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Submission in response to the Interim Voice Report

Thank you for the opportunity to make a submission in response to the Interim Voice Report. I make the following submission in my personal capacity as a Wamba Wamba First Nations public lawyer, researcher and community member.[1]

I am also a Research Associate at the Indigenous Law Centre, UNSW and a postgraduate researcher at Griffith Law School, Griffith University. I have followed constitutional reform closely for the past decade. Indigenous peoples and the law more broadly form the basis of my research expertise and scholarship.

1. Preliminary comments on the voice co-design process

I appreciate the work of the Senior Advisory Group, the National Co-Design Group and the Local & Regional Co-Design Group in preparing the Interim Voice Report. I am also thankful for the opportunity to make a submission in response to the Interim Voice Report. I must note at the outset however my extreme disappointment at the design process, the models put forward for a First Nations Voice and the subsequent consultation process that has taken place.

I believe that none of these processes have been empowering of First Nations nor have they appropriately addressed the desperate need for reform in a meaningful way that would bring about real, empowering change. Rather we have experienced yet another Government led process select its own membership and develop, in secret, models for a First Nations Voice that are supposed to represent us and our communities.

These processes, as evidenced by the models put forward, have too narrowly focused on affirming existing structures without appreciating fully the problems with those structures and their role in our continued disadvantage. The process has furthermore been too focused on government and bureaucracy at the expense of our own communities – an example of this is the fact that state and territory representatives were consulted and had input into the design process when our own people have not.

[1] I am a named contributor on two other submissions to this consultation process. The first being the Public Lawyers submission and the second being the Northern Sydney Alliance for the Uluru Statement submission.

What has eventuated is the very species of law reform that the First Nations Voice is intended to overcome. No amount of limited consultation after the fact of design can cover that over.[2] The original intention of the First Nations Voice – for structural reform that is different to existing structures while empowering and representative of First Nations – necessarily stems from the Uluru Statement from the Heart and the Final Report of the Referendum Council. The Uluru Statement's sequenced reforms of a First Nations Voice to parliament protected by the Constitution and a Makarrata Commission to supervise agreement-making and truth-telling are the standard by which reform must be assessed. This includes constitutional enshrinement of a First Nations Voice.

This process has not met the standard of reform set by the Uluru Statement. This is evidenced by many aspects of the Interim Voice Report but is especially clear in the fact that the terms of reference for the co-design process prohibited discussion of constitutional enshrinement and the Uluru Statement. Furthermore, co-design members have repeatedly distanced the co-design process from the Uluru Statement and constitutional enshrinement. This has included noting the co-design process is being conducted in response to Recommendation 1 of the Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples ('the Joint Select Committee') that recommended more design work on a First Nations Voice be undertaken. Despite this, however, the Joint Select Committee was called in response to the Uluru Statement and further recommended that the decision on the legal form of a First Nations Voice be made following the design process.

While it is encouraging that members of the co-design groups have more recently emphasised this staged process, the centrality of constitutional protection to matters of design must be emphasised rather than being dismissed as a matter concerning mere words or simply the legal form of a First Nations Voice. As outlined in the Public Lawyers Submission, constitutional protection of a First Nations Voice cannot reasonably be separated from design if the proposed model is to achieve the stated aims of the Interim Voice Report. The intent of the First Nations Voice necessarily takes the voice model within the remit of the Constitution as it deals with key institutions (parliament and government) and functions that are enumerated by the Constitution. Not centring the importance of constitutional enshrinement in the design of a First Nations Voice limits the potential of reform to meaningfully address the stated aims within the Interim Voice Report and the original intent of the First Nations Voice as informed by the Uluru Statement.

There have been further issues with the consultation process. While the time extension for public submissions was welcome, the process has otherwise been inappropriately truncated and complicated and has not provided for meaningful engagement with the community, especially with First Nations. The Interim Voice Report itself is 240 pages of complex information. Further to this there are six videos, eight general documents, six 'Local and Regional Voice' documents, nine 'National Voice' documents, three 'Terms of Reference' documents and three 'Communiques'. There is an avalanche of complicated information that is impossible for our communities to appropriately understand and reflect upon in the

[2] Despite the number of consultations being held by the National Indigenous Australians Agency they are not comprehensive or deliberative. They are also being conducted after the fact of design and provide little to no real opportunity for First Nations to have input into the design of a First Nations Voice.

time provided, let alone in the 1.5-to-3.5-hour consultations. Further to this, none of the consultations involve First Nations in the actual design of the voice; rather the opportunity is to provide limited commentary on already designed models.

