

Submission to Indigenous Voice Co-Design Process

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Dear Committee members,

The Uluru Statement calls for a *constitutionally guaranteed* First Nations voice because the desired and required change cannot be achieved through legislation alone. The intended legislative reform you are now considering therefore cannot be separated from the necessary constitutional amendment empowering and requiring a First Nations voice. I urge you not to forge ahead with legislating a voice before dealing with constitutional reform. Prematurely legislating a First Nations voice would destroy chances of achieving the constitutional reform sought by the Uluru Statement – perhaps forever.

My submission therefore argues against legislating a First Nations voice before implementing the concomitant constitutional guarantee through a referendum. I argue this on three grounds:

1. practical and legal
2. political and strategic
3. moral.

I also recommend that Australia now instigates a formal process of negotiation between Indigenous people and the Australian government, to finalise the words of the constitutional amendment to put to the people.

1. Practical and Legal Reasons

Indigenous Australians need a permanent, authoritative and empowered voice in their affairs if Australia is to truly address Indigenous disadvantage, improve practical outcomes in Indigenous affairs and close the gap. Permanent change requires constitutional reform. Genuine and lasting change will not be achieved through mere legislation.

In pursuing nation-building reform, it is important we learn from history. The Indigenous bodies of the past have failed largely because government has never been committed to maintaining those bodies as part of the institutional framework of the nation. Such bodies have never carried constitutional status. Governments have therefore never been constitutionally compelled to treat such bodies as permanent institutions. Accordingly, past Indigenous bodies have been abolished as soon as problems arose or political priorities changed. What was always missing was the

constitutional hook: the constitutional guarantee that the institution will always exist; the constitutional promise that Indigenous voices will always be heard in their affairs.

The list of failed, non-constitutional Indigenous bodies in Australia is therefore long. The Aboriginal and Torres Strait Islander Commission (ATSIC) was a merely legislated body that was enacted by Labor with high hopes, then later abolished by the Liberal government with ALP support. The National Congress of Australia's First Peoples intended to fill the gap left by ATSIC, but it was a private corporation without legislative or constitutional underpinning. It folded due to lack of funding. Earlier, there was the National Aboriginal Consultative Committee (NACC, 1972-1977) and the National Aboriginal Conference (NAC, 1977-1985). At the state and territory levels, there are many more such bodies. Is this current co-design process going to add yet another example to this depressing list of disappearing Indigenous institutions? Lacking constitutional underpinning, a First Nations voice would always be vulnerable to abolition. It would inevitably be transient, just like the Indigenous bodies of the past. A constitutional guarantee is required to ensure the permanency of the institution.¹

Constitutional underpinning is also crucial to ensure effectiveness as an independent advisory and consultative institution. A merely legislated voice would lack the authority and confidence that would come from constitutional status and permanency. A constitutional institution carries the blessing of the Australian people, generated through a referendum. This popular endorsement will help imbue the institution with the permanency, authority and status required for it to effectively fulfil its role. Lacking constitutional underpinning, the voice's representatives would always be worrying about potential abolition of the institution. Their advocacy and advice could never be frank and fearless – they would be too concerned about keeping the government of the day on side, to avoid the body being dismantled. This would stymie the honest discussion needed to improve outcomes and close the gap. It would render the voice impotent and ineffective.

Only inclusion in the Constitution through a national referendum can ensure a First Nations voice carries the necessary authority, status and permanency. Constitutional permanency together with legislative flexibility would allow the institution to evolve and improve over time. But while legislative flexibility is necessary, constitutional underpinning is crucial for success.

¹ The Inter-State Commission, which has not operated for most of Australia's history despite being mandated under s 101 of the Constitution, can readily be distinguished from the proposed constitutional voice. For full discussion see Shireen Morris, *A First Nations Voice in the Australian Constitution* (Hart Publish 2020) 255-262; Shireen Morris, 'A Constitutional Duty for Parliament to Consult with Indigenous Peoples' (2015) 26 *Public Law Review* 166, 186-189.

2. Political and Strategic Reasons

Legislating a First Nations voice before implementing the concomitant constitutional guarantee through a referendum would destroy chances of achieving the necessary constitutional amendment. Legislating first is bad strategy if constitutionalisation is the ultimate aim – which it must be.

