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19 January 2021

Voice Secretariat
C/- Professor Tom Calma AO and Professor Marcia Langton AO
Co-chairs, Senior Advisory Group
Reply Paid 83380
CANBERRA ACT 2601

by e-mail: Co-designVoice@niaa.gov.au

Dear Professors Langton and Calma,

Re: Submission to Indigenous Voice Co-design Process
Stage Two Consultation and Engagement

Uphold & Recognise is pleased to have the opportunity to make a formal submission to Stage Two Consultation and Engagement of the Indigenous Voice Co-design Process.

Our organisation was formed in 2014 by Julian Leeser and Damien Freeman, with the Hon. Lloyd Waddy AM RFD QC as its first chairman. Its purpose is to advocate for upholding the Australian Constitution whilst at the same time recognising Indigenous Australians in it. Our current board comprises Indigenous people (Theresa Ardler and me) as well as people from other backgrounds who have expertise in law and politics (Greg Craven, Damien Freeman, Ian McGill, and Kerry Pinkstone).

As you know, I was a delegate to the conference held at Uluru in May 2017, which approved the Uluru Statement From the Heart. Since then, I have been working with my fellow directors at Uphold & Recognise to develop options for the detail required to give effect to the big ideas contained in the Uluru Statement.

Please find enclosed with this letter three documents that provide further particulars about the work that Uphold & Recognise has been doing, and which together form our submission:

1. *Anchoring our Commitment in the Constitution: finding the common ground*
   by Kerry Pinkstone;
2. *A way for the Commonwealth to hear the voices of Aboriginal and Torres Strait Islander peoples*
   by Ian McGill;
3. *Legal opinion*
   by Professor Greg Craven AO GCSG and Damien Freeman.

We look forward to having the opportunity to discuss this submission with you and your colleagues in due course.

Yours sincerely,

SEAN GORDON
CHAIRMAN

CN 605 590 216

ANCHORING *our* COMMITMENT *in the* CONSTITUTION

Finding common ground

KERRY PINKSTONE

ANCHORING *our* COMMITMENT *in the* CONSTITUTION

Finding common ground

KERRY PINKSTONE

Uphold & Recognise

2020

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Anchoring our commitment in the Constitution

INTRODUCTION

Recognising Aboriginal and Torres Strait Islander peoples in the Constitution is a truly nation-building project.

In 2020, we are on the edge of making history and concluding what has been a long and, at times, very difficult process to find a suitable way to recognise those Australians who were here first, but who have not been recognised in our nation's founding document.

In 2017, the Uluru Statement from the Heart called for a First Nations Voice enshrined in the Constitution. This was the first time the Indigenous communities had expressed a consensus position on the way they would like to be recognised in the Constitution.

It was a broad statement that did not prescribe how this reform could be or should be achieved.

Successive prime ministers have ruled out one option that could have given effect to the Statement from the Heart: the constitutional enshrinement of a national Indigenous representative body.

We know Indigenous people have consistently ruled out symbolic recognition, and in an unlikely alliance, symbolic recognition will be opposed by constitutional conservatives too.

Constitutional expert Anne Twomey has put forward a new alternative that would provide a constitutional anchor for Indigenous voices to be heard, without the legal enshrinement of the representative body which has been rejected. It would contain a new obligation, but leaves Parliament and the Government with the flexibility to determine the means by which it is achieved. In this respect, the obligation created by the amendment is more political than legal.

This new amendment meets the aspirations of Aboriginal and Torres Strait Islander peoples for a substantive change to the Constitution.

The purpose of this paper is to find common ground. Now is the time for a final deliberation so we can reach agreement on a constitutional amendment that, as Warren Mundine put it, looks beyond symbolism to Indigenous aspirations for constitutional recognition on the one hand, and mainstream concerns about it on the other.[1]

[1] Mundine, W, Practical recognition from the Mobs' perspective.

Australians cannot allow the opportunity to reach agreement to pass, and to hand this on to yet another generation.

The new amendment put forward by Professor Twomey may still require further refinement, however the intention is to respond to the concerns of the key groups of stakeholders, and initiate a new discussion that could lead to a positive resolution in the life of the 46th Parliament.

We are in a position of strength, having developed, debated, and refined different models over time, as we looked for a proposal that could meet the aspirations of Indigenous Australians; garner the support of the Australian Parliament; create practical change to be endorsed by the Australian people; and finally achieve the aspirations of the 1967 referendum for the advancement of Indigenous peoples.

We can uphold the Constitution and the liberal values that underpin it, and at the same time recognise Indigenous Australians within this very practical document.

The Uluru Statement from the Heart used the analogy of leaving base camp and starting a trek across this vast country. This paper hopes to make a contribution to that journey.

There is a chance to find common ground and find the pathway to a referendum. If we cannot seize this chance, put a question to the Australian people and hold a referendum, the failure will be on all of us.

Constitutional Exclusion

Unlike our Commonwealth counterparts in Canada or New Zealand, Australia did not recognise our Indigenous peoples in our Constitution following colonisation.

Guugu Yimithirr man, and Cape York leader Noel Pearson reflects on this:

> The pre-existence of Indigenous people was again denied at the time of Federation in 1901. The polities that made up the new Commonwealth comprised the original colonial states. The pre-existing indigenous polity was ignored and though its numbers were equal if not more than that of the smaller states, the federal convenience was to ignore the native polity, to not count the natives in the reckoning of the new Commonwealth, and deny the new parliament law-making power in relation to them.

At the time of Federation, each colony was guaranteed equal representation as states in the new compact. The Indigenous peoples went unrecognised and unrepresented, and constitutional provisions ensured Indigenous exclusion.[2]

As a nation, we did not turn our minds to the rights of Indigenous peoples until the 1967 referendum when Australians voted overwhelmingly to end their constitutional exclusion.

[2] Pearson, N (2017) "A Job Half Undone", *The Monthly*, June 2017 https://www.themonthly.com.au/issue/2017/june/1496239200/noel-pearson/job-half-undone.

While 1967 was a significant watershed moment for our nation, in reality, it only conferred upon Parliament the power to recognise and protect Indigenous rights.[3] It did not guarantee the rights of Indigenous peoples or ensure their fair treatment.[4]

Ending the Constitutional Silence

237 years after Cook claimed Australia for the British, an unexpected opportunity emerged in the midst of the ferocious 2007 election battle. Prime Minister John Howard called on Australians to find room in our national life to formally recognise in our Constitution the special status of Aboriginal and Torres Strait Islander peoples as the first peoples of our nation. Mr Howard spoke of the distinctiveness of Indigenous peoples, and argued for a stronger affirmation of Indigenous identity and culture as a source of dignity, self-esteem, and pride for our nation.[5]

Mr Howard argued there had to be a "fundamental correction to the unbalanced approach to rights and responsibilities" and "a positive affirmation in our Constitution of the unique place of Indigenous Australians" that could be "the cornerstone of a new settlement".[6]

Since 2007, our nation has had six prime ministers and undertaken seven substantial processes of consultation, debate, and discussion on the way Aboriginal and Torres Strait Islander Australians could be recognised in the Constitution (see Appendix A for details). Parliaments led by both Labor prime ministers and Liberal prime ministers have grappled with this issue. Kevin Rudd called for detailed and sensitive consultations, Julia Gillard said this was a "once-in-50-year opportunity", Tony Abbott promised to "sweat blood", Malcolm Turnbull called for poetry to be turned into prose, and Scott Morrison has called for "good faith".

This thirteen-year debate has been necessary in order to reach the consensus we have arrived at, putting us in a strong position in 2020 and making real the possibility of a referendum in the life of the 46th Parliament.

The Right to Take Responsibility

We cannot expect the correction between rights and responsibilities that John Howard spoke of to occur unless we ensure that the voices of Indigenous people are heard when decisions are being made about policies that impact them in a special way. This requires governments to shift their thinking. Aboriginal education expert and former co-chair of the Prime Minister's Indigenous Advisory Council, Chris Sarra, termed this as moving from doing things *to* Indigenous peoples, to doing things *with* Indigenous peoples.

[3] *Ibid.*
[4] *Ibid.*
[5] Howard, J (2007) "The Right Time: Constitutional Recognition for Indigenous Australians", Sydney Institute 11/10/2007.
[6] *Ibid.*

Noel Pearson's 2003 paper, *Our Right to take Responsibility*, remains one of the most powerful pieces written about the shift in thinking that is necessary for this correction to take place:

> Self determination is hard work. It's not some utopian formula that can be handed on a silver platter by the United Nations or under some kind of convention, it is actually the practical business of taking charge and taking back responsibility. It is hard work but we have to get on top of our predicaments economically, socially, politically. It is a matter of us taking charge. These things are not just delivered by governments, they are assumed by people who take charge of their lives and take responsibility for their own people and for their own direction.

Pearson asserts that it is not enough for Indigenous people to simply assume this new role, but that governments need to rethink the way they work too:

> Government has got to retreat quite significantly. Government has got to give us the space to take responsibility. Government can enable and support but it must understand that it can only be and that it can only ever be a junior partner in our decision as a people to climb out of our problems . . . We need our people to take charge of our own problems and not see Government as the deliverer of all of the solutions . . . It will be a struggle for control, it will be a struggle for responsibility and the keenest struggles will take place with those agencies that are most intimately involved in the lives of Aboriginal people. The renegotiation of our relationship with government and the retreat of service delivery so that we can develop maximum self-service is a challenge that those who work with Aboriginal communities will also have to confront.

There needs to be a structural change in the relationship to enable political agency to occur. The consensus achieved at Uluru was in large part a recognition of the desire for Indigenous people to take back control, and protect their rights while taking responsibility for their own lives. It is up to governments, and the broader Australian community, to listen to that desire, and enter into a new era built on the rebalancing of this relationship so Indigenous people can truly have the right to take responsibility.

Achieving success at a referendum would be an endorsement of this approach, and constitutional reform would be the new cornerstone Mr Howard rallied for.

Substantive recognition over symbolism

"As a legal document, the Constitution is subject to interpretation by the High Court and, as such, any additional words added will be subjected to legal scrutiny of the sort which will restrict the form of language, the expression of sentiment, and the beauty of the poetry that can be used to describe the history, culture, and enduring significance and contributions of Indigenous people in Australia."[7]

Julian Leeser and Damien Freeman, 2014

[7] Freeman, D. & Leeser, J. (2014) *The Australian Declaration of Recognition* https://static1.squarespace.com/static/57e8c98bbebafba4113308f7/t/58f1cf7f03596e9d44c3730d/1492242379665/Freeman_and_Leeser-Declaration.pdf

The purposes of constitutional recognition fall into two categories: symbolic recognition and substantive recognition.[8]

Symbolic recognition includes inserting words into the preamble, but this has been described as simply putting a 'plaque' about Indigenous people into the Constitution as it will not address their structural disempowerment.

Both the Australian people in the 1999 referendum, and Indigenous people through successive processes, have consistently rejected the option of symbolic recognition.

There have been two key proposals for substantive recognition that aim to deal with the structural disempowerment of Indigenous peoples.

First, the 2012 Expert Panel on Recognising Aboriginal and Torres Strait Islander Australians recommended the insertion of a new section 116A into the Constitution to prohibit the Commonwealth, a State, or a Territory from discriminating on the grounds of race, colour, or ethnic or national origin.

The racial non-discrimination clause was not capable of wide support as it would have empowered the High Court, undermined Parliamentary supremacy, and led to the "one clause bill of rights" conservatives had said they would not support.

Second, Cape York Institute proposed the insertion of a new chapter 1A into the Constitution, which would see the establishment of an Indigenous body that Parliament must consult with, and receive advice from, when making laws affecting Indigenous interests.[9] The intention was to "draft a procedural Chapter to the Constitution that is non-justiciable and therefore does not transfer any power to judges, but that creates a real platform for Indigenous people to be heard by and engage with the democratic processes of Parliament".[10]

This became known as the "2015 Twomey model", after constitutional expert Professor Anne Twomey who drafted the amendment.

The 2015 Twomey model would have meant that the Constitution would be amended to require the Parliament to establish the body ("there shall be an Aboriginal and Torres Strait Islander body") and the Constitution would state that the new body's function was "providing advice to the Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander peoples". It also imposed an obligation on the two Houses of Parliament to give "consideration to the tabled advice of the [body] in debating proposed laws with respect to Aboriginal and Torres Strait Islander peoples".

[8] Pearson, N. & Morris, S. (2017) "Indigenous Constitutional Recognition: Paths to Failure and Possible Paths to Success", *Australian Law Journal* https://static1.squarespace.com/static/57e8c98bbebafba4113308f7/t/5934dbd437c581fea84dc351/1496636373982/Morris-Pearson-%282017%29-91-ALJ-350.pdf.

[9] Cape York Institute (2015) Supplementary submission to the committee https://capeyorkpartnership.org.au/wp-content/uploads/2018/09/Supplementary-Submission-to-Joint-Select-Committee-January-2015.pdf

[10] *Ibid.*

Cape York Institute summarises the way the policy debate shifted in 2015:

> The potential for adverse discrimination against Indigenous people can be rectified through a judicially adjudicated racial non-discrimination clause, as was proposed by the Expert Panel . . . [or] it can be rectified politically and procedurally, by guaranteeing that the Indigenous voice is heard in Parliament's democratic processes.[11]

2. FINDING THE COMMON GROUND

Hearing the concerns of conservatives

In responding to the Referendum Council's report in 2017, the Government was concerned that the proposed model for a nationally entrenched body would, *in effect*, lead to a "third chamber". Mr Turnbull argued that a constitutionally enshrined additional representative assembly which only Indigenous Australians could vote for or serve in was inconsistent with the principle of equal civic rights and "one person one vote".

Proponents of the body's enshrinement argued these concerns were legally unfounded, but after becoming Prime Minister in 2018, Scott Morrison affirmed Mr Turnbull's position, which had been a decision of the Federal Cabinet (of which Scott Morrison was a member).

In an interview with ABC radio breakfast host, Fran Kelly, Mr Morrison stated, "I don't support a third chamber". Ms Kelly rebuked him and said, "it's not a third chamber they're talking about necessarily, it's a representative body." He replied, "No, it really is. People can dress it up any way they like but I think two chambers is enough . . . the implications of how this works frankly lead to those same conclusions. I share the view that I don't think that's a workable proposal."[12]

In addition to the issues raised above, there were two other principal concerns about the proposal.

Firstly, there were concerns that, by enshrining an Indigenous body in the Constitution, it would enable judicial activism and empower the High Court.

Secondly, opponents of recognition argued against putting race in the Constitution. However, as the former Chief Justice, Murray Gleeson, has pointed out, race already exists in the Constitution and was put there by our founding fathers at the time of Federation. Because of the need to legislate for native title and cultural heritage, the race power cannot simply be removed without inserting a replacement.

[11] *Ibid.*
[12] Morrison, M (2018), Radio interview with Fran Kelly. 26 September 2018.

Mr Morrison also believes there is "a large gap between where the opposition stands on the form of this and where the government stands . . . [the Labor Party has] very different view as to the manner and form of this to the view of those in the government".

As we seek to find common ground, work must be done across the political aisle to ensure a proposal can pass the Parliament with minimal division.

