

Interim Report to the Australian Government: Indigenous Voice Co-Design Process

17 April 2021

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Thank you for the opportunity to respond to the to the Interim Report to the Australian Government on Indigenous Voice Co-Design Process. I acknowledge the significant work of the Co-design Committees that has led to this Report.

It is, however, disappointing to see that terms of reference for the Co-design Process have excluded making recommendations about constitutional recognition of the Voice, as recommended in the Uluru Statement from the Heart¹ and adopted by the Referendum Council in its Final Report² in 2017.

This exclusion 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.

If this provision that is central to sustained substantive systemic reform is being sidelined, then this needs to be clarified at the outset. A Voice unprotected constitutionally is a diminished Voice as its very existence and nature is vulnerable to political fluctuations of power and control. For this to be in the shadows, belies our effort to properly examine and appraise the Voice.

The Uluru Statement and the Final Report of the Referendum Council emerged from the most significant deliberative dialogue consultation³ of Aboriginal and Torres Strait Islander peoples in 2017. The Referendum Council was established with bipartisan support by the Turnbull government, and it was tasked with advising the prime minister and the opposition leader

¹ The Uluru Statement from the Heart. 2017. <https://ulurustatement.org/the-statement> [Accessed 15 April 2021].

² Referendum Council. 2017. Referendum Council Final Report. https://www.referendumcouncil.org.au/sites/default/files/report_attachments/Referendum_Council_Final_Report.pdf p.66 [Accessed 14 April 2021].

³ Parliament of Australia. 2017. Uluru Statement: A Quick Guide https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/UluruStatement [Accessed 15 April 2021].

on next steps towards a successful referendum to recognise Aboriginal and Torres Strait Islander peoples in the Constitution. The Referendum Council's Final Report recommended for a referendum to amend the Constitution and recognise a representative body that gives Aboriginal and Torres Strait Islander First Nations a Voice to the Commonwealth Parliament. The Council provided the overall context for consideration of the Voice.

It was explicitly stated in the Referendum Council's Final Report⁴, "In consequence of the First Nations Regional Dialogues, the Council is of the view that the only option for a referendum proposal that accords with the wishes of Aboriginal and Torres Strait Islander peoples is that which has been described as providing, in the Constitution, for a Voice to Parliament."

The pursuit of a Voice *in* Parliament rather than a Voice *to* Parliament does not ensure the primacy of Aboriginal and Torres Strait Islander people's participation and their self-determination in what was resolved in a formal and legitimate way as the Uluru Statement from the Heart, and presented in the Final Report to the then Prime Minister and the Leader of the Opposition in June 2017. The pursuit of a Voice in Parliament risks rejection by Aboriginal and Torres Strait Islander people and the many⁵ who are advocating for constitutional recognition, as this reform is only symbolic and minimalistic in nature.

In 2018 the Government promised a referendum on constitutional recognition before the next election⁶. The Government must honour its election commitment to a referendum once a model for the Voice has been settled to ensure that a First Nations Voice to Parliament is protected by the Constitution. In his first Press Club address, Mr Wyatt reiterated this and said, "the Morrison Government has put aside \$7.3 million for a co-design process to "improve local and regional decision making" while \$160 million has been allocated for a future referendum once the model has been determined⁷."

Following a referendum in the next term of Parliament on the enshrining of a First Nations Voice in the Australian Constitution, legislation for the Voice must then be passed. This will give the Voice its foundational legitimacy, power and stability, while enabling Parliament to refine its effectiveness. Sequencing legislating the Voice after the referendum will also ensure that there is less potential in the community for confusion over the referendum.

⁴ Referendum Council. 2017. Referendum Council Final Report. https://www.referendumcouncil.org.au/sites/default/files/report_attachments/Referendum_Council_Final_Report.pdf p.66 [Accessed 14 April 2021].

⁵ CQ University Australia and Griffith University. 2021. Australian Constitutional Values Survey 2021. https://www.cqu.edu.au/__data/assets/pdf_file/0021/190092/australian-constitutional-values-survey-2021.pdf [Accessed 17 April 2021]

⁶ Coalition Government. 2019. Our Plan to Support Indigenous Australians. [online] ParInfo. Available at: <https://parinfo.aph.gov.au/parInfo/search/display/display.w3p;adv=yes;orderBy=dateFirst;page=0;query=%22support%20indigenous%20australians%22%20Content%3ALiberal%20Date%3A01%2F05%2F2019%20%3E%3E%2031%2F07%2F2019;rec=1;resCount=Default> [Accessed 16 April. 2021].

⁷ NITV. 2019. Federal government commits to referendum on Indigenous constitutional recognition in the next three years. 18 July 2019. <https://www.sbs.com.au/nitv/article/2019/07/10/federal-government-commits-referendum-indigenous-constitutional-recognition-next> [Accessed 16 April. 2021].