Prematurely legislating a voice would confuse the Australian people and dissipate the momentum and productive tension currently driving the public campaign for a constitutionalised voice.

Currently, there is a gap that the public can see needs to be filled. But legislating a voice without constitutional amendment will totally muddy the issue: the institution's existence will ostensibly negate the need for constitutional reform. Opponents would point to the legislated institution to argue that no constitutional amendment is needed because an Indigenous voice already exists. They would also inevitably highlight imperfections in the institution (for no institution is perfect) to contend that it is not worthy of constitutional recognition. Individuals on the legislated voice would become targets for constitutional no-campaigners. This would put immense pressure on its representatives. It would be setting the institution up to fail.

Legislating a First Nations voice before a referendum to implement the concomitant constitutional guarantee will therefore substantially *decrease* chances of referendum success. It would whittle away public support. Yet currently, Australians do support a constitutionally guaranteed voice. A 2017 Ominipoll showed 61 per cent of Australians would vote 'yes' to the proposal² and a February 2018 Newspoll showed 57 per cent support.³ By July 2019, research showed support at 66 per cent,⁴ despite opposition from government. By November 2020 that figure had grown to 81%.⁵ Research in

² Calla Wahlquist, 'Most Australians Would Support Indigenous Voice to Parliament Plan that Turnbull Rejected', *The Guardian* (online 30 October 2017) <<https://www.theguardian.com/australia-news/2017/oct/30/most-australians-support-indigenous-voice-to-parliament-plan-that-turnbull-rejected>>

³ Simon Benson, 'Bill Shorten Raising Voice a Winner With Voters: Newspoll' *The Australian* (online 20 February 2018) <<https://www.theaustralian.com.au/nation/bill-shorten-raising-voice-a-winner-with-voters-newspoll/news-story/3d6ee299780b7ac6901df9ccdfa16cc5>>.

⁴ Katherine Murphy, 'Essential Poll: Majority of Australians Want Indigenous Recognition and Voice to Parliament', *The Guardian* (online 12 July 2019) <<https://www.theguardian.com/australia-news/2019/jul/12/essential-poll-majority-of-australians-want-indigenous-recognition-and-voice-to-parliament>>. Earlier, in May 2019, research showed 64% support: Isabella Higgins and Sarah Collard, 'Federal Election 2019: Vote Compass Finds Australians Are Ready to Back Indigenous "Voice to Parliament"', *ABC News* (online 3 May 2019) <<https://www.abc.net.au/news/2019-05-03/vote-compass-federal-election-voice-to-parliament/11071384>>.

⁵ Lorena Allam, 'More Australians want an Indigenous voice protected in constitution, survey suggests', *The Guardian* (online 30 November 2020) <<https://www.theguardian.com/australia-news/2020/nov/30/more-australians-want-an-indigenous-voice-protected-in-constitution-survey-suggests>>.

2021 shows that more Australians support a constitutionalised First Nations voice, than a body enacted merely by legislation.⁶

Support continues to grow across the political spectrum. Notably, in the same sex marriage postal survey around 60% of Australian voted 'yes', with the Prime Minister advocating *for* marriage equality. In the Indigenous recognition debate, research now shows that around 80% of Australians would vote 'yes' to a First Nations constitutional voice, despite past government negativity. With positive leadership, this support would be higher. But prematurely legislating a voice will dissipate the growing public support and momentum for a referendum.

3. Moral Reasons

The Australian Constitution is a power sharing compact that established for Indigenous peoples a position of perpetual powerlessness. The compact of 1901 united the historic political communities – the former colonies – to create Australia, but it did not include the most ancient of political communities – the First Nations. The Constitution ensures that even the smallest former colonies are guaranteed a voice in their affairs, notwithstanding variations in population size. That is why the Constitution guarantees Tasmanians an equal voice in the Senate, under s 7. There are more Indigenous Australians than Tasmanians. Is it really too much to ask, therefore, to give the First Nations a constitutionally guaranteed voice – not a veto – in their own affairs?