In 1967 we were counted, in 2017 we seek to be heard

The Aboriginal and Torres Strait Islander communities are not homogenous, and their views on politics and policy are as diverse as those of all other Australians. Considering the diversity of people who attended the National Indigenous Constitutional Convention at Uluru in 2017, it is a remarkable achievement that the Uluru Statement from the Heart was overwhelmingly endorsed by the delegates.

The delegates at Uluru agreed that "with substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia's nationhood". Far from seeking radical separatist policies, the Statement from the Heart affirms the Constitution, and calls for one new rule to be made which would allow Indigenous people to be heard.

"We seek constitutional reforms to empower our people and take a rightful place in our own country". This is not an extreme form of self-government. The sentiment is very much a call for a strengthening and a deepening of the expression of our nationhood, not a replacement of it.

This position accords with the liberal value of equality. The achievement of which requires a mechanism to enable Indigenous people to take responsibility, and to ensure their voices are heard when decisions are being made about policies that impact them in a special way. If we expect people to take responsibility, there must be a mechanism to hear their voices so they are part of the decision-making process. The Statement argues that in "1967 we were counted, in 2017 we seek to be heard".

Despite the consensus at Uluru, a very small group demanded a sovereign treaty with an independent sovereign treaty commission, and appropriate funds allocated.[13] Palawa man Michael Mansell also advocates for a seventh State that would hand full responsibility to Aboriginal people to run their own state system of government within the Federation. This would include a treaty that required an allocation of Australia's national gross domestic product to be set aside for Indigenous people.[14]

[13] "'We won't sell out our mob': Delegates walk out of Constitutional recognition forum in protest", 25 May 2017 https://www.sbs.com.au/nitv/nitv-news/article/2017/05/25/breaking-delegates-walk-out-constitutional-recognition-forum-protest

[14] Mansell, M (2019,) Interview with CAAMA radio 12/07/2019 https://caama.com.au/news/2019/michael-mansell-explains-why-a-treaty-will-deliver-more-than-the-voice-to-parliament.

These views risk being used to argue there is division on the "Indigenous position". However, the very small minority of dissenting views should not detract from the consensus that has been achieved.

The fact that, in the three years since Uluru, there has not been any other model for substantive recognition put forward makes it clear that the proposal to ensure Indigenous voices are heard is the best way forward.

We also need to keep this so-called division within the Indigenous community in perspective. As Marcia Langton reminds us, "Why is it only white people are permitted to disagree?"[15]

Indeed, we have seen the airing of views right across the political spectrum about the way forward. This includes former Nationals leader Barnaby Joyce advocating for regional senators as a way of increasing Indigenous representation,[16] despite this not forming the official policy of his party, and others rejecting the voice to Parliament by wrongly claiming it would insert race into the Constitution.

Overcoming political tribalism

In his 2019 PM Glynn Lecture, former Archbishop of Canterbury, Rowan Williams, argued that political tribalism is, above all, a shrinkage of the scope of mutual recognition.[17] It is a failure to see the perspective of the other as invested or developed. Moving beyond political tribalism lies a "deeper literacy about our histories, a commitment to identifying the grammar of a common language and the work of negotiating a shared future by looking for solutions that have a degree of durability and credibility, even if they are no one's ideal."

Constitutional recognition of Aboriginal and Torres Strait Islander peoples is a highly complex area where history, politics, policy, and sociology intersect. It requires us to examine the issues more deeply, rather than resorting to political tribalism. At times, it will require us to sit uncomfortably. It requires a willingness to hear the perspectives of others, to suspend judgement, and look for substantive change that will allow all Australians to look forward to the future with optimism.

We must approach these deliberations with goodwill and good intentions, aiming to build a stronger nation – not a different nation. The task is not beyond us if we are truly committed to finding a resolution.

This is part of the good faith process that Mr Morrison aspires to, and, if successful, it can form the true cornerstone of the new settlement that Mr Howard spoke of in 2007.

[15] Langton, M., "Pearson's Proposal for indigneous recognition deserves consolidation" https://capeyorkpartnership.org.au/constitutional-recognition/pearsons-proposals-for-indigenous-recognition-deserve-consideration-macia-langton/

[16] "Barnaby Joyce 'apologises' for calling Indigenous voice a third chamber of parliament", 18 July 2019 https://www.theguardian.com/australia-news/2019/jul/18/barnaby-joyce-apologises-for-calling-indigenous-voice-a-third-chamber-of-parliament.

[17] Williams, R (2019), Overcoming political tribalism, Third PM Glynn lecture https://www.abc.net.au/religion/rowan-williams-overcoming-political-tribalism/11566242.

There must be three components to the new covenant if these reforms are to succeed:

1. **Co-design of the entities** that will represent Indigenous people and ensure their voices are heard using a bottom-up approach. There must be an emphasis on regional governance models, and Parliament will provide for the creation of these entities;

2. **Interface** between the entities to ensure the voices are heard by the Commonwealth, and how these voices will be heard. The means of achieving the interface will be established by an act of Parliament;

3. **Amendment** of the Constitution to create a political obligation for the Commonwealth to hear Indigenous voices, rather than a legal obligation. Such an amendment needs to be based on the common ground between Indigenous aspirations and a conservative-led Government which has rejected the constitutional enshrinement of a national body.

Indigenous Australians will not accept the entities and the interface in statute without a guarantee in the Constitution that the future will be different from the past.

3. CO-DESIGN OF THE ENTITIES

"We have always supported giving Indigenous people more of a say at a local level. We support the process of co-design of the voice . . . we support constitutional recognition but maintain our reservations about a voice. We prefer to establish local bodies in the first instance and then build on a successful model to inform a regional, and then a national, governance model. So this is a ground-up process".

Scott Morrison, Prime Minister of Australia, 6 December 2018

Ground-up approach

The prevailing model at the time of the Uluru Statement from the Heart was a top-down approach. However, shortly before the Uluru conference, Warren Mundine put forward a ground-up approach in his paper, *Practical Recognition from the Mobs' Perspective: Enabling our mobs to speak for country.* Mr Mundine argued that local bodies could "realise the ambition of Indigenous Australians for self-determination and the mainstream ambition that Indigenous Australians take responsibility for improving their welfare."

In rejecting the constitutionally entrenched national body, Mr Turnbull said that the Government remained committed to finding effective ways to develop stronger local voices and empowerment of local people, as "people who ask for a voice feel voiceless or feel like they're not being heard."[18]

[18] Turnbull, M (2017), Response to Referendum Council https://www.malcolmturnbull.com.au/media/response-to-referendum-councils-report-on-constitutional-recognition.

Mr Morrison then initiated the co-design process with a strong focus on the ground-up approach advocated by Mr Mundine and endorsed by Mr Turnbull.

Co-design processes

The Morrison Government initiated the current co-design process in response to the key recommendation from the 2018 Joint Select Committee on Constitutional Recognition. The report recommended that a co-design process was needed in order to achieve a design for the voice proposal that best suited the needs and aspirations of Aboriginal and Torres Strait Islander peoples. The Morrison Government has recognised Indigenous peoples' longstanding desire to have greater involvement in the issues that affect them. Therefore, the process of co-design will determine options to improve local and regional decision-making and a national voice.[19]

The Terms of Reference for each of the three co-design groups explicitly state that "making recommendations as a Group through this co-design process on constitutional recognition, including the referendum question or when a referendum should be held" is out of scope. It is understandable that the Prime Minister is tasking the three co-design groups to focus on the detail of how the entities will work, rather than the way these entities will relate to the Constitution.

However, Indigenous people have been clear that the voices must not be in statute alone, and must be guaranteed in some way by the Constitution. The Government must recouple these two inextricably linked streams of work.

Design principles to ensure success

There are many different ways these entities can be designed, and an examination of the previous reports into constitutional recognition provides a lot of guidance to avoid reinventing the wheel. The previous monograph in this series, *Hearing Indigenous Voices*, describes six attributes of authenticity that could also assist the co-design working groups in shaping their views.

The co-design interim report should start to shape two key documents that can be further refined. The first document is the rulebook that provides a process for developing the entities and the way disputes will be resolved. The second document should provide detailed framework(s) that can be adopted and adapted based on our knowledge of what is effective in developing legitimate representative voices within communities.

For the co-designed entities to succeed, they need absolute clarity of purpose. If the purpose and mission of these new entities is poorly defined, they risk scope creep and their ability to

[19] Australian Government (2020), Senior Advisory Group Terms of Reference https://www.niaa.gov.au/sites/default/files/publications/senior-advisory-group-tor_0.pdf.

create change on the ground will be limited. To achieve this, the co-design process needs to examine the principles and methods used in collective impact.

The two most critical issues that will determine whether these entities are successful is that Indigenous people have confidence in the entities to represent their interests fairly, and that the entities are connected to the decision-makers within the Commonwealth. We need to keep this in perspective, as these new entities cannot and will not solve everything, but are an important way for Indigenous people to take responsibility by having their voices heard when decisions are being made about policies that impact them in a special way.

For the co-design process to be successful, there also needs to be an adjustment in the way governments do business. As we have seen with the Empowered Communities sites, the business of government has not shifted enough to deal with this devolved way of working and decision-making. Commonwealth power has not been delegated to those who are tasked with making decisions.

4. INTERFACE BETWEEN CO-DESIGNED INDIGENOUS ENTITIES AND THE COMMONWEALTH

Separate to the co-design process, there needs to be an understanding of how these entities will interface with the Commonwealth so their advice can be sought, offered, and heard with full transparency and accountability for all involved.

Ian McGill, former managing partner at Allens law firm, suggests the forum for hearing the voices of Indigenous peoples should be a statutory joint standing committee of the Parliament, called the *Parliamentary Joint Standing Committee for Aboriginal and Torres Strait Islander Peoples*.

Mr McGill's paper, entitled, *A way for the Commonwealth to hear the voices of Aboriginal and Torres Strait Islander peoples – a model anchored in our Constitution*, and summarised in the June 2020 issue of the *Australian Law Journal*, provides the governance and political architecture necessary to give effect to the model of ground-up entities and ensure the local voices are heard by the Federal Parliament in an appropriate way.

Mr McGill's work builds on the previously published paper in this series, *Hearing Indigenous Voices*, which provided two detailed proposals for the machinery required in the 'Speaking for Country option' and the 'Advisory Council option'.

It refines the 'Speaking for Country' option, so there are three parts to the Indigenous entities: local representative bodies, larger regional bodies, and a small national affiliation that becomes the conduit to the Parliamentary Committee.

- A **Recognition Authority** would approve the local regions, and oversee the establishment of the local representative bodies.
- **Local representative** bodies would then join or affiliate to form a larger regional body.
- **Regional bodies** would have the policy infrastructure and resources to assist local bodies to help shape Commonwealth legislative or executive action. These regional bodies, either in isolation or through affiliation, would have the legislative right to act as a conduit for advice.
- A **national affiliation** that would exist largely for administrative ease, to ensure the committee has a conduit that operates at a level that enables the new entities to work in harmony with the Parliamentary system, but which sources its authority from the ground up.
- The **Parliamentary Joint Standing Committee** provides a sensible way to connect the Indigenous entities with the Commonwealth to ensure the voices of Indigenous peoples are heard in a meaningful way by the Executive and the Parliament.

Mr McGill argues for a Parliamentary Committee as the committee system is well established, and already provides important checks and balances that challenge the dominance of the Executive. The Committee system is recognised by section 49 of the Constitution, but it is clear it is under the full control of the Parliament, so any of its intra-mural activities would be non-justiciable.

Committees contribute to Australia's democratic system and responsible government, allow for community participation, and improve accountability of the Executive, and improve the creation and administration of Commonwealth programs.

Specifically, a Joint Standing Committee has several attractive features. It would exist for the life of the Parliament with new members appointed immediately following an election; it is made up of, and can speak to, both the House of Representative and the Senate; and it provides a level of certainty of process and permanence through statute.

Government policy originates in the Executive, who are elected to govern, to set the policy agenda, propose new laws and administer existing laws. Yet the 2018 Parliamentary Joint Select Committee found that previous bodies did not have a close relationship with the Executive, which is the major decision-making forum for the government. Former Chief Executive of the Aboriginal and Torres Strait Islander Commission, Patricia Turner, agreed the Commission's engagement was typically with the Minister for Indigenous Affairs, and there was only one meeting with the Cabinet that she could recall in her four years serving at the Commission. It is important that the new entities, through the national affiliation, can engage with the Executive, as well as the Parliament.

The key advantage of this type of interface is that it takes away the ad-hoc nature of the consultation and engagement that typically occurs, and rebalances the relationship so Indigenous people can take responsibility.

One of the key features of any reforms attempted in Indigenous affairs has been the failure of the Commonwealth to properly embed these reforms into their administrative arrangements and business processes. When reforms have failed, it was because they were not connected to governmental decision-making forums, with clear and transparent processes, and appropriate accountability mechanisms for all stakeholders. Mr McGill explains that the work of the Joint Committee would be considered a *proceeding in Parliament*, therefore members of the national affiliation appearing in Joint Committee will have both the protections and obligations offered under the *Parliamentary Privileges Act 1997* (Cth) under the standing orders of both Houses. This should ensure its workings are held to the current high standards of Parliamentary business, that people act with integrity and honesty, but have some protections from liability in defamation in respect of evidence given or matters discussed in the committee.

5. ANCHORING OUR COMMITMENT IN THE CONSTITUTION: UNITING ON COMMON GROUND

The proposal to hear Indigenous voices fits with our liberal democracy as it does not seek to limit the laws that should be made. Rather, it aims to give voice to the people who are the subject of those laws. This does not confer special rights, it only ensures fair treatment in our democratic processes.

Julian Leeser eloquently articulated the parameters for conservative support for constitutional recognition to the Samuel Griffith Society: "any package of reforms worth considering must be consistent with Australia's constitutional architecture" and it "should not affect the Crown, the Federation, the sovereignty of Parliament, or create a bill of rights."[20]

Tony Abbott argued constitutional recognition will be "a victory for Aboriginal people and will be the culmination of a long, long, long fight for justice. To succeed, though, it will also have to be a victory for all Australians: a vindication of our magnanimity as a nation whose Constitution will finally belong to all of us".

The 2012 Expert Panel's recommendation for a prohibition on discrimination was rightly ruled out as it would have empowered the High Court.

Instead, the proposal to hear Indigenous voices through a ground-up approach addresses the problem politically and procedurally, by increasing Indigenous participation in Parliament's democratic processes and ensuring that Indigenous views are better heard by Parliament when it makes laws and policies for Indigenous affairs.[21]

[20] Leeser, J. (2015), "Competing Proposals for Recognition: An Evaluation", *Proceedings of the Samual Griffith Society* Vol. 27 https://static1.squarespace.com/static/596ef6aec534a5c54429ed9e/t/5c9d8743419 2026554f91076/1553827654973/Vol27chap11.pdf.

The 2015 Twomey model was one way to achieve this, but the constitutional entrenchment of an advisory body has been ruled out by successive prime ministers. As we saw in the 1999 republic debate, having the Prime Minister opposing a reform makes it near impossible to gain the double majority required for success, therefore, we must put forward a model that speaks to the aspirations of the Statement from the Heart but which is acceptable to the Prime Minister and the Parliament.

