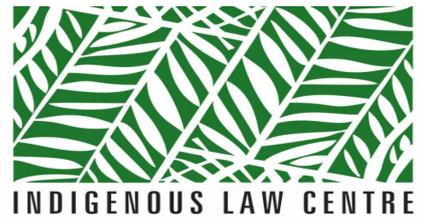


INDIGENOUS VOICE CO-DESIGN PROCESS

An Expert Analysis of the NIAA Public Consultations

29 June 2021

Prepared by:



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Table of Contents

<i>Executive Summary</i>	5
<i>Introduction to the Expert Analysis of the NIAA Public Consultations</i>	6
<i>Part I: Exclusion of constitutional enshrinement from the Terms of Reference</i>	8
<i>Part II – Public submissions reveal overwhelming support for constitutional enshrinement</i>	13
(a) Overwhelming public support for constitutional enshrinement	13
(b) Lack of public support for a legislated Voice, or a legislate-first option	20
<i>Part III – Next Steps</i>	24
<i>Appendix A: Methodology</i>	25

List of Figures

	Page
Figure 1: Public Submissions to the Co-Design Process by support for a constitutionally enshrined Voice (N = 2554)	14
Figure 2: Public Submissions to the Co-Design Process that Support a Constitutionally Enshrined Voice by Author	15

Executive Summary

This is an Expert Analysis of the NIAA Public Consultations that were undertaken as part of the 2020-2021 Co-Design Process for a national and regional/local Indigenous Voice. The genesis of this report is in concerns that the exclusion of the question of constitutional enshrinement from the terms of reference of the Senior Advisory Group and Voice Co-Design Groups has undermined the legitimacy of any final Voice design.

The analysis contained in this report has been undertaken by constitutional law, Indigenous law and human rights law experts, with experience in qualitative data analysis. The report has considered all publicly available information on the Co-Design Process and its consultations. Its findings can be summarised as follows:

1. Strong and persuasive arguments have been mounted in expert submissions that it is not appropriate to divorce “design” of a First Nations Voice from the question of constitutional enshrinement. In the course of “designing” the form of an Indigenous Voice, the question of its constitutional status must be determined.
2. The Australian public overwhelmingly want the Government to accept the invitation of the Uluru Statement from the Heart (Uluru Statement). Ninety per cent of the public submissions to the Co-Design Process demonstrate support for constitutional enshrinement of a First Nations Voice. They want the government to put the question of a constitutional First Nations Voice to a referendum.
3. There is very low public support for a legislated Voice, or an approach of ‘legislate first’ with constitutional enshrinement to possibly follow. A third of public submission state explicitly that a referendum on the Voice needs to be held before the establishment of any legislation for the Voice.
4. There are fundamental objections made by experts in their submissions to an approach of ‘legislate first’ with constitutional enshrinement to possibly follow; they warn that should a ‘legislate first’ option be taken, it would be highly unlikely that constitutional enshrinement will ever be pursued.

These conclusions leave the strong impression of high public support for the government to pursue a constitutional referendum to enshrine the First Nations Voice as a matter of urgency once the Co-Design Process is concluded.

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Indigenous Law Centre, UNSW

29 June 2021

Introduction to the *Expert Analysis of the NIAA Public Consultations*

On 9 January 2021, Minister for Indigenous Australians, Ken Wyatt, released the Interim Report of the Indigenous Voice Co-Design Process ('the Interim Report') to the Australian public for consultation. The Interim Report is almost a year's worth of work of three groups: a Senior Advisory Group, the National Voice Co-Design Group and the Local/Regional Co-Design Groups. The Interim Report was delivered by the Senior Advisory Group to the government in October 2020. Further context for the Interim Report is provided in Part I of this Report.

The Interim Report presents a series of recommendations for the design of a National Voice and Local/Regional Voices. Some of these recommend a single design option, and others recommend a small number of options for public comment.

Following the release of the Interim Report, a public consultation process commenced, which sought feedback from the public on the recommendations through making written submissions or answering an online survey and also through public consultation hearings that have been guided by members of the three Voice Co-Design Groups and coordinated by the National Indigenous Australians Agency (the 'NIAA'). In addition, there were closed-stakeholder consultations convened as part of the public consultation process.

The public consultations have revealed serious concerns as to the scope of the Terms of Reference of the Voice Co-Design Groups, purporting to limit their remit to questions of design only, removing from that remit the question of whether any final Voice should be constitutionally enshrined. These concerns have left many First Nations people and communities and the wider Australian public feeling as though their views and input, particularly insofar as it relates to their desire to see a constitutionally enshrined First Nations Voice, will not be considered by the process.

Indeed, the submissions of two significant land councils, the Central Land Council in the Northern Territory and the NSW Aboriginal Land Council, both express serious concerns with the integrity and accountability of the public consultation process. The NSW Aboriginal Land Council calls on the government to produce 'a complete independent report ... on the outcomes of the whole consultation process, identifying the issues that were raised so that Aboriginal and Torres Strait Islander organisations and communities can understand the full range of matters across Australia and consider the best way to respond.'¹

Against this background, the Indigenous Law Centre ('the ILC') at the University of New South Wales (UNSW) has undertaken a systematic review of the publicly available resources that reveal what the public have said about the Interim Report through the formal

¹ NSW Aboriginal Land Council, Submission to the Indigenous Voice Co-Design Process Interim Report (16 April 2021), 14. See also the call in the Central Land Council, Submission to the Indigenous Voice Co-Design Process Interim Report (30 April 2021) 17-18.

consultation process. This report, **An Expert Analysis of the NIAA Public Consultations**, is released to further the objectives of the ILC: to support the work of the Aboriginal and Torres Strait Islander representatives who issued the Uluru Statement through educating the Australian public and upholding the legal, social, and cultural aspirations of the Statement.

The ILC works closely with the Uluru Dialogue team. The Uluru Dialogue, chaired by Aunty Pat Anderson AO and Roy Ah-See, is imbued with the cultural authority and the mandate from the Uluru Statement from the Heart. That mandate is to pursue the key reforms of a First Nations Voice to Parliament enshrined in the Constitution and a Makarrata Commission to supervise agreement-making and truth-telling.

The ILC comprises of Indigenous and non-Indigenous legal experts and researchers. Since its establishment in 1981, the work of the ILC has been important to Aboriginal and Torres Strait Islander communities. The Centre has been involved in High Court cases such as *Koowarta v Bjelke-Petersen* and *Mabo v Queensland*, and international Indigenous rights advocacy including in the development and implementation of the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*. The ILC has also been integral to the development of constitutional reform over the past decade under the Directorship of Professor Megan Davis.

