional Convention. The Uluru Statement embodies the authority of those present who in turn represented their communities at the Regional Dialogues. The fact that the Uluru Statement was agreed with little dissent should be recognised as a genuine reflection

⁵ *Final Report of the Referendum Council*, p.10



Australian
Bar Association

of the voices of Australia's First Nations peoples and a viable starting point for any constitutional amendment affecting them.

14. The key parts of the Uluru Statement are as follows:

We seek constitutional reforms to empower our people and take a rightful place in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.

We call for the establishment of a First Nations Voice enshrined in the Constitution.

Makarrata is the culmination of our agenda: the coming together after a struggle. It captures our aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination.

We seek a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history.

15. The Referendum Council, responding to the Uluru Statement in its final report of 30 June 2017, recommended to Government that “a referendum be held to provide in the Australian Constitution for a representative body that gives Aboriginal and Torres Strait Islander First Nations a Voice to the Commonwealth Parliament”.

16. It is apparent that the focus of proposals about the form of recognition of First Nations peoples in the Constitution has shifted as a result of the Regional Dialogues and the National Constitutional Conference. The Uluru Statement proposes the establishment of a body to provide a ‘Voice’ enshrined in the Constitution together with a Makarrata Commission established to supervise the making of agreements (or treaties) between First Nations peoples and governments. The shift is important because it reflects the collective opinion of those First Nations’ communities which were represented at Uluru, rather than the opinions of experts or Parliamentarians.

17. Irrespective of the undoubted value of removing racially discriminatory and anachronistic provisions from the Constitution, the ABA recognises and respects the



Australian
Bar Association

call by First Nations peoples for amendment of the Constitution to provide for a First Nations Voice.

18. The proposals that emerged from Uluru “depend on the support of the legal profession and the leadership of the legal profession”.⁶ Lawyers have played a critical part in past reforms and have a role to play in considering the details and mechanisms which may give effect to the Uluru proposals. The ABA wishes to play a constructive role in supporting the very important work that the Dialogues and the Referendum Council have done.

The importance of consultation with First Nations peoples

19. Australia does not currently have an established body with a clear mandate and adequate funding which is able to independently speak for First Nations peoples in a representative capacity. Where consultation by Government does occur, it is usually with community controlled ‘issue specific’ organisations. To date, that role has been performed by land councils and native title representative bodies, Aboriginal or Torres Strait Islander health services and Indigenous legal services and their peak bodies, and community councils. There are also consultations with First Nations politicians, academics and community leaders. Those persons and bodies are often ill-equipped to respond quickly, comprehensively and effectively to calls for the input of First Nations peoples into policy and legislative development. There are concerns about their representative capacity from time to time. Timely consultation with First Nations peoples is vital to implementing government policy which acknowledges self-determination, provides sustainable outcomes, avoids ‘short-termism’ and the failed experiments in First Nations policy which have proliferated.
20. International legal standards about consultation with First Nations peoples emphasise that a nation should “consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free,

⁶ Comments made by Professor Rosalind Dixon at the NSW Bar Association seminar on the Uluru Statement held on 24 October 2017.



Australian
Bar Association

prior and informed consent before adopting and implementing legislative or administrative measures that may affect them”: Article 19, United Nations’ *Declaration on the Rights of Indigenous Peoples*.⁷

21. International treaty bodies have supported national laws and initiatives addressing Indigenous rights, where those arose through comprehensive negotiations and approval of the broader Indigenous population.⁸ The Uluru Statement carries significant weight because it was made after a national process of consultation and is consistent with international law. The inclusion of a Voice in the Constitution promises an institutional mechanism for that consultation to continue on a permanent basis. The consultation embodied in the process leading to the Uluru Statement also provides a guide as to how the process of recognition and representation should continue.

Previous attempts at establishing a representative voice for First Nations

22. The history of bodies established to represent Australia’s First Nations peoples reveals a succession of bodies which have been intermittently funded and short-lived.
23. In 1972 the Whitlam government established an advisory body, the National Aboriginal Consultative Committee (NACC), which was the first national body elected by Aboriginal people. That body was replaced by the National Aboriginal Conference (NAC) in 1977. In 1990 the Hawke government replaced the NAC with the Aboriginal and Torres Strait Islander Commission (ATSIC). ATSIC was established by statute to undertake the service role of the Department of Aboriginal Affairs, to act as an elected representative body for Aboriginal and Torres Strait Islander peoples, and to provide advice to the Commonwealth on First Nations issues as part of the Commonwealth Executive.

