

SUBMISSION IN RESPONSE TO THE CO-DESIGN INTERIM REPORT

Introduction

1. Banki Haddock Fiora (**BHF**) is a commercial law firm in Sydney specialising in intellectual property, technology and media law.
2. The firm makes this submission having registered its support of the Uluru Statement from the Heart (**Statement from the Heart**) as part of the national law firm response, in particular of the call from Indigenous Australians for a first nations voice to Parliament to be enshrined in the Constitution (**Voice**) and a Makarrata Commission to oversee agreement-making and truth-telling, that were the outcomes of the Uluru Dialogues.
3. Accordingly, BHF supports Indigenous contribution to the Co-Design interim report (**Report**) and, as none of BHF's staff is Indigenous, confines these submissions to legal and practical issues that arise from the Report's proposals, with the aim of ensuring that the Voice is implemented and has the best chance of succeeding in its purpose, as articulated in the Statement from the Heart.

Executive summary

4. BHF acknowledges the significant work the Senior Advisory Group has done alongside national, local and regional Co-Design groups to produce the Report, and welcomes the invitation that has been made to all Australians to provide feedback by way of submissions in response.
5. The Voice is one of the three pillars of the Statement from the Heart, the others being treaty and truth. In our view, the Voice must always be considered in this context: that our First Nations peoples have identified all three as essential to the nation's appropriate recognition of its history and foundation for its future.
6. The length and density of the Report are compelling indicators that the way in which the Voice will operate requires consideration of many issues expressed by many voices, and therefore also substantial time and resources. In our view, this process should be embraced, not avoided. Contrary to the disappointing statement made by the Prime Minister on 18 March 2021,¹ there is ample evidence that the nation is ready, indeed calling for, a new approach to be taken to Indigenous affairs; specifically, one that recognises at each stage of its development and in each aspect of its delivery an Indigenous methodology.

¹ Harris, R., 'Not our policy': Scott Morrison rejects push for referendum on Voice', *Sydney Morning Herald* 18 March 2021, <https://www.smh.com.au/politics/federal/not-our-policy-scott-morrison-rejects-push-for-referendum-on-voice-20210318-p57bxc.html>

7. This is evidenced by, for example, the most recent poll of the general public², leading Australian law firms³ and the National Association of Corporate Counsel,⁴ the banking sector⁵ and former chief justices of the High Court of Australia Murray Gleeson AC GBS QC and Robert French AC⁶. There is also a long list of Australian institutions from a wide range of community sectors – including corporate entities, universities, sport governing bodies, peak professional organisations, charities and prominent individuals – who have publicly expressed their support for the Voice.⁷
8. Australians recognise the duplication and waste of public money that has been spent on reports into Indigenous disadvantage and in service delivery aiming, and failing, to address the abiding shameful statistics in Indigenous incarceration, educational achievement and health indicators. As a matter of logic this may be due to the paternalistic approach that has been taken to Indigenous affairs since colonisation.
9. What would be the impact if policy and service delivery were designed with substantive Indigenous input? The Voice provides the opportunity to find out.

Detailed submissions

Context of the Co-Design process – Constitutional reform must remain the priority

Constitutional enshrinement of the Voice should be the first step

8. It is of course understood that the Voice is not addressed in the Report because the Report is a step in the process contemplated by the first recommendation of the Joint Select Committee,⁸ of co-design with Aboriginal and Torres Strait Islander peoples to consider national, regional and local elements of the Voice and how they interconnect; and to consider a starting point for the consultation documents.
9. However, the length and complexity of the Report, and the extent of the unresolved issues relating to the role and function of the Voice (even acknowledging that it is the first stage in the process) indicate both the illogic and inherent artificiality of embarking on its design without having first landed on the legal framework for underpinning its establishment and guaranteeing its existence into the future.
10. Further, the Co-Design process has been placed under such time pressure that there is insufficient opportunity for Indigenous people to explore and express in their own ways the appropriate scope of the Voice and how it should operate. This is evidenced by the generally low attendance numbers at

² Deem, J., Brown, A.J., Bird, S. *The Conversation* 9 April 2021 <https://theconversation.com/most-australians-support-first-nations-voice-to-parliament-survey-157964>

³ Pelly, M., 'Law firms back Uluru Statement', *Australian Financial Review* 22 March 2019, <https://www.afr.com/companies/professional-services/law-firms-back-uluru-statement-20190320-h1cm9x>.