In writing this Independent Evaluation Report of the Public Consultations, the ILC seeks to provide the public with an analysis that is external to government of the views that have been expressed during this process. In particular, it notes the strength of support amongst Australians for the government to accept the invitation of the Uluru Statement and move as a matter of urgency to constitutionally enshrine a First Nations Voice.

This report is structured as follows.

Part I will explain how the public contributions to the consultation process have highlighted why it was inappropriate for the Commonwealth Government to preclude consideration of constitutional enshrinement for the Voice from the Co-Design Terms of Reference. They also demonstrate the necessity of considering enshrinement together with design.

Part II will explain our analysis of the high level of public support expressed for constitutional enshrinement of a national First Nations Voice. It will also explain the negative public response to the idea that the Voice might be legislated before consideration is given to holding a constitutional referendum, and the dangers of doing so.

Part I: Exclusion of constitutional enshrinement from the Terms of Reference

The Senior Advisory Group (SAG) was announced in November 2019, with the remit of advising the Minister for Indigenous Australians on ‘options for models that will ensure that Indigenous Australians are heard at all levels of government – local, state and federal.’² Under the SAG, a National Co-Design Group and a Local/Regional Co-Design Group was established. The National Co-Design Group’s Terms of Reference stated:

The principal focus of the National Group is to develop options and models for a National Voice, including articulating relevant detail (such as the structure, membership, functions and operation of a voice), and how to give a National Voice legal form, excluding drafting of the establishing legislation.³

Despite the direction to consider ‘options and models’ for a National Voice, and ‘how to give a National Voice legal form’, specifically excluded from the scope of the SAG’s and the National Co-Design Group’s Terms of Reference was:

Making recommendations as a Group through this Co-Design Process on constitutional recognition, including determining the referendum question or when a referendum should be held.⁴

The work of the Groups in the Co-Design process and the Interim Report itself have attempted to maintain this division between “design” and “constitutional recognition”, including through constitutional enshrinement. The Interim Report makes no mention of the possible constitutional form of the Voice. Rather, the Senior Advisory Group Reflections and Recommendations state:

Consultation will need to contextualise some broader policy issues that are likely to arise from this process, including: ...

- A need to separate out constitutional recognition from the discussion. While the Australian Government has publicly stated its commitment to hold a referendum to recognise Aboriginal and Torres Strait Islander people in the Constitution should consensus on a question be found, this Indigenous Voice consultation process needs to focus on the detail of the Indigenous Voice and not focus on Constitutional amendments.

² See Media Release, Ken Wyatt, 8 November 2019, <https://ministers.pmc.gov.au/wyatt/2019/voice-co-design-senior-advisory-group> and Senior Advisory Group, Indigenous Voice Co-Design Process, *Terms of Reference*.

³ National Co-Design Group, Indigenous Voice Co-Design Process, *Terms of Reference* [6].

⁴ Ibid [19(d)], Senior Advisory Group, Indigenous Voice Co-Design Process, *Terms of Reference* [20(b)]. A similar exclusion is contained in the Local/Regional Co-Design Group, Indigenous Voice Co-Design Process, *Terms of Reference* [19(c)].

- Framing messaging will be important to explain the relationship with and differences between the Co-Design process and the Uluru Statement from the Heart.⁵

Despite this attempt to divorce the Co-Design process from the Uluru Statement, the relationship between them is a **direct and linear** one.

The 2018 Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples provides the link between the two processes. As the Executive Summary of the Voice Co-Design Process Interim Report states:

The Co-Design task follows the recommendation of the 2018 Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples to achieve a design for the Indigenous Voice, considering local, regional and national elements and how they interconnect.⁶

The Co-design process was *immediately preceded* by the recommendations of the 2018 Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples. The Joint Select Committee had been established to consider constitutional recognition more generally – and consider the work and recommendations of earlier reports⁷ – the Chairs acknowledged in their foreword that the *Uluru Statement from the Heart* was a major turning point in the debate.⁸ The call for a constitutionally enshrined First Nations Voice was acknowledged to have reorientated the debate. The Interim Report further indicated that the Co-Design Process built on previous reports, including in the last decade, the *Uluru Statement from the Heart*, the Final Report of the Referendum Council as well as reports commissioned by the Council, and the 2018 Joint Select Committee’s Report.⁹

The call in the *Uluru Statement from the Heart*, and the recommendation of the Referendum Council, was for a constitutionally enshrined First Nations Voice with a primary function of speaking to the Parliament. The more than 1000 First Nations people who were involved in the processes behind the Uluru Statement asked not simply for a Voice in the government, or in the parliamentary process, but a constitutionally enshrined First Nations Voice to Parliament. The reasons behind this were clear, and can be distilled as follows:

1. A constitutionally enshrined First Nations Voice to Parliament will provide Aboriginal and Torres Strait Islander people with a **stable and guaranteed** institutional vehicle

⁵ Indigenous Voice Co-Design Process, *Interim Report to the Government* (October 2020), 157.

⁶ Ibid 6.

⁷ Including the *Expert Panel on Constitutional Recognition of Indigenous Australians* (Final Report 2012) and the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (2015).

⁸ Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Final Report* (November 2018) vii.

⁹ Indigenous Voice Co-Design Process, *Interim Report to the Government* (October 2020), 60.

through which to speak to the Parliament and Government on laws and policies that affect them. Previous institutions, lacking constitutional protection, have been liable to be abolished or defunded by Government. A stable and guaranteed Voice will give effect to First Nations' right to self-determination, and lead to an improvement in policy and law-making in Aboriginal and Torres Strait Islander affairs.¹⁰

2. A First Nations Voice must be constitutionally enshrined to give it **the political status and power** it will need to speak with legitimacy and authority to the legislative and executive branches of government in our constitutional system. Without constitutional enshrinement, and the necessary referendum to achieve that, a Voice risks being dismissed by Parliament and the Government, and risks becoming another version of ineffective "consultation" that has plagued Aboriginal and Torres Strait Islander affairs in the past.¹¹
3. A constitutionally enshrined First Nations Voice will **recognise** the historical and contemporary place of First Nations people in the Australian state, and their unique cultural and spiritual connection with and responsibility for their Country.¹²

The Joint Select Committee recommended that further work needed to be undertaken before the constitutional reform it proposed could be progressed. It recommended a two-step process:

Recommendation 1: In order to achieve a design for the Voice that best suits the needs and aspirations of Aboriginal and Torres Strait Islander peoples, the Committee recommends that the Australian Government initiate a process of Co-Design with Aboriginal and Torres Strait Islander peoples. ...

