21 January 2021

Indigenous Voice co-design Group
Voice Secretariat
Co-designVoice@niaa.gov.au

Dear Voice Secretariat,

Thank you for the opportunity to make a submission in response to the Indigenous Voice Discussion Paper.

I am a Lecturer in the Faculty of Law at the University Technology Sydney. My recently published book, *Indigenous Aspirations and Structural Reform in Australia* (Hart Publishing, 2021) explored how the design of Indigenous representative bodies can help ensure that they are effective institutions, capable of empowering Indigenous peoples with the capacity to have their voices heard in the processes of government.

Many of these design issues, particularly those concerning membership, are properly ones for Aboriginal and Torres Strait Islander peoples to decide. For this reason, I will limit my submission to the question of the relationship between the National Voice and the Australian Government and the Australian Parliament, and how to enhance the likelihood that the Voice will be consulted.

Consultation and Dialogue

The report makes clear that the proposed national voice will not be able to veto legislation or otherwise overrule government policy. This is sensible. In our democracy, the party or parties that can command a majority of seats in the House of Representatives should be entitled to implement their policy program. Where that program may affect Aboriginal and Torres Strait Islander people, however, they should be allowed and encouraged to provide advice.

It is here where challenges emerge. The report suggest two degrees of consultation depending upon the scope of the proposed law. Parliament and the Australian Government would be *obliged* to consult the National Voice on a narrow range of proposed laws which are exclusive to Aboriginal and Torres Strait Islander people and would be *expected* to consult on a broader component of laws that also affect Aboriginal and Torres Strait Islander people. This suggestion is reasonable. And yet, because the obligation to consult in both cases would be non-justiciable, it is not clear whether consultation will actually occur.

The National Voice will not need to influence every government policy or proposed law. Nonetheless, if Aboriginal and Torres Strait Islander people come to believe that the National Voice is not able to express their voices to the government and to the Parliament, because the government and the Parliament does not engage or consult with the body, it is likely that they will regard the Voice as ineffective. The success of the National Voice will ultimately rest on whether Aboriginal and Torres Strait Islander peoples support it. In turn, that support rests on whether the government and the Parliament consult.

For this reason, it is critical that obligations for the Australian government and opportunities for the Australian Parliament to consult are made clear and simple. This does not mean that obligations have to be justiciable.

Non-justiciable consultative obligations can be effective. Section 2(2) of the *Norwegian Sámi Act 1987* imposes an obligation on Norwegian government agencies to consult the Norwegian Sámi Parliament when making decisions on matters that concern the business of the Parliament. In 2005, this obligation was transformed into a comprehensive political agreement. The agreement applies to all matters 'that may affect Sámi interests directly',[1] which is defined as encompassing all material and immaterial forms of Sámi culture, including land ownership rights. The agreement covers all forms of decision-making including legislation, regulations, administrative decisions, guidelines and governmental reports. Consultation must be 'genuine and effective' and may include consideration and debate by the Sámi Parliament.[2] It does not extend to a veto, but Cabinet documents must indicate where agreement has not been reached and the views of the Sámi Parliament must 'be reflected in the documents submitted'.[3]

In some cases, this non-justiciable, political obligation works smoothly. The Special Rapporteur on the Rights of Indigenous peoples has praised the agreement as 'represent[ing] good practice'.[4] Scholars have noted that it has empowered the Sámi Parliament with 'significantly greater influence and increased responsibility in negotiating laws and measures that are of importance for the Sámi community'.[5] The agreement has been identified as integral to the development and adoption of several laws, including the landmark *Finnmark Act 2005*, which recognised Sámi rights to land in the northernmost Finnmark County. The formal consultation procedure also strengthened the position of the Sámi Parliament in pushing for amendments to the *Reindeer Husbandry Act 1978*. Reflecting on these events, some scholars have argued that the Sámi Parliament is 'a fully informed formal participant in public decision-making processes', exercising 'a real opportunity to influence both the process and the outcome of matters on which there is consultation'.[6] This is exciting and represents the goal of a National Voice.

