

30 April 2021

National Indigenous Australians Agency
Voice Secretariat
By email: Co-designVoice@niaa.gov.au

Dear Indigenous Voice Co-Design Group Members,

Re: Submission to the Indigenous Voice Co-Design Process

Thank you for the opportunity to make this submission to the Indigenous Voice co-design process. We acknowledge the significant work undertaken to date by the members of the Indigenous Voice Co-design groups.

We note that the terms of reference for the Indigenous Voice co-design process specifically excluded making recommendations about constitutional recognition. In our view, this is regrettable and a significant missed opportunity. It is inconsistent with the wishes of many First Nations people who have called for a Voice enshrined in the Australian Constitution.^{1 2} It is also inconsistent with the Coalition Government's election promise to hold a referendum once a model for the Voice is settled.³

Community Legal Centres NSW strongly agrees with the many First Nations-controlled organisations and coalitions,^{4 5} constitutional and public law experts,^{6 7} and others⁸ who argue that a First Nations Voice to Parliament must be constitutionally enshrined to achieve its objective of enabling First Nations self-determination and effectively perform its function as a representative of, and advocate for, First Nations people.

This submission addresses:

- The legal, political and justice case for constitutional entrenchment of the First Nations Voice to Parliament
- Our views on the proposals put forward by the co-design groups in the Interim Voice Co-design Interim Report

¹ From the Heart, 'Uluru Statement from the Heart', 2017, <https://fromtheheart.com.au/explore-the-uluru-statement/>

² Referendum Council, *Final Report of the Referendum Council*, 2017, https://www.referendumcouncil.org.au/sites/default/files/report_attachments/Referendum_Council_Final_Report.pdf

³ Coalition Government, 'Our Plan to Support Indigenous Australians', 2019, <https://apo.org.au/sites/default/files/resource-files/2019-05/apo-nid242236.pdf>

⁴ See, for example: Reconciliation Australia, *Submission to the Indigenous Voice Co-design Process*, March 2021, <https://haveyoursay.voice.niaa.gov.au/submissions/view/sbm16de18c8f494863eba6ac>

⁵ See for example: *From the Heart submission No. 1*, 21 January 2021, <https://haveyoursay.voice.niaa.gov.au/submissions/list>

⁶ See, for example: Public Lawyers, *Submission to the Indigenous Voice Co-design Process*, 20 January 2021, <https://haveyoursay.voice.niaa.gov.au/submissions/view/sbm15bd4d37275607e51b233>

⁷ See for example: Murray Gleeson, 'Recognition in Keeping with the Constitution: A Worthwhile Strategy', *Uphold & Recognise*, 2019, https://cdn.brandfolder.io/3RTTK3BV/as/putr90-7ew1ns-5sqfef/Indigenous_Recognition_-_Murray_Gleeson.pdf

⁸ See for example: Public Interest Advocacy Centre, *Submission to the Indigenous Voice Co-design Process*, 19 March 2021, <https://haveyoursay.voice.niaa.gov.au/submissions/view/sbm16dde0615c94d349ec8d8>

- The unique opportunity presented by a referendum and the establishment of a constitutionally enshrined Voice to reset the relationship between First Nations people and the state / non-First Nations population.

About Community Legal Centres NSW

Community Legal Centres NSW is the peak body for 40 community legal centres in NSW. Our team supports, represents and advocates for our members, and the legal assistance sector more broadly, with the aim of increasing access to justice for people in NSW.

Community legal centres are independent non-government organisations that provide free legal assistance to people and communities when they need it most, particularly to people facing economic hardship, disadvantage, discrimination or domestic violence.

Community Legal Centres NSW is advised on matters relating to justice for First Nations people by our Aboriginal Advisory Group, our Aboriginal and Torres Strait Islander Rights Working Group, and our Aboriginal-controlled member centres, as well as by the Aboriginal Legal Service (NSW/ACT).