¹⁰ See, eg, the following quotes from delegates at the Regional Dialogues:

"We don't want to go back to ATSIC where it can be abolished."

"ATSIC had a powerful voice in Parliament when it existed. ... But its weakness was that it could be abolished by government."

¹¹ See, eg, one quote from a delegate at the Regional Dialogues:

"If it's in the Constitution, it sets the tone for all legislation."

"We need certainty through constitutional change. We can draw down power from the Constitution, it can give us political power on the ground."

¹² The Uluru Statement says:

'With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia's nationhood. ...

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.'

Recommendation 2: The Committee recommends that, following a process of Co-Design, the Australian Government consider, in a deliberate and timely manner, legislative, executive and constitutional options to establish the Voice.¹³

Following the Joint Select Committee’s report, the Government established a Co-Design Process, in accordance with the Committee’s first recommendation.

What has become clear during the Co-Design Process is that it is not appropriate to divorce “design” of a First Nations Voice from the question of constitutional enshrinement. In the course of “designing” the form of an Indigenous Voice, the question of its constitutional status must be determined, as this will influence policy choices including around its function, its interaction with other arms of government and particularly the Parliament. Furthermore, it will influence the independence, stability and funding of the Voice.

The public consultation process that was undertaken on the Interim Report has demonstrated this point. Experts from across Australia have told the Government that the Co-Design process has highlighted the importance of constitutional enshrinement to the design of the Voice.

A submission made by 45 public law academics from across the country’s universities explained:

The terms of reference for the Co-Design Process specifically excluded making recommendations about constitutional recognition. However, it is our strong and unanimous view that for the Voice to have legitimacy, to achieve its objectives and perform its functions, it must be constitutionally enshrined. In this respect, this submission speaks to the following issues that are discussed in Chapter 2 of the Interim Report: the Voice’s objectives, its functions, its interface with Parliament and the government, and its form.¹⁴

The Law Council of Australia also explained how fundamental constitutional enshrinement is to design, and specifically to the purpose and efficacy of the Voice:

The Co-Design Process does not include fundamental aspects of this prior work [by the Uluru Statement from the Heart and Referendum Council]: first, that the Voice be organised around the individual First Nations and, second, that the Voice be constitutionally enshrined. This fundamentally changes the proposition put forward at the Uluru Convention, compromising the Voice’s intended purpose and efficacy.

¹³ Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Final Report* (November 2018) xvii–xviii.

¹⁴ Public Lawyers, Submission to the Indigenous Voice Co-Design Process Interim Report (20 January 2021) 1.

On this basis, the Law Council cannot offer its support for the proposals put forward through the Co-Design Process.¹⁵

A submission from Dr Diann Rodgers-Healey, an academic from the University of Wollongong and the Director of the Australian Centre for Leadership for Women (ACLW), further explained the connection:

[The exclusion of making recommendations about constitutional recognition] creates critical uncertainty as to whether the Voice will be legislated or enshrined in the Constitution by a referendum. Any design of the Voice cannot be separated from addressing its constitutional enshrinement, as this undermines the longevity, authority and power of the Voice.

Addressing the configuration of the Voice in the knowledge that it will be put forward in a referendum to be constitutionally enshrined provides a context necessary for evaluation of the Voice, as its import, infrastructure and validity are deepened. Inclusion of the Voice in the Constitution, the legal and political foundation document of Australia, which is the heart of Australia's nationhood, will ensure that the Voice is given constitutional protection, stability and authority.¹⁶

¹⁵ Law Council of Australia, Submission to the Indigenous Voice Co-Design Process Interim Report (30 April 2021), 5 [3].

¹⁶ Dr Diann Rodgers-Healey, Submission to the Indigenous Voice Co-Design Process Interim Report (17 April 2021) 1.

Part II – Public submissions reveal overwhelming support for constitutional enshrinement

While constitutional recognition was excluded from the Terms of Reference of the Senior Advisory Group and the National Voice Co-Design Group, and this exclusion was reflected in the Interim Report, the Australian public used the submission process as an opportunity to express overwhelming support for a constitutionally enshrined First Nations Voice and the Uluru Statement.

Our analysis of the public submissions to the Co-design Process shows that the Australian public overwhelmingly want the Government to accept the invitation of the Uluru Statement. They want the Government to put the question of a *constitutional First Nations Voice* to a referendum. The submissions also indicate there is very low public support for a legislated Voice, or an approach of ‘legislate first’ with constitutional enshrinement to possibly follow.

(a) Overwhelming public support for constitutional enshrinement

Submissions from the public to the NIAA Co-Design Process were overwhelmingly in support of constitutional enshrinement of a First Nations Voice. As at Wednesday 9 June 2021 (12pm), more than a month after public submissions closed, **2554 public submissions** had been uploaded to the NIAA website.

This represents a high level of engagement by the Australian public with the submission process. To put it in context of other government and parliamentary inquiries into constitutional recognition, the 2018 Joint Select Committee received 480 submissions; the 2015 Joint Select Committee received 139 submissions. The Referendum Council received 1,111 submissions. The Expert Panel was the only process that outstrips the level of engagement, with more than 3500 submissions. Other reform bodies similarly receive significantly fewer submissions than that received in this process. In other areas, the Productivity Commission’s most recent report on national water reform (2020) received 194 public submissions; the Australian Law Reform Commission’s most recent report on family law reform (2019) received 426 submissions.

The public submissions came from a broad cross-section of the Australian community, and included submissions from substantive Indigenous member-based organisations such as land councils, experts in Indigenous affairs and law reform, and individuals and organisations from all walks of life. Submissions ranged from brief and single page statements, to long and technical documents. There was evidence in many submissions that people and organisations had engaged with the educational materials produced by groups such as the Uluru Dialogue and From the Heart. Many individuals and groups drew upon these resources when expressing their support for constitutional enshrinement of the Voice. There was strong evidence that many who made submissions consciously sought to remain faithful to the objectives and sequence of the Uluru Statement, including in respect of a pursuing a constitutionally enshrined Voice as a matter of priority and urgency.