We need an amendment that can provide the "constitutionally entrenched, legislatively controlled" capacity for Indigenous people to have input into the making of laws that impact them, as Murray Gleeson stated in his monograph in this series, *Recognition in Keeping with the Constitution*.

Any constitutional amendment must be substantive as Indigenous people have ruled out symbolic recognition. They seek a guarantee that the future will be better than the past.

Sufficient status

"We are talking about sufficient status in the Constitution to empower the Parliament to legislate the creation of the voice that will not impede the parliamentary process . . . we will accept parliamentary supremacy in a way that provided the necessary status that would define recognition".

Noel Pearson, 2014

Recently, Anne Twomey has suggested inserting the following words as a new section of the Constitution:

> The Commonwealth shall make provision for Aboriginal and Torres Strait Islander peoples to be heard by the Commonwealth regarding proposed laws and other matters with respect to Aboriginal and Torres Strait Islander affairs, and the Parliament may make laws to give effect to this provision.

The constitutionally enshrined model drafted by Professor Twomey in 2015 aimed to provide a "political, preventative and proactive approach, rather than a reactive and litigious approach".[22] Her new drafting does not deviate from that intention, and provides the "sufficient status" Mr Pearson spoke of, which could achieve the aspirations of the Uluru Statement from the Heart while accepting parliamentary supremacy.

Arrernte and Kalkadoon woman Rachel Perkins forcefully argued in her Boyer Lectures that a referendum would provide the moral weight that comes with the majority of Australians backing an idea. If this amendment succeeded at a referendum, it would contain a new

[21] Cape York Institute supplementary submission, *supra*.

[22] Pearson and Morris https://static1.squarespace.com/static/57e8c98bbebafba4113308f7/t/5934dbd437c581fea84dc351/1496636373982/Morris-Pearson-%282017%29-91-ALJ-350.pdf.

obligation, but one that leaves the Parliament and the Government with the flexibility to determine the means by which it is achieved. In this respect, the obligation created by this amendment is more political than legal.

This new amendment is a good balance of the four principles for a successful referendum proposal in that it will:

1. contribute to a more unified and reconciled nation;

2. be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples;

3. be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums;

4. be technically and legally sound.

Permanency without justiciability

While the 2015 Twomey model would be non-justiciable, the revised amendment put forward by Professor Twomey in 2020 is a stronger option. Professor Twomey has developed a new amendment that creates a political obligation to hear the voices of Indigenous peoples rather than a legal obligation.

The 2020 Twomey model creates what is known as a 'duty of imperfect obligation'. This means that there is a duty to conform with the obligation, but it is a duty that is not enforceable at law. Instead, it is a political or moral duty that is enforceable by the will of the people. The vote of the people in the referendum will provide the evidence of the will of the people, which can then be reinforced through their electoral rejection of any political party that seeks to thwart the will of the people and breach the Constitution.

By stating that Indigenous peoples are "to be heard by the Commonwealth" rather than the "Parliament" or the "Executive", this gives the maximum flexibility in designing how the voices will be heard. The obligation is imposed upon 'the Commonwealth', as a polity to act, rather than the Parliament or the Executive specifically being required to exercise the power.

The words "The Commonwealth shall" provide the permanent constitutional obligation that Indigenous people have asked for, but the discretion as to how to give effect to this permanency is completely up to the Commonwealth. The Constitution therefore mandates that the Commonwealth must make the provision to be heard, without entrenching an Indigenous advisory body as the way to achieve that. In this regard, the obligation is political and not legal. Anne Twomey confirms this as an obligation that would be a constitutional duty and a political obligation, but not a legally enforceable one.

Mutual respect

"Reaching of a point in time whereby Indigenous Australians and our identities, our cultures, our languages, our histories and our dignity as resilient peoples are afforded the same degree of respect as other cultures . . . we are tired of being too often referred to, treated and considered as peoples whose cultures, languages, beliefs and histories are somehow inferior or secondary to others . . . in seeking this parity of esteem I believe we Indigenous Australians do not wish to deny, denigrate or usurp the cultures of others or to takeover the world. We simply seek to establish our rightful place in the nation and globally – we seek genuine mutual regard for the integrity and dignity of our ways of knowing, our ways of thinking, our ways of doing and who we are."[23]

Russell Taylor AM, 2017

Warren Mundine asserts that recognition "must not be framed around the way others have looked at us, but how we look at ourselves; it must not be about recognising a race of people, but about recognising First Nations of our country and the mobs to which each of us still belongs".[24]

The new Twomey amendment would accelerate the "parity of esteem" as Kamilaroi man and public sector executive Russell Taylor describes it. For the first time, in a positive sense, our Constitution would formally recognise "Aboriginal and Torres Strait Islander peoples" as peoples who need and deserve to be heard by the Commonwealth.

This elevates the status of Aboriginal and Torres Strait Islander peoples, and captures the dignity that Indigenous peoples have long sought. It allows them to be recognised as peoples whose voices should be heard. There is nothing illiberal about a constitutional duty of imperfect obligation to hear Indigenous voices.

6. CONTRIBUTION TO NATION-BUILDING

The year 2020 has taken an unexpected turn both at home and abroad. We are in the midst of an economic and health crisis and adjustments are being made to the way we live. As we recover from the pandemic, and deal with the ensuing economic issues, there is a window to hold a referendum that might seek to amplify the social cohesiveness that pulled us through the pandemic so successfully. Australians are generous and caring. Through bushfires, global pandemics, and economic crisis, our uniquely Australian values show us to be a mature

[23] Taylor, R., "Indigenous Constitutional Recognition: The 1967 Referendum and Today", Papers on Parliament no. 68 https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/pops/Papers_on_Parliament_68/Indigenous_Constitutional_Recognition_The_1967_Referendum_and_Today.

[24] Mundine, W., *Practical Recognition from the Mobs' Perspective*.

nation capable of dealing with difficult issues and doing so with courage and empathy for our fellow citizen.

This same spirit will help us complete the unfinished business of our founding fathers, and recognise our Aboriginal and Torres Strait Islander peoples in our Constitution.

In the paper in this series, *The Australian Declaration of Recognition: Capturing the Nation's Aspirations by Recognising Indigenous Australians*, Damien Freeman and Julian Leeser proposed a new Australian Declaration of Recognition as the best way of addressing the cultural issues while avoiding legal technicalities.[25]

The second (largely unknown) recommendation from the 2017 Referendum Council was for an extra-constitutional Declaration of Recognition that could be enacted by legislation as a symbolic statement to unify Australians.

The Referendum Council stated:

> The Declaration should bring together the three parts of our Australian story: our ancient First Peoples' heritage and culture, our British institutions, and our multicultural unity. It should be legislated by all Australian Parliaments, on the same day, either in the lead up to or on the same day as the referendum establishing the First Peoples' Voice to Parliament, as an expression of national unity and reconciliation.

A Fuller Declaration of Australia's Nationhood provided two options for how this recommendation might be implemented in practice. Tim Wilson's draft Declaration in the *Forgotten People* is an excellent starting point (see Appendix D for his suggestion).

When refusing to say sorry to the stolen generations, Mr Howard criticised symbolic statements alone as gestures that let too many people off the hook without "grappling in a serious, sustained way with the real practical dimensions of indigenous affairs."[26] However, if there were to be a package that includes both symbolic and substantive change, we can grapple with the very real issues impacting Indigenous Australians in a way that will benefit the wider community too.

At a time when our nation has shown social cohesion that is the envy of the world, we should be ready to start to articulate the values that underpin this harmony in a positive statement that will endure for future generations.

A package that includes the suggested amendment to the Constitution, as well as the extra-constitutional Declaration of Recognition, could provide a lasting symbolic and substantive legacy we can all be proud of.

[25] Freeman, D. & Leeser, J. (2014) *The Australian Declaration of Recognition: Capturing the Nation's Aspirations by Recognising Indigenous Australians*, 2014.
[26] Howard, *supra*.

7. CONCLUSION

Fundamentally, a referendum to recognise Aboriginal and Torres Strait Islander peoples will create a new covenant, in which we promise the future will be better than the past. If we are not prepared to make that promise, then we are misleading ourselves and our fellow Australian.

If we can agree to an amendment that meets the aspirations of Indigenous people – that is their desire to be recognised and a guarantee that they will be heard – within the parameters of a liberal democratic polity, we can certainly progress to a referendum. The new amendment put forward by Anne Twomey can provide a middle ground that respects the view that a new obligation needs to be imposed on the Commonwealth by the Australian people voting to amend the Constitution, but that this must be done in a way that is not illiberal and that does not enshrine an Indigenous body in the Constitution.

The new settlement that John Howard spoke of in 2007 requires more than just changes to the machinery of government – changes that parliamentarians can swiftly reverse through the stroke of a pen. The relationship must be underpinned by a structural shift that will create equality of opportunity, not by making one section of the community superior to another or conferring special privileges, but by ensuring the relationship is fair, respectful, and balanced.

Noel Pearson posed a significant question to the Australian people in 2014. He called on all of us to consider the question he claims has been unanswered after two centuries:

> Is there a proper and rightful place for the original peoples of Australia in the nation created from their ancestral lands?[27]

We should have great faith in the Australian people that when they are given the chance to vote in favour of this more complete expression of our nationhood, that we can positively answer Mr Pearson's question at the ballot box.

[27] Pearson, N (2014) *A Rightful Place* Quarterly Essay 55.

Appendices

APPENDIX A

List of consultation processes on Constitutional Recognition since 2011

1. Expert Panel on Recognising Aboriginal and Torres Strait Islander Australians chaired by Professor Patrick Dodson and Mark Leibler AC reported to Prime Minister Julia Gillard MP, 16 January 2012

2. Final report of the Aboriginal and Torres Strait Islander Act of Recognition Review Panel by John Anderson AO, Tanya Hosch and Richard Eccles to Prime Minister Tony Abbott MP, 9 September 2014

3. Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples chaired by Ken Wyatt AM MP and Senator Nova Peris reported to Prime Minister Tony Abbott MP, 25 June 2015

4. Aboriginal and Torres Strait Islander leaders meet at Kirribilli House with Prime Minister Tony Abbott and Opposition Leader Bill Shorten, 6 July 2015. Indigenous leaders issued a statemament that:

- "Any reform must involve substantive changes to the Australian Constitution"
- "A minimalist approach that provides preambular recognition, removes section 25 and moderates the races power (section 51(xxvi)) does not go far enough and would not be acceptable to Aboriginal and Torres Strait Islander peoples."

5. Referendum Council chaired by Pat Anderson AO and Mark Leibler AC reported to Prime Minister Malcolm Turnbull MP and Opposition Leader Bill Shorten MP in June 2017 (the Council's processes included the National Indigenous Constitutional Convention which resulted in the Uluru Statement from the Heart), recommending:

- "That a referendum be held to provide in the Australian Constitution for a representative body that gives Aboriginal and Torres Strait Islander First Nations a Voice to the Commonwealth Parliament"
- "That an extra-constitutional Declaration of Recognition be enacted by legislation passed by all Australian Parliaments, ideally on the same day, to articulate a symbolic statement of recognition to unify Australians".

6. Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples 2018 chaired by Senator Patrick Dodson and Julian Leeser MP reported to Prime Minister Scott Morrison MP, November 2018, recommending that:

   · "The Australian Government initiate a process of co-design with Aboriginal and Torres Strait Islander peoples". The co-design process should "consider national, regional and local elements of The Voice and how they interconnect…. outline and discuss possible options for the local, regional, and national elements of The Voice, including the structure, membership, functions, and operation of The Voice, but with a principal focus on the local bodies and regional bodies and their design and implementation"

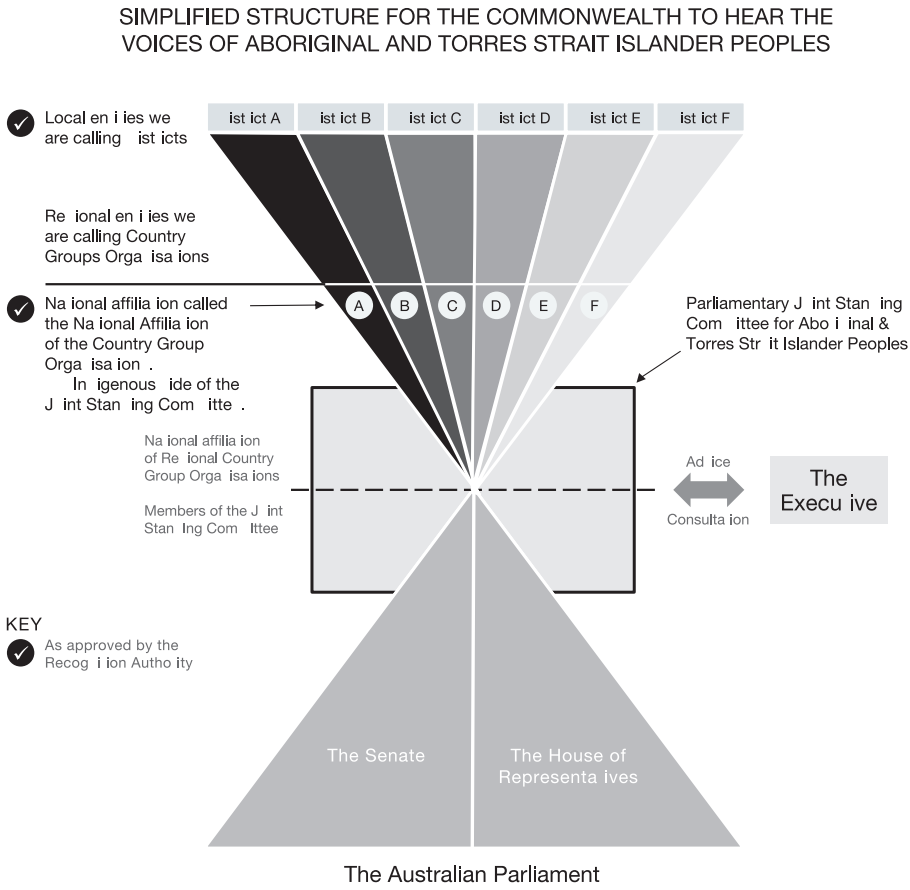
   · "following a process of co-design, the Australian Government consider, in a deliberate and timely manner, legislative, executive and constitutional options to establish The Voice"

7. Co-design process chaired by Professor Tom Calma AO and Professor Marcia Langton AO due to report to Prime Minister Scott Morrison MP in late 2020

APPENDIX B

Ian McGill's suggestion for interface

Ian McGill's proposal for a mechanism for an interface between the co-designed Indigenous voices and the Commonwealth was published in the June 2020 issue of the *Australian Law Review* and is summarized in the diagram below.



APPENDIX C

Anne Twomey's suggestions for amendment

In 2015, Anne Twomey published the following suggestion for an amendment to the Constitution in *The Conversation*:

> 60A. (1) There shall be an Aboriginal and Torres Strait Islander body, to be called the [insert appropriate name], which shall have the function of providing advice to the Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander peoples.
>
> (2) The Parliament shall, subject to this Constitution, have power to make laws with respect to the composition, roles, powers and procedures of the [body].
>
> (3) The Prime Minister [or the Speaker/President of the Senate] shall cause a copy of the [body's] advice to be tabled in each House of Parliament as soon as practicable after receiving it.
>
> (4) The House of Representatives and the Senate shall give consideration to the tabled advice of the [body] in debating proposed laws with respect to Aboriginal and Torres Strait Islander peoples.

