Submission in support of an Indigenous Voice protected in the constitution.

Aboriginal and Torres Strait Islander peoples are calling for a Voice to the Parliament, enshrined in the constitution.
I support this call because the 1967 referendum gave the Parliament the responsibility to enact laws for the benefit of Aboriginal and Torres Strait Islander people.
I believe the next step to be a mechanism whereby Aboriginal and Torres Strait Islander people can speak directly to the parliament on matters pertaining to themselves and their communities.
I am confident, that with national will, we can design a constitutional Voice for Aboriginal and Torres Strait Islander people while concurrently upholding the universal principles of our democracy.

Yours Respectfully
Margaret Gould

Referendums are both ordinary and extraordinary. Ordinary because all constitutions have a method to allow for the future alteration of the text, recognising that societies are not static and

change over time. But referendums can also be extraordinary because they can lead to transformative, once-in-a-blue-moon change. In constitutional law we sometimes call this "a constitutional moment". The last successful change to the Australian Constitution, in 1977 – introducing a retirement age for judges in federal courts – was practical. Uninspiring? Yes. Sensible? Also yes. A constitutional moment? No. Yet in the dying days of the Trump presidency, when Americans debated a mandated retirement age for Supreme Court justices, and the reality of brazenly ideological, judicial appointments-for-life dawned upon many, we were reminded of our sage pragmatism 43 years ago.

The most successful referendum question in Australian history was held in 1967, when Australians united to vote "Yes" to grant the Commonwealth parliament competence to make laws for Aboriginal and Torres Strait Islander peoples. It was the highest "Yes" vote in Australian history. One of the nation's most uniting and defining moments. Inspiring? Yes. Pragmatic? Yes. A constitutional moment? No.

These two referendums in some ways reflect very Australian traits of conservatism and common sense, a quiet regard for the practical. But now, in 2021, the nation is preparing for an extraordinary referendum, a constitutional moment, to implement the first step of the Uluru Statement from the Heart, equal parts inspiring and practical, but also transformative.

But we are not there yet. Australia stands at a crossroads.

In January this year, the Minister for Indigenous Australians, Ken Wyatt, released an interim report on his "co-design process" of an Indigenous voice to parliament – following a government commitment to the recommendation of the 2018 joint select committee on constitutional recognition. This committee found that a co-design process (a bureaucratic

buzzword void of any real meaning) was needed to put "meat on the bones" of the constitutional voice recommended by a Referendum Council in 2017, following the issuing of the invitation of the Uluru statement to the Australian people. In its 2019 election platform the Coalition committed to this process as a step towards putting a voice to the Australian community at a referendum once a model was agreed upon. It budgeted $7.3 million for the process and $160 million for a referendum, which sits in the contingency reserve.

Despite this recent history, following the 2019 election the minister announced that he had decided to design a "voice to government" only, and have a referendum instead on symbolic recognition, which virtually all First Nations peoples have rejected.

We have now entered the second decade of constitutional recognition. Six processes and nine reports in 10 years. And this ninth report seeks to decouple the first decade of work, which involved contributions from many Australians from all walks of life, from its considerations.

The Uluru dialogues, which culminated in the First Nations National Constitutional Convention, were unanimous that there was no single existing entity or organisation that represented their voice. This has been ignored as bureaucrats and their cheerleaders have sought to neutralise the Uluru process by insisting that, despite what the dialogues said about powerlessness and voicelessness, there were, to the contrary, ***plenty*** of representative mechanisms that already exist at a state, territory and local level. Voila! These already provide a voice. Grassroots communities were mistaken. It was like a kind of cheery cooking show: "I whipped this one up earlier!" And Wyatt's interim report is replete with such examples. Historian and sociologist Tim Rowse explains the bait and switch

effectively in his *Inside Story* article "Is the Voice already being muted?".

The 230-page interim report, which gives First Nations communities 11 weeks to respond, contains the design of *two* mechanisms, a "voice to government" and a "voice to parliament". The former focuses on the structure, membership, functions and operations of the voice to government, and how state, local and regional bodies would feed into it. But this distracts from, and obscures, the crucial aspect of the latter: in the Uluru proposal, a voice to parliament must be constitutionally enshrined in order to *distinguish it* from the usual voices to government, and to be independent from the government of the day.

In all fairness, the Voice Co-Design Senior Advisory Group, hand-picked by Wyatt, was fenced in. It was forbidden by government from making any reference whatsoever to the Uluru constitutional voice and banned from talking about any reform called for by the Uluru statement.

Regardless, the limitations of the legislated voice proposed in the interim report compel comparison with a constitutionally protected voice. The limitations of this model include that the government of the day itself mediates the First Nations voice – in parliament, the government of the day would speak on behalf of the voice. This is the antithesis of what the deliberative dialogues sought. This approach consolidates Indigenous structural powerlessness as well as the unaccountable exercise of power and decision-making by the government in Indigenous affairs (which, as the Australian National Audit Office has found, can be arbitrary and has often fallen afoul of Commonwealth guidelines on fairness and transparency).

Although the Wyatt-proposed legislated model empowers a voice to some extent, it can be ignored and rendered silent by government, as occurred with the National Aboriginal

Consultative Committee (1972–77), the National Aboriginal Conference (1977–85), the Aboriginal and Torres Strait Islander Commission (1989–2005) and the National Congress of Australia's First Peoples (2010–19). The legislated model, without a constitutional anchor, remains subject to repeal at the whim of the government of the day, as happened to ATSIC. This would be much more difficult with a constitutionally enshrined model.

