Voice Secretariat
Reply Paid 83380
CANBERRA ACT 2601
By email: Co-designVoice@niaa.gov.au

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Thank you for considering this submission to the Voice Co-Design Process.

We make this submission in our roles as researchers on the Australian Research Council-funded project, 'Recognition after Uluru: What next for First Nations?' (ARC Grant ID IN190100075). This project examines principles of law, particularly public law and international law, to understand and address the relationship between the state and Indigenous peoples, in light of the Uluru Statement from the Heart.

As such, this submission will focus on the legal principles of self-determination and participation, and how these relate to the Voice Design Process. This submission therefore addresses issues raised in Chapter Two of the Interim Report, particularly the objectives, function, structure, and form of the Voice.

We are of the view that a Constitutionally-enshrined Voice to Parliament is the only mechanism that can provide full expression to the legal principles of self-determination and participation. A Constitutionally-enshrined Voice to Parliament is therefore the most appropriate legal reform, and the Voice as proposed under the Interim Report should be designed to satisfy this. It is not in line with the legal principles of self-determination and participation to divorce the question of the Voice from its Constitutional entrenchment.

Background

As the Interim Voice Report points out, the Referendum Council Final Report (2017) 'emerged from a process of regional dialogues with 1200 Aboriginal and Torres Strait Islander peoples. This consultation process was significant in its breadth and depth. It was characterised by impartiality; accessibility of relevant information; open and constructive dialogue; and

mutually agreed and owned outcomes'.[1] The consensus position that emerged from those dialogues and the National Constitutional Convention at Uluru was for a Constitutionally-enshrined Voice to Parliament, as well as a Makarrata Commission to oversee a process of treaty-making and truth-telling. This was outlined in the Uluru Statement from the Heart, and is known as the sequenced reform of Voice, Treaty, Truth.

The Prime Minister recently kept open the possibility of constitutional entrenchment of the Voice, stating that either constitutional entrenchment or legislative provisions would be considered, after the co-design process (as is consistent with the recommendations in the Joint Select Committee report).[2] Although the terms of reference for the co-design process excluded submissions on constitutional recognition, given the history of the Voice design process – emerging, as it does, from over a decade of legal and political debate on the form of *Constitutional Recognition of Indigenous peoples in Australia*, which culminated in the National Convention at Uluru – as well as the possibility left open by the Prime Minister, we feel it is impossible to leave aside the question of Constitutional status.

We are aware of and wholeheartedly agree with the submission made by the 'Public Lawyers' and indeed, each of us have also signed that submission. For consistency, we adopt the definition of Constitutional entrenchment offered there: that 'that the existence and core function of the Voice should be included in the written text of the Constitution, alongside a power enabling the Commonwealth Parliament to determine its composition, additional functions, powers and procedures in legislation'.[3]

Self-determination

Self-determination is 'a foundational principle that anchors the constellation of indigenous peoples' rights'.[4] Self-determination is concerned with ensuring that people have the right to make decisions about their lives and futures, and is connected to concepts of 'group autonomy, self-government, independence, democracy and non-interference',[5] as well as being 'grounded

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[1] Commonwealth of Australia, *Indigenous Voice Co-design Process Interim Report to the Australian Government* (2020), 26.

[2] Scott Morrison, 'Address, Closing the Gap Statement to Parliament' (Speech, 12 February 2020), available: https://www.pm.gov.au/media/address-closing-gap-statement-parliament.

[3] Public Lawyers, 'Submission: The imperative of constitutional enshrinement: Submission to the Voice Secretariat', 20 January 2021

[4] S James Anaya, 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (International Work Group for Indigenous Affairs, 2009), 184, 184.