The work we do across NSW – supporting victim-survivors of domestic violence, women in prison, children and families engaged with the child protection system and people experiencing disadvantage and discrimination among others – highlights the extent and structural nature of the injustices First Nations people continue to experience. In 2019, our members identified First Nations justice as a priority justice system reform

Community legal centres stand in solidarity with First Nations people and communities. We support the substance and intent of the Uluru Statement from the Heart and strongly support the establishment of a constitutionally enshrined Voice to Parliament.

The Voice Must be Enshrined in the Constitution

It is the only form of constitutional recognition endorsed by First Nations people

Community Legal Centres NSW acknowledges that First Nations people have a unique relationship with the Constitution and the colonising state that enacted it. Only they were dispossessed as a result of invasion and expressly excluded from being counted as members of the 'new' nation under the Constitution. They were given no role to play in the framing of Australia's political and legal institutions.

First Nations' people's calls for constitutional recognition are not new and proposals for reform have taken multiple forms over the years. The Parliamentary Joint Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander People considered 21 examples of past, current and proposed First Nations advisory bodies.⁹

A constitutionally enshrined Voice is the only current option for constitutional reform that accords with the wishes and aspirations of First Nations people themselves.¹⁰ In May 2017, after

⁹ Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander People, *Final Report*, 2018, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Constitutional_Recognition_2018/Constitutional_Recognition/Final_Report

¹⁰ Referendum Council, *Final Report of the Referendum Council*, 2017,

the most ‘significant consultation process that has ever been undertaken’,¹¹ First Nations people presented the *Uluru Statement from the Heart* to the Australian Government and the community.

As the joint submission by several leading public and constitutional law academics explains:¹²

The delegates who were locally selected to participate in the Regional Dialogues that culminated in the Convention at Uluru were drawn from First Nations communities across vast and differing regions throughout Australia. They were intentionally selected to represent people who are often politically forgotten by government and Parliament. Delegates included Elders, Traditional Owners, community representatives, youth and other First Nations representatives from local and regionally based organisations. The experiences of this diverse range of delegates meant that the reforms in the Uluru Statement provided an unprecedented insight into the wishes and needs of First Nations communities across the country.

The statement rejected earlier proposals for constitutional reform, which tended to focus on repealing or amending discriminatory provisions (notably sections 25 and 51(xxvi)).¹³ Instead, it recommended a constitutionally enshrined First Nations Voice to Parliament.¹⁴

Community Legal Centres NSW recognises that only by enshrining the Voice to Parliament in the Constitution and committing to truth-telling and a process of agreement-making with First Nations people, will non-Indigenous people and communities demonstrate our acceptance of First Nations’ people’s invitation to ‘walk with us in a movement of the Australian people for a better future.’¹⁵

The Australian public supports constitutional enshrinement

Community Legal Centres NSW notes that many people already support a constitutionally enshrined Voice to Parliament. The 2020 Australian Reconciliation Barometer found that:¹⁶

- 95% of the general community believe it is important for First Nations people to have a say in the matters that affect them
- 81% of the general community believe it is important to protect a First Nations representative body in the Constitution so that it ‘can’t be removed by any government’.

https://www.referendumcouncil.org.au/sites/default/files/report_attachments/Referendum_Council_Final_Report.pdf

¹¹ Referendum Council, *Final Report of the Referendum Council*, 2017,

https://www.referendumcouncil.org.au/sites/default/files/report_attachments/Referendum_Council_Final_Report.pdf

¹² Public Lawyers, *Submission to the Indigenous Voice Co-design Process*, 20 January 2021,

<https://haveyoursay.voice.niaa.gov.au/submissions/view/sbm15bd4d37275607e51b233>

¹³ Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander People, *Final Report*, 2015,

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/2015_Constitutional_Recognition_of_Aboriginal_and_Torres_Strait_Islander_People/Constitutional_Recognition/Final_Report