In consideration of the above issues with the co-design process I make the following recommendations:

(1) Now that a model, regardless of its form, has been canvassed, the Government should move to introduce legislation for a referendum to establish a First Nations Voice to parliament protected by the Constitution.[3]

(2) Following a successful referendum, another process must be conducted to appropriately engage and consult First Nations in the design of a First Nations Voice to parliament.[4]

2. The importance of constitutional enshrinement on design and legal form

I support a First Nations Voice to parliament that is protected by the Constitution. As noted above, the constitutional enshrinement of a First Nations Voice to parliament is not only a matter for the legal form of the voice but is also centrally relevant to the design of the voice including its form and internal mechanisms and its relationships with other constitutionally enumerated institutions. This is because the proposed models necessarily take the First Nations Voice within the remit of the Constitution and because for the voice to have the intended effect of substantive and meaningful reform then the impact and benefit of constitutional enshrinement must be fully appreciated.

There appears a failure to appreciate what exactly the First Nations Voice is and what informed the call for this substantive reform including the circumstance of the relationship between First Nations and other Australians. This is evidenced by the fact that this co-design process has been focused on the familiar and narrowly informed public policy practice of overcoming disadvantage through practical solutions such as that which we have become accustomed to under closing the gap and the recently negotiated and subsequently ignored agreement with the Coalition of Peaks.[5] Through these processes the Commonwealth has ignored the other essential part of First Nations' claims – that is for the beginning of a meaningful settlement between our peoples that recognises and enforces our rights as First Nations.

First Nations people have political and cultural rights that have been poorly recognised in Australia. We had them when the relationship first began, despite practice otherwise, and

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3 Substantive work and agreement already exist on the form of a constitutional amendment despite assertions otherwise. Much of this was canvassed by the Joint Select Committee in 2018.

4 First Nations people and communities have not been meaningfully consulted or had purchase on the design of the current models..

5 The Government's recent decision to extend the trial of the cashless debit card despite strong opposition from the Coalition of Peaks and many other community organisations is evidence of the deeply entrenched nature of disempowerment that First Nations face, even with organisations and agreements such as those represented by the Coalition of Peaks existing.

we continue to hold them today despite the failure of the Australian state and its predecessors to enter into any formal agreement or recognition of those rights. These rights, to various degrees, now exist as a matter of fact in our common and statutory laws but are recognised domestically only because of ad-hoc and limited changes (*Mabo v Queensland (No 2), Racial Discrimination Act 1975* (Cth), *Aboriginal Land Rights Act (Northern Territory) 1976 (Cth)*, *Love v Commonwealth* etc).

Rather than meaningfully engage with First Nations rights, racism has been the lasting legacy of Australian constitutionalism with respect to First Nations. From originally being excluded to now having laws made about us through the 'race power' (s 51(xxvi)), the Australian state lacks an appropriate constitutional mechanism to meaningfully engage and deal with (1) our rights and claims as First Nations people which are *constitutional* in their nature and (2) address our comparative disadvantage through law reform and public policy.

Two of the persistent myths that contribute to a failure to overcome this challenge are (1) that Indigenous peoples and rights are just like the rights of any other Australian citizen or minority group and that (2) practical and symbolic reform are antithetical to one another.

On the second, symbolic reform *alone* is of no use – this is one of the main reasons why the previous Recognise campaign was rejected by the community, as have other minimal reforms. Symbolic and practical reform together however are precisely the kind of meaningful reform which would result from a First Nations Voice to parliament protected by the Constitution existing at the meaningful intersection of the symbolic and practical. This reform would provide the necessary sutural changes required to answer First Nations claims and would refound the relationship between First Nations and other Australians. It would further enable the necessary structural reforms for the proper inclusion and consultation of First Nations in decisions that affect them.

3. A First Nations Voice to Parliament

There is a real and significant difference between parliament and government. At first instance the co-design process was based on a voice to government, not parliament, and the role of government and bureaucracy continued to be emphasised. The Interim Voice Report now canvasses both institutions being connected to the First Nations Voice but there is a worrying emphasis on government and bureaucracy over parliament and a failure to fully appreciate the power and authority of parliament as an important institution for the First Nations Voice to make representations to.

The First Nations Voice as intended is also about providing authority, legitimacy and durability to a refounded relationship between First Nations and the Australian state and the policy environment of Indigenous affairs. Parliament is the institution that holds the authority and legitimacy of the constitutional foundation of the Australian state and where the Australian people are represented. Furthermore, government is accountable to and made up from the parliament. Despite developments in the power of executive government and the business of bureaucracy, parliament remains the representative and authoritative seat of power for the Australian state. The fact that the co-design process has emphasised the role of government, bureaucracy and existing structures over greater reform is further

evidence of the failure to fully comprehend the call for reform from the Uluru Statement and the problems with the existing structures and public policy environment.