In 2020, Professor Twomey wrote another article for *The Conversation* in which she made two further suggestions, the first of which was as follows:

> 51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: –
>
> . . .
>
> (xxvi) Aboriginal and Torres Strait Islander affairs; and in relation thereto, the interaction between Aboriginal and Torres Strait Islander peoples and the Parliament and Government of the Commonwealth.

Professor Twomey's second suggestion in her 2020 article for *The Conversation* reads as follows:

> 127. The Commonwealth shall make provision for Aboriginal and Torres Strait Islander peoples to be heard by the Commonwealth regarding proposed laws and other matters with respect to Aboriginal and Torres Strait Islander affairs, and the Parliament may make laws to give effect to this provision.

APPENDIX D

Tim Wilson's suggestion for a declaration

Tim Wilson published the following suggestion for a declaration of recognition in his 2016 chapter in *The Forgotten People: liberal and conservative approaches to recognising indigenous peoples*:

An Australian Declaration of Unity

With this pledge we recognise we are all Australians,

Aboriginal and Torres Strait Islander peoples,
Whose heritage, culture and language we cherish and enduring
connection to land and waters we respect,

The first European settlers that followed,
Whose institutions and traditions we preserve,

The generations of migrants from across the seas,
Who come to contribute to our shared future,

Built on a liberal democracy that binds us as equals,
With mutual respect and responsibility for each other
For a free, fair, just and united Australia for all.

We pledge our loyalty to Australia.

Kerry Pinkstone served as Senior Adviser on Social Policy in the Office of the Prime Minister between 2015 and 2018, during the premiership of the Hon. Malcolm Turnbull MP. She is currently a Visiting Fellow at the PM Glynn Institute (Australian Catholic University's public policy think-tank). From 2003 until 2009, she served as an adviser to various members of the Howard Ministry. For the next five years, she served as manager of strategic engagement and director of policy and research at GenerationOne – the Mindaroo Foundation's initiative to close the gap in employment outcomes between Indigenous and non-Indigenous Australians – before returning to the Department of the Prime Minister and Cabinet as a special adviser on Indigenous employment in 2015.

Finding common ground on constitutional recognition

In this paper, Kerry Pinkstone begins a conversation that aims to find common ground. She proposes an approach to constitutional recognition of Indigenous peoples that identifies common ground between the position in the Uluru Statement and the Government s response. She argues that it is possible to have a constitutional amendment to create a political obligation to hear Indigenous voices without enshrining in the Constitution a representative assembly based on race. Such an approach would address Indigenous aspirations by providing a guarantee that Indigenous voices would be heard by the Commonwealth. At the same time, it would address the concerns of classical liberals that all Australians should have the same constitutional rights and the concerns of constitutional conservatives that the supremacy of Parliament should not be undermined.

UPHOLD & RECOGNISE is a non profit organisation committed to its charter for upholding the Australian Constitution and recognising Indigenous Australians.

This pamphlet forms part of the Uphold & Recognise Monograph Series, which includes papers by a range of authors including Julian Leeser MP, Warren Mundine AO, and the Hon. Murray Gleeson AC QC:

1 *The Australian Declaration of Recognition*
2 *Practical Recognition from the Mobs Perspective*
3 *Claiming the Common Ground for Recognition*
4 *This Whispering in Our Hearts*
5 *Journey from the Heart*
6 *Hearing Indigenous Voices*
7 *Makarrata*
8 *A Fuller Declaration of Australia s Nationhood*
9 *Recognition in keeping with the Constitution*
10 *Anchoring our Commitment in the Constitution*

For more information, or to download a copy of any of these, visit www.upholdandrecognise.com

A way for the Commonwealth to hear the voices of Aboriginal and Torres Strait Islander peoples – a model anchored in our Constitution

Ian McGill,[1] Solicitor, Sydney

The Uluru Statement from the Heart:

….With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia's nationhood….

We seek constitutional reforms to empower our people and take a rightful place in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.

We call for the establishment of a First Nations Voice enshrined in the Constitution……

In 1967 we were counted, in 2017 we seek to be heard. We leave base camp and start our trek across this vast country. We invite you to walk with us in a movement of the Australian people for a better future. (emphasis added)

1 Introduction

The above extracted passages from the Uluru Statement from the Heart emphasise the need to provide a mechanism to hear the voices of Aboriginal and Torres Strait Islander peoples, but anchored in our Constitution. Successive Australian governments have committed to recognising Aboriginal and Torres Strait Islander peoples in the Constitution.[2] Until the historic four-day National Constitutional Convention at Uluru in May 2017 that culminated in the Uluru Statement from the Heart addressed to the Australian people, there was no national Indigenous consensus on how to make this a practical and substantive reality. The Uluru Statement was tactically issued to the Australian people, rather than elected representatives, and is a clear direction to the nation that Aboriginal and Torres Strait Islander peoples want their voices to be heard, and that the Constitution should provide guarantee for these 'voices'.

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[1] This paper is an expanded version of the note published at (2020) 94 ALJ 406. I am indebted to Dr Damien Freeman, Dr Shireen Morris, Kerry Pinkstone and my former colleagues at Allens, particularly Kat Tsatsaklas, Malcolm Stephens and Ted Hill for their comments on an earlier version of this paper. All errors are mine.

[2] Recognising Aboriginal and Torres Strait Islander peoples in the Constitution has enjoyed bipartisan support for over a decade. In advance of the 2007 election, John Howard committed to a referendum to recognise Aboriginal and Torres Strait Islander peoples (The Hon John Howard MP, Prime Minister, 'The Right Time: Constitutional Recognition for Indigenous Australians' [Speech delivered at the Sydney Institute, Sydney, 11 October 2007] accessed at https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FL41P6%22;src1=sm1). Julia Gillard's Labor Government announced in December 2010 that it was committed to holding a national referendum on the subject and formed the Expert Panel on Constitutional Recognition of Indigenous Australians (The Hon Julia Gillard MP, Prime Minister, 'Expert Panel on Constitutional Recognition of Indigenous Australians Appointed', 23 December 2010 accessed at https://formerministers.dss.gov.au/13957/expert-panel-on-constitutional-recognition-of-indigenous-australians-appointed/). In 2014, Prime Minister Tony Abbott asserted his readiness to 'sweat blood' to achieve constitutional recognition (The Hon Tony Abbott MP, Prime Minister, [Address to the RECOGNISE Inaugural Gala D).
Bill Shorten promised in November 2018 that, if elected, he would establish a Voice for First Nations people and seek for it to be enshrined in the Constitution (The Hon Bill Shorten MP, 'Labor Will Establish a Voice for First Nations People', 27 November 2018 https://www.billshorten.com.au/_labor_will_establish_a_voice_for_first_nations_people_tuesday_27_november_2018). inner, Sydney, 11 December 2014] accessed at https://pmtranscripts.pmc.gov.au/release/transcript-24055.
In July 2019, Ken Wyatt, Minister for Indigenous Australians in the Morrison Government, pledged to put an option for constitutional recognition to a referendum during the current parliamentary term (The Hon Ken Wyatt MP, 'Walking in Partnership to Effect Change' [Address to the National Press Club, Canberra, 10 July 2019]] https://www.kenwyatt.com.au/ministerial-news-indigenous-australians/2019/7/10/transcript-national-press-club-address-walking-in-partnership-to-effect-change.

In this paper, I wanted to outline in detail how a potential practical model for hearing Aboriginal and Torres Strait Islander peoples' voices might be implemented by the Commonwealth, but anchored in the Constitution, within the structure of, and under the control of, the existing checks and balances of the Federal Parliament.

The proposed model assumes the existence of local and regional Aboriginal and Torres Strait Islander organisations at its base: the structure of these entities will be determined by the co-design process currently being undertaken by the Senior Advisory Group, under the leadership of Professor Tom Calma AO and Professor Marcia Langton AO. The Senior Advisory Group was commissioned by the Minister for Indigenous Australians on 30 October 2019, to determine the details of Indigenous voices at the local, regional and national levels.[3]

This paper focusses on the interface between those local and regional entities, created or recognised through the process of co-design, and the Commonwealth through the Federal Parliament.

The model suggested for the interface is a statutory joint standing committee of the Parliament, comprising members of the House and the Senate, to be known as the Parliamentary Joint Standing Committee ***for*** Aboriginal and Torres Strait Islander peoples (***Joint Committee)***. The highlighted preposition is significant: this is not a committee about a subject matter but a committee that exists for the purpose of engagement and interaction with Aboriginal and Torres Strait Islander peoples, at the centre of our Parliamentary democracy.[4]

The interface at the Parliamentary committee structure is suggested because Parliamentary committees contribute to Australia's system of democratic and responsible government. Community participation is a critical feature of any committee's structure, and they are also a mechanism of accountability. It is suggested that the accountability role of a Parliamentary committee is their core business, testing the process of government policy and decision-making in the sense of qualifying as genuinely responsible and appropriate to the best interests of the community. It is this community engagement aspect that the model of the Joint Committee seeks to develop: for the Joint Committee the relevant community is Aboriginal and Torres Strait Islander peoples local communities and organisations.[5]

The Joint Committee would engage and interact with local Aboriginal and Torres Strait Islander local and regional voices (the subject of the co-design process) through a democratising process of enabling those voices from local communities or local organisations, through a regional representative body, up to a national affiliation. The national affiliation is intended as the primary (but not exclusive) interface of those voices to the Parliament. The proposed structure for the interface is represented in the chart at **Schedule 1**.

[3] See The Hon Ken Wyatt AM MP, Minister for Indigenous Australians, 'A voice for Indigenous Australians', accessed at https://ministers.pmc.gov.au/wyatt/2019/voice-indigenous-australians.
[4] It is recognised that there is an existing Standing Committee on Aboriginal and Torres Strait Islander Affairs. That committee has no current references from any Minister, and its work would be subsumed into the work of the Joint Committee.
[5] See paragraph 4.1 of this paper below. See also J Forkert, *Parliamentary Committees: Improving public engagement*, ASPG Conference 27 – 30 September 2017, Hobart accessed at https://www.aspg.org.au/wp-content/uploads/2018/01/Parliamentary-Committees-Improving-public-engagement-Dr-Joshua-Forkert.pdf.

The flow of advice, comment or wisdom is local at the first instance, then from local to regional, and from the regional level to the national affiliation, and into the Joint Committee. A request for advice from the Executive or the Parliament would flow in the opposite direction. An illustrative flow chart of a request for advice from the Executive/the Parliament and the subsequent consultation with local organisations and/or local communities and the flow of advice back to the Executive/the Parliament is at **Schedule 2**.

Of course, nothing in the suggested construct of hearing Indigenous voices in this paper is meant to exclude other, or business as usual, interactions between Aboriginal and Torres Strait Islander peoples or their established peak or other organisations and the Executive or the Parliament. Rather, the existence of a constitutionally anchored mechanism for hearing local voices through the Joint Committee is intended to inject Aboriginal and Torres Strait Islander peoples into the centre of the check and balance machinery of our constitutional Parliamentary arrangements.[6]

Through the interface with the Joint Committee, it is intended to give Aboriginal and Torres Strait Islander peoples at a local level political agency with the Executive and with the Parliament. The interface is intended to provide transparency of process through the jurisdiction of the Joint Committee (whether in enabling legislation or in its resolutions of appointment by the House and by the Senate), ensuring clear rules of engagement and improved accountability. Transparency and accountability are directed to the achievement of improved outcomes.

The potential model developed in this paper is not unique nor innovative. It is informed by:

(a) the substantial work of, and the extensive submissions to, the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander peoples (***JSCCR***);[7] and

(b) the current parliamentary committee structure of the Australian Parliament.

Finally, the purpose of this paper is not to canvas models for a constitutional amendment. Rather, it is assumed that it is perfectly possible to craft an amendment to our Constitution which is substantive, not merely symbolic, and which enables a mechanism for Aboriginal and Torres Strait Islander peoples' voices to interface with the Parliament. The concept of hearing the voices must be anchored in the Constitution (to honour the rallying call to the Australian people of the Uluru Statement) but the detailed design of how a mechanism for hearing those voices interacts with the Executive and with the Parliament is left to the Parliament through enabling legislation and by resolutions of both Houses.

There are undoubtedly other solutions to make the hearing of Aboriginal and Torres Strait Islander peoples' voices a practical reality in the system of responsible government in Australia, and under our constitutional arrangements.[8] Indeed, we must bear in mind the importance of respecting that the design of that mechanism must be led by Aboriginal and Torres Strait Islander

[6] See, for example, S Morris, "The argument for a constitutional procedure for Parliament to consult with Indigenous peoples when making laws for Indigenous affairs" (2015) 26 PLR 166.
[7] The JSCCR was established by resolution of the Parliament on 19 March 2018. It published its Interim Report in July 2018 (***Interim Report***) and its Final Report in November 2018 (***Final Report***).
[8] Other models for the Voice were canvassed in the Interim Report, at Chapter 4 of that report.

people, recognising that there is no single way of implementing the Uluru Statement from the Heart, and there will be a range of other options.

Any interface must also be acceptable to the Australian Parliament. For this reason, as set out in this paper, the implementation and practical operation of the mechanism for hearing Aboriginal and Torres Strait Islander peoples' voices is under the full control of the Parliament.

This remainder of this paper is in five parts. Part 2 of this paper summarises the potential model, with Part 3 referencing the findings and work of the JSCCR. Part 4 then outlines the constitutional basis of the parliamentary committee system in our system of government, with Part 5 providing further detail on a potential model for consideration.

2 A potential interface model – summary

By reference to **Schedule 1**, the national affiliation is the proposed sharp point of ensuring that local Aboriginal and Torres Strait Islander peoples' voices are heard by the Executive and by the Parliament. Subject to the co-design work that is being done, the concept of local voices in a "District" (a geographical construct) is intended to be inclusive. That is, inclusive of all those who speak for country as traditional owners but also those who through, for example, dispossession, might not have retained a traditional connection to land in a District. All of these peoples are contemplated to be within the concept of local voices represented by a "Country Group Organisation".

Subject to the co-design work being done, the potential model suggests that it be a design feature of a Country Group Organisation that it is for the Aboriginal and Torres Strait Islander peoples within that District to work out how to reconcile the different associations with Country within a District. There would be no one size fits all model.

For ease of administration, the national affiliation is intended as a conduit to and from the Joint Committee and to and from these local voices in a District. It may be difficult for the Joint Committee to engage with each Country Group Organisation individually (unless, of course, the Joint Committee chose to do so), so the national affiliation would provide the secretariat function, assisting in the initiation of the securing of advice, as a one stop shop for the Joint Committee. The national affiliation would also have a role in the subsequent collation and synthesis of advice from all Country Group Organisations, and their respective local voices. Each Country Group Organisation is conceived as having the resources to enable it to collect and to consolidate advice (from the full range of Aboriginal and Torres Strait Islander people, living within, or otherwise connected to that District) and to provide that advice (or the range of advices) to the national affiliation for collation and synthesis.