¹⁴ From the Heart, ‘Uluru Statement from the Heart’, 2017, <https://fromtheheart.com.au/explore-the-uluru-statement/>

¹⁵ From the Heart, ‘Uluru Statement from the Heart’, 2017, <https://fromtheheart.com.au/explore-the-uluru-statement/>

¹⁶ Reconciliation Australia, ‘Australian Reconciliation Barometer’, 2020, https://www.reconciliation.org.au/wp-content/uploads/2020/11/australian_reconciliation_barometer_2020_full-report_web.pdf

More recently, the Australian Constitutional Values Survey 2021 undertaken by CQUniversity Australia and Griffith University found that 62% of the 1,511 respondents were in favour of a First Nations Voice and over 50% expressly in favour of it being protected in the Constitution (compared to 26% in favour of a purely legislative Voice).¹⁷

Entrenchment is in keeping with our constitutional tradition

The entrenchment of the Voice in the Constitution is in keeping with Australia's constitutional tradition. As Liberal MP Julian Leeser argues, 'it is the kind of machinery clause that Griffith, Barton and their colleagues might have drafted.'¹⁸ Constitutional entrenchment of the Voice is consistent with the purpose of the Constitution in providing a rulebook to regulate power sharing. A Voice that is, 'constitutionally entrenched but legislatively controlled' is also congruent with the system of Parliamentary democracy that is established in the Constitution.¹⁹ It will enhance (not curtail) the existing powers of Parliament, including by ensuring that it is better informed in its approach to First Nations affairs. We discuss this point in detail below.

Entrenchment will provide legitimacy, stability and independence

The history of past First Nations representative bodies²⁰ created through executive or legislative action provides a compelling justification for constitutional enshrinement. Once established, all were subsequently abolished by governments. This fact clearly highlights the inadequacy of non-constitutional means to safeguard the Voice's existence, to compel governments to engage in good faith, and to support genuine self-determination. Further, we note that relationships between the state and these bodies, particularly the Aboriginal and Torres Strait Islander Commission, have been plagued by failures to listen, communicate or cooperate effectively and to recognise cultural differences.

Including the Voice in the Constitution alongside other foundational institutions of government, such as the High Court, will confer a degree of popular legitimacy that will ensure Parliament's legislative implementation of the Voice aligns with First Nations people's expectations as well as those of the broader community.²¹ In contrast, establishing the Voice in legislation only would send a clear message to First Nations people and the wider community that it has very limited impact and significance.

¹⁷ CQ University and Griffith University, 'The Australian Constitutional Values Survey 2021', https://www.cqu.edu.au/_data/assets/pdf_file/0021/190092/australian-constitutional-values-survey-2021.pdf

¹⁸ Julian Leeser quoted in Uphold & Recognise, *Submission No 172 to the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander People*, 5 June 2018, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Constitutional_Recognition_2018/ConstRecognition/Submissions

¹⁹ Murray Gleeson, 'Recognition in Keeping with the Constitution: A Worthwhile Strategy', *Uphold & Recognise*, 2019, https://cdn.brandfolder.io/3RTTK3BV/as/putr90-7ew1ns-5sgfef/Indigenous_Recognition_-_Murray_Gleeson.pdf

²⁰ National Indigenous Australians Agency, *Indigenous Voice Co-Design Process: Interim Report*, October 2020, see: Chapter 4, <https://voice.niaa.gov.au/sites/default/files/2021-02/indigenous-voice-codesign-process-interim-report-2020.pdf>

²¹ Public Lawyers, *Submission to the Indigenous Voice Co-design Process*, 20 January 2021, <https://haveyoursay.voice.niaa.gov.au/submissions/view/sbm15bd4d37275607e51b233>

Given the legitimate concerns that a purely legislative mechanism would leave the Voice vulnerable to changes in political will,²² Community Legal Centres NSW strongly believes that its permanence, independence and stability must be guaranteed in the Constitution. Constitutional enshrinement will protect the Voice from being dismantled at the whim of the government of the day and increases its ability to speak necessary truths, to hold governments and Parliaments accountable and to fearlessly represent the diverse views of First Nations people. We note that the effectiveness of the Voice will also depend on whether it receives adequate, ongoing funding.