⁷ See also the UN’s Food & Agriculture Organisation, *Free Prior and Informed Consent: An indigenous peoples’ right and a good practice for local communities* (United Nations, Rome 2016) 14-17; and the World Bank’s *IFC Guidance Note 7: Indigenous Peoples* (Washington DC 2012), 1-2].

⁸ *Mahuika -v- New Zealand* (2000) Human Rights Committee, UN doc CCPR/C/70/D/547/1993, 9.6 & 9.8



Australian
Bar Association

24. ATSIIC was disbanded in 2005 by the Howard Government after a number of probity issues involving elected representatives. The ATSIIC model suffered from a number of flaws including lack of gender equity, a lack of traditional authority and the absence of sufficient probity protections. Its removal meant that there was no longer a formal representative advocate of First Nations interests in the Commonwealth Government.
25. In 2009 the Government agreed to the formation of a National Congress of Australia's First Peoples ("National Congress"). The National Congress is a company subject to an ethics council with a requirement for gender equality in all elected positions. It is a body independent from government and was resourced to "give advice, advocate, monitor and evaluate government performance on Aboriginal and Torres Strait Islander issues", but not to deliver services or programs. However, the National Congress has recently received little government funding rather the Government appointed a separate Indigenous Advisory Committee which performs a policy function. The National Congress still functions, but on very limited resources.
26. This history highlights the vulnerability of past advisory bodies to change or abolition and the need for a constitutionally guaranteed body (the Voice).
27. There is merit in establishing a permanent body, enshrined in the Constitution, which will be properly representative of First Nations peoples, stable, properly funded and long-lasting. Such a body should be one which is accepted and supported by First Nations peoples. It may be possible to re-purpose an existing body if that is supported by First Nations.

Constitutional amendment

28. Importantly, the Uluru Statement is not prescriptive as to the terms of any amendment to the Constitution but simply says that a 'Voice' should be inserted into the Constitution.
29. Whether intended or not, this provides some latitude to devising the terms of the amendment. It allows for a well-recognised approach to the drafting of a



Australian
Bar Association

Constitutional provision, being one where the Constitution sets out the power, function or body and its structure and implementation is left to the Parliament. This is a similar approach to the way in which Chapter III allows for the creation of “such other courts as [the Parliament] invests with federal jurisdiction” alongside the High Court of Australia.⁹

30. The ABA considers it premature to suggest precise language for the creation of the Voice when the Select Committee has not determined whether it accepts the Uluru Statement’s call for a Voice. This is likely to be a matter which can be explored after the Interim Report but before the Select Committee delivers its Final Report. However, it would appear in keeping with the Uluru Statement for the wording of the amendment in the Constitution not to be overly prescriptive as to the nature of the Voice. If the wording of the amendment is broad, then this will provide flexibility well into the future for Government and First Nations peoples in determining what sort of body the Voice should be.
31. The ABA notes that the Referendum Council has qualified the nature of the Voice as a ‘Voice to Parliament’, a qualification not reflected in the Uluru Statement. A Voice to Parliament is likely to be a body with a more specific focus than say a Voice to the Commonwealth which might include both the Executive and the Parliament.

The shape of the Voice

32. The focus of the Uluru Statement is on the inclusion of a Voice for First Nations peoples in the Constitution and not on the nature and functions of that Voice. Clearly, there are a number of viable and lawfully available means to achieve a Voice built upon past examples. What is likely to be adopted as a proposed amendment to the constitution will in all likelihood depend, ultimately, on the support of First Nations peoples and the acceptability of that model to the Government of the day. There is also likely to be a process for agreement of a model which involves First Nations

⁹ Section 71. While the High Court is established by Chapter III, the Parliament has been able to establish the Federal Court, the Family Court and the Federal Circuit Court and invest each with federal jurisdiction.



Australian
Bar Association

peoples determining the sort of body they consider appropriate to comprise their Voice and then seeking the agreement of the Commonwealth in a process of negotiation.

