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Dear Co-Design Body

Submission to the Co-design body

As a proud Wiradjuri woman, I welcome the opportunity to provide a submission on the co-design of an Indigenous Voice. My Aboriginal heritage is derived from my mother. My ancestral roots lie within the Bogan River on the grounds of the Bulgandramine Mission site. As a young girl, my great-grandmother was subject to the harsh child removal policies of former governments and the Aborigines Protection Board and later as an Aboriginal woman living under the *Aborigines Protection Act 1909* (NSW). My family, like every other First Nations family, has been directly impacted by the lack of voice Indigenous people have in this Country.

As a young girl myself, working my way through my high school education in Orange, NSW, I became acutely aware of the powerlessness of Indigenous people in Australia. From the lack of truthfulness within the Australian History curriculum, which fails to bring to light the massacres and wars which marked the beginning of the country we call now call Australia, to the health deficits reinforced in PDHPE during the HSC, it was an unavoidable conclusion. The older I got; the more questions came to mind. Why does this country lack pride in an Indigenous history I find so fascinating? Why are disparities in health, education, employment seen as an inevitable, irreparable consequence of being Aboriginal? At the time, I didn't have a nuanced understanding of why these statistics don't tell the full story. I didn't understand the impact of laws and policies and intergenerational trauma on the powerlessness of our people.

As I got older, I moved off country to Newcastle where I studied a Bachelor of Law/Bachelor of Communication. As I progressed through my studies, many questions were answered and many more arose. The state of Indigenous incarceration rates, the lack of civic engagement, the battle for land rights. The consistent search for truth, justice, and reconciliation.

I, like many other First Nations youth, sought out a way I could help community and contribute to rectifying these issues. I found this in the *Uluru Statement from the Heart* (Uluru Statement). I understand that my personal experience does not equip me with all the answers, but I also understand that the Uluru Statement puts me on the right path. It represents real First Nations engagement

Since graduating with my law degree, I have been working at the Public Interest Advocacy Centre on the Towards Truth project in partnership with Professor Megan Davis and the Indigenous Law Centre. We're building a database of all of the law and

policy that has affected Indigenous people since first contact to be used as a framework for localised truth-telling processes as called for in the Uluru Statement.

The database compiles documents that speak to the impact and long-term consequences of these laws and policies. Essentially, it is a record of what happens when First Nations don't have a voice on the matters that affect us. When decisions are made at a government level with little input from the communities that those decisions will impact the most. It's documentary evidence of why we need a constitutionally enshrined Voice to Parliament.

My submission to the Co-design process will centre around the significance of the Uluru Statement from the Heart and the intention of the delegates at the Regional Dialogues, specifically with respect to constitutional enshrinement.

As you will read below, notwithstanding my contempt for the insufficient First Nations engagement in the Co-Design process, I will outline my opinion on the model proposed by the co-design body and my view on the necessary process that must follow the Final Report of the co-design body to ensure the Voice's efficacy and legitimacy.

1 The Uluru Statement from the Heart and the need for a Voice to Parliament

The Uluru Statement is one of the most powerful documents presented to the Australian people. It is an opportunity for all of Australia to walk together, recognise our nations' past and move forward together. It offers practical steps on how to move forward together – Voice, Treaty, Truth.

The first reform of the Uluru Statement, a Voice to Parliament, is important as it will allow for Australia's First Peoples to have a say in the matters that affect them. For centuries, Indigenous people have been locked out of the policy room, only having the opportunity to consult on decisions after they have been made.

Without a Voice to Parliament, Indigenous people have no say in the matters that affect them. They can only fight laws after they have been made. If the Voice provided a means for community groups to elevate their struggles to the national body, the laws would be better placed to address these concerns.

A Makarrata Commission is needed to oversee a process of agreement-making and truth-telling. Our communities have been calling for a treaty for decades. However, without a Voice to Parliament, treaty negotiations will be impeded by the inherent power imbalance that currently exists between the State and First Nations. We must reconcile amongst our communities and coordinate ourselves through local, regional, and national Voices to ensure our representatives understand our terms when negotiating a treaty.