2198 of the public submissions expressly support constitutional enshrinement of a First Nations Voice, that is **86 per cent of all submissions**. A further 101 submissions, or 4 per cent, indicate in-principle support for constitutional enshrinement of a First Nations Voice, that is, expressed support for the Uluru Statement, or some equivalent form of in principle support for structural, constitutional reform.¹⁷ **Accordingly, of the public submissions to the Co-Design Process uploaded to date, 90 per cent (or 2299 submissions) demonstrate support or in-principle support for constitutional enshrinement of a First Nations Voice.**

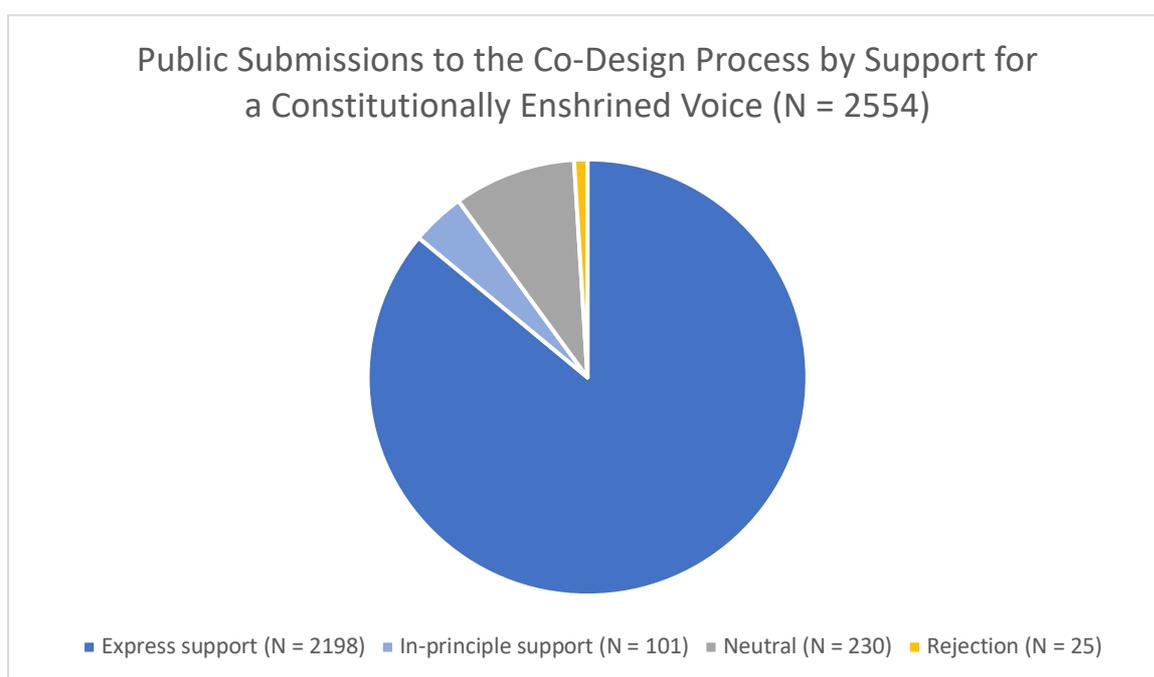


Figure 1: Public Submissions to the Co-Design Process by support for a constitutionally enshrined Voice (N = 2554)

Constitutional enshrinement was widely supported by non-Indigenous individuals, First Nations individuals and organisations/groups. 1411 of the public submissions in support of constitutional enshrinement were made by non-Indigenous individuals (61 per cent), 384 submissions were made by organisations/groups (including groups of individuals, corporate organisations, First Nations community organisations, and community groups) (17 per cent) and 79 submissions were made by individuals who identified as First Nations people (3 per cent). For just under a fifth of submissions in support this information was unclear (425 submissions, 18 per cent).¹⁸

¹⁷ For further detail on methodology and coding, please see Appendix A.

¹⁸ This was typically due to the submission being short form and/or including no indicators as to whether an individual was First Nations or non-Indigenous.

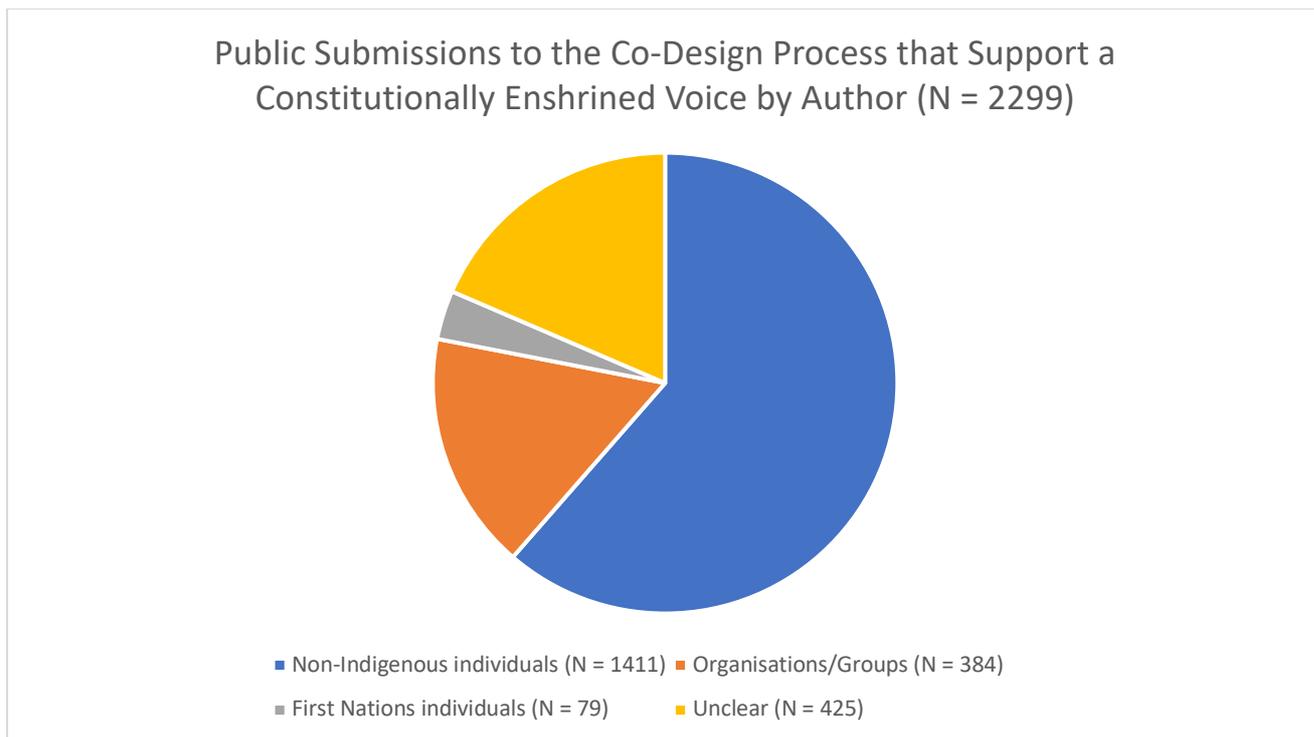


Figure 2: Public Submissions to the Co-Design Process that Support a Constitutionally Enshrined Voice by Author (N = 2299)

It should be noted that there are very low levels of disagreement with the proposal for a First Nations Voice. Only 25 (or 1 per cent)¹⁹ of the public submissions to the Co-Design Process expressly disagreed with the proposal of a First Nations Voice.