⁴ Ryan, E., 'ACC backs Uluru Statement from the Heart in open letter to PM' *Lawyers Weekly* 17 February 2021, <https://www.lawyersweekly.com.au/corporate-counsel/30678-acc-backs-uluru-statement-from-the-heart-in-open-letter-to-pm>.

⁵ Fowler, E., 'Finance gets behind the Uluru statement' *Australian Financial Review* 23 May 2019, <https://www.afr.com/companies/financial-services/finance-gets-behind-the-uluru-statement-20190522-p51pxa>.

⁶ Appleby, G., 'A worthwhile project': why two chief justices support the Voice to parliament, and why that matters', *The Conversation* 1 August 2019, <https://theconversation.com/a-worthwhile-project-why-two-chief-justices-support-the-voice-to-parliament-and-why-that-matters-120971>.

⁷ The Uluru Statement from the Heart, 'Our Support', <https://ulurustatement.org/our-support>.

⁸ Parliament of Australia, Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples Final Report (JSC), November 2018

the consultation sessions that have taken place since the Report's release⁹. This leaves the Voice exposed to potentially fatal criticism even before it has been fully conceptualised.

11. Without a Constitutional foundation, the destiny of the Voice is vulnerable and uncertain. ATSIC is the historical proof of this risk. Constitutional enshrinement of the Voice enables the composition and operation of the Voice to develop over time. In our view, this is essential. In the words of former Chief Justice Gleeson, the proposal for the Voice "can be achieved without legal derogation from parliamentary supremacy" and "what would appear in the Constitution would be the minimum requirements necessary to guarantee its continued existence and its essential characteristics".¹⁰
12. The composition, remit and processes of the Voice must be allowed to change over time without risk to its existence. This can only be ensured by Constitutional enshrinement.

Constitutional recognition is a long-held, bi-partisan commitment

13. There has been bipartisan support for a referendum on Constitutional Indigenous recognition since 2007. The suggestion has been made by prime ministers and opposition leaders, Indigenous affairs ministers and their shadow counterparts of both major political parties.
14. Any argument that there is "no consensus" for recognition by way of the Voice, let alone its adoption as a rationale for delaying or avoiding Constitutional recognition, is ill-conceived, in that:
 - a. it misstates and undervalues the support that has already been shown;¹¹
 - b. it sets a false precondition – "consensus" – for a referendum that has not been required for any previous Constitutional reform;
 - c. even if there is a genuine concern that such a precondition were necessary, there are conventional processes – such as a plebiscite – to ascertain its public support; and
 - d. it is unclear whether this is a reference to the consensus of the general public, First Nations peoples or political parties, and whether it refers to unanimity or a majority of a particular kind.
15. Accordingly, any casual dismissal of the call for the Voice on the basis of an assertion that the issue lacks "consensus" is not soundly based and is counterproductive.

The Voice is not a vague aspiration, it is a concrete proposal

16. It is sometimes said against Constitutional recognition by means of the Voice that it is destined to fail at referendum because the form that recognition would take, and the question that should be asked at a referendum, are unclear.
17. This is wrong. Over the years, some of the most pre-eminent scholars in the field of Australian Constitutional and public law, including Professor Anne Twomey¹² and Professor George Williams¹³,

⁹ NIAAA website https://voice.niaa.gov.au/resources?field_rscategory_target_id=21

¹⁰ Murray Gleeson, 'Recognition in keeping with the Constitution' *Uphold & Recognise*, 18 July 2019 p12

¹¹ See paragraph 7 above.

¹² See, eg, Anne Twomey, 'Putting words to the tune of Indigenous constitutional recognition', *The Conversation* (online), 20 May 2015 <<https://theconversation.com/putting-words-to-the-tune-of-indigenous-constitutional-recognition-42038>>.