If designed and implemented appropriately, the Voice could have a real impact on the lives of First Nations people on the ground

In the absence of a strong and secure national representative Voice, policy decisions have been largely left to be determined by governments, with minimal, genuine input from First Nations people. Despite spending billions of dollars each year,²³ successive governments have failed to close the gap between First Nations people and their non-Indigenous counterparts on a range of social, economic and justice measures. In fact, evidence suggests that on many measures, the gap is widening.^{24 25} As a result of historical and ongoing dispossession and institutional racism, First Nations people continue to experience worse outcomes in health, education and employment, incarceration and child removal.²⁶ They live on average 10 years less than non-Indigenous people, are three times more likely to suffer from chronic diseases and five times more likely to be hospitalised for mental-health conditions.²⁷ These statistics are an outrage and an ongoing scourge on our modern history.

This month marks 30 years since the Royal Commission into Aboriginal Deaths in Custody handed down its final report in April 1991. The report included 339 recommendations, many of which have been ignored or only partly implemented. Yet, the rates of incarceration of First Nations people and deaths in custody remains a source of deep national shame – at least 474

²² See, for example: Reconciliation South Australia, *Submission No 475 to the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander People*, June 2018, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Constitutional_Recognition_2018/Constitutional_Recognition/Submissions

²³ See for example: Natalie Ahmat and Shahni Wellington, 'Budget 2020: what's the long and short of it at first glance?', *NITV*, 6 October 2020, <https://www.sbs.com.au/nitv/article/2020/10/06/budget-2020-whats-long-and-short-it-first-qlance>

²⁴ Patricia Karvelas, 'Closing the gap: how are we getting it so wrong?', *ABC News*, 11 February 2015 <https://www.abc.net.au/news/2015-02-11/karvelas-closing-the-gap-how-are-we-getting-it-so-wrong/6086018>

²⁵ National Congress of Australia's First People, *Submission 292 to the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander People*, June 2018, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Constitutional_Recognition_2018/Constitutional_Recognition/Submissions

²⁶ Shireen Morris and Noel Pearson, 'Indigenous Constitutional Recognition: Paths to Failure and Possible Paths to Success' (2017) 91 *Australian Law Journal* 350

²⁷ The Royal Australian and New Zealand College of Psychiatrists, *Submission No 118 to the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander People*, June 2018, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Constitutional_Recognition_2018/Constitutional_Recognition/Submissions

First Nations people have died in custody since 1991.²⁸ Seven First Nations people have died since the beginning of March 2021.²⁹

The current, top-down approach to addressing the disadvantage and exclusion experienced by many First Nations people and communities is inadequate. The exclusion of First Nations voices from Parliament has contributed to the ongoing enactment of paternalistic policies which are often short-lived, duplicative, ineffective, discriminatory and dismissive of First Nations' traditions, cultures, knowledges and lived experiences.³⁰ Such approaches have not and will not work to address the structural drivers of disadvantage and exclusion.

The problems facing First Nations communities are not intractable. In 2009 the Australian Human Rights Commission presented to government its report on the options for a sustainable national representative body for First Nations people. More than a decade ago, the report noted that the gap is not closing because the approach taken by successive governments did not meet the standard of evidence-based policy.³¹

Similarly, we have long known that self-determination is key. As the National Aboriginal Community Controlled Health Organisation notes, people's health and wellbeing suffer when they lack autonomy or feel as though they are being controlled by others or by their social, economic or political circumstances.³² Or, in the words of the *Uluru Statement from the Heart*, '[w]hen we have power over our destiny our children will flourish'.

