

RESPONSE TO INDIGENOUS VOICE CO-DESIGN PROCESS *INTERIM REPORT TO THE AUSTRALIAN GOVERNMENT*

SUBMISSION BY LANDER & ROGERS

This submission is in response to the invitation to all Australians to provide feedback on the proposals contained in the *Interim Report to the Australian Government* of October 2020.

ABOUT LANDER & ROGERS

Lander & Rogers is a law firm practising across the lands of the Kulin Nation (Naarm, Melbourne), the Eora Nation (Djubuguli, Sydney) and the land of the Jagera and Turrbul people (Meanjin, Brisbane).

We are committed to promoting reconciliation and contributing to Australia's effort to recognise, understand and repair the relationship between Aboriginal and Torres Strait Islander peoples and the wider Australian community, an effort that is grounded in listening to the voices of Aboriginal and Torres Strait Islander people and accepting the truth of our nation's history.

We are about to launch our next Reconciliation Action Plan (RAP), which intends to focus on the theme of Voice and embraces the proposal in the Uluru Statement from the Heart regarding the Indigenous Voice to Parliament. More broadly, Lander & Rogers intends to defer to, amplify and elevate the voices of Aboriginal and Torres Strait Islander peoples in Australia in carrying out the objectives of our RAP. We recognise that the ultimate recommendations of the Indigenous Voice Co-design Process will be important to our mission and to the position of Aboriginal and Torres Strait Islanders across Australia.

RESPONSE TO THE INTERIM REPORT TO THE AUSTRALIAN GOVERNMENT

The Interim Report states that stage two of the co-design process intends to give Aboriginal and Torres Strait Islander peoples the opportunity to provide detailed feedback throughout consultation and engagement. We therefore expect that stage two will involve open, accessible, and widespread consultation with Aboriginal and Torres Strait Islander communities.

Constitutional amendment

While constitutional amendment with regard to the Voice has been excluded from the terms of reference for the co-design process, the Interim Report refers to principles established in previous calls for constitutional amendment by Aboriginal and Torres Strait Islander peoples.¹ This includes the Uluru Statement from the Heart, the largest

¹ For example: "*The co-design task follows the recommendation of the 2018 Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples to achieve a design for the Indigenous Voice, considering local, regional and national elements and how they interconnect.*" (page 6); the Interim Report draws on consultative processes "*echoing*

ever consensus of Aboriginal and Torres Strait Islander people on a proposal for substantive recognition.² The reference in the Uluru Statement from the Heart to the establishment of the Voice is reflective of its significance to the delegates who represented the First Nations people in producing that statement.

Lander & Rogers is one of 18 law firms that issued a joint public response in support of the Uluru Statement and we continue to support it.

We submit that the process set out by the Uluru Statement from the Heart is the most empowering and effective way to achieve a meaningful Indigenous Voice. We support key demands championed by the Uluru Statement from the Heart campaign, including that:

1. the Australian Government honours its election commitment to a referendum once a model for the Voice has been settled; and
2. legislation enabling the Voice must be passed after a referendum has been held in the next term of parliament.

We agree that constitutional enshrinement provides stability and certainty, which would protect the Voice from abolition or diminishment by subsequent governments. It is also crucial that the Voice is truly independent and can speak necessary truths to the Australian government and parliament of the day.³

Constitutional enshrinement would ensure that Aboriginal and Torres Strait Islander voices transcend legislative and parliamentary change and the right to be heard would not be at the whim of politics, as is the status quo. Whilst legislation can be relied upon to further define or amend the structure, composition and functions of the Voice as required, its presence should enjoy the same recognition as the legislative and judicial bodies already referenced in the Constitution. To that end, we believe that simply passing legislation creating the Indigenous Voice will not go far enough. Its core existence should be written into the Constitution to provide certainty.

Constitutional recognition also carries a significant symbolic effect. The Constitution establishes a set of fundamental principles regarding the governance of Australia and it reflects some of the central tenants of our way of life, such as the rule of law. It is nationally revered and respected throughout the Nation and is not capable of being easily changed. Enshrining the Indigenous Voice into the Constitution will reflect Australia's commitment to listening to Aboriginal and Torres Strait Islander voices.

Despite the challenges of achieving a successful referendum, our view is that a popular and bipartisan campaign would provide legitimacy and move the public to vote "yes". Particularly as a June 2020 poll found that 56% of Australian voters said they would vote

the Uluru Statement from the Heart" (page 25); the co-design process relies on and uses principles drawn from resources that are premised on a Constitutionally enshrined Voice or constitutional recognition (see references throughout the report including: Professor Dr Langton and Professor Calma's foreword (page 3); various reports used to inform the co-design process (page 60)); the Interim Report recognises that "*in addition to reflecting on these international examples, there was consideration of the stability of these arrangements in Canada in particular. It was noted that reference to the arrangements in Canada's constitution was one factor involved in its stability.*" (page 119).

² The Guardian, *A year on, the key goal of Uluru statement remains elusive*, 26 May 2018, <https://www.theguardian.com/australia-news/2018/may/26/a-year-on-the-key-goal-of-uluru-statement-remains-elusive>

³ These concepts are addressed in more detail in the submission of Public Lawyers in response to the Interim Report, *The Imperative Of Constitutional Enshrinement*, 20 January 2021.

