



Law Council
OF AUSTRALIA

Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples

Joint Select Committee on Constitutional Recognition relating to Aboriginal and
Torres Strait Islander Peoples

28 September 2018

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933 and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
- Mr Arthur Moses SC, President-Elect
- Mr Konrad de Kerloy, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of the New South Wales Bar Association, the Victorian Bar, the Law Institute of Victoria and the Law Society of New South Wales in the preparation of this submission. The Law Council also acknowledges the input of its Indigenous Legal Issues Committee in guiding this submission.

Background and context

1. The Law Council welcomes the opportunity to provide this further submission to the Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples 2018 (**Joint Select Committee**). This submission responds to many of the issues that have been identified by the Joint Select Committee in its Interim Report dated 30 June 2018 (**Interim Report**).
2. On 15 June 2018, the Law Council provided the Joint Select Committee with written submissions based on the terms of its resolution of appointment. Further input was provided at a public hearing of the Joint Select Committee on 5 July 2018.
3. In addition to the earlier input provided to the Joint Select Committee, the Law Council again draws on its previous work on the topic of constitutional recognition, most notably the Law Council's submission in response to the Referendum Council's Discussion Paper on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples,¹ and its submission to the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Australians.²
4. Further, the Law Council notes previous reports and inquiries that have taken place on the issue of constitutional recognition, including the 'Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel',³ the 'Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples',⁴ and most recently, the work of the Referendum Council and the Uluru Statement from the Heart, the recommendations from which included a call for a constitutionally enshrined First Nations Voice to the Parliament, for which the Law Council restates its continuing and strong support
5. Finally, the Law Council is guided by relevant international human rights law, in particular the terms of the *United Nations Declaration on the Rights of Indigenous Peoples (the Declaration)*.⁵ The Declaration recognises the urgent need to respect and promote the rights of Indigenous people affirmed in treaties, agreements and other constructive arrangements with States. To this end, the Law Council notes the importance of genuine consultation and for the design of options for constitutional recognition to be led by Aboriginal and Torres Strait Islander communities and organisations throughout this process of empowerment and self-determination.

General comments

6. The Law Council has publicly provided its full and unqualified support for the recommendations of the Referendum Council,⁶ and considers the creation of a representative body providing a Voice to the Parliament to be a unique opportunity to recognise and respond to the will of Aboriginal and Torres Strait Islander Australians.

¹ Law Council of Australia submission 'Discussion Paper on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples' (19 May 2017).

² Law Council of Australia submission 'Constitutional Recognition of Aboriginal and Torres Strait Islander Australians' (6 October 2011).

³ Expert Panel on Constitutional Recognition of Indigenous Australians, 'Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution' (January 2012).

⁴ Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples 2015.

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

⁶ Law Council of Australia 'Law Council throws support behind referendum on the creation of new Indigenous representative body' (24 October 2017), <www.lawcouncil.asn.au/media/media-releases/law-council-throws-support-behind-referendum-on-the-creation-of-new-indigenous-representative-body>.

The Law Council reiterates there is no legal impediment to making provision for such a body in the Constitution and continues to support such measures.