The remaining 230 submissions were coded as ‘Unstated’ to the concept of a constitutionally enshrined First Nations Voice as they did not put forward a perspective regarding constitutional enshrinement. These submissions made up 9 per cent of the public submissions to the Co-Design Process.²⁰

Qualitative review of the submissions indicate that individuals and organisations/groups strongly support constitutional enshrinement of the First Nations Voice for a range of reasons, including the following:

- **Constitutional enshrinement will secure permanent change and will ensure the Voice is not removed at the whim of the government/future governments.** The dismantling of institutions such as ATSIC and the National Congress of Australia’s First Peoples was cited to demonstrate the way governments may politicise First Nations affairs and undermine First Nations efforts at self-determination when

¹⁹ This figure includes one submission that has been uploaded twice.

²⁰ Submissions within this category may have broadly supported the concept of a First Nations Voice, but did not indicate a view as to whether that Voice should be constitutionally enshrined. Further detail regarding this is available at Appendix A.

institutions are not protected through structural reform. For instance, Denise McConnachie from Wollongong said:

*'I have observed what occurred to ATSIC at the hands of a hostile government. Legislated bodies can be unlegislated, at a whim. The Voice to Parliament needs to be secure, consistent and an inalienable right for First Nations people. This right must be part of our National Constitution. This is the only way to establish equality and to move forward to a better Australia.'*²¹

Another anonymous submission stated that *'For too long "indigenous affairs" have been a political football, with extreme shifts in policy depending on the government of the day.'*²² This sentiment was echoed by First Nations individual Matt Jarrett, who said in his submission that Australia needs a constitutionally enshrined Voice: *'so that the plight of First Nations people and communities are not used as political leverage and subject to the whim of the government in power on any given day.'*²³

- **Constitutional enshrinement will ensure that the legislative form of the Voice can be changed over time if need be, but the structural representation will remain secure.** For instance, Gail Fulton from Sydney said in her submission:

*'The voice is about who we are as a country. It represents a core principle about how this country should operate and it belongs at the highest level of our legal structures. Not subject to whims of passing governments but standing solid for all time. The details can and should change as we change but the principle should stand.'*²⁴

In their public submission, Australian Lawyers Alliance similarly stated:

*'The detail of the Voice's design, including its membership and governance structure, would be contained in legislation passed after constitutional enshrinement, allowing the Voice to be adapted to future circumstance.'*²⁵

- **Constitutional enshrinement matches the aspirations of the Uluru, and represents a consensus position, derived from thorough, deliberative processes led by First Nations peoples.** For instance, in their submission Vintage Reds Canberra submitted:

'The Uluru Statement From the Heart was a magnificent feat of cooperation, organisation, negotiation and diplomacy by Indigenous Australians. The

²¹ Submission #1904.

²² Submission #2536.

²³ Submission #2172.

²⁴ Submission #2582.

²⁵ Submission #524.

*Statement is a fine example of reason, compassion, wisdom and statesmanship from which we all have much to learn.'*²⁶

In their submission to the process, Ngalya Indigenous Corporation stated:

*'The delivery of the Uluru Statement from the Heart was a watershed moment for this nation. The statement, representing the culmination of an unparalleled consultation of First Peoples, following decades of activism and years of various reviews, reports and statements on Constitutional Recognition, called for an end to the structural exclusion of First Nations and delivered a clear path forward for empowerment and unity. The path forward requires that a structural promise to listen to Aboriginal and Torres Strait Islander voices be enshrined in the Australian Constitution.'*²⁷

- **The Australian Constitution is an outdated document that was founded on First Nations dispossession. Constitutional reform through enshrinement of the Voice will appropriately recognise First Nations peoples in Australia's founding document. This will go some way to healing the wrongs of the past, by recognising Australia's First Nations but also by giving First Nations people a say in what happens with their communities, their families and their lives.** As one anonymous First Nations person said in their submission:

*'Having a voice is not only the right thing to do, but it is also logical, if you want real change, involve us in the decision making and tell the truth, not only about our history but how our people are still being treated and perceived.'*²⁸

As Bradley Leahy from Western Australia said in his submission:

*'The constitution is the most fundamental charter of our country. Laws can be made and other laws can change them. The constitution underpins who we are as Australians, not just what is legal and what is not.'*²⁹

- **The process of putting the Voice to a referendum will ensure the Australian public is educated about the Voice, and this process will add greater legitimacy to the reform, allowing Australians to take ownership over the change.** For instance, as an anonymous individual from Lismore, New South Wales, said:

*'The referendum process required to enshrine the Voice in the Constitution is what will prove and validate the public support for the Voice and give it the strength and legitimacy it will need.'*³⁰

²⁶ Submission #331.

²⁷ Submission #2785.

²⁸ Submission #2544.

²⁹ Submission #2028.

³⁰ Submission #1924.

Another anonymous individual from South Australia said:

‘As a lawyer, I believe that enshrining the Voice to Parliament in the Constitution is key to ensuring it is effective and permanent. A referendum will result in the education of the Australian public, and will guarantee that the Voice’s legitimacy can never be denied and its rightful place in our Parliament can no longer be ignored.’³¹

Constitutional enshrinement of the Voice was widely recognised as a pre-condition for achieving equality and fairness for First Nations people in Australia. Individuals and organisations/groups who made a submission to the process also cited a range of reasons why a constitutionally enshrined Voice was important to their communities, their families and Australian society. These reasons included:

- That successive governments have failed to ‘Close the Gap’ and the Voice will help Australia’s First Nations to have a greater say in policy making around issues of relevance to First Nations people. First Nations people know best how to address issues affecting First Nations people and communities.
- That accepting the invitation of the Uluru Statement in full will demonstrate commitment to ending discrimination and inequality between First Nations and non-Indigenous Australians.
- That the Voice will help to make Australia more inclusive and bring Australia into line with other international jurisdictions that support self-determination of First Nations peoples in accordance with human rights standards.
- That the Voice will contribute to nation-building in Australia and promote a stronger, more reconciled future between First Nations people and non-Indigenous Australians.
- That change is long overdue.