We note the many local examples which demonstrate that meaningful engagement with First Nations communities delivers appropriate and impactful outcomes and can drive meaningful change. Numerous studies have shown that First Nations-controlled health services consistently deliver better outcomes for First Nations people.³³ Yet, Productivity Commission figures confirm an increasing proportion of funding for First Nations policies is going to non-First Nations organisations.³⁴

Community Legal Centres NSW strongly believes that only First Nations people can identify and devise solutions to the unique challenges they face. We recognise that constitutional reform must be accompanied by other substantive reforms, including the establishment of a Makarrata

²⁸ Stan Grant, 'Aboriginal deaths in custody reflect the poor health of Australia's democracy', *ABC News*, 18 April 2021, <https://www.abc.net.au/news/2021-04-18/aboriginal-deaths-custody-reflect-health-democracy-australia/100074262>

²⁹ Evan Young, 'Two more Indigenous deaths in custody take Australia's total since the start of March to seven', *SBS News*, 27 April 2021, <https://www.sbs.com.au/news/two-more-indigenous-deaths-in-custody-take-australia-s-total-since-the-start-of-march-to-seven>

³⁰ Megan Davis, 'Closing the Gap in Indigenous Disadvantage: A Trajectory of Indigenous Inequality in Australia', 2015, 16(1) *Georgetown Journal of International Affairs*

³¹ Australian Human Rights Commission, 'Our Future is in our Hands – Creating a Sustainable National Representative Body for Aboriginal and Torres Strait Islander People', *Report of the Steering Committee for the Creation of a New Representative Body* (2009) <https://humanrights.gov.au/our-work/our-future-our-hands-2009>

³² National Aboriginal Community Controlled Health Organisation, *Submission No 373 to the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander People*, June 2018, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Constitutional_Recognition_2018/Constitutional_Recognition/Submissions

³³ National Aboriginal Community Controlled Health Organisations, *Submission No 373 to the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander People*, June 2018, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Constitutional_Recognition_2018/Constitutional_Recognition/Submissions

³⁴ Productivity Commission, *Indigenous Expenditure Report*, 2017, <https://www.pc.gov.au/research/ongoing/indigenous-expenditure-report/2017>

Commission to oversee agreement-making and truth-telling. However, in our view a constitutionally enshrined Voice is an important step in recognising self-determination and addressing the systemic lack of government engagement with First Nations people. By constitutionally enshrining the Voice, Parliament will be finally held accountable for government action in relation to First Nations affairs. This permanent avenue for engagement will help reinforce 'closing the gap' as a genuine shared responsibility and will result in policies and programs that deliver better outcomes for First Nations people and communities.

RECOMMENDATION

1. To ensure the permanence, legitimacy and stability of the Voice is guaranteed and that it is empowered to fearlessly advocate on behalf of First Nations people, the Voice must be enshrined in the Constitution.

Response to Interim Co-Design Proposals

Community Legal Centres NSW acknowledges that the Interim Report for the Indigenous Voice Co-design process provides a valuable summary of the work that has been undertaken to date to consider models for a national forum for First Nations people to advise upon and guide responses to issues that impact them.³⁵

Critically, and contrary to the misconceptions promoted by some politicians and media institutions, the report makes clear that the Voice will not:

- be a 'third chamber' of Parliament
- have a veto power
- deliver government programs or services
- replace existing bodies or structures.

A Voice, which poses no threat to existing structures of government and functions in an advisory capacity, should be capable of winning broad support among politicians, constitutional conservatives and the public.

Community Legal Centres NSW believes current proposals for the design of the National Voice requires further development to ensure it is genuinely representative of the diverse voices and needs of First Nations people and that the Government honours its election commitment to a referendum once a model has been settled.

The Voice must genuinely represent the diverse experiences and needs of First Nations people and communities

Community Legal Centres NSW supports the Interim Report's recognition that a representative body will only be effective if it aligns with the priorities and aspirations of First Nations people themselves and reflects the diversity of experiences and views (from individuals, organisations and communities). across the country.