The Uluru Statement makes a modest and constitutionally congruent request. As such, merely legislating a First Nations voice, without the required constitutional commitment, would be an insult to the Uluru Statement and to the First Nations of this country who have for so long waited for just recognition. An institution representing the voices of the First Nations has a rightful place in the Australian Constitution.

Legislating a First Nations voice to 'road-test' it before it is put to a referendum would be akin to forcing Indigenous people to audition for their rightful place in Australia's Constitution. After so many decades of exclusion, discrimination and non-recognition, this is totally unfair. It is unconscionable to ask Indigenous Australians to prove their worthiness before the nation affords them a constitutionally recognised voice in their own affairs.

⁶ Australian Constitutional Values Survey, 2021:
https://www.cqu.edu.au/_data/assets/pdf_file/0021/190092/australian-constitutional-values-survey-2021.pdf

Proposed Process to Finalise the Words of a Constitutional Amendment

The current co-design process is doing important work. After the design of a First Nations voice is finalised, the legislation should be drafted but not enacted.

As soon as is practicable, concurrently with the co-design process if possible, the government should instigate a formal process to finalise the words of the constitutional amendment. A Drafting Committee should be established by the government and the opposition, in bipartisan co-operation. The Committee should be made up of Indigenous and Non-Indigenous experts who have been involved in the Indigenous constitutional recognition debate, who have appropriate knowledge, expertise and experience of the many options for constitutional amendments with respect to a First Nations voice. Members should be chosen in bipartisan fashion, through a process of nominations and applications. Positions should be filled on the basis of experience and merit and ensuring fair gender and ethnic balance reflecting the diversity of Australia.

The Committee should develop three contrasting options for constitutional drafting guided by the Referendum Council's parameters. Therefore, each option should aim to

- give effect to the Uluru Statement's call for a constitutionally guaranteed First Nations voice
- respect parliamentary supremacy through non-justiciability and avoidance of any veto
- minimise legal uncertainty
- should not constitute a third chamber of Parliament.

Each proposed amendment option should fulfil Indigenous aspirations by constitutionally empowering Indigenous voices to be heard in their affairs, while upholding the Australian Constitution and addressing government's concerns.

After the Committee puts forward its contrasting options for constitutional drafting, there should be a process of formal negotiation between Indigenous leaders and multiparty political representatives, to ensure the arising amendment carries multiparty support. The Indigenous representatives would include the Indigenous members of the Drafting Committee, plus other Indigenous people by application, chosen on the basis of merit by the Indigenous members of the Committee.

A retired judge could be appointed to oversee the negotiation process, to act as a mediator and facilitator. The negotiation process should use the Committee's options as a guide to stimulate discussion, but should not be limited by those options if different ideas emerge through the negotiations. Through this negotiation process, the parties should come to an agreement on the words of the amendment to be put to referendum.

Further Reading

My other publications on a First Nations voice may be of help to the Committee:

- Shireen Morris, *A First Nations Voice in the Australian Constitution* (Hart Publishing, 2020)
- Shireen Morris, 'Parliamentary Scrutiny and Insights for a First Nations Voice to Parliament' in Laura Grenfell and Julie Debnak (eds), *Law Making and Human Rights* (Thomson Reuters, 2020)
- Shireen Morris (ed), *A Rightful Place: A Roadmap to Recognition* (Black Inc, 2017)
- Damien Freeman and Shireen Morris (eds), *The Forgotten People: Liberal and Conservative Approaches to Recognising Indigenous Peoples* (MUP, 2016)
- Shireen Morris, 'The Torment of Our Powerlessness': Indigenous Constitutional Vulnerability and the Uluru Statement's call for a First Nations voice' (2018) 41(3) *UNSW Law Journal* 629.
- Shireen Morris and Noel Pearson, 'Indigenous Constitutional Recognition: Paths to Failure and Possible Paths to Success' (2017) 91 *Australian Law Journal* 350
- Shireen Morris, 'The Argument for a Constitutional Procedure for Parliament to Consult with Indigenous Peoples when Making Laws for Indigenous Affairs' (2015) 26 *Public Law Review* 166

Please feel free to contact me to discuss further any aspects of this submission.

Your Sincerely,

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