



MONASH  
University

# SUBMISSION ON THE PROPOSALS FOR AN INDIGENOUS VOICE

Monash University welcomes the opportunity to provide feedback on the proposals for an Indigenous Voice.

Monash is proud of its legacy of contributing to the advancement and well-being of the Aboriginal and Torres Strait Islander community, here in Victoria and across the nation. With over 50 years of Indigenous programs and engagement, at various times Monash has played a significant role in initiating change and making life better for Indigenous people.

The [Monash Aboriginal and Torres Strait Islander Framework: 2019-2030](#) establishes our commitment to making a leading national and international contribution to Indigenous advancement over the next decade.

The Framework comprises four framing pillars:

- *Increasing the participation of and supporting success in Indigenous students*
- *Embedding Indigenous perspectives and content into curriculum*
- *Growing research contributions to address and serve the needs of Indigenous people and communities*
- *Upholding traditional knowledge and respecting Indigenous students, staff and communities*

Monash University has Indigenous research and teaching expertise in a diversity of disciplines encompassing the arts, architecture and design, medical and health sciences, education and the law. This submission is made by the [William Cooper Institute](#), the [Castan Centre for Human Rights Law](#) and [Better Governance and Policy](#), on behalf of Monash University. The submission provides an overarching position on the status of the Indigenous Voice and provides feedback on some of the specific proposals for the Local and Regional Voice and the National Voice.

In making this submission, we acknowledge that the views of Aboriginal and Torres Strait Islander peoples on the proposals in the Interim Report are paramount and that the design of the local/regional and national Voice is ultimately up to them. However, we provide some comments and suggestions in relation to various aspects of the proposals which we hope are of some assistance. The foundation of this submission is the *United Nations Declaration on the Rights of Indigenous Peoples*.

## THE STATUS OF THE INDIGENOUS VOICE

We commence our submission by endorsing the public lawyers' submission #38 on the imperative of constitutional enshrinement of the Voice. Monash University supports the *Uluru Statement of the Heart*, and constitutional enshrinement is central to the *Uluru Statement's* vision for the Voice, a vision arising from one of the most comprehensive consultation processes with Aboriginal and Torres

Strait Islander peoples seen in this country to date.<sup>1</sup> With this front of mind, it is Monash's position that a referendum is needed to ensure a Voice to Parliament that is protected by the *Constitution*. Anything less would be an example of the Australian government listening to but not hearing the clear and unambiguous voices of Aboriginal and Torres Strait Islander peoples.

Without constitutional recognition, the Voice has less ability to meaningfully influence proposed laws and policies, and remains at the mercy of changes in Government. The purpose of enshrining the Indigenous Voice in the *Constitution* is to empower Indigenous people in their own right, regardless of the mechanisms that follow. This fundamental commitment to hearing Indigenous voices and the empowering of communities is needed regardless of the legislative framework and processes put in place to facilitate it. We urge that the *purpose* of the Voice not be lost in the process of establishing processes and mechanisms.

Having expressed its support for the *United Nations Declaration on the Rights of Indigenous Peoples*, the Australian Government has an obligation under international law as a matter of human rights and not merely as policy to improve the lives of Indigenous peoples and ensure their self-determination. The status of the Indigenous Voice should reflect this obligation.

While that is our primary position, we participate in good faith with the Voice Co-Design public consultation process and the Interim Report with the following submissions.

## LOCAL AND REGIONAL VOICE

While much of our feedback provided below relates to *process*, we return to our key point of *purpose*. The key to success for the Local and Regional Voices is a clarity of purpose. In the view of Monash University, the most important consideration will be whether the Local and Regional Voices can play a genuine role in achieving the outcomes sought in the *Uluru Statement*.

### Formation of Local and Regional Voices

The concept of establishing local community mechanisms for input, in the form of Local and Regional Voices, is supported. We agree that local control of local representation is fundamentally important and one element of ensuring Indigenous self-determination. However, the proposed approach to 'give communities flexibility to tailor Local and Regional Voice arrangements' raises some concerns, both in terms of process and outcomes.

When it comes to establishing representative structures, communities have different capabilities. In light of the situation on the ground with the communities concerned, it is important that communities be assisted to choose an effective form of representation that is suitable for them. This does not mean they should be left entirely on their own to make the decision which may undermine both the process and the outcome. The kind of assistance that may be needed is a model/s or standard structure/s which communities may use as a starting point and adapt to their own needs, in a timely manner. It should not be too prescriptive. Leaving communities without this kind of assistance with deciding 'how best to organize themselves' may set some up to fail. The assistance should be linked to a timeframe for establishing the representative structure.

We do not see the need for representation on Local and Regional Voices to be caught up in convoluted and complicated processes. We suggest that there is no need to 'start again', when there are good examples that can be replicated. We point to the process to establish representation on the Victorian Treaty Advancement Commission as an example of obtaining good representation while respecting Aboriginal Communities.

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<sup>1</sup> Final Report of the Referendum Council (30 June 2017) 10. See also Megan Davis, 'The Long Road to Uluru – Walking Together: Truth Before Justice' (2018) 60 *Griffith Review* 13.

Beyond the establishment phase, a lack of consistency across each Local and Regional Voice, in terms of its approach to consultation and representation, may result in uneven and inequitable community feedback and representation to the National Voice.

In summary, the formation of local and regional representative structures will often require support and assistance for the Indigenous communities concerned. This should be seen to be a government responsibility that is linked both the purposes of the Voice and ensuring the right to Indigenous self-determination. The formation of representative structures must be properly resourced and supported by government upon the basis of Indigenous input and advice.