As primary school students N (age 9) and E (age 10) said in their submission (prepared alongside their year 3/4 classmates):

‘[First Nations people] should have a say because everyone’s voice and point of view is important and it should be listened to because they have been here for sixty five thousand years and they are no different than everyone else. They have the right to say what they need to say’.³²

As Deadly Inspiring Youth Aboriginal and Torres Strait Islander Corporation stated in their submission:

‘We urge the Australian Government to provide the Australian people an opportunity to express their support for an enshrined voice in the constitution. A referendum must

³¹ Submission #2535.

³² Submission #981.

*occur before legislating an Indigenous Voice. We cannot be fearful that Australians are not in support of constitutional recognition. Instead, we carry hope in our hearts that we will walk together for a better future.'*³³

Review of public consultations

In addition to the public submissions process, as at 12pm 9 June 2021, 79 summaries of public consultations had been uploaded to the NIAA website. These summaries provide attendance numbers but do not provide details as to whether attendees were First Nations or non-Indigenous people.

Public consultation summaries suggest that constitutional enshrinement was raised as an issue in at least 30 consultations (38 per cent) despite not forming part of the Terms of Reference for the Co-Design Process. In almost all of the consultations where it was raised, attendees expressed support for constitutional enshrinement of the Voice (28 sessions), although in some sessions it would also appear that concerns were raised including around whether a referendum would succeed. Unfortunately, due to constitutional enshrinement being excluded from the Terms of Reference, current research highlighting high levels of support for a referendum was apparently not introduced or discussed in any of the public meetings.

While public consultation summaries mostly provide a thin, incomplete overview of the discussions held, a few summaries provide more detail around why participants thought constitutional enshrinement of the Voice was important. For instance, the summary from Port Lincoln session 1 notes that:

'Some participants commented that they had had these type of discussions with Government before and were cautious of getting too excited about something that might end with a change of government. It was suggested the Voice should be enshrined in the constitution to protect it from simply being abolished by Government.'

In many consultations where constitutional enshrinement was apparently not raised, participants nonetheless expressed concerns around the need to ensure permanency and stability for the Voice. For instance, in the Napranum public consultation the summary describes that *'Participants highlighted the importance of certainty, reflecting on the termination of ATSIC'*. Similarly in the first consultation in Ceduna the summary notes that *'Participants strongly agreed that they want to see action and ensure that any Voice is adequately protected'*. In both Katherine sessions issues related to permanency were raised – in the second session a participant apparently described that the Voice should be *'something with teeth.'*

Notes from several public summaries also suggest that participants do not clearly understand the lack of stability that a legislatively enshrined Voice would provide. This

³³ Submission #2922.

highlights another limitation of decoupling constitutional enshrinement from design process for the Voice. For instance, in the first consultation in Ceduna, participants described that *'the Voice needs to sit in legislation to be acted upon and given stability.'* Similarly in Coffs Harbour session 2, the summary notes that *'Participants stressed that the structure must be legislated so that it cannot be abolished'*. By failing to include constitutional enshrinement in the Terms of Reference for the Co-Design Process, participants' concerns around the stability and longevity of the Voice were unable to be effectively addressed within these sessions.

(b) Lack of public support for a legislated Voice, or a legislate-first option

In addition to the overwhelming support for constitutional enshrinement expressed in the public submissions process, there are strong indications that the public do not support a legislated model for the Voice, or the proposal that a Voice might be legislated first, to be potentially followed by constitutional enshrinement at a later time.

The lack of public support for a legislated Voice is demonstrated by the results of a national survey conducted during the consultation process. This is the *Australian Constitutional Values Survey 2021*, a national survey conducted by CQUniversity and Griffith University in February 2021. In a submission to the Co-Design Process, the academics leading that survey, Professor AJ Brown, Dr Susan Bird and Dr Jacob Deem explained their results. First, they explained levels of support for a constitutionally enshrined Voice:

Over 50% of respondents were expressly in favour of a constitutionally enshrined First Nations Voice to Parliament. The next most chosen option was 'undecided', accounting for 30% of respondents. This meant that only one in five respondents were expressly against the idea of constitutionally enshrining a Voice to Parliament.

Of respondents who had a clear opinion (i.e., excluding 'undecided' responses), 75% were in favour of constitutional change.³⁴

They also then tested public opinion on a legislated Voice. They explained their results, which was a very low level of support:

Only 26% of respondents said that they would support a purely legislated Voice to Parliament – that is, half as many as would support constitutional reform to establish the Voice.

Further, after accounting for respondents who said they would be in favour of both reform options, but would prefer constitutional over legislated change, support for a legislated Voice drops to 18.6%.

³⁴ Jacob Deem, Susan Bird and AJ Brown, Submission to the Indigenous Voice Co-Design Process Interim Report (29 March 2021) 6.

Only 4.5% of respondents were in favour of a legislated Voice but against a constitutional Voice. This indicates that most respondents who are supportive of a First Nations Voice see value in taking the extra step of enshrining the body in the Constitution.³⁵

The Constitutional Values survey demonstrates a high level of public support for a constitutionally enshrined First Nations Voice, and a low level of public support for a legislated version.

The ILC analysis of the public submissions to the Co-Design process also shows that a third of all public submissions (846 submissions, or 33 per cent of all submissions) expressly describe that a referendum on the Voice needs to be held **before** the establishment of any legislation for the Voice. Only 4 public submissions specifically express a preference for a legislate-first approach – where the Voice could be established in legislation prior to a referendum being held.