The national affiliation is not a policy determining body, a peak body nor a funding body. It may have a secretariat, and subject to the rules of engagement at the Joint Committee, there may be standing representatives from a number of Country Group Organisations, who will have the statutory right to attend any hearings or meetings of the Joint Committee. How the Country Group Organisations are represented in the Joint Committee needs to be worked through: it seems logical, as a meeting of equals, that the number of standing representatives of Country

Group Organisations in any hearing by the Joint Committee should be equal to the number of members of the Joint Committee.

In the same way that Joint Committee relates to the Executive and to the Parliament (that is, the Joint Committee is not a policy origination body, but an advisory and accountability body) the national affiliation relates to local and regional voices (that is, it is not a policy determining body, but a conduit of advice).

The national affiliation and the members of the Joint Committee would, when required, meet and conduct business in the committee as equals in the political process. This interface on equal terms is a key design feature of the suggested model: further detail on this proposed design feature is provided at paragraph 4.6 below. The vector for advice from the voices of Aboriginal and Torres Strait Islander peoples to the Executive, the Ministerial Departments and to the Parliament is through the Joint Committee.

It must be emphasised that nothing in the model is meant to preclude other avenues for advice to or consultation with Aboriginal and Torres Strait Islander peoples. Over time, the operation of the Joint Committee and the national affiliation should prove itself as effective in providing advice to the Executive and to the Parliament. It may require fine tuning over time.

The Joint Committee on the one hand and the national affiliation on the other hand will have roles and responsibilities given to each by the legislature by resolutions of both Houses or under its enabling legislation. Although this is a matter for the Parliament, those roles could include assisting the Executive:

(a) with the development of policy affecting Aboriginal and Torres Strait Islander peoples, for example, in assisting the Parliament in working out the implications of the recent High Court case of *Love v The Commonwealth* and *Thoms v The Commonwealth*;[9]

(b) on the drafting of legislation under section 51(xxvi) (the race power) or section 122 (the Territories power) of the Constitution, to the extent that that legislation affects Aboriginal and Torres Strait Islander peoples or their affairs;

(c) on the formulation of delegated legislation under any relevant legislation made under paragraph (b); or

(d) in relation to the execution of Commonwealth programs in flight, including, for example, the Closing the Gap targets.

The enabling legislation establishing the Joint Committee and the mechanism for hearing Aboriginal and Torres Strait Islander peoples' voices would make provision for:

(a) the recognition of discrete geographic areas as Districts;

[9] [2020] HCA 1. Those implications include the full implications under citizenship law of the legal concept of Aboriginality as set out by her honour Gordon J at para. 366-368, including the tripartite test of biological descent, self-identification and recognition laid down in Mabo [No.2] ((1992) 175 CLR 1) because the "political and societal ramifications of translating a communal, spiritual connection with the land and waters within the territorial limits of the Commonwealth of Australia into a legislatively ineradicable individual connection with the polity of the Commonwealth of Australia" need to be considered by the Parliament, not by the Court (Gageler J at para.134).

(b) the recognition of local Aboriginal and Torres Strait Islander peoples organisations or communities (within a District);

(c) the recognition of a Country Group Organisation to take a representative role in respect of the local organisations/communities in a District;

(d) how each Country Group Organisation will be resourced to enable it to efficiently interface to the local level and also at the national affiliation level;

(e) the design of the national affiliation and the establishment of a secretariat for the national affiliation; and

(f) how the national affiliation interfaces at the Joint Committee.

This interconnectedness and the methodology for interfacing at each level is central to the model to ensure that the Executive has the ability to efficiently consult with, and to efficiently receive advice from local and regional Aboriginal and Torres Strait Islander peoples.

As noted, the national affiliation is conceived as a conduit of Aboriginal and Torres Strait Islander peoples' advice and concerns to the Joint Committee, and through the Joint Committee to the Executive and to the Parliament. Where there is unanimous agreement on an issue or unanimous advice from a Country Group Organisation, the national affiliation secretariat would forward this to the Joint Committee. Where there is disagreement arising from the work of any Country Group Organisation, the national affiliation secretariat would be obliged to pass those different views into the political process for consideration by the Joint Committee and ultimately, by the Executive and/or by the Parliament.

Finally, the intention of the proposed model is that consultations with, and advice sought from, a constitutionally anchored mechanism for hearing Aboriginal and Torres Strait Islander peoples' voices creates political obligations, rather than enforceable legal consequences, for the Executive and for the government of the day. By political obligations, what is meant is the moral obligation to consider expert advice from the Joint Committee, but subject to the right of the Executive to accept that advice, modify a program or legislation as a result of that advice or to reject the advice. In terms of legal consequences, for example, the legislation setting up the Joint Committee would provide that the fact that advice has been sought from local voices through the Joint Committee, delivered to the Executive or to the Parliament, and not acted upon, does not affect the validity or enforceability of any executive action, any Act or any legislative instrument.

Finally, the intention of the proposed interface model is that the operations of this mechanism for hearing the voices of Aboriginal and Torres Strait Islander peoples, including its interactions with the Joint Committee, would be an integral part of the intramural activities of the Parliament and would be non-justiciable.[10]

[10] See, for example, *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 162 and Egan v Wills (1998) 195 CLR 424 at 438-439 (cited by Gordon J. in *Alford v Parliamentary Joint Committee on Corporations and Financial Services* [2018] HCA 57.)

3 Relevant recommendations of the JSCCR

Before outlining in more detail a potential model, it is worth reflecting on the central recommendations from the JSCCR, including the extraordinary amount of work involved in its Interim Report and Final Report. The JSSCR recommended a process of co-design and, following that process, that the Australian government consider legislative, executive and constitutional options to establish what the JSSC referred to as The Voice. The JSCCR achieved a remarkable consensus, particularly its distillation of the principles for the design of a mechanism to hear Aboriginal and Torres Strait Islander peoples' voices.[11] Those principles are restated here:

> *The table below outlines the principles which the Committee saw as underpinning the design of a voice in the interim report. Additional principles which have emerged since the interim report appear in italics.*
>
> **Box 2.1 Principles for the design of The Voice**
>
> - Most significant is the strong support for local and regional structures.
> - The members of The Voice should be chosen by Aboriginal and Torres Strait Islander peoples, rather than appointed by government.
> - The design of the local voices should reflect the varying practices of different Aboriginal and Torres Strait Islander communities—a Canberra designed one size fits all model would not be supported.
> - There should be equal gender representation.
> - The Voice at the local, regional, and national level should:
>   - be used by state, territory and local governments as well as the federal government;
>   - provide oversight, advice and plans but not necessarily administer programs or money; and
>   - provide a forum for people to bring ideas or problems to government and government should be able to use the voices to road test and evaluate policy. This process should work as a dialogue where the appropriateness of policy and its possible need for change should be negotiable.
> - Consideration must be given to the interplay of any Voice body with existing Aboriginal and Torres Strait Islander organisations at both local and national level (in areas such as health, education, and law) and how such organisations might work together.
> - *Cross-border communities should be treated as being in the same region where appropriate.*

[11] See Final Report, note 7 above, at para. 2.19.

- *Advice should be sought at the earliest available opportunity [in the policy making process].*

Informed by those principles, the JSCCR recommended in its Final Report the initiation of a process of co-design with Aboriginal and Torres Strait Islander peoples (subsequently accepted by the government) that should:

- *consider national, regional and local elements of The Voice and how they interconnect;*
- *be conducted by a group comprising a majority of Aboriginal and Torres Strait Islander peoples, and officials or appointees of the Australian Government;*
- *be conducted on a full-time basis and engage with Aboriginal and Torres Strait Islander communities and organisations across Australia, including remote, regional, and urban communities;*
- *outline and discuss possible options for the local, regional, and national elements of The Voice, including the structure, membership, functions, and operation of The Voice, but with a principal focus on the local bodies and regional bodies and their design and implementation;*
- *consider the principles, models, and design questions identified by this Committee as a starting point for consultation documents; and*
- *report to the Government within the term of the 46th Parliament with sufficient time to give The Voice legal form.*[12]

One of the critical elements of the co-design process must be how a mechanism for hearing Aboriginal and Torres Strait Islander peoples' voices is established to enable the authority of the local elements to be conveyed to the regional and national elements. How, for example, a voice from a remote community on a particular issue, or the implications of legislation, can be heard by the Executive and by the Parliament in a meaningful and timely way.

The JSCCR recognised the critical importance of hearing the voices at a local level, including regional and remote communities, and also the need to listen to existing Aboriginal and Torres Strait Islander peoples' organisations. They also recognised the self-evident truth that Aboriginal and Torres Strait Islander peoples should not be assumed to speak with one voice. Therefore, the model for the voice must accommodate a perfectly natural diversity of voices on matters that affect Aboriginal and Torres Strait Islander communities. These voices are not only to be heard by the Executive and the Parliament, but also recognised at a national level through a form of governance institution that can speak with authority, on behalf of the local voices, to the Executive and to the Parliament. It is suggested that governance institution is the proposed Joint Committee.

[12] Final Report, note 7 above, para. 2.314.

Having noted a model where local and regional bodies might affiliate into regional groups to provide advice to the Parliament, the JSCCR set out a suggestion from Professor Anne Twomey:[13]

> *Professor Twomey suggested that a secretariat could collect, order, and record advice and present it to the Parliament in the form of a database, which could be published online and formally tabled in the Parliament. Professor Twomey went on to suggest:*
>
> *To ensure that what was said was heard, there could be a parliamentary committee that would be responsible for reviewing that advice, in a similar way to the manner in which the Joint Standing Committee on Treaties reviews all treaties that Australia proposes to ratify. It could alert Parliament to the issues raised in that advice, as is done by the Senate Standing Committee on Regulations and Ordinances.*

It is Professor Twomey's suggestion of a Parliamentary Committee upon which the proposed model outlined in this paper is built.

The proposed model also builds upon the 'Speaking for Country option' presented by Uphold & Recognise in its monograph 'Hearing Indigenous Voices, Options for Discussion' which was referred to by the JSCCR in its Interim Report, including evidence given by Dr Damien Freeman on behalf of Uphold & Recognise.[14] This option set out a suggested legislative mechanism to enable the Parliament to establish and recognise local Aboriginal and Torres Strait Islander bodies for Indigenous peoples who speak for Country, and to provide the machinery for them to provide advice to the Parliament.

4 Parliamentary committees and responsible government

4.1 The Australian Parliament's committee system

At a conceptual level, the committee system of the Commonwealth Parliament is a means of ensuring the vitality of our democracy. It challenges the dominance of the Executive and has been referred as putting the 'responsible' back into Australian government.[15] Academic studies have suggested that parliamentary committees are uniquely placed to address increasing public dissatisfaction and disengagement with the political process, and there is an opportunity for improvement in how committees engage with the community and contribute to democratic renewal.[16]

At a practical level, [17] the committee system performs a number of important functions within Australia's system of government including:

- scrutinising government activity (an accountability role);
- informing members on various issues;
- taking the parliament to the people, through public submissions and public hearings;

[13] Ibid, at para. 2.100.
[14] See Interim Report, note 7 above, at paras 4.106 – 4.112 inclusive.
[15] See generally M Indyk, *Making Government Responsible: The role of Parliamentary Committees,* 1980 Australian Journal of Political Science, vol. 15(2) at page 93. Online citation: https://doi.org/10.1080/00323268008401761.
[16] See Forkert, note 5 above, at page 1 and the substantial research he cites and analyses on Parliamentary committees in Australia and in the United Kingdom.
[17] See K Burton, Community Participation in Parliamentary Committees: Opportunities and Barriers, Research Paper 10 1999-2000 accessible here.

- opening the parliamentary and legislative process to the public, particularly by stimulating public debate on issues of significance;
- contributing to the formulation of better public policy by providing parliament with expert and informed opinion on specific matters before parliament, and
- contributing to better legislation through the scrutiny of bills with regard to technical requirements and the safeguarding of fundamental personal rights and liberties.

According to the Australian Parliament itself, its committees:

> *…are one mechanism the House uses to keep a check on the activities of the government. Because they have extensive powers to call for people, including public servants, and documents to come before them, committees can thoroughly investigate questions of government administration and service delivery. Committees may oversee the expenditure of public money and they may call the government or the public service to account for their actions and ask them to explain or justify administrative decisions.*
>
> *Committees can contribute to better informed policy-making and legislative processes. They help Members to access a wide range of* ***community and expert views*** *so that through the committee process, the Parliament is able to be better informed of community issues and attitudes.* ***Committees provide a public forum for the presentation of the various views of individual citizens and interest groups****.*
>
> *In a sense committees* ***take Parliament to the people*** *and allow direct contact between members of the public and groups of Members of the House. Because they can travel extensively throughout Australia and have flexible procedures, they provide opportunities for people to have their say on the issues being investigated. By simply undertaking an inquiry a committee may promote public debate on the subject at issue.*[18]

Parliamentary committees therefore contribute to Australia's system of democratic and responsible government. Community participation is a critical feature of a committee's structure. As noted, they are also a mechanism of accountability. It is suggested that the accountability role of a Parliamentary committee is their core business and according to one commentator (a former Senate committee secretary) the committee process, and the public hearings that are often part of that process have the task of quality assurance:

> *testing that the process of government policy and decision-making measure up, in the sense of qualifying as genuinely responsible and appropriate to the best interests of the community.*[19]

It is this community engagement aspect that the model of the Joint Committee seeks to develop, and the relevant community is Aboriginal and Torres Strait Islander peoples local communities and organisations.

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[18] See Parliament of Australia, Infosheet 4 – Committees accessed here: https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets/Infosheet_4_-_Committees (emphasis added).

[19] J Uhr, Parliamentary Committees*: What are the appropriate performance standards?,* Canberra, Constitutional Centenary Foundation, 1993, pp 6-7 cited by Burton, note 13 above, at text accompanying footnote 43.

In order to encourage local participation by Aboriginal and Torres Strait Islander peoples in the Joint Committee, in order to hear their voices, a number of mechanisms are suggested at para 5.3 below, to increase the efficiency of the interface offered through the national affiliation to the Joint Committee.

4.2 Types of Parliamentary committees

Amongst the genus of Parliamentary committees there are numerous species.

There are three key reasons why the statutory joint standing committee model is preferred for the Joint Committee. First, the *standing committee* is preferred because it exists for the life of a Parliament and imbues a construct of permanence as compared to a select committee. Second, the *joint committee* is preferred because on matters affecting Aboriginal and Torres Strait Islander peoples there is a need to speak to the Parliament, not to a particular House. In giving effect to a constitutionally anchored mechanism for hearing Aboriginal and Torres Strait Islander peoples' voices through the Joint Committee there is no subversion of any concept of bicameralism (in the sense of removing an important check on the Executive provided by the Senate).[20] Indeed, I believe there is strong bipartisanship on this issue. Third, a *statutory committee* is preferable as it also imbues in the Joint Committee the relative permanence that comes with a statutory form, particularly, if this be the sequence, following the passage of a successful referendum.

4.3 Amendment to legislation establishing a joint standing committee

Of course, it is possible that a future Parliament may amend the legislation establishing the Joint Committee and its interface with the national affiliation. That is entirely appropriate.

It seems sensible, for example, that any enabling legislation have an inbuilt review mechanism (for example after 2 years initially and thereafter every 5 years) to ensure that the Joint Committee is working efficiently in hearing local voices and achieving its legislated goals. Any such amendment would be a political decision and would have political, but not legal, consequences.