¹³ George Williams, 'Constitutional recognition by way of an indigenous advisory body?' (2015) 8(18) *Indigenous Law Bulletin* 18

have dedicated significant resources and time to developing appropriate proposals for Constitutional recognition, including draft referendum questions and draft provisions.¹⁴

18. Professor Twomey has put forward a number of viable draft provisions over the years, including a new 'Chapter 1A' which would, much in the same way as section 101 of the Constitution provided for an inter-State commission, provide that an 'Aboriginal and Torres Strait Islander body' be established.¹⁵ This proposal has been scrutinised for potential separation of powers and justiciability issues.¹⁶ Extensive research has been undertaken as to how referendum questions should (and should not) be drafted¹⁷ and many have proposed referendum questions.¹⁸
19. In our submission, the issue here is not a lack of precision by those proposing a referendum on the Voice, it is inadequate attention having been given to the work that has been done and an absence of appetite for its progress.
20. We urge the Federal government, once the Co-Design process is complete, to focus on this question. We endorse the From The Heart Submission No. 1 dated 21 January 2021 and paragraph 3.1 in particular in this regard.

The Voice

Principles

21. BHF supports the principles that the Voice:
 - (a) should be linked with Local and Regional Voices;
 - (b) should be chosen by Aboriginal and Torres Strait Islander peoples rather than appointed by the Federal government;
 - (c) in respect of the Local and Regional Voices, will not deliver programs or manage funding, nor make parliamentary decisions; and
 - (d) in respect of the Local and Regional Voices, will not replace current mechanisms or avenues for Aboriginal and Torres Strait Islander peoples to have their voices heard, such as the National Partnership on Closing the Gap.
22. However, BHF hears the concerns that have been expressed by Indigenous people that it is critical that the Voice provide a means to hear new voices, including those that are routinely not acknowledged, or are ignored in preference of familiar ones.

¹⁴ See Megan Davis et al *Submission to the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples* (Submission 479).

¹⁵ Anne Twomey, 'There are many ways to achieve Indigenous recognition in the constitution – we must find one we can agree on', *The Conversation* (online), 8 July 2020, < <https://theconversation.com/there-are-many-ways-to-achieve-indigenous-recognition-in-the-constitution-we-must-find-one-we-can-agree-on-142163>>.

¹⁶ *Ibid.*

¹⁷ See George Williams and David Hume, *People power: the history and future of the referendum in Australia* (UNSW Press, 2010).

¹⁸ See Megan Davis et al's submission to the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples (Submission 479).

Functions

23. BHF supports the role of the Voice in both consulting and advising both Parliament and the Government at all stages in policy and legislative development. The opportunity for Indigenous Australians to have their voices heard on issues and policies that affect them, or impact their culture, society and economic involvement, is a significant step forward in Indigenous agency.
24. It is proposed that advice provided by Local and Regional Voices would focus on national level issues. BHF assumes that this extends beyond issues within the jurisdiction of the Commonwealth to issues which have either become nationally or internationally prominent but may fall within the jurisdiction of State or Territory governments – and which have very grave impact on Indigenous peoples. Such matters include health services, education, and prisons, which impact on life expectancy, indigenous literacy rates and indigenous incarceration rates. The Voice should not be prevented from advising the Commonwealth and State and Territory governments on these important issues.
25. BHF welcomes the Report’s emphasis on the importance of early involvement. Consideration needs to be given as to how the Voice will be notified in a timely way of proposed policies and legislation that impact Aboriginal and Torres Strait Islander people, as well as the process for submitting advice.
26. We think it is premature to delineate the matters on which the Voice would be heard, and to circumscribe the role that it would play in its advisory function. We are particularly concerned by the proposal that “[t]he Parliament and Australian Government would be obliged to consult and engage the National Voice on a **very narrow range of matters**.”.
27. We note internal inconsistencies in the Report in relation to the proposed role of the Voice and vagueness as to who (the Government or Indigenous people) would determine its scope. For example, the Report states [our emphasis]:
- *A Voice would have a **proactive, unencumbered scope** to advise on priorities and issues **as determined by the National Voice**.*
 - *The Parliament and Australian Government would be **obliged** to consult and engage the Voice on a **very narrow range of matters**.*
 - *There would be an **ability** to consult and engage on **any matter which is critically important or which has a significant or particular impact** on Aboriginal and Torres Strait Islander peoples. This would go both ways – the Parliament and Australian Government would be able to refer any issue to the National Voice, and the Voice would be able to initiate advice on any issue under this scope.*
 - *Parliament and Australian Government would be **expected** to consult and engage more generally on a **broader range of matters that significantly affect** Aboriginal and Torres Strait Islander peoples.*
28. BHF considers that the Parliament and Federal government, as well as State and Territory governments, should be obliged to consult and engage the Voice on a specified range of matters that