³⁵ National Indigenous Australians Agency, *Indigenous Voice Co-Design Process: Interim Report*, October 2020, <https://voice.niaa.gov.au/sites/default/files/2021-02/indigenous-voice-codesign-process-interim-report-2020.pdf>

However, we note that the Interim Report proposes a maximum 18-person membership model for the Voice, with two members of different genders per jurisdiction.³⁶ We agree with From the Heart³⁷ that these numbers are arbitrary and significantly underestimate the level of representation needed to bring about effective change. The caps fail to take into account the uneven distribution of First Nations people across the country (for example, NSW accounts for 33% of Australia's First Nations population, while the ACT and Torres Strait Islands each account for less than 1% of the total population) and the fact that their specific needs often depend on where they live.³⁸ The current proposals risk creating a perception that jurisdictions with particularly low or high numbers of First Nations people are over or under-represented on the Voice. We recommend that further work be done to consider how best to mitigate this.

This proposal also fails to account for the fact that there is a range of First Nations nations within this country, each with their own leadership and decision-making structures, which do not follow colonised state borders. The make-up of the Voice will have to ensure that these diverse groups are represented authentically. Working with First Nations people to develop representation structures within the Voice will be integral to ensuring that this occurs.

The Voice must also ensure direct representation of First Nations people and communities who continue to suffer the worst impacts of colonisation and whose voices are most often silenced in policy and law-making processes, including people living in rural and remote communities, people with lived experience of the criminal, legal, youth justice and child protection systems and victim-survivors of violence and abuse.

It is therefore critical that the Voice's eligibility requirements (such as criminal convictions) do not arbitrarily deny people, who would otherwise make important contributions, the opportunity to participate.³⁹ We agree that it is important to ensure members of the Voice act in a manner that enhances public confidence. However, we consider that excluding a person based on a past criminal conviction alone is discriminatory, particularly given First Nations people's disproportionate rates of contact with the criminal justice system.⁴⁰

RECOMMENDATIONS

2. The Voice must ensure direct representation of First Nations people and communities whose voices are most often silenced in policy and law-making processes.
3. Further work should be undertaken to ensure that the Voice's caps on membership and eligibility requirements do not arbitrarily deny people the opportunity to participate, and that the Voice is inclusive of people with varied life experiences.

³⁶ Ibid, see page 8.

³⁷ From the Heart, *Submission to the Indigenous Voice Co-design Process*, 21 January 2021, <https://haveyoursay.voice.niaa.gov.au/submissions/view/sbm16dde0615c94d349ec8d8>

³⁸ Ibid.

³⁹ Public Interest Advocacy Centre, *Submission to the Indigenous Voice Co-design Process*, 19 March 2021, <https://haveyoursay.voice.niaa.gov.au/submissions/view/sbm16dde0615c94d349ec8d8>

⁴⁰ Australian Law Reform Commission, Executive summary of the *Pathways to Justice Report*, January 2018, <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-people-alrc-report-133/executive-summary-15/disproportionate-incarceration-rate/>

Government consultation with the Voice must be proactive, meaningful and transparent

Community Legal Centres NSW supports the Interim Report's commitment to ensuring:

- adequate scrutiny of the Government's and Parliament's engagement with the Voice
- due consideration of its advice, including through the establishment of a Parliamentary committee modelled on the Parliamentary Joint Committee on Human Rights.⁴¹

However, we believe that additional measures are needed to ensure that consultation with the Voice takes place in a proactive, meaningful and transparent manner.

We note that under the proposed models outlined in the Interim Report, governments and Parliaments are only *obliged* to consult and engage the Voice on a very narrow range of matters.⁴² In our view, policy and lawmakers should be required to:

- consider the Voice's advice on, 'proposed laws and policies of general application which particularly affect, or which have a disproportionate or substantial impact on First Nations People'⁴³
- attach statements of consultation which address Voice engagement to bills which propose such laws and policies.