7. The Law Council further supports the Joint Select Committee's call for 'a process of deep consultations between the Australian Government and Aboriginal and Torres Strait Islander peoples in every community across the country, in order to ensure that the detail of the Voice and related proposals are authentic for each community across Australia'.⁷
8. In the Law Council's view, it is important that momentum generated from the Uluru Statement is not lost. Public debate in relation to the creation of a First Nations Voice enshrined in the Constitution, as was called for at Uluru, as a body through which Aboriginal and Torres Strait Islander peoples are able to design and lead policy and legislative matters affecting them is a constructive step. Ultimately, however, as noted in the Interim Report and in previous submissions by the Law Council and others, the importance of leadership and design of options for a First Nations Voice by Aboriginal and Torres Strait Islander communities and organisations cannot be overstated.
9. The Joint Select Committee's Interim Report has produced a detailed and useful summary of the oral and written submissions made to it about recognition of Aboriginal and Torres Strait Islander peoples in the Constitution. In the Interim Report, the Joint Select Committee elucidated themes and issues for further consideration by posing a number of important questions. Many of those questions call for very detailed and precise answers.
10. One of the difficulties in answering such questions is that issues of principle and structure in establishing a Voice need to be determined before answers can be given. The Law Council acknowledges that fundamental questions about the nature and the role of the Voice must be led by Aboriginal and Torres Strait Islander peoples. A process which is devised by Government without design and leadership from Aboriginal and Torres Strait Islander communities raises the distinct possibility of not being supported.
11. Without authority properly derived from Aboriginal and Torres Strait Islander peoples there is the possibility that any new organisation will be the subject of criticism that it is not truly representative and therefore lacks legitimacy. Accordingly, it is important to get the foundation principles right and to allow for the design and leadership to be driven by Aboriginal and Torres Strait Islander communities. The process as much as the outcome must be aimed at having a distinct, representative and authentic First Nations Voice.
12. It remains the Law Council's view that respecting the principles of self-determination and its manifestation in practice by empowering communities and individuals is critical. The establishment of a First Nations Voice will assist in progressing these goals. However, without the benefit of an analysis of concrete options, it would be premature for the Law Council to express a firm view on the specific attributes of the representative body as these are matters which should be the subject of dialogue between Aboriginal and Torres Strait Islander peoples and the Australian Government.
13. However, the Law Council notes that once this process has occurred, the legal profession will be integral in supporting the realisation of the proposals that emerged from the Uluru Statement from the Heart and subsequent recommendations of the Referendum Council.

⁷ Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples '*Interim Report*' (July 2018), viii.

A principled foundation

14. A principled approach to the establishment of a First Nations Voice dictates that Aboriginal and Torres Strait Islander peoples must be integral to the development of and support the proposal. The Law Council considers that it is vital that the Joint Select Committee adopt a set of principles to underpin its final recommendations, and those principles should be derived from the themes identified in the Interim Report.
15. An important source for guiding principles is those adopted at the Uluru Convention. The principles governing assessment of proposals for reform, adopted at Uluru, are that any proposal should only proceed if it:
 - does not diminish Aboriginal sovereignty and Torres Strait Islander sovereignty;
 - involves substantive, structural reform;
 - advances self-determination and the standards established under the *United Nations Declaration on the Rights of Indigenous Peoples*;
 - recognises the status and rights of First Nations;
 - tells the truth of history;
 - does not foreclose on future advancement;
 - does not waste the opportunity of reform;
 - provides a mechanism for First Nations agreement-making;
 - has the support of First Nations; and
 - does not interfere with positive legal arrangements.
16. The final shape of a First Nations Voice must be guided by the wishes and aspirations of Aboriginal and Torres Strait Islander representatives, and it is submitted ought to be guided by the above principles at all times.

The approach of the Joint Select Committee

17. In relation to the call in the Uluru Statement from the Heart that a First Nations Voice be established and enshrined in the Constitution, the Interim Report of the Joint Select Committee appears to have taken the following approach to consideration of the submissions and the matters before it:
 - all forms of constitutional recognition appear to be given consideration by the Joint Select Committee, and deliberations are not confining its deliberations to the Uluru Statement from the Heart or recommendations of the Referendum Council; and
 - the Interim Report suggests that the Joint Select Committee is preparing to make recommendations about the form of a Voice, not just the process for its establishment. Rather than accepting that the design work on the Voice should be performed by Aboriginal and Torres Strait Islander communities, the Joint Select Committee appears to promote a joint process involving Government, and the Joint Select Committee itself. In this regard, the Joint Select Committee states in its Interim Report:

The Committee acknowledges that much of the work to be done should be led by Aboriginal and Torres Strait Islander peoples. The Committee also acknowledges that in any co-design process, the government should take an active role in participating in any Aboriginal and Torres

Strait Islander-led consultations so that the outcomes of the consultations are co-owned by the government and Aboriginal and Torres Strait Islander peoples and so that government can have a richer appreciation for the authentic perspective offered by Aboriginal and Torres Strait Islander peoples.

While some of the previous processes referred to in this interim report have deeply engaged Aboriginal and Torres Strait Islander peoples, there has not yet been coordinated discussion between government and Aboriginal and Torres Strait Islander peoples on the detailed design of a voice on a local, regional, and national basis with the participation of all parties.