directly affect Indigenous peoples, as well as any matter on which the Voice offers its advice. First Nations peoples are best placed to determine a proposed statute or policy's impact on them and thus should be able to advise bodies without prior invitation.

29. To be clear, BHF understands and accepts that the proposed Voice would have no right of veto or power to overturn existing laws.
30. BHF welcomes the acknowledgement in the Report that further consideration must be given as to how meaningful engagement by Government and Parliament with the Voice will be achieved. The Report notes that certain options already exist, such as the tabling of the Voice's formal advice in Parliament; establishing a Parliamentary Committee chartered to give formal consideration of that advice; regular reporting of advice received and actions taken as a consequence; and expressly recognising the contribution of the Voice when a proposed law is introduced into Parliament.
31. The tabling of formal advice of the Voice in Parliament would not be an unprecedented development. As the Report notes, it would align the Voice with presently existing Senate Standing Scrutiny Committees such as those for Delegated Legislation and Bills.
32. Similarly, the Senate Standing Committee for the Scrutiny of Bills takes a non-partisan approach to considering a bill's compliance with scrutiny principles, and the Parliamentary Joint Committee on Human Rights examines legislative instruments for compatibility with human rights.
33. We note that the Senate Standing Committee for the Scrutiny of Delegated Legislation can instigate disallowance of a legislative instrument after assessment against a set of scrutiny principles focusing on compliance with statutory requirements, the protection of individual rights and liberties and principles of parliamentary oversight.
34. Another model for accountability is found in the Office of Best Practice Regulation that supports COAG in providing Regulatory Impact Assessments/Statements.
35. The overriding concern remaining at this time is ensuring that the Voice operates with efficacy, and its advice is not ignored. These matters demand careful further consideration, time and the input of Indigenous people in order to avoid the real risk that the Voice could fail even before it has begun, or be rendered inutile if not given sufficient enforceability and Constitutional backing.

Governance/membership models

36. The number and eligibility requirements of members of the Voice are issues for Indigenous feedback. However, we raise the following:
 - Both in order to achieve agency, and in recognition of the heterogeneity of Aboriginal and Torres Strait Islander communities, whether it is appropriate that Aboriginal members be selected according to State and Territory, rather than First Nations, borders.
 - The need to ensure that the Voice itself, and its members, are appropriately remunerated and supported (both in training, staffing, sufficient notice of upcoming bills and debates), and that their responsibilities to their communities are respected.

- In light of the volume of policy and legislation that is generated by the Australian Government, whether there should be one Voice that speaks on all issues, or whether there may be several Voices, the one that speaks on any particular issue to be determined on a case by case basis.
 - Given the shamefully high rates of Indigenous poverty and incarceration, whether bankruptcy and criminal convictions are appropriate or necessary eligibility criteria for membership of the Voice, especially given that the proposal does not involve the application of funds or service delivery.
 - Eligibility to vote raises the question of how indigeneity is determined. This issue in itself has been vexed for communities for a very long time and its resolution should not be rushed.
37. BHF also encourages further consideration of Indigenous peoples' preferred structure and membership options. The options proposed in the Report are surprisingly conventional, and appear not to take into account the wide range of existing organisational structures and leadership amongst communities. The selection of members from existing local and regional assemblies may serve only to reinforce the presence of a few already well-known and prominent Indigenous leaders, while missing the opportunity to hear from quiet and emerging voices. Moreover, the experience of Indigenous Australians varies today depending on whether they live in rural, remote or urban centres, and these experiences no doubt also have variations depending on their individual communities.

Banki Haddock Fiora

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