[5] Dylan Lino, 'The Politics of Inclusion: The Right of Self-Determination, Statutory Bills of Rights and Indigenous Peoples' (2010) 34(3) *Melbourne University Law Review* 839, 845.

in values of freedom and equality'.[6] Particularly since the passage of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),[7] self-determination can be understood as not necessarily linked to independent statehood. UNDRIP was drafted with a conceptualisation of self-determination as a right to be exercised as meaningful representation within the state as well as meaningful self-government or autonomy.[8] Because Indigenous peoples had been largely denied the opportunity to be meaningfully involved in the building of the state, self-determination means 'that the existing State has the duty to accommodate the aspirations of indigenous peoples through constitutional reforms designed to share power democratically'.[9] Self-determination, then, is concerned with Indigenous power and decision-making within the governing structures of the state, and with an improved relationship with the state and citizenry. We argue that there must be self-determination at the establishment of institutions as well as in their operation, and that self-determination should be understood as a relationship built on non-domination. Self-determination is also linked to the principle of participation and agreement. We examine all this as linked to the Voice, and argue that these principles require constitutional entrenchment of the Voice.

Substantive self-determination can be understood as either constitutive or ongoing.[10] Constitutive self-determination 'concerns the establishment of governing institutional arrangements, and requires that such arrangements reflect the collective will of the people or peoples governed.'[11] Further, this 'imposes requirements of participation and consent such that the end result in the political order can be said to reflect the collective will of the people, or peoples, concerned.'[12] In its ongoing aspect, self-determination requires that 'those arrangements, independently of the processes that created them, must establish a system of

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[6] James Anaya, 'A Contemporary Definition of the International Norm of Self-Determination' (1993) 3 *Transnational Law and Contemporary Problems* 131–64, 143.
[7] Australia has formally supported UNDRIP since 2009. Self-determination for Indigenous peoples is articulated in several provisions of UNDRIP (See art. 3, 4, 5, 18), with UNDRIP providing a strong framework that supports Indigenous self-determination both in participating in decisions that affect them, and also in their own governance.
[8] UN Sub-Commission on the Promotion and Protection of Human Rights, *Explanatory note concerning the draft Declaration on the Rights of Indigenous Peoples / by Erica-Irene A. Daes, Chairperson of the Working Group on Indigenous Populations.*, 19 July 1993, E/CN.4/Sub.2/1993/26/Add.1 [13]. See also Megan Davis, 'Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples' (2008) 9(2) *Melbourne Journal of International Law* 439, 459.
[9] Ibid [25].
[10] Anaya (n 6), 145-157.
[11] Megan Davis, 'The United Nations *Declaration on the Rights of Indigenous Peoples*' (2007) 11(3) *Australian Indigenous Law Review* 55, 31.
[12] James Anaya, *Indigenous Peoples in International Law* (2nd ed) (Oxford University Press, 2004), 105.

governance that enables individuals and groups to make meaningful choices about their lives.'[13]

To satisfy the requirements of both constitutive and ongoing self-determination, the structure, composition, and functions, of the Voice must 'reflect the collective will'[14] of First Nations peoples in Australia. Given the significance of the Uluru Statement from the Heart, and the emphasis placed on constitutional entrenchment in the Dialogues and at the National Constitutional Convention, this is crucial for constitutive self-determination to be satisfied. While the structure, composition, and functions of the Voice would be able to be changed by Parliament,[15] the Voice itself should be 'constitutionally entrenched, but legislatively controlled',[16] in order to satisfy self-determination in constitutive and ongoing aspects.

Self-determination, as exercised within a state, emphasises the relationship between Indigenous peoples and the state. Anaya clearly sets out this relational nature of self-determination, and how this connects to peoples living in relationship with a government, when he notes that 'self-determination concerns human beings in regard to the constitution and functioning of all levels and forms of government under which they live'.[17] In particular, self-determination should be understood as 'about non-domination, rather than non-interference'.[18] Under this understanding, self-determination means that a peoples has

> a right to their own governance institutions through which they decide on their goals and interpret their way of life. Other people ought not to constrain, dominate, or interfere with those decisions and interpretations for the sake of their own ends, or according to their judgement of what way of life is best, or in order to subordinate a people to a larger 'national' unit.[19]

The Uluru Statement is a clear example of a demand for self-determination that is based on the 'interdependence of peoples and the embeddedness of their relationships'.[20] The Voice is