The Committee also considers that, through this inquiry, it can play a constructive role in the process of developing the proposal for a Voice.⁸

18. The role that the Joint Select Committee can play may well be decisive in achieving progress through some of the legal and policy challenges relevant to establishing a constitutionally enshrined Voice. However, without appropriate consultation developing this proposal, there is a risk that direct government participation in the design process will be opposed or not embraced by Aboriginal and Torres Strait Islander peoples because of their history and nature of the relationship with government. It would be crucial to establish the legitimacy of the Joint Select Committee or other government participation so that the outcomes of the process are not, from the perspective of Aboriginal and Torres Strait Islander peoples, compromised.
19. As the Joint Select Committee has made broad comments that go to form as well as process, the Law Council responds in terms intended to assist the deliberations as far as possible. However, without the benefit of an analysis of tangible options, the Law Council is not in a position to collectively express a firm view on particular matters on behalf of its membership.
20. Regardless of how a First Nations Voice may be established, the Law Council reiterates the position adopted in its earlier submission that emphasis should be placed on developing an appropriate mechanism for allowing those who are able to legitimately represent and negotiate with government on behalf of Aboriginal and Torres Strait Islander peoples to give effect to the proposals arising from the Uluru Statement and Referendum Council through design and leadership.
21. To be clear, the submissions that follow are premised on the basis that the structure, content and role of the Voice are matters for First Nations to determine with government and are only provided for consideration in developing options and alternatives around which those discussions could take place.

Consistency of vision

22. The Law Council confirms its commitment to the Uluru Statement and the need for the establishment of a Makarrata Commission as soon as possible. It is noted that the development of treaty processes in Victoria, Northern Territory and more recently announced in Queensland are likely to result in agreements between the States and Territories and First Nations.

⁸ Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Interim Report* (July 2018), [7.46]—[7.29].

23. Self-governance in some form is likely to be one of the primary goals of all Aboriginal and Torres Strait Islander peoples. Given the desire for that outcome and the likelihood that the separate First Nations will be the entity through which that outcome will most likely be achieved, it is important that the structure of the Voice be built around those First Nations. If there are to be local voices, then those voices should be the local First Nation(s). Any political empowerment of an Aboriginal and Torres Strait Islander voice on a different basis would undermine the effectiveness of First Nations and potentially set up entities in opposition to those voices.
24. The Law Council suggests that a primary goal in establishing a national Voice, and regional and local voices, is to facilitate the right to self-determination and in particular self-governance.

Structure of a national voice

25. Those that gathered at the 2017 National Constitutional Convention made the following comments in the Uluru Statement from the Heart:

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.

26. This is a clear statement about the need for reforms that will empower Aboriginal and Torres Strait Islander people and ensure that the voices of Aboriginal and Torres Strait Islander people are listened to.
27. The New South Wales Bar Association (**NSW Bar**), guided by its First Nations Committee, has pointed out that the structure of a First Nations Voice necessarily involves a determination of whose voice is to be heard. In the view of the NSW Bar, there is no existing national body from which the First Nations Voice could be drawn. Instead there are currently some First Nations which each have their own membership and methods of political organisation.
28. Any process of determining the form and structure of the First Nations Voice should be directed by the First Nations. One mechanism for enabling direction by First Nations could be for those First Nations to meet and determine a collective approach. This could be done informally or through the establishment of a First Nations representative structure. The NSW Bar suggests that it is these First Nations which could comprise the delegates or members of a national First Nations representative body. Such a body could in turn elect or appoint an executive which could comprise the Voice. In that way, the NSW Bar states that First Nations would control the membership of the national representative body and it could be truly independent from government. Under this model, First Nations could then interact with Government through that national representative body. That interaction could be managed by a formally designated executive of the national representative body which is then also appointed by the Governor General-in-Council on Ministerial recommendation, enshrined in statute. The Voice would in essence be the envoy to the Parliament, not a representative body itself.
29. The NSW Bar submits that the composition of the First Nations Representative Body would depend on First Nations and the manner in which they wish to organise. This might be done through an incorporated entity to take advantage of corporatisation, especially for funding purposes. However, it might also be done as an unincorporated entity or an unincorporated association.