"yes", and only 17% said they would vote no, if a referendum were held on a constitutionally enshrined Voice to Parliament.⁴

The structure of the Voice

Achieving a 'true partnership'

The Interim Report expresses the intention for the Voice to be *"a robust system in which Aboriginal and Torres Strait Islander people and our communities are able to work in true partnership with governments, to have our advice heard by the Parliament and Australian Government and to be part of shared decision making with governments at the local and regional level"*.⁵

The **National Voice** is proposed as an advisory body, in a two-way interaction with the Parliament and the Australian Government, that would provide advice on behalf of Aboriginal and Torres Strait Islander peoples to ensure their views are considered in legislation and policy development. Advice from the National Voice would be on matters of critical importance to the social, spiritual and economic wellbeing of Aboriginal and Torres Strait Islander peoples at the national level.

The **Local and Regional Voice** is proposed to provide flexibility for communities to enhance their own existing governance arrangements or to design new ones. This will allow for governance structures to fit local cultures, needs and aspirations, consistent with the agreed purpose, scope and principles set out in the applicable governance framework. It will also ensure shared decision-making at program and service delivery levels.

We commend these goals and acknowledge it is widely known that Aboriginal and Torres Strait Islander peoples are best placed to advise on what works best for community. We also recognise there are existing beneficial partnerships between Aboriginal and Torres Strait Islander communities and governments (some being referred to in the Interim Report).

However, we observe that the Interim Report places high expectations on all levels of government to come together in a coordinated way and, in relation to the Local and Regional Voice, "requires systemic transformation of government 'ways of doing business'".⁶ It will require commitment from all tiers of government and must include targeted and mainstream policies, programs and services.

These are very high expectations of government, particularly given that consultation with the Voice is non-justiciable. In this regard, we refer to the views of the Law Institute of Victoria (**LIV**) in its response to the Interim Report, dated 21 February 2021. The LIV states that decisions made by parliament which require consultation with the Voice must be capable of being held to account, by reference to an appropriate judicial forum and, if the obligation on parliament to consult with the Voice is not justiciable, this will detract from its authority and legitimacy.

In our observation, the Interim Report does not canvass how this envisioned systemic change will occur to the extent expected or required for the proposed Voice to succeed. We hope this will be addressed further in stage two and, to this end, propose the following issues for further consideration.

⁴ Poll carried out by C|T Group, cited in From The Heart press release, 15 July 2020 <https://fromtheheart.com.au/press-release/poll-shows-strong-rise-in-support-for-constitutional-change-to-create-indigenous-voice-to-parliament/> and as referred to in the submission of Arnold Bloch Leibler in response to the Interim Report, March 2021.

⁵ Interim Report, page 3.

⁶ Interim Report, pages 17 and 84.

'Obligation' and 'expectation' to consult the National Voice

The **obligation** to consult the National Voice is proposed to be limited to laws which are exclusive to Aboriginal and Torres Strait Islander peoples. For example, laws proposed under section 51(xxvi) of the Constitution or under the *Racial Discrimination Act 1975* (Cth) where they impact Aboriginal or Torres Strait Islander peoples.

The **expectation** to consult the National Voice is proposed to be on "*proposed laws and policies of general application which particularly affect, or which have a disproportionate or substantial impact on Aboriginal and Torres Strait Islander peoples*".

In our view, if consultation is structured in this way, it will not achieve the stated purpose of the Voice: to be engaged in *all* matters of critical importance to Aboriginal and Torres Strait Islander peoples at the national level.

We hope that in stage two, the **obligation** to consult is expanded in scope to adopt the description in the current expectation to consult, so that the National Voice will be consulted on *all* matters of critical importance.

Membership of the National Voice

The membership model for the National Voice must ensure that previously unheard Aboriginal and Torres Strait Islander people have the same chance of being selected as established leadership figures. The Interim Report proposes two core models, each with multiple options for selection and/or election of members. We acknowledge the challenges and complexities that arise in both and the most appropriate model will best emerge from further consultation with Aboriginal and Torres Strait Islander peoples.

We believe that the four-year staggered terms for members would provide better continuity of knowledge and assistance to new members than a three-year membership model with all terms ending at the same time.

The option to exclude ministerial appointees also appears preferable in order to maintain actual and perceived independence.

Scope of the Local and Regional Voice

The Interim Report states that the Local and Regional Voice will provide engagement and advice provided to the non-government sector, including philanthropic, business, corporate and academic sectors.

We anticipate many organisations at the local level, from small community associations to national and international corporate entities, will enthusiastically take up the opportunity to engage with the Local and Regional Voice on issues relevant to their regions. We look forward to further explanation in stage two about how engagement with the non-government sector will be resourced.

CONCLUSION

The co-design process detailed in the Interim Report provides a sound intention to support partnerships between Aboriginal and Torres Strait Islander peoples and the Australian Government in amplifying Indigenous voices in our parliamentary systems. We welcome the development of both stages of the co-design process and strongly encourage the Australian Government to continue to consult with and be guided by Aboriginal and Torres Strait Islander peoples in developing the co-design process.

While we support the foundations of the proposals for the Voice at both national and local levels, we strongly recommend that the Voice be constitutionally enshrined.

Constitutional recognition will reflect a serious commitment to listen to the Indigenous Voice and it is a vital step to empowering Aboriginal and Torres Strait Islander peoples.

Genevieve Collins | Chief Executive Partner

28 April 2021
Lander & Rogers