The transparency, accountability and authority that a First Nations Voice requires to be meaningful would be achieved by ensuring its relationship to parliament. Maintaining the existing and arbitrary vicissitudes of government and bureaucracy as being central to the First Nations Voice, or rather building that voice based on existing structures and enhancing Indigenous participation within those structures, is a failure of reform. Once again, this inappropriately focuses the issues on simplistic understandings of practical solutions and service delivery, does not understand that current structures and organisations themselves form large part of the existing problem with the failure of practical solutions and service delivery and finally mischaracterises Indigenous claims as simply wanting more inclusion.

As such, my further recommendation is:

(3) That the First Nations Voice, as empowered by a constitutional provision, must be to parliament. That is the voice's primary institutional relationship must be to parliament; but it must also have appropriate resources and mechanisms to engage directly with the government and bureaucracy when required. This relationship to parliament should not be controlled or under the authority of government or any designated responsible minister. Rather, the First Nations Voice should be free, on its own self-determining basis, to decide when and on what topics it will engage with the parliament.

4. The Interim Voice Report and proposed voice models

I have not made extensive comment on the overall design elements of the Interim Voice Report. As noted above I believe another process is required following a successful referendum in order to enable a proper and empowering design process be undertaken that involves First Nations themselves in the actual design process.

I have picked out two broad issues however that I believe are reflective of many problems with the proposed designs. The first being that there will be no new extensive funding and the second being that regional and local voices would not be able to elevate specific local issues to the national voice and they would rather be quarantined to the local level.

It is ridiculous to expect meaningful reform in this space to be achieved without serious investment of new resources. This is absolutely needed if meaningful and lasting reforms are to take place. It is unfortunate to see discussions of limited resourcing already being front and centre of the design process. This was a common tactic used to disempower the former Aboriginal and Torres Strait Islander Commission ('ATSIC') and to limit the political power and authority of First Nations.

If the Australian state is to appropriately recognise the rightful place of First Nations through these structural reforms, then it must also be committed to a fair resourcing of these reforms, especially one that is willing to contribute permanently to the future settlement of First Nations claims. The Commonwealth absolutely has a central role to play

in this respect not only due to the fiscal imbalance within the Federation that exists to the Commonwealth's favour but because the Commonwealth is authoritative and representative of the Australian nation.

The trend toward deemphasising the role of the Commonwealth in Indigenous affairs as opposed to the states and territories is worrying and wrongheaded in this respect also. Commonwealth involvement in Indigenous affairs was a hard fought reform that should not be dismissed. This is also concerning regarding the proposed limitations on what issues the national voice would be able to take up as opposed to the local and regional bodies. This is not empowering of First Nations. Rather it adds another layer of ineffective bureaucracy that is ultimately curtailed by inappropriate design.

For a First Nations Voice to parliament to be meaningful and effective it must be empowered to be so through the self-determining basis of its own agenda. Continuing to control and limit what First Nations can speak to in this respect inappropriately curtails First Nations political power and authority, blindly places faith in existing structures that are failing our communities and makes a mockery of any contention otherwise that these reforms are designed to make a difference by listening to First Nations.

As such, my further recommendations are:

(4) Any First Nations Voice to parliament must be appropriately resourced to ensure its function as a self-determining body. This should include significant investment from the Commonwealth and a permanent commitment toward the funding of the settlement of First Nations claims.

(5) Any national level of a First Nations Voice to parliament should not be restricted in what can it bring up as an issue, investigate, resource, speak on or otherwise engage on, including bringing to the attention of parliament, irrespective of whether those issues or topics may also be considered local or regional in their nature.

5. Concluding remarks and recommendations

The voice co-design process has provided a welcome opportunity to explore the design of a First Nations Voice to parliament protected by the Constitution. As noted, however, there are a number of issues with this process that must be addressed.

As such, my recommendations in response to the Interim Voice Report as canvassed above are:

(1) Now that a model, regardless of its form, has been canvassed, the Government should move to introduce legislation for a referendum to establish a First Nations Voice to Parliament protected by the Constitution.

(2) Following a successful referendum, another process must be conducted to appropriately engage and consult First Nations in the design of a First Nations Voice to Parliament.

(3) That the First Nations Voice, as empowered by a constitutional provision, must be to parliament. That is the voice's primary institutional relationship must be to parliament; but it must also have appropriate resources and mechanisms to engage directly with the government and bureaucracy when required. This relationship to parliament should not be controlled or under the authority of government or any designated responsible minister. Rather, the First Nations Voice should be free, on its own self-determining basis, to decide when and on what topics it will engage with the parliament.

(4) Any First Nations Voice to parliament must be appropriately funded and resourced to ensure its function as a self-determining body. This should include significant investment from the Commonwealth and a permanent commitment toward the funding of the settlement of First Nations claims.

(5) Any national level of a First Nations Voice to parliament should not be restricted in what can it bring up as an issue, investigate, resource, speak on or otherwise engage on, including bring to the attention of parliament, irrespective of whether those issues or topics may also be considered local or regional in their nature.