Mechanisms for effective contribution

30. Again, for the avoidance of any doubt, it is critical that First Nations develop the structure and process to determine the method of collectivised negotiation and design with the Government around these issues. However, in an effort to assist the Joint Select Committee by responding to its request for submissions, the Law Council makes the following observations
31. The primary role for an organisation such as the First Nations Voice is to be able to communicate the needs, wishes and desires of Aboriginal and Torres Strait Islander peoples to government. Clearly there are many ways in which this occurs within the Westminster representative governance structure. The call for a First Nations Voice is to set up a permanent conduit for the Voice to be heard by Government. The Legislature and the Executive are the two primary organs of Government engaged by the proposal. While the Referendum Council expressly calls for a 'Voice to Parliament', it is submitted that a Voice to the Executive should not be foreclosed. The Law Council notes the view of the NSW Bar in this respect, who suggest that a narrow Voice, limited to commenting on new Bills, may not be adequate.
32. Dealing first with Parliament, the Voice could play a vital role in commenting on legislation as it is presented to Parliament. It will be most effective if it is integrated in a formal sense into the drafting and processes leading to the passage of legislation without inhibiting or delaying its passage. It is important that the Voice form part of the current democratic process and not obstruct it. At the same time, where the Voice opposes particular legislation or its component parts then that opinion should be heard by both Houses of Parliament. Secondly, the Voice could have the ability to make submissions to, and appear before, the multitude of Parliamentary committees whose work affects Aboriginal and Torres Strait Islander peoples.
33. Next, the Voice could have access to the Executive in the normal way that a Commonwealth statutory authority and many community representative bodies have access to government. Representatives of the Voice could be able to speak with an individual Minister whose portfolio affects First Nations people and not be limited to the Indigenous Affairs Minister. The Voice could also actively design development and review of Government policy. Statutory authorities such as the Productivity Commission or the Australian Securities and Investment Commission could, for example, be required to consult with the Voice when they undertake work which particularly affects Aboriginal and Torres Strait Islander peoples.
34. The Law Council notes input received from the Law Institute of Victoria (**LIV**) which emphasises the important difference between an obligation for government to consider the advice of a First Nations Voice, and an obligation to act in accordance with that advice. In the LIV's view, the proposal to enshrine a Voice to Parliament in the Constitution will only attain the goals of the Uluru Statement from the Heart and constitute substantive, structural reform if it places a substantive obligation on the Minister responsible for enacting legislation to consider the Voice's advice to ensure that the voices of Aboriginal and Torres Strait Islander peoples are listened to. Further details of the LIV's views, including suggestions for drafting are at [Appendix A](#).
35. It is submitted that serious consideration should be given to imposing a duty upon the relevant Minister to respond to the comments of the Voice.

The National Voice and First Nations body politic

36. The separation of the two organisations is important so as to distinguish between the conduit of information to government (the Voice) and self-government of First Nations. The Voice may form a representative function and be able to express the position of First Nations on a number of policy matters at the national level. Experience tells us that the same or similar issues recur in Aboriginal and Torres Strait Islander affairs with a high degree of repetition. This will allow the Voice to establish a particular position on new policy issues and review old government policies, procedures and services. On more complex and contentious issues, the Voice will be able to take issues back to First Nations for consultation, deliberation and decision.

Regional and Local Structures

37. It is submitted that two important principles apply to regional and local structures: first there must be flexibility and, second, there must be authentic self-government. The Law Council notes that there are very real dangers in using a 'cookie cutter' approach to representation because it may cut across traditional organisation or well-established governance which already exists. Indeed, one of the criticisms of the Aboriginal and Torres Straits Islander Commission was that it was based on geographical regions with each First Nations person given one vote. This approach denied or diluted the authority of traditional ownership and the vital role of peak bodies.
38. Aboriginal and Torres Strait Islander communities have and continue to govern themselves in a variety of ways, often determined by a history of colonisation and dispossession and other government policy. The Joint Select Committee will be aware that the approach to representation which applies in the Kimberly will not be directly appropriate in South Eastern Australia.
39. In some regions Aboriginal and Torres Strait Islander peoples may wish to acknowledge that there are existing community organisations that are controlled and operated by the First Nation, or that contribute to First Nation governance in a positive manner. There should be sufficient flexibility in the system to allow Aboriginal and Torres Strait Islander peoples to draw on those relationships and those organisations to strengthen their local voice.
40. There will be a need for regional and local voices to be heard. It is submitted that this is best done by adopting a similar approach to a national Voice. That is, that First Nations either at a local or regional level elect or appoint a local or regional executive. That executive can then provide a Voice to either local or state governments. There is merit in also forming state regional groupings, even where First Nations straddle state boundaries, because of the effect that state government policies and laws have on Aboriginal and Torres Strait Islander peoples.