Diversity in representation and expertise must characterise the membership model for the National Voice so that it is authentically representative, structurally inclusive, has sufficient scale of membership, and appointments are not determined by ministers or government, but solely by Aboriginal and Torres Strait Islander people. It is important that the structure of the National Voice enables effective consideration of the concerns of First Nations People rather than be disabled by factors such as size of membership, support frameworks, inadequate resources and funding.

The proposed maximum 18 member composition⁸ for a National Voice with 2 members per jurisdiction would be potentially challenging, given that 2 members would need to represent each state, territory and the Torres Strait Islands.

Furthermore, for strengthened connection of the National Voice to issues at the coalface, it would be effective for local and regional Voices to provide views from local communities and for this membership to have agency in ensuring that their views and concerns are addressed. Being structurally linked to the National Voice⁹ will enable continuity, grass roots representation and agency.

Voices at a national, regional or local level would require capacity building and resources in order to ensure good governance and effectiveness. The leadership style used in all of these tiers is critical so that power is shared and inclusive, and voices that are not dominant are given equal consideration, and overall national concerns, as well as issues specific to local and regional areas are addressed. Cohesion rather than just a siloed focus will enable macro and micro national reforms.

The proposed obligation on the Australian Parliament and Government to consult the National Voice on Laws which are “special measures¹⁰” under the Racial Discrimination Act 1975, is extremely disconcerting, as these laws should not be in the Australian Constitution in the first place and should be repealed. This proposed obligation reduces the legitimacy of the National Voice from the outset, as it leaves open the possibility for legal discrimination required by the government to be considered and sanctioned by the Voice against First Nations people, whom it represents. It would be more effective for the Voice and the government to reform any residual discriminatory laws upon the establishment of the Voice rather than provide a mechanism for the laws to be enacted.

As the overall orientation is on the National Voice acting in an advisory¹¹ capacity to parliament and the government, either initiated or requested, it would be useful for this

⁸ Aboriginal and Torres Strait Islander National Voice. 2021. <https://voice.niaa.gov.au/sites/default/files/2021-01/detailed-national-voice-proposal.pdf> [Accessed 16 April. 2021].

⁹ National Indigenous Australians Agency. 2021. National Codesign Group. Aboriginal and Torres Strait Islander National Voice <https://voice.niaa.gov.au/sites/default/files/2021-01/detailed-national-voice-proposal.pdf> [Accessed 17/4/21].

¹⁰ National Indigenous Australians Agency. 2021. National Codesign Group. Indigenous Voice Proposal Explainer 1. 2021. <https://voice.niaa.gov.au/sites/default/files/2021-02/proposal-explainer-1-advice-to-parliament-and-government.pdf> [Accessed 16/4/21].

¹¹ National Indigenous Australians Agency. 2021. Indigenous Voice Proposal Explainer 1. <https://voice.niaa.gov.au/sites/default/files/2021-02/proposal-explainer-1-advice-to-parliament-and-government.pdf> [Accessed 16/4/21].

level of agency to include advising on outcomes attained or unattained, so that there is follow-up on the advice given, and when the advice has not been integrated, there is a right to seek an explanation from government, and when it has, insights can be shared and integrated, moving forward.

At the risk of excluding significant players in the progressive historical considerations for constitutional reform, it is important that in moving forward to consider constitutional options to establish the Voice, that Aboriginal and Torres Strait Islander experts who were directly involved on the Expert Panel on Constitutional Recognition of Indigenous Australians and the Referendum Council are included in the Committee. Their expert voices matter significantly in shaping the next crucial stage.

In conclusion, any legislative design of the Voice cannot be separated from addressing its constitutional enshrinement, as this is an existential threat to its permanence and its integrity and power. It undercuts decades of past and present effort for its constitutional enshrinement. It turns back the clock on the momentum for symbolic and substantive nation building as the nation's consciousness has been primed for this change. It is crucial that the membership model for the National Voice is a legitimate representation and is enabled by an effective structure and governance to enact decisions by its members.

Honouring First Nations people and more than 60,000 years of continuous culture requires authentic and meaningful systemic reform from the perspective of Indigenous Australians, not transient and limited recognition.

As Referendum Council member Galarrwuy Yunupingu in his essay 'Rom Watangu'¹² writes,

"What Aboriginal people ask is that the modern world now makes the sacrifices necessary to give us a real future. To relax its grip on us. To let us breathe, to let us be free of the determined control exerted on us to make us like you. And you should take that a step further and recognise us for who we are, and not who you want us to be. Let us be who we are – Aboriginal people in a modern world – and be proud of us. Acknowledge that we have survived the worst that the past had thrown at us, and we are here with our songs, our ceremonies, our land, our language and our people – our full identity. What a gift this is that we can give you, if you choose to accept us in a meaningful way."

¹² Watangu, Rom, The Law of the Land in *Final Report of the Referendum Council*. 30 June 2017. pp 61-72. https://www.referendumcouncil.org.au/sites/default/files/report_attachments/Referendum_Council_Final_Report.pdf [Accessed 17/4/21]