But note that the model proposed in this paper requires that any such amendment or modification would itself engage the jurisdiction of the Joint Committee, and therefore Aboriginal and Torres Strait Islander voices must be heard on that amendment or modification.

4.4 Potential repeal of legislation establishing a joint standing committee

Whether or not repeal of the mechanism for hearing Aboriginal and Torres Strait Islander peoples' voices is possible will depend on the precise terms of the amendment to the Constitution. However, it seems logical that the mechanism should be under the legislative control of the Parliament in its implementation but that its continued existence must be constitutionally entrenched. Otherwise, the anchor in the Constitution has no enduring impact upon the power imbalance that has existed since Federation between the Commonwealth and Aboriginal and Torres Strait Islander peoples. In the current century, the mechanism could be

[20] See Odgers', Australian Senate Practice (14th edition, 2016) at pp 489-490.

modified, as the circumstances of Aboriginal and Torres Strait Islander peoples permit. But it should never be abolished. There is too much work to do and the power imbalance is structural.

4.5 Potential precedents for the Joint Committee

A useful precedent might be the Joint Committee on Public Accounts and Audit, established by the *Public Accounts and Audit Committee Act 1951*. Under section 5 of that Act:

> *(1) As soon as practicable after the commencement of this subsection and the first session of each Parliament, a joint committee of members of the Parliament, to be known as the Joint Committee of Public Accounts and Audit, is to be appointed.*
>
> *(2) The Committee is to consist of 16 members of the Parliament. 6 members must be members of, and be appointed by, the Senate. 10 members must be members of, and be appointed by, the House of Representatives. The members must be appointed according to the practice of the Parliament for the appointment of members to serve on joint select committees of both Houses of the Parliament.*

Another precedent is the Parliamentary Joint Committee on Corporations and Financial Services. That joint committee is referred to in section 241(1) of the *Australian Securities Commission Act 1989* (now repealed) which provided as follows:

> *As soon as practicable after the commencement of this Part and after the commencement of the first session of each Parliament, a joint committee of members of the Parliament ... shall be appointed*."

As set out in the judgment of Gordon J in *Alford v Parliamentary Joint Committee on Corporations and Financial Services* (***Alford***)[21]

> *Section 241(3) [of the 1989 Act, now repealed] provided that the appointment of members to the Committee was to be in accordance with each House's practice relating to the appointment of members of that House to serve on joint select committees of both Houses.*
>
> *By reason of s 261 of the Australian Securities and Investments Commission Act 2001 (Cth) ("the ASIC Act"), the Corporations and Financial Services Committee continues in existence. Section 242 of the ASIC Act provides that "[s]ubject to [that] Act, all matters relating to the Parliamentary Committee's powers and proceedings must be determined by resolution of both Houses".*

That legislative authority might enable, for example, that in the first session of each new Parliament following an election, the Joint Committee on Aboriginal and Torres Strait Islander Affairs is to be appointed on behalf of the Parliament. At the same time, the legislation would contemplate that the Country Group Organisations would each appoint a representative who would have a statutory right to attend and to give evidence before the Joint Committee, as part of the national affiliation construct.

[21] [2018] HCA 57, at paras. 10 and 11.

Administrative arrangements would ensure that the number of representatives of Country Group Organisations at any public hearing of the Joint Committee would be equal to the number of members of the Joint Committee from the House and from the Senate.

Provision can also be made for section committees of the Joint Committee, which might be empowered to report on particular issues, for example those involving a particular region of Australia (or particular community within a District). The Joint Committee in section committee could then examine that particular issue, that might include proposed legislation or proposed executive action that has a unique impact on Aboriginal or Torres Strait Islander peoples in that region.

4.6 Conclusion on a statutory joint standing committee model

A statutory joint standing committee is suggested for the following reasons:

- given that a constitutionally anchored mechanism for hearing Aboriginal and Torres Strait Islander peoples' voices should be to the Commonwealth, it seems appropriate that membership of the Parliamentary committee should be drawn from both Houses of Parliament, enabling members and senators to work together with the national affiliation and with regional and local communities and organisations on matters of concern to Aboriginal and Torres Strait Islander peoples;
- a joint committee would align, on Parliament's side, with the structure of the JSCCR which has operated powerfully and effectively in a short space of time;
- unlike the JSCCR, the new committee would be a standing committee (rather than a select committee) and therefore appointed for the life of a Parliament; and
- the joint standing Committee might be able to draw upon the hard won knowledge and the experience of the core group of members and senators who participated in the work of the JSCCR (and could draw upon the expertise, from the House of Representatives, of the Standing Committee on Aboriginal and Torres Strait Islander Affairs).[22]

The idea behind the statutory joint committee is informed by the political fact that a Parliamentary committee has no executive power. It is a conduit to the Executive and to the Parliament. Equally, the coming together of the Country Group Organisations nationally is that they be a conduit for local voices to the Parliament and Executive.

This therefore creates the conditions for the Parliament, through its committee, and Aboriginal and Torres Strait Islander peoples, through their national affiliation, to work together as equals.

[22] See https://www.aph.gov.au/Parliamentary_Business/Committees/Committees_Exposed/~/~/link.aspx?_id=302F4C29FCD646B9965CD6E886E4C12C&_z=z and see note 4 above.

5 A potential model for A Constitutionally anchored mechanism for hearing Aboriginal and Torres Strait Islander peoples' voices – detail

Under a new Act of Parliament, take for example, *Hearing Aboriginal and Torres Strait Islander Peoples' Voices Act (2020)* (Cth) (***Voices Act***),[23] provision would be made:

(a) for the establishment and/or recognition of local and regional entities for the various Aboriginal and Torres Strait Islander peoples and for their affiliation at a national level, on behalf of all Aboriginal and Torres Strait Islander peoples; and

(b) for the establishment of the Joint Committee, on behalf of the Parliament.

Structurally, one Part of the Voices Act will deal with the establishment of the mechanism for hearing Aboriginal and Torres Strait Islander peoples' voices. Another Part of the Voices Act will deal with the establishment of Committee.

The Voices Act will make it clear that the national affiliation, and the constituent elements of recognised local and regional organisations, on the one hand, and the Joint Committee on the other hand, are intended to work together as equals, to provide advice, and to report to the Executive and to the Parliament on matters relating to Aboriginal and Torres Strait Islander affairs, and other matters within the jurisdiction of the Joint Committee.

This legislated requirement for working together as equals is offered as one powerful indicia of a potential political and procedural solution to historical disempowerment.

5.2 Constitutional basis

The first part of the Voices Act would be enabled by the race power (section 51(xxvi); it would be preferable, however, in my opinion, that the first part of the Voices Act be enabled by the new provision in the Constitution inserted after a successful referendum. That is, the successful referendum creates the moral and political mandate on which this part of the Voices Act would be based. The second part of the Voices Act would be supported under sections 49,[24] 50,[25] and 51(xxxvi)[26] of the Constitution.

As stated by Justice Gordon in *Alford:*[27]

> *The plaintiffs contended that because the Corporations and Financial Services Committee is a joint committee, it does not fall within the meaning of "the committees of each House" in s 49 of the Constitution. That contention does not assist the plaintiffs.*

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[23] It would be preferable, as a first step in the formulation of the Voices Act that there be consultation with Aboriginal and Torres Strait Islander peoples, through a transitional arrangement, in relation to the drafting instructions for the Voices Act.

[24] Section 49 of the Constitution headed "Privileges etc of Houses", provides as follows:
The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

[25] Section 50 of the Constitution headed "Rules and Orders" provides:
Each House of the Parliament may make rules and orders with respect to:
(i) the mode in which its powers, privileges, and immunities may be exercised and upheld;
(ii) the order and conduct of its business and proceedings either separately or jointly with the other House.

[26] Section 51(xxxvi) of the Constitution provides that *the Parliament shall, subject to this Constitution, have power to make laws*…with respect to:
Matters in respect of which this Constitution makes provision until the Parliament otherwise provides.

[27] *Alford v Parliamentary Joint Committee on Corporations and Financial Services* [2018] HCA 57, at paras 31 and 32 (footnotes and citations omitted).

First, s 49 of the Constitution recognises that there will be "committees of each House". There is nothing to suggest that the phrase would not extend to encompass joint committees. Second, this Court has held that that section should not be given a restricted meaning without clear reason. That construction is reinforced by the reference to joint and statutory committees in s 3 of the Parliamentary Privileges Act, which suggests that Parliament intends joint and statutory committees to be treated as "committees of each House" for the purposes of ascertaining the powers, privileges and immunities of those committees.

5.3 Establishment of a Constitutionally anchored mechanism for hearing Aboriginal and Torres Strait Islander peoples' voices – the national affiliation and its building blocks

Subject to the co-design process output, and consistent with the design principles identified by the JSCCR, the design of the local voices should reflect the varying practices of different Aboriginal and Torres Strait Islander communities—a Canberra designed and imposed one size fits all model should not be supported.

It would be for the Aboriginal and Torres Strait Islander peoples in a particular region (defined as a District) to decide, for themselves, the terms on which their local representative or community bodies should be established.

The Voices Act could establish a Recognition Authority, comprising only Aboriginal and Torres Strait Islander representatives. The Recognition Authority would supervise, provide advice and ultimately recognise what the people in each District have decided as a matter of their own local custom and practices, and as an act of civil society, are their local bodies and organisations.

Nothing in the concept of the Recognition Authority is meant to imply government interference.

Against that background, the Recognition Authority could be tasked with the following powers and functions:

(a) to approve regions of Australia, for example, to be designated as *Districts* in accordance with principles set out in the Voices Act;

(b) in approving Districts, the Recognition Authority would have regard to the preferences and views expressed by Aboriginal and Torres Strait Islander peoples, their contemporary circumstances, areas in which different languages are and were spoken, areas subject to native title applications, land handbacks or grants, areas represented by Aboriginal Land Councils, anthropological evidence and other relevant considerations;

(c) in approving Districts, the Recognition Authority would also have regard to the findings of the JSCCR that cross-border communities should be treated as being in the same region or District where appropriate;

(d) to recognise the establishment, in each District, of new local representative bodies or recognise, for the purposes of the Voices Act, existing local bodies, for

example, existing regional authorities or regional assemblies or organisations representing the Empowered Communities initiative;[28]

(e) in approving local representative bodies, the Recognition Authority would have regard to the circumstances of Aboriginal and Torres Strait Islander peoples in different parts of Australia: there would not be a one size fits all model, but instead recognition of different organisational structures in particular areas, different history and recognition of a different approaches in different areas;

(f) to approve a single body to represent an approved District to be designated a *Country Group Organisation*: the Recognition Authority would leave it to the Aboriginal and Torres Strait Islander peoples in a District and their respective local representative bodies to resolve amongst themselves the terms upon which they might associate or incorporate to represent the various peoples and organisations within a District and the Recognition Authority's role would be limited to being satisfied that the single body, the Country Group Organisation, has the capacity to speak for Country or to interface with the bodies referred to in paragraph (d) above within the District; and

(g) to formally recognise a national affiliation, which would have the legislated right to attend, as community members, any meeting or hearing held by the Joint Committee for the purpose of communication of local advice to the Executive and the Parliament through the Joint Committee.

In recognising local representative bodies, and the Country Group Organisations, the mechanism for hearing voices is being constructed from bottom or Country up. The intention is that under this building block approach the Voices Act must assume a diversity of voices from Aboriginal and Torres Strait Islander peoples to the Joint Committee, and through the Joint Committee to the Executive and the Parliament.

The efficiency of the model proposed is the national affiliation: the national affiliation is not a legal entity but a governance construct of Country Group Organisations coming together with the Joint Committee for a statutory purpose, namely, to provide organised and synthesised advice to and to work with the Joint Committee as equals on matters within the jurisdiction of the Joint Committee. That work is to be undertaken for the benefit of the Executive and for any advice (or indeed competing views from local bodies in Districts) to be tabled in Parliament. For example, a representative of a Country Group Organisation, acting in the national affiliation, may be able to assist the Joint Committee by discussing the competing views at a local level within a District and thereby assist the Joint Committee to be a forum for engagement with and deliberation on that advice that has been passed on by the national affiliation.

This will increase the quality of advice to the Executive and to the Parliament.

As a potential governance structure, and this could be determined by the Recognition Authority in formally recognising the national affiliation under the Voices Act, nominated representatives

[28] See Final Report, note 7 above, para 2.159.

of the Country Group Organisations could be appointed to act as a committee of the national affiliation. For example, it might be that the number of members of that committee would be equal to and not exceed the number of members of the Joint Committee, except as the Joint Committee might otherwise direct.

To emphasise the coming together of equals in the political process, at the time that the Joint Committee is appointed (on behalf of the Parliament) the Recognition Authority would also call for nominations from Country Group Organisations for the appointment of representatives to the national affiliation (on behalf of Aboriginal and Torres Strait Islander peoples).

Under the model proposed, the national affiliation is not an Aboriginal and Torres Strait Islander peak organisation. For example, it is not charged with settling a uniform national policy for and on behalf of the Country Group Organisations. The national affiliation is in governance terms a conduit of advice, views and opinions on matters within the jurisdiction of the Joint Committee to the Executive and the Parliament. As stated by Dr Freeman in his evidence before the JSCCR:[29]

> *The idea here is that the national affiliation would be a conduit between the local bodies and the national parliament. So it would be for the national affiliation to have advice tabled in parliament but the obligation is imposed on this national affiliation to provide the advice from the local organisations. So if there is a consensus position [amongst all Country Group Organisations or within a Country Group Organisation], it presents the consensus position. If there are divergent positions amongst the [Country Group Organisations or within a Country Group Organisation], then the obligation is to make the Parliament [and the Executive through the Joint Committee] aware of those divergent positions.*

There would be no compulsion for the Country Group Organisations to affiliate nationally; as a design issue one possibility is that if a Country Group Organisation exercises its free right in a civil society not to affiliate with the national affiliation, the opportunity to provide advice through the national affiliation might be lost. However, not affiliating nationally would not preclude other business as usual avenues for a Country Group Organisation providing advice to the Executive and the Parliament.

In terms of efficiency of operation of the Joint Committee, the conception of the national affiliation is therefore a single point of contact for the Joint Committee through, for example, a secretariat based in Canberra. That secretariat would be supported by the greater resources of the Country Group Organisations and by research capability provided the Australian Parliament, including the Parliamentary Library and by the resources of the Joint Committee itself, given to it by the Parliament.

5.4 Establishment of the Joint Committee

The Voices Act would provide that as soon as practicable after commencement of the first session of each Parliament or the commencement of the Voices Act (whichever occurs later), a

[29] See Interim Report, note 7 above, para. 4.110.

joint committee of the Parliament, to be known as the Joint Standing Committee on Aboriginal and Torres Strait Islander Peoples, shall be appointed.

The appointment of members of the Joint Committee should be in accordance with each House's practice relating to the appointment of members of that House to serve on joint committees of both Houses.

The Voices Act could provide that the matters relating to the Joint Committee's composition, powers and proceedings must be determined by a resolution of both Houses, or alternatively, certain powers and functions of the Joint Committee could be set out in the Voices Act.

Provision should be made, for example, for the Joint Committee, in section committee, to conduct proceedings in any place, particularly if the Joint Committee wished to consult on Country with particular local communities.