Next steps

41. The Law Council looks forward to the development of concrete options for a First Nations Voice that will allow for a process of meaningful dialogue between the Australian Government and Aboriginal and Torres Strait Islander peoples in order to ensure that the detail of the Voice are authentic for each community across Australia. This will assist in navigating the complexities inherent in the consideration of this issue, which necessarily includes the extent to which a First Nations Voice is able to properly reflect the diversity of Aboriginal and Torres Strait Islander experiences in modern Australia, and its influence over policy making and legislative development processes.

42. The Law Council awaits the Committee's release of a final report by 29 November 2018 and is hopeful that the report will identify a number of preliminary options upon which further stakeholder feedback will be sought.

Appendix A: additional input from the Law Institute of Victoria

43. In addition to providing input to the core submissions of the Law Council, the LIV has made specific submissions in relation to the recommendation of the Referendum Council that the functions of the Voice, to be set out in legislation, would include commenting on the use by the Australian Parliament of its legislative powers under sections 51(xxvi) and 122 of the Constitution so far as they were relevant to Aboriginal and Torres Strait Islander peoples.
44. The LIV submits that there must be Constitutionally entrenched or legislated obligations on the Parliament to consider the advice of the Voice when enacting laws made under sections 51(xxvi) and 122 to ensure that the Voice is listened to.

Function of the Voice to give advice on laws made under section 51(xxvi)

45. In the LIV's view, the proposal to enshrine a Voice to Parliament in the Constitution will only attain the goals of the Uluru Statement from the Heart and constitute substantive, structural reform if it places a substantive obligation on the Minister responsible for enacting legislation to consider the Voice's advice to ensure that the voices of Aboriginal and Torres Strait Islander peoples are listened to.
46. The LIV has noted its concern that without additional amendment to the Constitution, other than to establish the Voice, there would be no requirement for Ministers to have regard to the Voice when enacting legislation under section 51(xxvi) that relates to Aboriginal and Torres Strait Islander peoples. The LIV therefore wishes to emphasise that there is an important difference between placing an obligation on Ministers to consider the Voice's advice and an obligation on Ministers to act in accordance with that advice.
47. The LIV points out that Parliament has the power to make laws with respect to Aboriginal and Torres Strait Islander peoples for whom it is deemed *necessary* to make special laws under section 51(xxvi). The LIV suggests that the Constitution could be amended to include an objective test for determining the meaning of 'necessary' under section 51(xxvi) that requires the Executive to have regard to the advice of the Voice when enacting legislation with respect to Aboriginal and Torres Strait Islander peoples.
48. The LIV suggests that a way to achieve this could be to redesignate section 51(xxvi) to section 51(xxvi)(a) and insert a new provision, section 51(xxvi)(b). Section 51(xxvi)(b) might provide that 'in regard to any law made under section 51(xxvi)(a) in respect of Aboriginal and Torres Strait Islander peoples, the Executive must have regard to any advice received from the Voice'. The provision would refer to 'the Executive' to ensure consistency with the wording of the Constitution.
49. The LIV further suggests that this new requirement could be implemented by legislation that requires the responsible Minister to table a 'statement of reasons' (similar to a Statement of Compatibility with Human Rights) with any new Bill that is proposed to be enacted under section 51(xxvi) that outlines:
 - The advice of the Voice; and
 - The Government's reasons for acting in accordance with the advice or not acting in accordance with the advice.
50. The LIV submits that this would ensure substantive, structural reform because there would be a requirement that the Government must listen to the Voice when determining

whether legislation can be enacted under section 51(xxvi). The Government would be required to consider its advice and explain why the Government has acted in accordance, or not acted in accordance with the advice, before enacting legislation that will impact Aboriginal and Torres Strait Islander peoples. The LIV is concerned that without such a safeguard, the Voice will not necessarily be listened to by the Government and this would undermine the intention of the reforms.