In any case, given that advice provided by the Voice would be non-justiciable, the demarcation between 'obligatory' and 'expected' areas of consultation is a false dichotomy. If accepted, it would seriously risk the Voice's ability to shape laws and policies that impact First Nations people.

To help ensure decisions made about First Nations affairs are appropriately informed, policy and lawmakers must be required to obtain expert advice and guidance from the Voice at the earliest stages of policy and legislative development. While the Interim Reports suggests that informal advice will not be tabled,⁴⁴ we strongly urge that all advice provided by the Voice must be tabled so that it forms part of the public record. This will help to keep governments and Parliaments accountable.

⁴¹ National Indigenous Australians Agency, *Indigenous Voice Co-Design Process: Interim Report*, October 2020, see: pages 18 and 54, <https://voice.niaa.gov.au/sites/default/files/2021-02/indigenous-voice-codesign-process-interim-report-2020.pdf>

⁴² Ibid, see pages 51-52

⁴³ Ibid, see page 53

⁴⁴ Ibid, see pages 16 and 50

RECOMMENDATIONS

4. Parliament and governments should be obliged to consult the Voice on all 'proposed laws and policies of general application which particularly affect, or which have a disproportionate or substantial impact on First Nations People'.
5. To ensure the voices of First Nations people are considered in the early stages of legislative and policy making processes, further consideration must be given to the timing of the obligation to consult with the Voice.
6. All advice provided by the Voice, whether it be formal or informal guidance, should be tabled in Parliament.
7. Law makers should be required to attach to every bill that significantly or particularly affects First Nations people be a comprehensive statement of consultation and engagement with the Voice.

The Government must honour its commitment to hold a referendum before passing legislation

Community Legal Centres NSW respects First Nations people's calls for a Voice to Parliament that is protected in the Constitution. There is no mandate for a purely legislative Voice. We are strongly opposed to a 'legislate first, referendum later' approach to establishing the Voice. We support the position advocated by many First Nations people, organisations and coalitions:

1. As a first step, the Voice should be enshrined in the Constitution.
2. As a second step, legislation should be passed to govern the Voice's operations.

Establishing the Voice through legislation before a referendum presents several significant risks. As noted above, it risks undermining the independence, authority and credibility of the Voice. It also increases the risk that First Nations people will not support the Voice, which would significantly compromise its ability to advocate for and represent voices of First Nations people. There is also a real possibility that, once the Voice is legislated, the Government will walk away from its election commitment to hold a referendum. Now is the time. We cannot risk letting the current popular momentum for constitutional reform dissipate.

Statements made by both the Labor and Liberal parties in support of a constitutionally enshrined Voice make clear that this position has bi-partisan support. In particular, we refer to the Coalition's promise in the lead up to the 2019 federal election that 'a referendum will be held once a model has been settled'⁴⁵ and to Labor Leader Anthony Albanese's comment that 'at its most basic level, the denial of a constitutionally enshrined Voice is a denial of the Australian instinct for a fair go.'⁴⁶ In order to bolster community engagement in the next phase of the co-design process, we strongly recommend that the Government publicly reaffirm its commitment to establishing a constitutionally enshrined Voice. Once a general model for the Voice is agreed, the Government must then honour its election commitment to a referendum.

⁴⁵ Coalition Government, 'Our Plan to Support Indigenous Australians', 2019, <https://apo.org.au/sites/default/files/resource-files/2019-05/apo-nid242236.pdf>

⁴⁶ Anthony Albanese, 'Ministerial Closing the Gap Speech', 12 February 2020, *Anthony Albanese MP*, <https://anthonyalbanese.com.au/ministerial-statements-closing-the-gap-wednesday-12-february-2020>

After the continued existence and core function of the Voice are guaranteed in the Constitution, its structure, composition and precise functions can be finalised through legislation in the next Parliamentary term.⁴⁷ However, to ensure maximum community consultation and support, we recommend the Government begins developing a draft exposure bill for comment as soon as possible.