5.5 Machinery provisions in the Voices Act

For discussion, the proposed model contemplates that the Joint Committee might have a three part jurisdiction, comprising:

(a) a mandatory jurisdiction for the Joint Committee where the race or territories power is expressly engaged by the Commonwealth;

(b) an optional jurisdiction where the national affiliation, acting on the request of local voices in Districts, initiates engagement with the Joint Committee: that engagement might be on legislation or executive action of any kind, or the implementation of a government program, affecting a particular community in a District; and

(c) an optional jurisdiction, whereby the Executive, the Parliament or the Joint Committee itself, requests advice on any matter affecting Aboriginal and Torres Strait Islander peoples.

For the purposes of the mandatory jurisdiction of the Joint Committee, the Voices Act could include a definition of a *Designated Act* and a *Designated Legislative Instrument*.

A Designated Act might be defined to include not only any amendment to the Voices Act itself but a list of Acts scheduled to the Voices Act (including, for example, the *Native Title Act 2006* (Cth)) and any other Act supported by section 51(xxxvi) or section 122 of the Constitution, to the extent it is directed to Aboriginal and Torres Strait Islander peoples or their affairs.

A Designated Legislative Instrument might be defined as a legislative instrument made under a Designated Act.

The Voices Act would include machinery that ensures that any reference to the Joint Committee within its jurisdiction must engage the mechanism for hearing Aboriginal and Torres Strait Islander peoples' voices, by ensuring that advice, guidance and comment (***Advice***) is sought from local voices through the national affiliation.

Schedule 2 illustrates how a request for Advice from either the Parliament or the Executive is flowed down to a local level, with Advice flowed up into the Joint Committee.

The Voices Act would provide that any Bill for a Designated Act must be tabled with a certificate that the Bill has been referred to the Joint Committee for consideration and the date upon which it was referred. The Voices Act could also provide machinery for consultation on Designated Legislative Instruments, which ensures that a rule maker must be satisfied that, before a Designated Legislative Instrument is made, there has been consultation with the Joint Committee.

The Voices Act would provide that any Advice given on a Designated Act or Designated Legislative Instrument must be tabled by the Joint Committee in each House of the Parliament, together with any comment from the Joint Committee.

Consistent with Parliamentary supremacy, and the intention of the model to create political obligations rather than justiciable legal obligations and rights, the Voices Act will provide that a failure to comply with those machinery provisions, including the failure to seek Advice, will not affect the validity or enforceability of any Designated Act or of any Designated Legislative Instrument.

5.6 Working together in the Joint Committee

As noted at para. 5.3 above, nominated representatives of the Country Group Organisations could be appointed to act as a committee of the national affiliation for the purposes of attending any meetings or hearings of the Joint Committee. This is suggested for efficiency reasons. However, this would not preclude the Joint Committee engaging with local communities and voices in any way that it chooses, consistent with any rules of engagement set out in resolutions by the Houses of Parliament.

It is suggested that the Joint Committee should meet and conduct its business in a manner that takes account of the cultural differences within and between Districts, and accommodates new and flexible ways of interacting with those communities. For example, digital technology and online platforms could be used whenever practical, and there is no need for the proceedings of the Joint Committee to be conducted with undue formality as noted in a 1999 Research Paper[30]:

> *The format of the [Joint Committee's] proceeding can vary, from the standard format of statement/question/answer to the more relaxed, and less frequent, round table and seminar formats. Regardless of the surroundings-a committee room in Parliament House or a tin shed at the local racetrack-the hearing process is governed by parliamentary privilege, by rules set out in the conduct of proceedings (covering matters such as meeting and election of a chair, quorum, equally divided votes and disclosure of evidence) and by resolutions of the Senate and of the House relating to the protection of witnesses…. Relevant rules of both Houses apply to the [Joint Committee's] committee proceedings, for example offensive language and personal reflections, although the examination of witnesses is generally conducted in a relatively relaxed fashion*.

The Joint Committee would encourage strong, culturally appropriate, engagement with Aboriginal and Torres Strait Islander peoples' local voices, building on the experience of the

[30] See K Burton, note 16 above.

Standing Committee on Aboriginal and Torres Strait Islander Affairs. For example, in the 1999 Research Paper referred to above, it was noted that:

> *…in its field trips around the country, the Standing Committee on Aboriginal and Torres Strait Islander Affairs conducts discussions with Aboriginal communities and groups, as well as other community organisations. These discussions allow a freer flow of information and exchange of views than might be the case in a formal environment such as a committee hearing room at Parliament House. There is also the likelihood that those who are unwilling to place themselves before a public committee hearing may feel more comfortable expressing their views in another, perhaps more familiar, environment.*[31]

Over the past 20 years there have been a number of inquiries by the Australian Parliament directed to achieving broader and deeper public engagement by Parliamentary committees: those inquiries and their findings have been summarised by Dr Joshua Forkert in this paper, Parliamentary Committees: Improving Public Engagement.[32]

Dr Forkert, after referencing the Australian Parliament's inquiries, examined reports commissioned in the United Kingdom, including a report by Professor Ian Marsh, Professor Matthew Flinders and Leanne-Marie Cotter, commissioned by the UK House of Commons Liaison Committee to research the effectiveness of select committees in engaging with the public. The resultant report, *Building public engagement: Options for developing select committee outreach (**Building Public Engagement Report**)*[33], has recommendations that resonate in relation to the potential model of the Joint Committee.

One key recommendation of the Building Public Engagement Report that might resonate in relation to the conduct of the Joint Committee is that the recommendation 'explore opportunities to enhance two-way learning'. As described by Dr Forkert, the report suggested that one option for this two way learning would be for the committee to think not so much in terms of engagement but also in terms of *deliberation* in the sense of a more meaningful two-way dialogue and learning process.[34]

The use of roundtable discussions to deliberate on issues of contention might resonate in the Joint Committee. Roundtable discussions will enable the Joint Committee to listen to and participate in collaborative problem solving with the local voices and their representatives, including to sound out potential courses of action. There is an opportunity through this level of engagement and deliberation to work in partnership to identify solutions to what might appear to be intractable problems in Aboriginal and Torres Strait Islander affairs. Those solutions can then be tendered to the Executive and to the Parliament by the Joint Committee.

Whilst the Joint Committee is a parliamentary committee, and even acting informally, will have all of the powers of a committee of the Parliament, including the power to call witnesses to attend, given the special nature of its engagement and deliberative work this would be unlikely to

[31] Ibid, note 16 above.
[32] See note 5 above at pages 3-4.
[33] Ibid, note 5 above, at page 5 and at footnote 24 of the Forkert paper.
[34] Ibid, note 5 above, at page 9.

be exercised. This is particularly so given the statutory right of attendance of representatives of the Country Group Organisations, in national affiliation.

The frankness of engagement of views between equals will be protected. As set out by Gordon J in *Alford*:[35]

> *Article 9 of the Bill of Rights 1688 declares that "[p]roceedings in Parliament, ought not to be impeached or questioned in any Court". Pursuant to s 16(2) of the Parliamentary Privileges Act, for the purposes of Art 9 of the Bill of Rights, "proceedings in Parliament" is extended to include all words spoken and acts done in the course of or for the purposes of the transacting of the business of a House or committee, and includes the giving of evidence before a committee.*

As noted above,[36] there is no doubt that this protection extends to a statutory joint committee.

The conduct of the Joint Committee would clearly be a *proceeding in Parliament*, such that all members of the national affiliation appearing in Joint Committee will enjoy protection from any liability in defamation in respect of evidence given or matters stated in the committee. Those members will also enjoy the protections provided by the *Parliamentary Privileges Act 1997* (Cth) in relation to the use which may be made of the same evidence or matters stated in ordinary civil or criminal judicial proceedings. Those members will also be subject to the obligations that attend participation in Parliamentary committee, for example, relating to not giving evidence that is false or misleading and not releasing a written submission unless the Joint Committee has authorised publication.

This potential for frankness of exchange between equals, in a non-legislative and non-judicial forum at the centre of our Parliamentary democracy, goes some of the way to addressing the historical power imbalance in our system of Government for Aboriginal and Torres Strait Islander peoples.

5.7 Conclusion

In conclusion, under this potential model, a Constitutionally anchored mechanism for hearing Aboriginal and Torres Strait Islander peoples' voices:

(a) would be administratively lean at the centre, with policy and legal resourcing decentralised to Country Group Organisations, best able to speak to and advise upon local, regional or through affiliation, national impacts;

(b) would not be a peak body, a funding body, a service delivery body, nor a body that determines policy;

(c) would not preclude, but would complement, existing methods by which Aboriginal and Torres Strait Islander peoples participate in the political process; and

[35] Alford, note 17 above, at para 27.
[36] Ibid, see note 17 above.

(d) in its formulation, represents a coming together of equals at the Joint Committee for engagement and deliberation, and seeks to address the historical power imbalance in our Constitutional and political arrangements for Aboriginal and Torres Strait Islander peoples.

6 Conclusion

The potential model discussed in this paper is offered merely as one form of recognition of Aboriginal and Torres Strait Island people. It is not a radical idea. As noted by the former Chief Justice, Murray Gleeson AC QC in relation to a voice to Parliament:[37]

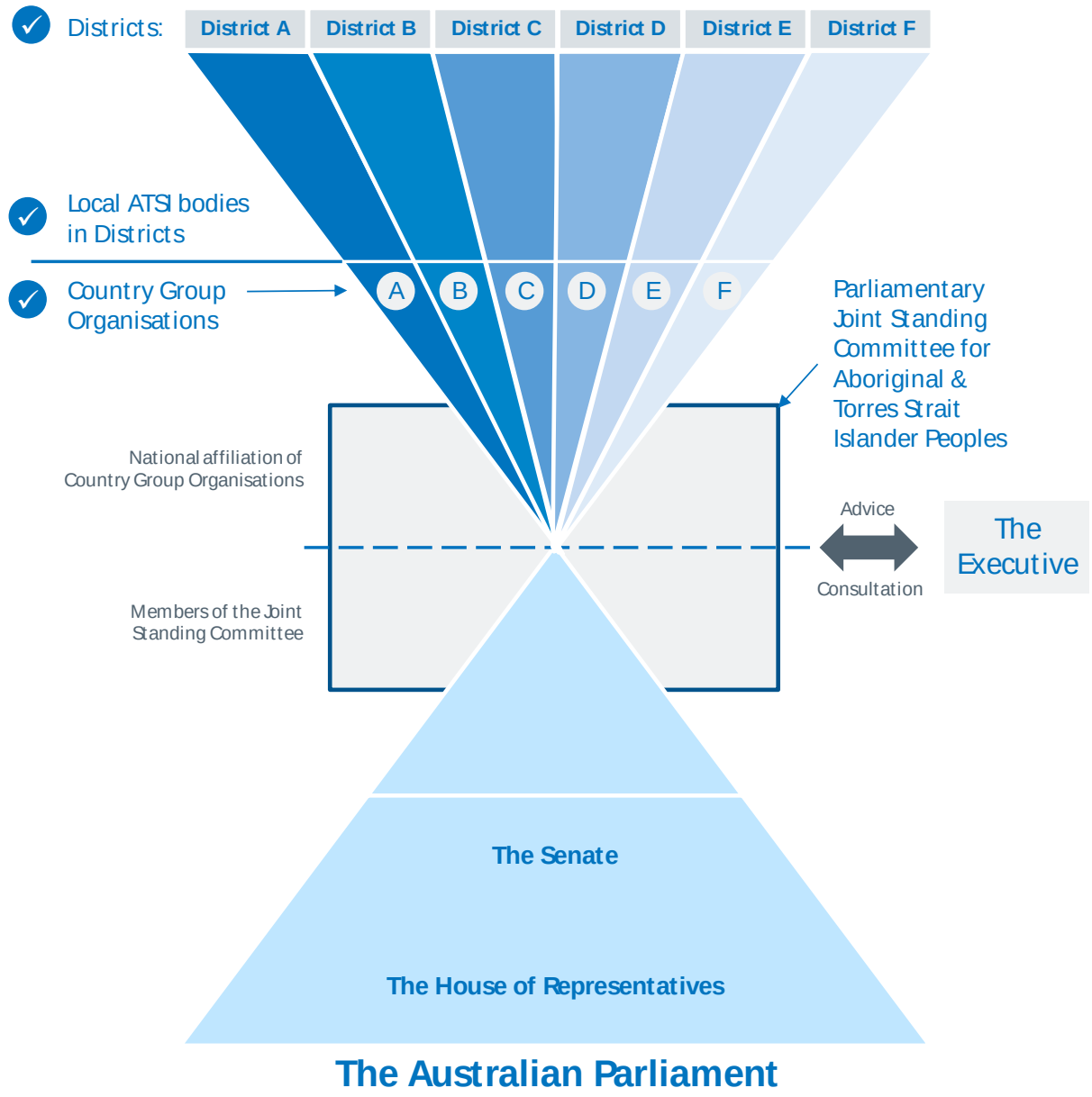
> *It has the merit that it is substantive, and not merely ornamental. It is not aimed at assuaging the sensibilities of some non-Indigenous people. It would give Indigenous people a constitutionally entrenched, but legislatively controlled, capacity to have an input into the making of laws about Indigenous people or Indigenous affairs.*

The Constitution creates the practical rules that establish how our nation is to be governed. Indigenous Australians have called for one additional, and practical rule, that will enable Aboriginal and Torres Strait Islander peoples' voices to be heard and to be consulted on legislation and policy affecting their communities. Since the Uluru Statement of the Heart, the challenge has been to decide on how to give effect to this big idea, and how to address the structural powerlessness that was echoed in the Uluru Statement from the Heart. The above is offered as merely one idea that might be capable of meeting that challenge.

[37] Murray Gleeson, Recognition in Keeping with the Constitution – A Worthwhile Project, at page 14.