51. Alternatively, the LIV notes that the requirement to consider the advice of the Voice could be placed on the whole Parliament, instead of just the Executive or the responsible Minister. This would mean that each Member of Parliament would be required to consider the advice of the Voice before voting on a Bill enacted under section 51(xxvi). However, the LIV submits that if the obligation were to be placed on the whole Parliament, each Member of Parliament should also be required to table a statement of reasons outlining their reasons for acting, or not acting, in accordance with the advice, and this would be too onerous.
52. The LIV notes that the Regional Dialogues decided that the establishment of a Voice would be the preferred approach to amending section 51(xxvi). Although the Regional Dialogues revealed 'no significant appetite' to pursue amendment to section 51(xxvi), the LIV notes that this was in response to the 2012 Expert Panel's proposal to repeal section 51(xxvi) and insert a new section providing the power to the Commonwealth to make laws for the *benefit* of Aboriginal and Torres Strait Islander peoples.

Justiciability issues

53. The LIV's proposal to amend section 51(xxvi) to include an objective test for determining the meaning of 'necessary' would mean that the Executive's decision to enact legislation under the head of power is justiciable.
54. The proposal would mean that legislation enacted under section 51(xxvi) with respect to Aboriginal and Torres Strait Islander peoples could be referred to the High Court of Australia where the Executive may not have taken into account the advice of the Voice in determining whether legislation enacted under section 51(xxvi) is necessary. The Executive would have ultimate decision-making power to determine whether the legislation is 'necessary' under section 51(xxvi) as long as the advice has been considered. The Executive would not be required to agree with the Voice's assessment of whether the legislation is necessary.
55. The LIV submits that the proposal would ensure consistency with parliamentary sovereignty and would give Aboriginal and Torres Strait Islander peoples a Voice to the Australian parliament, not in the Australian parliament, while also resulting in substantive, structural reform.

Function of the Voice to give advice on laws made under section 122

56. The LIV is also concerned that without additional amendment to the Constitution there would be no requirement for Ministers to have regard to the Voice when enacting legislation under section 122 that relates to Aboriginal and Torres Strait Islander peoples in the Territories. However, unlike section 51(xxvi) the power to enact laws is not limited to those that are 'necessary'. The power to enact laws under section 122 is plenary in quality and unlimited and unqualified in point of subject matter.⁹

⁹ *Teori Tau v Commonwealth* (1969) 119 CLR 564, 570.

57. The LIV submits that a new requirement could be set out in legislation that requires the responsible Minister to consider the advice of the Voice before enacting legislation under section 122.

A Bill of Rights

58. Finally, the LIV has made an additional suggestion about how the Parliament could be required to not only listen to the Voice, but also to act on its advice, noting the role of a potential bill of rights at a federal level. The Law Council supports the development of a charter or bill of rights at the federal level.

59. The LIV notes that a bill of rights would protect and promote all rights contained in the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Declaration on the Rights of Indigenous Peoples, including the Indigenous right to self-determination.

60. The LIV submits that a Bill of Rights should be constitutionally entrenched to ensure that these rights are protected from interference or abrogation by any future parliament. Without constitutionally entrenched rights, the Parliament can simply choose to ignore them depending on political exigencies, as can be seen in the Hindmarsh Island bridge affair, the 1998 amendments to the *Native Title Act 1993* (Cth), the abolition of the Aboriginal and Torres Strait Islander Commission, and the suspension of the *Racial Discrimination Act 1975* (Cth) under the Northern Territory Intervention.

61. In the view of the LIV, a constitutionally entrenched Indigenous right to self-determination would mean that Indigenous peoples are entitled to proper dialogue and good faith negotiations with the state. This right could not be abrogated by the Parliament. If a Voice were established and a Bill of Rights were constitutionally entrenched, the Parliament would be obligated to negotiate in proper dialogue with the Voice and act on its advice.

62. However, the LIV recognises that a constitutionally entrenched bill of rights is unlikely to be supported politically and may not be supported at referendum. Alternatively, the LIV suggests that the Parliament should enact legislation to create a bill of rights that protects the right to self-determination.