RECOMMENDATIONS

8. The Government should confirm its commitment to establishing a constitutionally enshrined Voice and expressly instruct the Indigenous Voice to Parliament Co-design groups to begin considering and reporting on:
 - a. options for constitutional enshrinement of the Voice, including draft wording;
 - b. pathways to referendum.
9. The Government must honour its election commitment to a referendum once a model for the Voice is settled.
10. After the existence and core function of the Voice has been guaranteed in the Constitution, enabling legislation for the Voice must be passed in the next term of Parliament. We recommend that the Government begin developing an exposure draft bill for comment as soon as possible.

Referendum – A Unique Opportunity to Educate and Change the Discourse

At its core, enshrining the Voice in the Constitution is a formal acknowledgement that First Nations people have unique historical, practical, spiritual and cultural knowledge. It would mark a critical paradigm shift away from unsuccessful and paternalistic approaches to First Nations affairs towards an approach based on empowerment that recognises First Nations self-determination and their capability to address the unique challenges they face as a result of colonisation. In turn, this will provide the basis for a relationship between First Nations people and the State that might meaningfully involve active listening, inclusivity and mutual respect.⁴⁸

A carefully crafted referendum campaign, designed by and with First Nations people, has the potential to help increase the broader community's understanding of First Nations people's unique histories, cultures and relationship with the Constitution and to ensure that the public is engaged with the Voice establishment process.⁴⁹ It also presents an opportunity to challenge and change the highly problematic discourse that often pervades conversations about challenges facing our First Nations people.

⁴⁷ From the Heart, *Submission to the Indigenous Voice Co-design Process*, 21 January 2021, <https://haveyoursay.voice.niaa.gov.au/submissions/view/sbm16dde0615c94d349ec8d8>

⁴⁸ Uphold & Recognise, *Submission No 172 to the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander People*, 5 June 2018, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Constitutional_Recognition_2018/Constitutional_Recognition/Submissions

⁴⁹ Public Lawyers, *Submission to the Indigenous Voice Co-design Process*, 20 January 2021, <https://haveyoursay.voice.niaa.gov.au/submissions/view/sbm15bd4d37275607e51b233>

Community Legal Centres NSW is deeply concerned about the impacts of the mainstream media's systemic misrepresentation of First Nations people.⁵⁰ Media coverage of First Nations issues is often misinformed, excludes First Nations voices, or incorrectly and disrespectfully positions First Nations people as victims who are unable to speak on their own behalf.⁵¹ This tendency to frame stories about First Nations people through a lens of deficiency perpetuates disadvantage and clouds an understanding of ongoing impacts of colonisation and structural biases.

A constitutionally entrenched First Nations Voice to Parliament will provide First Nations people with a permanent and appropriate platform for truth-telling and engaging in dialogue with our nation. As we know from the *Uluru Statement from the Heart* this is critical to the overall healing process for First Nations people and to addressing the unfinished business between First Nations people and the Australian state.

More Information

Thank you for taking the time to consider this submission. If you have any questions or require further information, please contact Emily Hamilton, Policy & Advocacy Manager at Community Legal Centres NSW via emily.hamilton@clcnsw.org.au or on (02) 9212 7333.

Yours sincerely,

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⁵⁰ Melissa Stoneman et al, 'The Portrayal of Indigenous Health in Selected Australian Media', *The International Indigenous Policy Journal*, vol 5, no 1, 2013

⁵¹ Amanda Porter and Eddie Cubillo, 'Not criminals or passive victims: media need to reframe their representation of Aboriginal deaths in custody', *The Conversation*, 20 April 2021, <https://theconversation.com/not-criminals-or-passive-victims-media-need-to-reframe-their-representation-of-aboriginal-deaths-in-custody-158561>