Truth-telling is imperative to all Australians understanding our nation's history and moving forward towards a better future. To move forward nationally, we must acknowledge our past and recognise the ongoing injustices. The Delegates at the First Nations Regional Dialogues called for localised truth-telling process to be held across Australia. Importantly, truth-telling was not conceived as happening on a large national scale and instead it should be localised, where communities can conduct truth on their own terms, at their own speed and with their own cultural protocols, but with support of the Makarrata commission.

2 Constitutional Enshrinement

While I note that the Terms of Reference for the co-design specifically exclude the issue of constitutional enshrinement, it cannot be ignored. The body to which I am writing this submission would not exist but for the Uluru Statement from the Heart. The most important feature of the Voice to Parliament to ensure its success is its protection in the constitution, as called for in the Uluru Statement.

We have previously seen the abolition of Indigenous representative bodies created in legislation (i.e. ATSIC). Their quick destruction and swift defunding are the reason why the body must be protected by the Constitution. If the Voice is merely legislated, any issues with its operation or structure may be used as grounds to eliminate the Voice altogether. If the Voice is constitutionally enshrined, the government will be forced to actively resolve issues with its operation as the only alternative is to hold another referendum to remove it.

The validity and legitimacy the Voice to Parliament will obtain from a referendum cannot be understated. The campaign that will precede a referendum will ensure Australian voter reflects on whether or not Indigenous Australian's deserve a voice and why do they need it. This process will be an exercise in truth-telling in and of itself. A successful referendum will imbue the Voice with such a sense of political legitimacy that it will be averse to the public interest for the Government to actively ignore it. If the Voice is merely created in legislation, there will be millions of Australians who will fail to recognise its addition.

The current Government has attempted to separate the questions of structure from questions of form. However, the success of any model of the Voice will be completely and completely dependent on the way in which the Voice is formed as an institution in our legal framework. Constitutional enshrinement is the **only way**.

I would also like to emphasise that while the structure of the Voice is important if it is not enshrined in the Constitution, any errors in its creation may be grounds for abolition by the Government. We have seen this before with ATSIC. The inherent vulnerability of a legislative Voice limits its potential to evolve into a powerful, well-structured institution. If it is enshrined in the constitution, its existence will be secured, and the

government will be more likely to amend its enabling legislation as opposed to repeal it.

3 The Co-Design Process

Before providing my opinion on the structural features of the Voice and its membership, I want to note that, in my view, this process of co-design could have been conducted in a more deliberative way to engage a broader range of First Nations perspectives. An ideal scenario would have built on the structure and process of the First Nations Regional Dialogues. This was highlighted in the recommendations of the Joint Select Committee On Constitutional Recognition Relating To Aboriginal And Torres Strait Islander Peoples, which noted the for the co-design process to engage with Aboriginal and Torres Strait Islander communities and organisations across Australia, including remote, regional, and urban communities (at 2.314). The Joint Select Committee's Final Report also noted the stakeholders who stated that the Regional Dialogue process should inform future design discussions (at 2.232, 2.240, 2.260 to 2.265). The current co-design process could have addressed the limitations of the Regional Dialogue process, such as the budgetary constraints which led to only limited invited participants and improved on the model.

With great respect to the members of the current process, the government's selection of appropriate members to run this process is counter-intuitive to the sentiment of the Uluru Statement. It must give a voice to the voiceless. Allowing submissions on a model that has already been designed by handpicked representatives limits the body's potential by failing to make it an institution of nationwide Indigenous design. Many features of the Voice appear decided with only limited binary options up for discussion.

Further, providing Australians only eleven weeks to consider a detailed 239-page report limits the engagement of many individuals and communities across Australia. A longer submission process would have allowed for greater engagement and more thoughtful consideration of the models.