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[13] Davis (n 11**Error! Bookmark not defined.**) 31.
[14] Ibid.
[15] Murray Gleeson, 'Recognition in Keeping with the Constitution: A Worthwhile Project' (2019), 14; see also Referendum Council, *Final Report of the Referendum Council*, 30 June 2017, 2.
[16] Ibid.
[17] Anaya (n 6), 143. See also Lino (n 5), 853.
[18] Iris Marion Young, *Inclusion and Democracy* (Oxford, 2003), 237. See also Iris Marion Young, 'Two Concepts of Self-Determination' in Austin Sarat and Thomas R Kearns (eds), *Human Rights: Concepts, Contests, Contingencies* (University of Michigan Press, 2001) 25; Iris Marion Young, 'Self-Determination as Non-Domination: Ideals Applied to Palestine/Israel' (2005) 5 *Ethnicities* 139, 140.
[19] Ibid. In the Australian context, see Lino (n 5).
[20] Dorothée Cambou, 'The UNDRIP and the legal significance of the right of indigenous peoples to self-determination: a human rights approach with a multidimensional perspective' (2019) 23(1-2) *International Journal of Human Rights*, 34, 39, and citing Iris Marion Young, *Global Challenges: War, Self Determination and Responsibility for Justice* (Cambridge: Polity, 2007).

fundamentally grounded in the desire for an improved and ongoing relationship between First Nations peoples and the state (and its citizenry). Moreover, the Voice will improve the relationship between First Nations peoples and the state, because it will reduce the ability of the state to *arbitrarily* interfere with Indigenous peoples by ensuring consultation on decisions before they are taken. It is therefore concerned with ensuring a structural relationship of non-domination of the state over Indigenous peoples. These understandings are so integral and crucial that they require protection in the form of constitutional enshrinement.

To summarise, it can be said that self-determination of Indigenous peoples, in light of UNDRIP, involves a meaningful redistribution of power and involvement in decision-making, away from the state and towards Indigenous peoples.[21] What is fundamental is not simply a legal guarantee of a right to self-determination, but rather a 'legal structuring of the Indigenous-state relationship, the balancing of bargaining power, and the laying down of terms for negotiation'.[22] This typically will involve creating an institution or authority to be vested with power – as is the call in the Uluru Statement from the Heart and its demand for a constitutionally entrenched First Nations Voice to parliament.

Participation

Self-determination is also linked to the legal principle of participation. A relationship of non-domination of the state over Indigenous peoples – that is, a structural relationship which ensures self-determination – requires participation and agreement, and ultimately some redistribution of decision-making power form the state to Indigenous peoples. S James Anaya argues that self-determination involves 'dual aspects': autonomous governance of Indigenous people's own affairs, and 'participatory engagement' with the state, regarding decisions that affect them.[23] Because participation in the life of the state has historically been denied to Indigenous peoples, self-determination of Indigenous peoples includes meaningful participation with the state, whereby 'Indigenous peoples are able to join with all the other peoples that make up the State on *mutually agreed upon and just terms*, after many years of isolation and exclusion'.[24] This involves 'the recognition and incorporation of distinct peoples

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[21] See Lino (n 5), 867; Martin Scheinin and Mattias Åhren, 'Relationship to Human Rights, and Related International Instruments', in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford, New York: Oxford University Press, 2017), 72; Cambou (n 20).
[22] Lino (n 5), 868. See also Scheinin and Åhren (n 21), 66-7.
[23] Anaya (n 4), 193. For more on autonomy and participation in relation to 'Free, Prior and Informed Consent', see Nathan Yaffe, 'Indigenous Consent: a Self-Determination Perspective' (2018) 19(2) Melbourne Journal of International Law 703.
[24] UN Sub-Commission on the Promotion and Protection of Human Rights (n 8) [26], emphasis added.

in the fabric of the State, *on agreed terms*'.[25] As we can see from these quotes, the *agreement* is key. Any attempt to regulate the relationship between the state and Indigenous peoples must be undertaken with Indigenous agreement, and on just terms. This agreement can only come from the participation of Indigenous peoples.