However, while political obligations may enhance the likelihood that Indigenous interests are presented to relevant decision-makers, they cannot guarantee that consultation will occur or that it will be adequate. Unfortunately, the evidence in Norway suggests that the consultation agreement has had a 'mixed' record.[7] Sámi representatives have expressed concern that the Government has 'at times entered into consultations having already decided on outcomes',[8] and there is a perception among Sámi politicians that while the consultation process 'works well in matters of little significance … in the case of issues of major economic and political

[1] Procedures for Consultation between the State Authorities and the Sámi Parliament [Norway], signed 11 May 2005, art 2.
[2] Ibid art 6.
[3] Ibid.
[4] James Anaya, 'The Situation of the Sámi People in the Sápmi Region of Norway, Sweden and Finland', UN Doc A/HRC/18/35/Add.2 (6 June 2011) 7 [17].
[5] Torvald Falch, Per Selle and Kristen Strømsnes, 'The Sámi: 25 Years of Indigenous Authority in Norway' (2016) 15 *Ethnopolitics* 125, 134 – 35.
[6] Ibid 135.
[7] Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Norway' , UN Doc A/HRC/13/5 (4 January 2010) 5 [24].
[8] Anaya (n 4) 11 [39].

importance … Sámi input is incorporated to a very limited degree'.[9] For these reasons, the Norwegian Sámi Rights Committee has recommended the agreement be given legal force.[10]

The experience in Norway suggests that non-justiciable consultative obligations are effective to the extent they prompt a moral obligation or extract a political cost to ignoring Indigenous voices. The Indigenous Voice Interim Report proposes enhancing visibility within the process of conferral and receipt of advice as a means to catalyse that moral obligation. The proposals discussed are reasonable and should be adopted. Others can be considered.

- The Cabinet secretariat could report annually on the National Voice's involvement in the Cabinet process, including by noting the number of draft Cabinet documents the body is consulted or provides comments on. This measure complements the suggestion that when introducing legislation, relevant Ministers explain how Indigenous views have influenced the Bill, or why those views have not been adopted;

- The chair of the National Voice could be provided with observer status, permitting them to speak to either House of Parliament on bills affecting Indigenous interests, and deliver an annual report to the nation on Indigenous affairs;

- A provision modelled on s 17 of the *Legislation Act 2003* (Cth) could require rule-makers to consult with the national body before making legislative instruments, and document how that consultation affected the eventual rule.

These measures will make it clear to the Australian people whether Aboriginal and Torres Strait Islander peoples are being listened to or not.

Nevertheless, measures aimed at improving transparency are of limited value. The Uluru Statement from the Heart recognised this fact. This is why the Statement called for a constitutionally entrenched First Nations Voice. The desire that a National Voice be put in the Constitution is informed by the experiences of previous national Indigenous representative bodies in Australia, but it also reflects the fact that constitutional entrenchment is key to the effectiveness and success of the body.

Putting the body in the constitution requires a referendum. A grassroots popular campaign leading to successful constitutional reform could build considerable moral and political pressure on government and the Parliament to meaningfully listen and engage with the body. The government would not be legally required to consult, but the Australian people would expect that it does just that.

I recognise that the terms of reference do not allow consideration of constitutional entrenchment. I nonetheless believe it important to make clear that constitutional entrenchment is likely key to the success of the National Voice. In the absence of constitutional backing, enhanced transparency measures are unlikely to impose that moral or political obligation on the government and on the Parliament to engage. Without that obligation, government and the Parliament may choose to ignore the National Voice.

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[9] Adam Stepien, Anna Petretei, and Timo Koivurova, ' Sámi Parliaments in Finland, Norway, and Sweden' in ! Tove Malloy, Alexander Osipov and Balázs Vizi (eds), *Managing Diversity through Non-Territorial Autonomy: . Assessing Advantages, Deficiencies, and Risks* (Oxford University Press, 2015) 117, 130. !

[10] Sámi Rights Committee, 'Den Nye Sameretten' (NOU 2007:13). !

Thank you again for the opportunity to provide a submission. I would be happy to discuss any aspect of my submission or my research on Indigenous representative bodies with the co-design group.

Yours sincerely

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