4 National Voice: Role/ Structure and Function

As I have alluded, the core function of the voice and its structural relationship with the Parliament is central to its success. I can understand from a legal perspective why the role of the Voice may be non-justiciable given the need to ensure parliamentary supremacy. However, the proposed transparency mechanisms fall short of ensuring the Voice be heard. In absence of justiciability, there is no legal enforcement mechanism available to members of the Voice to be heard. Instead, the Voice will rely heavily on the political goodwill of the government and the parliament.

I propose to address this issue, the Voice should be empowered to speak *directly* to parliamentary members. The Voice members (or representatives of the Voice who can speak to the Voice's position) should be able to engage in the parliamentary debates. The proposed Voice currently does not have the ability to speak to the houses of

Parliament about the laws and policies that impact them. This feature was expressly called for in the Referendum Council's Final Report (page 38).

As [noted by Professor Geoffrey Lindell](#), the hearing rule is one of the primary rules of natural justice, that is, that persons affected by a decision should be allowed to express their views to the decision-maker. While the transparency mechanisms of the proposed Voice offer a potential avenue to have the Voice's advice heard by the bill's legislature prior to tabling, involvement in the debates will allow the Voice to express their views directly to the members making their decision on the bill.

5 Local and Regional Voices

The flexibility in the Interim Report concerning the formation of Local and Regional Voices is positive as it allows for the Voices to be established with respect to local protocols. However, I also note the importance of ensuring that communities are not inclined to rely heavily on existing structures where they are insufficient. This may occur where communities are inadequately informed, underfunded, or the existing structure holds a lot of power. Transition arrangements will need to be refined to address these concerns and ensure previously unheard Aboriginal and Torres Strait Islander people have the same chance of being selected as established leadership figures.

6 National Voice: Membership

6.1 Election

It is difficult to choose between the Structural Link model or the Direct Election model as I believe more clarity is needed around how they would work in practice. The Structural Link model would allow for the national members to be closely linked to the local and regional members, however, more detail is needed around the transitional arrangements as electing national members before the local and regional Voices being established would be difficult.

With respect to the Direct Election model, while I believe it would ensure all Indigenous peoples voices are heard, there are issues relating to voter turnout which should be addressed further in the Final Report. I am also concerned about issues of individuals identifying as Indigenous. The government's historical policies of assimilation have resulted in considerable identity issues amongst many Indigenous people. It is also difficult for many to know who their mob is or obtain a Confirmation of Aboriginality. This certainly by no means makes them any less Indigenous, however, Indigenous identity politics often become media and political fodder which has real repercussions for Indigenous people, specifically Indigenous youth coming to terms with their identity. I, therefore, have concerns about how such a direct election model would work.

6.2 Core membership numbers

Although I can understand that there are concerns around the ‘workability’ of a large National Voice membership, both Houses of Parliament manage to operate with considerably higher numbers than 16 or 18. The Voice must not sell itself short. The Voice must represent the Voiceless, and to have only 16-18 members to represent almost 800,000 people is inadequate. Nonetheless, I support the greater of the two options.

6.3 *Eligibility*

I have further questions about how the objective eligibility requirements or broader character tests would be applied. Further detail is needed to ensure they don’t arbitrarily exclude Indigenous people based on their past experiences. While I understand there may be certain violent crimes that would warrant exclusion, there must be clear criteria to ensure those with a history of crime are not punished beyond their imprisonment and seen as no more than criminals. The purpose of our jail system is supposed to be rehabilitation. We must allow people an opportunity to move past their history. We cannot separate high rates of Indigenous incarceration from decades of intergenerational trauma due to past policies of protection and assimilation. Careful consideration must be given to ensure that the Voice gives an opportunity to all to represent their local community.

Similar can be said for the bankruptcy requirement. The Voice will not have a program delivery function and will also not be handling funds. Given the low rates of financial literacy amongst Indigenous people, we should not exclude people for their past mistakes where they have shown that they have taken responsibility, learnt from their mistakes and now are in a position to represent their local communities.