Participation (particularly as stipulated under Article 18 of UNDRIP) obliges states to ensure the participation of Indigenous peoples 'in matters that would affect their rights'. This has two elements. The first, procedural, element is 'allowing indigenous peoples to be actually able to participate in decision-making processes' (for example, ensuring mechanisms and processes for participation are available and known about); the second, substantive, element is 'the capacity to influence the outcomes of decision-making processes'.[26] Moreover, the rights of autonomy and self-government 'find expression in the participation and/or consultation in the rule-making of the State', and this must be understood as including the ability of Indigenous peoples to 'influence the law- and decision-making processes of the State'.[27]

The Voice clearly satisfies the requirements of self-determination, but the design of the Voice requires Indigenous authorship. While the exact structure, functions, and composition of the Voice would be ultimately determined by the parliament, this should only be done after a process where Indigenous peoples views and participation are centred – in line with the idea of a relationship of non-domination between the state and First Nations peoples.

In light of this, it is important to emphasise that the process that led to the Uluru Statement from the Heart – the Regional Dialogues and the National Convention – were themselves an exercise of self-determination and involved significant participation. Both the process (deliberative decision-making, designed to ensure deep and active participation) and the number of people involved (a significantly high proportional engagement) align strongly with the requirements of self-determination and participation. The way the Dialogues were organised and run by Indigenous peoples, and involved Indigenous participants in ways to reach their own conclusions on the issues, meant that the process was Indigenous-authored and led. Because of this, the outcome of the Uluru Statement and its particular calls therefore carry significant legitimacy and weight. As a threshold point, it would be inconsistent with the principles of self-determination and participation to ignore, or undermine, the outcomes of the

[25] Ibid, emphasis added.
[26] International Law Association, 'The Hague Conference (2010) Rights of Indigenous Peoples, Interim Report', 14.
[27] Ibid, 12.

Regional Dialogues and the National Convention. This includes the place of the Voice in the Constitution.

A legislated Voice to government and parliament is fundamentally different from the constitutionally entrenched Voice to Parliament that was demanded at Uluru. The constitutionally entrenched Voice appealed to participants in the Regional Dialogues and the National Convention,

> because of the history of poor or nonexistent consultation with communities by the Commonwealth. Consultation is either very superficial or it is more meaningful, but then wholly ignored. For Dialogue participants, the logic of a constitutionally enshrined Voice – rather than a legislative body alone – is that it provides reassurance and recognition that this new norm of participation and consultation would be different to the practices of the past.[28]

The constitutional entrenchment, then, was a considered and fundamental aspect of the Uluru Statement's calls. A legislated Voice to government and parliament is not able to satisfy the requirements of self-determination we have set out above. It is not mutually agreed to by First Nations peoples, and does not align with the requirements of participatory engagement and non-domination of relationship. Instead, it is the state imposing a particular form of Voice, directly contrary to the calls made by First Nations peoples. This current proposal fails at the first hurdle of self-determination: it directly goes against the very structure that Indigenous peoples have advocated for.

Conclusions

The Uluru Statement from the Heart was an invitation to the Australian people, for a structural reform to the state and its legal and political composition. The Statement aimed to address 'the torment of our powerlessness', by a solution that would ensure greater self-determination for First Nations peoples: a constitutionally-entrenched Voice to Parliament. The act of self-determination in the Uluru process – a significant dialogic participatory process, led by First Nations peoples – means that the outcome of the process should be engaged with by the Australian state and its citizens.

We have outlined the legal principles of self-determination and participation in order to provide background for the Voice Design. UNDRIP shifted self-determination, so that it now emphasises a relationality between the state and Indigenous peoples (rather than solely

[28] Referendum Council (n 15), 14.

secession). This involves several elements: constitutive and ongoing self-determination; understanding self-determination as a relationship of non-domination between the state and Indigenous peoples; and the need for participation and agreed terms. In order to provide full expression to the principles of self-determination and participation, the Voice must be Constitutionally enshrined (and with a structure, functions, and composition that ensures ongoing self-determination and participation).

Yours Sincerely,

Megan Davis, Professor, Balnaves Chair in Constitutional Law, and Pro Vice Chancellor (Indigenous), UNSW

Sophie Rigney, Senior Research Associate, Indigenous Law Centre, UNSW

George Williams, Professor and DVC (Planning and Assurance), UNSW