Schedule 1

Simplified structure for hearing Aboriginal and Torres Strait Islander peoples voices' to Parliament



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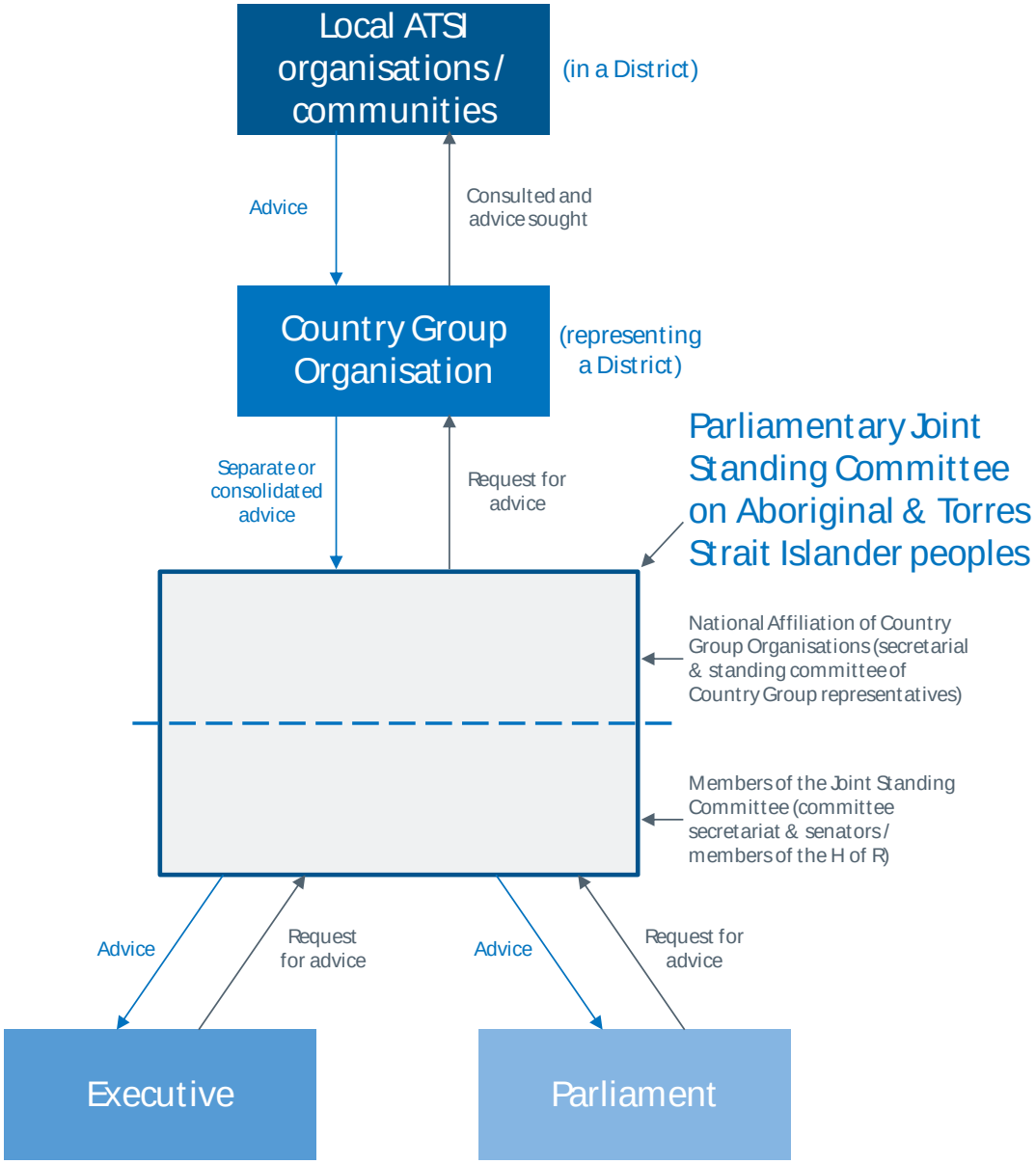
As approved by the Recognition Authority

Schedule 2

Flow chart of request for advice from the Executive / Parliament



1. The challenge of constitutional recognition of Aboriginal and Torres Strait Islander peoples in 2020 is to find a way of addressing the aspirations contained within the Uluru Statement from the Heart within the parameters set by the Government in its response to the Uluru Statement. In doing so, the proposed amendment must be *substantive* rather than *symbolic*. It must also address the concerns of constitutional conservatives that the *supremacy of Parliament is not disturbed*, and the concerns of classical liberals that *liberal values should not be offended*. We believe that Professor Anne Twomey has developed a proposal that is capable of addressing this range of concerns. The political case for Professor Twomey's proposal is set out by Kerry Pinkstone in *Anchoring our Commitment in the Constitution: finding common ground*. We are concerned with setting out the legal case for the proposal.

2. The Uluru Statement from the Heart, which was a product of the Referendum Council's consultation process, states:

> We call for the establishment of a First Nations Voice enshrined in the Constitution.

   Neither the Uluru Statement nor the final report of the Referendum Council stipulated how this First Nations Voice was to be "enshrined" in the Constitution. Given that there is currently no authoritative statement as to how it should be enshrined, how the Constitution is to be amended in order to "enshrine" it remains an open question. The First Nations Voice could be *established* through legislation, providing it is somehow *enshrined* in the Constitution.

3. In providing the Government's response to the recommendations contained in the final report of the Referendum Council, the Prime Minister, the Hon. Malcolm Turnbull MP, said:

> Our democracy is built on the foundation of all Australian citizens having equal civic rights—all being able to vote for, stand for and serve in either of the two chambers of our national Parliament—the House of Representatives and the Senate.
>
> A constitutionally enshrined additional representative assembly for which only Indigenous Australians could vote . . . or [in which only they could] serve . . . is inconsistent with this fundamental principle.
>
> It would inevitably become seen as a third chamber of Parliament.

His successor, the Hon. Scott Morrison MP, has reiterated that this remains his position. The Government has ruled out one specific means of realizing the Uluru Statement's aspiration for "enshrinement"—namely, establishing a new entity within the Constitution. So the political challenge is to find a way of creating a constitutional guarantee that Aboriginal and Torres Strait Islanders will be heard ("enshrinement") without establishing a new entity within the Constitution.

4. In order to address the aspirations of the Uluru Statement, the proposed amendment to the Constitution must be substantive rather than symbolic. A symbolic amendment would be one which inserted a new recitation in the Constitution without addressing the way in which power is exercised under the Constitution. Such a recitation might contain a statement about the place of Aboriginal and Torres Strait Islander peoples within the history of Australia. It might also give expression to sentiments about the enduring significance of these peoples for the cultural heritage and contemporary life of the nation. Such a recitation might recognise Indigenous people in the Constitution, but it would not recognise them in the way that they have said they wish to be recognised. In order for them to be recognised in a way that is acceptable to them, the amendment to the

Constitution would have to have some substantive effect, rather than being purely symbolic.

5. The call for a substantive amendment does not equate to a call for a change to the legislative power of the Commonwealth. In order for the amendment to be substantive, it would have to create some kind of guarantee that gives Indigenous people reason to believe that the future will be different from the past. Such a guarantee would see the Constitution imposing on the Commonwealth an obligation to ensure that Indigenous voices would be heard in future by lawmakers and decisionmakers (even if the entities through which they are heard are established in legislation). Such an obligation need not increase or diminish the legislative or executive power of the Commonwealth. It would create a constitutional obligation for those exercising the existing plenary legislative and executive power of the Commonwealth to make provision for Indigenous peoples to be heard. Of course, the existing plenary legislative and executive power of the Commonwealth is sufficient for such provision to be made by the Executive or the Parliament. For such power to be exercised under the Constitution as it currently stands would, however, involve acting in a discretionary way; to be benevolent, magnanimous, or generous without any obligation to do so. What a substantive amendment to the Constitution aims to achieve is a constitutional obligation to act in this way; for the electors (by voting for an amendment to the Constitution) to impose an obligation on the Commonwealth to use its existing plenary power to ensure Indigenous voices are heard.

6. There are three possibilities for how the exercise of power could be affected by an amendment to the Constitution: no new rights are created; new perfect rights are created; or, a new duty of imperfect obligation and new imperfect rights are created. A symbolic amendment (which has been unequivocally rejected by Indigenous people) would neither

create new rights nor diminish existing rights. A substantive amendment could create new rights or diminish existing rights. In 1967, the Constitution was amended in a way that increased the legislative power of the Commonwealth, by expanding s 51(xxvi). In 2012, the Expert Panel recommended an amendment to create a racial non-discrimination clause, which would have diminished the legislative power of the Commonwealth. It is possible, however, to impose a constitutional duty upon the Commonwealth without enlivening the jurisdiction of the High Court to strike down legislation or to quash administrative decisions. An amendment to the Constitution that operated in this way would be a substantive amendment rather than a symbolic amendment, but rather than creating new *perfect* rights, it would create a new *duty of imperfect obligation* and corresponding new *imperfect rights*.

7. In his 2014 Quarterly Essay, *A Rightful Place*, Noel Pearson proposed that, instead of amending the Constitution to create a racial non-discrimination clause, the Constitution should be amended to provide for a new Indigenous advisory body to provide advice to the Parliament and the Executive in matters relating to Indigenous peoples. In 2015, Professor Anne Twomey published a proposal for an amendment to the Constitution that could give effect to Pearson's Indigenous advisory body. We were actively involved in the discussions through which this amendment was drafted. We believed in 2015, and still believe, that it is legally sound. It is a provision that would not undermine the supremacy of Parliament or give rise to uncertainty in the High Court's interpretation of the Constitution.

8. Along with Professor Twomey, we accept that, although legally sound, her 2015 drafting was effectively ruled out by the Government's response to the recommendations of the Referendum Council. We utterly reject the mischaracterization of this drafting as any

form of a "third chamber" of Parliament, however, we accept that once it was mischaracterized in this way, its prospects lost any political viability. Given that the Prime Minister has rejected this option, it behooves us all to open our minds to new possibilities that could give rise to a substantive amendment to the Constitution within the parameters that have been set by the Government.

9. On 7 July 2020, Professor Twomey published another article on The Conversation, in which she proposed new options for an amendment to the Constitution, including the following one:

> *127. The Commonwealth shall make provision for Aboriginal and Torres Strait Islander peoples to be heard by the Commonwealth regarding proposed laws and other matters with respect to Aboriginal and Torres Strait Islander affairs, and the Parliament may make laws to give effect to this provision.*

We believe that this provides a new option for constitutional recognition of Indigenous peoples which addresses the aspirations of the Uluru Statement within the parameters set by the Government by creating a new constitutional duty of imperfect obligation. The proposed First Nations Voice could be established through legislation, but the new constitutional duty would enshrine the obligation in the Constitution.

10. Duties of imperfect obligation have long been recognised by the common law. In *Love v Commonwealth* [2020] HCA 3, when discussing the Crown's duty to protect its subjects, Gageler J said at [107]:

> By federation, the Crown to which such allegiance was owed was understood to be the monarch "in his politic, and not in his personal capacity" and the full feudal dimensions of what might once have been meant by the "protection" of

> the Crown had been lost in the mists of time. To the extent that the "protection" of the Crown might have been thought to involve a positive duty on the part of the Crown to exercise prerogative power physically to protect a British subject, any such duty of the Crown to provide that protection to a British subject was understood to be one of "imperfect obligation".

11. His Honour was citing Brett LJ in *Attorney-General v Tomline* (1880) 14 Ch D 58, where his Lordship considered Lord Coke's words in *The Case of the Isle of Ely* (1609) 10 Co Rep 141a. Lord Coke held that the King has a duty to defend his realm not only against foreign enemies, but also against incursion of the sea into the realm in a way that would destroy land or drown his subjects. In trying to explain the nature of the duty identified by Lord Coke, Brett LJ said at 66:

> Now, I confess to my mind that is a duty of what is called imperfect obligation. Supposing that the King were to neglect that duty, I know no legal means—that is, no process of law—common law or statute law—by which the Crown could be forced to perform that duty, but there is that duty of imperfect obligation on the part of the Royal authority, and that duty on the part of the King gives a corresponding right to the subject; but inasmuch as the duty of the King seems to me to be a duty of imperfect obligation, the right of the subject is also an imperfect right. It is a right which as against the Crown the subject has no means to enforce: nevertheless the right exists. The right of the subject exists and the duty of the King.

12. It has been held that the Constitution of the Commonwealth of Australia can give rise to such a duty of imperfect obligation. In *The King v the Governor of the State of South Australia* (1907) 4 CLR 96, Barton J held that s 12 of the Constitution imposed a duty of

imperfect obligation on the Governor of South Australia. The High Court, sitting as the Court of Disputed Returns, had previously found the election of Joseph Vardon as a senator absolutely void. This created a vacancy, which s 12 of the Constitution required to be filled by a person chosen by the electors of the State. An order *nisi* for a mandamus to the Governor was granted by Barton J commanding the Governor to cause a writ to be issued for the election of a senator for that State. The order *nisi* for a writ of mandamus was subsequently discharged. Barton J, delivering the judgment of the court, held, at 1510-1511, that s 12 does impose a duty upon the Governor, but it is a duty of imperfect obligation:

> We will assume, without deciding, that sec. 12 imposes a duty upon the Governor to issue a writ . . . But the question remains: To whom does he owe this duty? A somewhat analogous duty is cast upon the State Governors under the Constitutions of the States, all of which provide that upon a dissolution of the Houses of Assembly the writs for a general election are to be issued by the Governor. It has never been suggested that if the Governor failed to issue the writs a mandamus would lie from a State Court to compel him to do so. There is, of course, a remedy in such a case but it is to be sought from the direct intervention of the Sovereign and not by recourse to a Court of law. The case of an election to the Senate is not quite analogous. It is conceivable that the Executive Government of a State for the time being might desire that no senator should be chosen to fill a particular vacancy. If they advised the Governor to abstain from taking any action to fill it, and refused to afford him the necessary administrative facilities, and he accordingly did nothing, it may be that he would have failed in his duty. But, if so, it is clear that the duty would be one which he owed to the State collectively. It is not easy to see

> how, in such a case, he could perform this duty without dismissing his Ministers and finding others, and that power is manifestly one the exercise of which could not be reviewed by any authority but the Sovereign. The duty, therefore, is one of the duties which the Constitutional Head of a State owes to the State (and in the case of a Governor, but in a slightly different sense, to the Sovereign), and its performance must be enforced in the manner appropriate to the case of such duties. Instances of such duties—duties of imperfect obligation—are familiar to students of Constitutional Law.

13. Professor Twomey's proposed amendment would see the Constitution impose such a duty of imperfect obligation upon the Commonwealth. The Commonwealth would be under an imperfect obligation to make provision for Indigenous peoples to be heard in certain circumstances, and the right of the Indigenous peoples to be heard would also be an imperfect right. To paraphrase Brett LJ in *Attorney-General v Tomline*, it would be a right which against the Commonwealth the Indigenous peoples have no means to enforce: nevertheless the right would exist. The right of the Indigenous peoples would exist and the duty of the Commonwealth.

14. It is true that John Austin struggles with laws of imperfect obligation in *The Province of Jurisprudence Determined*, 2nd edn (London: J. Murray, 1861), Vol. 1, p. 20, and has to concede that they constitute an exception to his general proposition "that laws are a species of commands":

> The imperfect laws, of which I am now speaking, are laws which are imperfect, in the sense of *the Roman jurists*: that is to say, laws which speak the desires of political superiors, but which their authors (by oversight or design) have not provided with sanctions.

What should be apparent, however, is that such an exceptional law is precisely what Australians are looking for in the cause of constitutional recognition of Indigenous peoples. We require an amendment to the Constitution which speaks the desires of the political superiors of the Parliament and the Executive, namely the electors, but which (by design) they have not provided with sanctions. A referendum to recognise Indigenous peoples is precisely meant to be an opportunity for the Australian people to express their desire that the Commonwealth make provision for the voices of Indigenous Australians to be heard when the Parliament and Government of Australia are making decisions about Indigenous affairs—without placing any constitutional restrictions on how this is to be achieved.

15. Professor Twomey's proposed amendment is substantive rather than symbolic, in that it creates an imperfect obligation. This new imperfect obligation imposed upon the Commonwealth would give Indigenous peoples reason to believe that the future will be different from the past, even though it creates no new perfect rights for Indigenous peoples. It maintains the supremacy of Parliament because there is no recourse to a court of law to enforce performance of the duty. It is not illiberal because it does not grant perfect rights to any group of Australian citizens—all would remain equal before the law. It would not involve establishing within the Constitution any new entities. In this way it addresses the aspirations of the Uluru Statement within the parameters set by the Government.

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15 July 2020