Further, the necessity for Voice members to be Australian Citizens must also be considered with respect to the recent case of *Love v Commonwealth of Australia* [2020] HCA 3, where it was held that non-citizen Indigenous Australians could not be considered ‘aliens’ as they hold a spiritual connection to the land, forged over thousands of years. As stated in the Uluru Statement, we have never ceded our sovereignty and our sovereignty co-exists with the crown. The highest court in Australia has recognised that our Indigenous identity cannot be defined by an Australian passport. As such, consideration should be given to this fact when determining eligibility criteria.

6.4 *Ministerial Appointments:*

I believe it is offensive to suggest that ministerial appointments are necessary to fill “skill gaps” on the Voice. There are thousands of proud First Nations people across Australia who hold a range of skills, high levels of education and a breadth of experience that would equip them with the skills to sit on the Voice. To suggest a need for ministerial appointments is to disregard the purpose of the Voice – representation

of communities by the community, not elected officials. To be effective, the Voice must not be overpowered by bureaucrats.

Instead, I support the establishment of an independent Indigenous policy body to provide advice to the Voice on request. I believe this is the most effective way of ensuring that expert opinion is taken into consideration without limiting the community representation on the Voice.

6.5 *Term*

I support a four-year term for members with staggered elections. This will provide greater stability for the Voice. Changing all member seats after three years would impact the Voice's ability to make consistent advice as it will be like starting again every time. By keeping half of the membership at each election, ongoing matters of advice can be appropriately handed over.

6.6 *Age*

The absence of any guaranteed Traditional Owner or Elder advisory mechanism fails to recognise the salience of elders within Indigenous communities. While I believe there is a need for a Youth Advisory Group (as discussed below), we must also respect and listen to our Elders, who offer wisdom and guidance. While it is likely that many Elders will be elected as community representation for the Voice, there are benefits to ensuring the inclusion of their perspectives through a similar Advisory Group to the Youth Advisory Group.

I also believe that age limitations for membership and voting for the Voice should be dropped to age 16 and over. I am going to be 25 years old this year. More than half of Australia's Aboriginal and Torres Strait Islander population are my age or younger.¹ As such, for the majority of First Nations people, this is the first time we've experienced the potential of a representative body like a Voice on a national level. Whilst we were alive for much of the rise and fall of ATSIC, we have never engaged in Indigenous politics in this way. We don't want our youth to disengage from these processes because they don't feel heard. By reducing the age of participation to 16, we can engage Indigenous youth like never before, giving them a chance to be heard about the way their world is being shaped for the future.

The need for engaged youth also reinforces how important it is for the Voice to be constitutionally protected. If this Voice gets legislated and then abolished, it will be decades before we see something like this get so close again. We don't want to be

¹ Australian Institute of Health and Welfare, 'Profile of Indigenous Australians' (Web page, 11 September 2019) < <https://www.aihw.gov.au/reports/australias-welfare/profile-of-indigenous-australians>>

telling our grandchildren how close we got but that we just didn't get there. For Indigenous youth, there is a sense of urgency for us. We want to set up a powerful institution that provides platforms for Indigenous people across the country for centuries to come. We can't accept a legislated voice because the risk is too high. We need a referendum to ensure the Voice to Parliament has the integrity and authority of the Australian people.

7 Closing comments

Thank you for the opportunity to contribute to the development of a First Nations Voice. I appreciate the hard efforts of the co-design body, who have been tasked with a difficult mandate with government-enforced limitations. I am eager to read the final report of the co-design process, which I hope reflects the range of submissions made and the huge levels of support for the Uluru Statement from the Heart.

If the government fails to deliver a constitutionally enshrined Voice to Parliament, they are missing the opportunity of a lifetime to be a part of a historic step in Indigenous affairs.

Mandaang guwu,

Kishaya Delaney