33. The Referendum Council's Final Report distilled 10 guiding principles which it recommended should inform the model to be adopted for the Voice, including both Constitutional amendment and the nature and functions of the Voice.¹⁰ It recommended that changes adopted should:

- not diminish Aboriginal sovereignty and Torres Strait Islander sovereignty;
- involve substantive, structural reform;
- advance self-determination and the standards established under the United Nations Declaration on the Rights of Indigenous Peoples;
- recognise the status and rights of First Nations;
- tell the truth of history;
- not foreclose on future advancement;
- not waste the opportunity of reform;
- provide a mechanism for First Nations agreement-making;
- have the support of First Nations; and
- not interfere with positive legal arrangements.

34. At a structural level, the role of the Voice could be performed by:

- a. a statutory authority established by the Australian Parliament;
- b. a corporate entity separately incorporated and independent of government but subject to normal regulatory requirements for corporations;
- c. a Parliamentary Committee established by the Australian Parliament; or
- d. First Nations members of Parliament, analogous to the Maori seats in the New Zealand Parliament.

¹⁰ At paragraph 2.2



Australian
Bar Association

35. To be effective the body which comprises the Voice will need to address issues such as the representation of First Nations peoples and their communities, as determined by them, as well as have sufficient resourcing and powers so that it may have input into the legislative process and the development of Government policy.
36. It is notable that neither the Uluru Statement nor the final report of the Referendum Council call for what has been termed a 'third chamber of Parliament'. There is no indication in either of these final documents that there be a shift from a bicameral to a tricameral Parliament of Australia. Rather, the Voice is proposed to be an independent body which is to advise Government.
37. As noted above, a body akin to a Parliamentary committee could perform the role of advising the Parliament on the effect of proposed legislation that affects First Nations peoples.¹¹ However, unlike other Parliamentary committees which are comprised entirely of members of Parliament, a First Nations committee would need different representative membership in a manner to be determined.
38. Each of the above options allow for a form of representation of First Nations peoples. Without preferring one option to another, it is clear that representation might occur by way of election or appointment or some combination thereof. Concerns about gender equity and traditional authority could be addressed through an appropriate design of the body, whether in legislation or the constitution of the corporate body. Where public funds are allocated to such a body then it could be made subject to scrutiny by the Auditor-General.
39. Election of First Nations representatives to Parliament is not straightforward. Maori seats were established in New Zealand by the *Maori Representation Act 1867* (NZ) and the mechanisms for election are now set out in the *Electoral Act 1993* (NZ). Section 45 of the *Electoral Act 1993* allows for the division of the Maori population into electoral districts, geographically defined. Under s. 76(1) Maori have the option of being

¹¹ The Parliamentary Joint Committee on Human Rights is a viable precedent: see s. 5 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.



Australian
Bar Association

registered either as an elector of a Maori district or a general electoral district.¹²

However, Australia has different constitutional arrangements to New Zealand. Any election of First Nations representatives to Parliament would appear to require a combination of amendments to s. 24 of the Constitution (which governs the composition of the House of Representatives) and the *Commonwealth Electoral Act* 1918. The proper exploration of this question is beyond the scope of this submission.

40. If a representative body is to be established, it is likely to be more effective if it has a role in both the development of legislation through the Parliament as well as Government policy by the Executive. The statutory functions in section 7 of the repealed *Aboriginal and Torres Straits Islander Commission Act* 1989 provide an available starting point for determining the functions of such a body. Relevant functions might include:
- a. advising governments at all levels on First Nations peoples issues;
 - b. ensuring maximum participation of First Nations peoples in government policy;
 - c. promoting First Nation self-management and self-sufficiency;
 - d. furthering First Nations economic, social and cultural development;
 - e. facilitating co-ordination of Commonwealth, state, territory and local government policy affecting First Nations peoples; and
 - f. advocating for the recognition of First Nations rights on behalf of First Nations peoples regionally, nationally and internationally.
41. As mentioned, the nature and functions of the Voice are best developed by First Nations peoples in negotiation with Government. While the ABA is able to assist with exploring the constitutionality, legality and workability of the various available models, the final shape of such body is for others to determine.

¹² And, like all eligible New Zealanders, may also vote for mixed member proportional (MMP) seats.



Australian
Bar Association

42. The ABA is prepared to assist with the development of models suitable for consideration by the Australian community to achieve the objectives declared in the Uluru Statement.

Oral hearing

43. Representatives of the ABA are prepared to appear before the Select Committee to develop this submission and to address any questions the Select Committee might have.
44. We thank you for the opportunity to make this submission. Should you require any further information please contact:

Cindy Penrose

Chief Executive Officer, ABA



11 June 2018