Some submissions to the Co-Design Process were extremely critical of a mooted proposal, also suggested by Co-Design members during public consultation,³⁶ to “legislate first, constitutionally enshrine later”. A submission by a number of key constitutional experts involved in the Referendum Council, and the Regional Dialogues and the First Nations Constitutional Convention, Professor Megan Davis, Professor Gabrielle Appleby, Associate Professor Sean Brennan and Dr Dylan Lino, explained:

[C]reating the Voice through legislation first predetermines that constitutional enshrinement will never happen. Legislating the Voice first will fatally undermine the public’s sense that the further step of constitutional enshrinement needs to be taken – even though constitutional enshrinement is essential for the Voice’s legitimacy, independence and longevity. Furthermore, legislating first is premised on the erroneous idea that constitutional enshrinement will naturally follow once the Voice has shown itself to be effective. That idea is erroneous for two reasons. First, it is highly unlikely that a legislated-only Voice will be able to demonstrate its effectiveness: only constitutional enshrinement can guarantee that the Voice has the legitimacy, independence and durability it needs to be effective. Second, even if a legislated-only Voice could somehow operate effectively, it is extremely unlikely that a Parliament or government confronted with an effective legislated Voice – that is, a Voice that successfully tempers the exercise of political power by Parliament and the government in Indigenous affairs – will want to confer greater legitimacy, independence and permanence on that institution by writing it into the Constitution. Instead of strengthening an effective legislated Voice through constitutional enshrinement, the Parliament and government are far more likely to weaken or even abolish it, as they have with earlier Indigenous representative bodies. For these

³⁵ Ibid 8.

³⁶ See Hobart session 2 public consultation summary.

reasons, a decision to defer the matter of constitutional enshrinement until after the Voice has been legislated is effectively a decision to stop constitutional enshrinement from ever occurring.³⁷

The Cape York Institute's submission states "legislating first is the wrong approach", and makes the case against this approach on legal, political and moral grounds.³⁸ The submission explains that to legislate first would require reliance on the races power in the Constitution (s 51(xxvi)), which, as initially drafted, excluded Aboriginal people from its scope, and has subsequently been relied upon to water down and abolish Indigenous rights and institutions. The Institute explains:

Surely this is the incorrect basis on which to try to permanently reconfigure the relationship between Indigenous peoples and the State. This would not be starting a fresh, fairer relationship; it would be repeating mistakes.³⁹

Further, the Institute explains that legislating first might politically render redundant any future constitutional amendment urging the existence of the Voice. It would also establish a Voice that lacks the necessary authority, independence, and stability for it to be effective. It claims that a legislated voice, vulnerable to abolition, would be 'timid and ineffective'. Such a Voice is not a 'road test' for a constitutional Voice but something different.

Politically, the Institute claims that a legislated first Voice would dissipate the tension and momentum towards achieving constitutional recognition of First Nations through a Voice. It says:

Currently there is a clear gap that the public can see needs to be filled. But legislating a voice without constitutional amendment would irrevocably confuse the issue: the institution's existence will ostensibly negate the need for constitutional reform. Opponents would point to the legislated institution to argue on the one hand that no constitutional reform is needed because an Indigenous Voice already exists; on the other hand, they would point to imperfections in the institution (for no institution composed of imperfect humans can be perfect) to contend it is not worthy of constitutional recognition. Worse, individuals on the legislated voice will likely become targets for constitutional no-campaigners. This would put immense pressure on the body and its members. It is setting the institution up to fail.⁴⁰

Morally, the Institute claims the idea of a 'road-test' is 'like asking Indigenous people to audition for their rightful place in Australia's Constitution. As though 233 years of exclusion, discrimination and non-recognition is not enough – now the First Nations must prove they

³⁷ Gabrielle Appleby, Sean Brennan, Megan Davis and Dylan Lino, Submission to the Indigenous Voice Co-Design Process Interim Report (30 April 2021) 9.

³⁸ Cape York Institute, Submission to the Indigenous Voice Co-Design Process Interim Report (30 April 2021) 17.

³⁹ Ibid.

⁴⁰ Ibid 19.

are worthy before being afforded a constitutionally recognised voice in their own affairs. It is unconscionable and unfair.’⁴¹

Similar points were made by others. For instance, the Atlassian submission states, in supporting a referendum for a constitutionally enshrined Voice:

We emphasise that this referendum should be held before the enabling legislation is passed. If the legislation is passed first, this effectively divorces the two critical elements to realising the proposal set forth in the Uluru Statement and could jeopardise the success of the referendum.⁴²

Professor Rosalind Dixon, Dr Lisa Burton Crawford, Kate Jackson, Professor Andrew Lynch, and Elizabeth Perham from the Gilbert + Tobin Centre of Public Law at UNSW explained in their submission that, in their view ‘it is deeply flawed to believe in this context that legislative change is likely to lead to a process of incremental constitutional change (‘incremental change’).’ They explain:

Incremental change is a plausible and workable approach in some cases, for example where there is a need to build increased knowledge or gain experience about the technical workings of an institution. However, that does not apply to a Voice – because it is not a question of technical complexity, and any constitutional design would necessarily build in scope for legislative updating of certain features of the Voice, and thus a degree of design flexibility.

Further, we believe that there is a natural tendency for legislative change to diffuse and deflect momentum for constitutional change and undermine calls for the necessity of that change. That is true comparatively. But is also an especially real danger in the Australian context where one of the major sources of opposition to constitutional change is often the argument that it is dangerous and redundant. In contrast, as we have demonstrated in this submission, constitutional change is necessary to ensure the success of this reform. Legislative establishment of the Voice risks setting the institution up to fail at its objectives.⁴³

⁴¹ Ibid.

⁴² Atlassian, Submission to the Indigenous Voice Co-Design Process Interim Report (29 April 2021).

⁴³ Rosalind Dixon, Lisa Burton Crawford, Kate Jackson, Andrew Lynch, and Elizabeth Perham, Submission to the Indigenous Voice Co-Design Process Interim Report (March 2021) 5-6.

Part III – Next Steps

This Analysis of the NIAA Public Consultations has outlined key themes that emerge from the public submissions and consultation records of the Indigenous Voice Co-Design Process public consultations. In summary, these can be stated in five principles:

- 1) Extremely high levels of support in the public submissions, and expressions of support at the public consultations, to see the Voice constitutionally enshrined as called for in the Uluru Statement.
- 2) Very low level of support for the Government pursuing a legislated model of the Voice.
- 3) A sense of urgency in the submissions that the Government pursue a constitutionally enshrined Voice, and strong opposition for legal, political and moral reasons for a “legislate first” option, kicking down the road the question of constitutional enshrinement.

These conclusions leave the strong impression of high public support for the Government to pursue a constitutional referendum to enshrine the First Nations Voice as a matter of urgency once the Co-Design Process is concluded.