The interim report also presents a bizarre eliding of government and parliament. While Australia has an asymmetrical version of the separation of powers, to go so far as to almost conflate the two is to misunderstand the role of parliament. The parliament has a representative function, an accountability function, and is public facing. Only a seasoned bureaucrat would regard the distinction between the two as flimsy or even imaginary. The obfuscation on voice/government reveals the failure of political elites to understand deeply the despair of the Uluru dialogues. Their work in the regions was replete with civics education and a deep understanding of the constitutional division of the parliament, executive and judiciary, and its functioning. While the report may view parliament as a mere extension of the government, the Australian people, and certainly First Nations peoples, don't see it that way.

Of course, there is more to the Wyatt voice than is immediately obvious. The process is deeply imbued with the Commonwealth's ongoing disavowal of the historical commitment made by the nation at the 1967 referendum. One federal politician recently declared that Aboriginal and Torres Strait Islander peoples are largely the responsibility of the states and territories, and the Commonwealth is, he put crassly, "just the ATM".

There were echoes of this walking back of 1967 in the 2018 joint select committee report:

> We have listened closely to Aboriginal and Torres Strait Islander peoples. Discussion has highlighted that the majority of day-to-day challenges facing Aboriginal and Torres Strait Islander peoples do not fall within the ambit of the national parliament. Many of the solutions to these challenges are at the local and regional level.

How effortlessly this disavowal rolls off the tongue. The assertion that most aspects of Indigenous affairs are not within the remit of the Commonwealth parliament is fiction, but goes unchallenged. Yet it has enormous consequences for First Nations people. Former senior federal bureaucrat Mike Dillon wrote on this very question following last year's signing of the revised Closing the Gap agreement. He wrote: "Commonwealth ministers will sleep soundly at night in the knowledge that when everyone is accountable, no one is accountable."

This is Australian retail politics, that of federalism, GST and cost-shifting. It is not limited to Aboriginal and Torres Strait Islander peoples. But the consequences are more acute for First Nations because of the 1967 referendum. Dillon concludes of this situation:

> It is the culmination of a decade-long push to shift Indigenous policy responsibilities away from the Commonwealth and towards the states and territories, and away from Indigenous-specific programs and towards mainstream programs. On issues as diverse as heritage protection, essential services, Indigenous housing and legal aid, the Commonwealth has been reducing its footprint …

> Australia's continued failure to tackle deep-seated Indigenous disadvantage diminishes us all. The federal government's ongoing retreat from policy responsibility is driven by short-term politics and doesn't align with the expectations of the Australian population when they voted overwhelmingly in 1967 to give the Commonwealth the power to legislate in relation to Aboriginal people. More insidiously, the pretence and self-deception involved in reassuring ourselves that we are doing all that is possible, and that somehow the issues are "intractable" and thus insoluble, undercut the very integrity of our democratic culture.

The Uluru statement and the constitutionally enshrined voice to parliament are about enhancing the integrity of our democratic culture. A First Nations voice in the Constitution, established by referendum, would shift Indigenous affairs out of the realm of ideological party politics, where our issues are ruthlessly measured against utilitarian rule. Such a voice would be imbued with the legitimacy of the First Nations peoples and the Australian people voting in unity at a referendum and conducting a dialogue with each other through the parliament for the century ahead. Symbolic and substantive.

And that is the crossroads we now face. The Uluru statement did not ask Australians to walk with us on a journey to a legislated voice controlled by the government of the day. So, do we endorse a legislated voice to parliament – which no one asked for but which serves the retail politics of Western liberal democracy (incrementalism) and a retreat to the status quo – while chanting "anything is better than nothing"? Or do we, as a nation, provoke a constitutional moment, and endorse a constitutionally protected voice to parliament, recognising that the lack of progress and the billions of dollars wasted on

Indigenous affairs each year occurs because there is minimal Indigenous input into laws and policies aimed at First Nations?

The crossroads where we now stand reminds me of Wiradyuri artist Amala Groom's painting ***The Fifth Element***, a finalist in the Telstra National Aboriginal and Torres Strait Islander Art Awards, which evokes Frederick McCubbin's 1889 iconic work ***Down on His Luck***. Groom says she found an old, discoloured McCubbin print in an Aldi car park. She couldn't leave it there, because "it was so faded and he looked so sad – this old bushie – I just kind of hugged the print and said, 'It'll be all right, mate.'" Across the image she painted in red, ***We Are All In This Together***. Groom says: "The colour red symbolises the polarity of togetherness of the bureaucracy that binds us and the blood that we all share." Ah, bureaucracy: two Australian painters, Indigenous and non-Indigenous, both let down by government, talking to each other across time.
Groom describes the painting as being based on the principle of ***marrumbang***, love and kindness. She says that, as Australians, "we have more in common than we have in difference". Her take on McCubbin's much-loved work was "her way of hugging Australians and Australian history, saying 'it's going to be all right'". And in that quote she sums up the generosity of the Uluru Statement from the Heart. In 2017, we invited you to walk with us in a movement of the Australian people for a better future. And now is the time for Australians to use their voice to make this happen. A constitutional moment beckons.

MEGAN DAVIS

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