The work of the Co-Design Process has provided further information about how the Voice might be designed and has thus further progressed the case for a referendum. As the submission from Professor Megan Davis, Professor Gabrielle Appleby, Associate Professor Sean Brennan and Dr Dylan Lino explained:

We believe that the Co-Design Process has crystallised the need for a referendum to constitutionally enshrine the Voice. The process has provided sufficient understanding of the proposal to undertake that referendum. The Interim Report’s reinforcement of key design principles ... demonstrates there is sufficient consensus on these fundamental principles. These principles provide not just adequate, but appropriate, foundations for the government to commit to a referendum to recognise First Nations people through constitutional enshrinement of a First Nations Voice.⁴⁴

⁴⁴ Davis et al 8-9.

Appendix A: Methodology

Public Submissions Analysis

Dataset

Public submissions to the Co-Design Process officially closed on 30 April 2021 with the majority of submissions being uploaded to the website within three weeks of the submission receipt date.

The NIAA advised in a personal communication that submissions were accepted and uploaded to the website beyond this date, and periodic audits have been completed to ensure the maximum number of late submissions and those where there has been a delay in uploading, have been captured.⁴⁵ At the time of writing, the maximum submission number was #3024 with that submission being date-stamped (indicating receipt) on 20 May 2021.

The ILC maintained surveillance over the public submission uploads on the NIAA process from March 2021 until 12pm 9 June 2021. All submissions that were publicly uploaded by this date and time have been included in the analysis. Weekly audits completed until 9 June 2021 suggest that few public submissions were uploaded beyond 31 May 2021.

All publicly uploaded submissions have been reviewed and coded for inclusion in the analysis.

Coding process

The ILC adopted a single/primary-user coding process to ensure coding consistency. A second user was engaged for the purposes of periodically auditing the NIAA database alongside the primary user to identify missing numbers and ensure back capture. For the purposes of coding the submission was read in full and coding recorded in a database.

Data fields

A database was developed for the purposes of coding submissions. This included the following data fields:

- **Submission number** – numerical.
- **Submission name** – free text.
- **Submission author** – category/drop down (options: non-Indigenous individual, First Nations individual, organisation/group, unclear). Non-Indigenous individual was coded where the author of the submissions specifically identified that they were a non-Indigenous person or language in the submission otherwise indicated that they were a non-Indigenous person (such as using the language ‘them’). First Nations individual was coded only where the author self-identified as a First Nations person in the submission. Organisation/group was coded where the submission involved more than one author (for instance, a family), or was identified as being from an

⁴⁵ Personal communication, received Tuesday 1 June 2021.

organisation or group. Unclear was coded where it was not clear who the author was.

- **Submission suburb/area/nation** – free text
- **Submission state/territory**- category/drop down (options: New South Wales, Victoria, Western Australia, Victoria, Queensland, Tasmania, South Australia, Australian Capital Territory, Other, International, Unknown). NOTE: This data was ultimately excluded from the analysis due to dataset limitations (discussed below).
- **Does the submission support constitutional enshrinement?** – category/drop down (options: yes, yes (in principle), no, neutral). The code ‘in principle’ was adopted where the submission indicated support for constitutional enshrinement without expressly stating as such – for instance, by expressing full support for the Uluru Statement. If a submission indicated support for a Voice but did not specify whether that Voice should be constitutionally enshrined, that submission was coded as ‘neutral’.
- **Does the submission indicate that a referendum should be held before the Voice is legislated?** – category/ drop down (options: yes, no).

An initial pilot of 50 submissions was examined to ensure the adequacy of the database and coding fields.

Dataset limitations

The ILC has identified several limitations in the NIAA process of uploading public submissions to the website. Some of these limitations may have an impact on data quality and are accordingly outlined below.

- The ILC is aware that several submissions were not uploaded on the website after they were submitted to the Co-Design Process and notes that these were uploaded only after the authors who made the submission made further enquiries with the Co-Design secretariat as to the whereabouts of their submission. This raises some concern that some submissions that were intended to be made public may not have been uploaded on the NIAA website and may not have been included in the Co-Design process.
- The ILC is aware that some submissions were uploaded as ‘anonymous’ submissions but contained identifying information (such as the author’s full name) that had not been fully redacted.
- There was apparent inconsistency in the redaction of authors’ location information, with some submissions (including named submissions) having this information redacted, and other submissions having this information retained. This inconsistency impacted the quality of state/territory data resulting in fewer than half of all submissions containing this information. Due to unreliability, this data was excluded from the analysis.

- Several authors had duplicate submissions uploaded to the NIAA website. It is believed that this issue affected less than 20 submissions to the process, although it is not clear whether this affected more anonymous submissions. All care was taken to identify duplicate submissions and notate these. For consistency with the public submissions website, duplicate submissions provided with different submission numbers were counted.
- The NIAA upload process means that the numbering of submissions was not always sequential. For instance, the numbering system in some instances went '20, 21, 2453, 24, 26'. All care was taken to identify non-sequential numbers and record these accurately within the database through ongoing audit processes. Particular attention was paid to this issue during periodic audits to ensure no uploads were missed.
- In some instances, public submissions were removed from the website by the NIAA after they had been uploaded and the data had been captured. Where submissions were removed, the entry and all data was removed from the database to ensure alignment with the NIAA website.

Public Consultation Analysis

All 79 summaries of public consultations were reviewed by a single-user and coded. These consultation summaries were coded as to whether constitutional enshrinement was expressly raised (Y/N), concerns around permanency were raised (Y/N) and whether the summary indicated that attendees had positive/negative or both positive and negative views around constitutional enshrinement.

Public consultation summaries were clearly limited as they were short, and were not accuracy checked by attendees after the meetings occurred. Due to their short and non-specific record of the consultation, frequently comments around constitutional enshrinement were recorded in a general way and did not indicate clearly whether attendees were in favour, or against, constitutional enshrinement. For instance, in Townsville session 2, the summary describes that '*There was some discussion about constitutional recognition for Aboriginal and Torres Strait Islander peoples.*' Due to these limitations it is accordingly difficult to ascertain clearly from the summaries what attendees' views on constitutional enshrinement of the Voice were/are.

Surveys

Surveys formed part of the public consultation process for the Voice but unfortunately these surveys were not made public. Accordingly, they have not been analysed in this report.

Stakeholder discussions/meetings

Webinars produced by Co-Design Process members indicate that stakeholder consultations/meetings were convened as part of the public consultation process.

Unfortunately, there are no public records/summaries of these meetings and accordingly they have not been analysed for this report.