### Number of Local and Regional Voices

The Interim Report proposes between 25–35 Local and Regional Voices and is seeking views on whether this figure should be closer to one end or the other. However, it does not appear to contemplate fewer than 25 or more than 35. Limiting the number of Local and Regional Voices to 35 risks undermining the diversity of communities across Australia and may not in fact be flexible enough to accommodate the wide spectrum of Aboriginal and Torres Strait Islander Community voices.

### Local and Regional Voice Principles

The principles articulated in the Interim Report are supported, however there needs to be greater emphasis on self-determination across all principles. Processes should also ensure that Indigenous knowledge is protected from (mis)appropriation where appropriate. Accordingly, pursuant to the ‘Data and Evidence-based Decision Making’ principle, Communities need to be ‘supported to collect, manage and control access to their own data.’

## NATIONAL VOICE

### ‘Obligated’ to consult v ‘expected’ to consult?

The advisory role of the Voice is articulated in the Interim Report, however there is a lack of clarity as to what role the Voice would have in practice. Language in the Interim Report such as ‘the National Voice *could* provide advice ...’; and ‘The Parliament and the Australian Government *would be expected to...*’; does not inspire confidence. There is no statement that the government must consider the input of the Voice in good faith, which is surely an absolute minimum requirement. Expectations for how the Government and Parliament will *use* what it hears through the Voice needs to be clearly articulated.

One purpose of the Voice process is to give effect to a relationship of respect between Indigenous peoples and government. The respect must necessarily be mutual. It is in the nature of an exchange in which the government recognises the special position of Indigenous peoples in the Australian historical and contemporary context and Indigenous peoples recognise the function of the Australia’s government under the *Constitution*. (This reciprocity can only be fully effective if the Voice is enshrined in the *Constitution*, but this is a separate point.) Unless the Voice process, even if legislative, contains some obligation to consider on the part of the government, the objective of ensuring mutually respectful relations is undermined. It is our position that consultation needs to be both meaningful and timely. Parliament should not pass legislation affecting Aboriginal and Torres Strait Islander peoples prior to receiving advice from the Voice. To do so would be disrespectful to the Voice, and to the Australian people who supported its establishment. It would also make a mockery of any assertions that its advice will be taken seriously and have an impact.<sup>2</sup>

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<sup>2</sup> See eg Daniel Reynolds, Winsome Hall and George Williams, Australia’s Human Rights Scrutiny Regime’ (2021) 46(1) *Monash University Law Review* 256, 264-7, where the authors note that tight time frames have prevented reports of the Parliamentary Joint Committee on Human Rights from being tabled prior to the associated legislation being passed.

It needs to be clear when there is an *obligation* to consult. The concept of an *expectation* to consult should be abandoned. It does not show respect to First Nations peoples. In fact, one must query why there is a need for such a distinction, given that a failure to consult could not be challenged in court.<sup>3</sup> The distinction between an obligation and an expectation presents a 'hierarchy of consultation', where the failure to fulfil an obligation to consult could be seen as morally more egregious than where there is only an expectation to consult (which could be seen as merely aspirational). Such a distinction may promote a practice whereby a bill is deliberately constructed to avoid it being considered as one on which there is an obligation to consult.

We have a concern that, as currently proposed, the National Voice is a 'toothless beast'. Given that it can only provide non-binding advice which the government is not obliged to consider, it is unclear how this differs from other forms of 'community consultation' that may or may not have any influence over outcomes. In the absence of a constitutionally enshrined status and a clearly articulated role, we question the power of the Voice in affecting real change in terms of legislation and policy reform.

## Representation

It is proposed in the Interim Report that the size of National Voice be a maximum of 18 members selected by Aboriginal and Torres Strait Islander peoples, with two additional members appointed by the Minister. The first point to note about the proposal for ministerial appointments is that it has the potential to undermine the independence of the Voice, even if made with the agreement of the National Voice members. The legitimacy and cultural authority of the Voice depends on it being free from, and *the appearance of being free from* any government influence, no matter how well meaning or qualified the ministerial appointees might be.

A further issue is that one of the reasons given for having ministerial appointments is to fill any skills gap. Rather than have ministerial appointments, it would be more appropriate to provide any necessary skills training to members of the Voice. This, in fact, is noted in the Interim Report (@ 40), therefore it appears unnecessary for there to be any ministerial appointments.

Another reason given for having ministerial appointments is to 'resolve issues of demographic balance, for example, providing additional representation for remote areas if needed.'<sup>4</sup> The fact that this is a potential issue to be resolved highlights an inherent problem with limiting the size of the National Voice to a maximum of 20. If the National Voice were larger, it likely would not encounter this problem.

Further, the proposal to limit the National Voice to no more than 20 members on a state and territory basis risks distorting the diversity of Aboriginal and Torres Strait Islander communities. State based representation does not reflect the diversity, location and size of Aboriginal and Torres Strait Islander communities. The Interim Report does acknowledge the smaller size of the ACT and Torres Strait Island populations by allocating them only one member on the National Voice, but fails to acknowledge some significant differences between the other states. For example, according to the 2016 ABS census, NSW has an estimated 265,685 residents who identify as Aboriginal and/or Torres Strait Islander, whereas Tasmania has only 28,537 Aboriginal and Torres Strait Islander residents.<sup>5</sup> Although it is important that those states with larger Indigenous populations don't 'drown out' the voices of those with smaller Indigenous populations on the National Voice, it is important that the National Voice reflect, as far as possible, the various Local and Regional Voices. This may not be possible, for example, in NSW or Queensland if membership from those states is limited to two. We therefore recommend that the membership of the National Voice be raised to enable a more accurate representation of the diversity of Aboriginal and Torres Strait Islander interests across Australia.

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<sup>3</sup> Submission #633 Arnold Block Leibler, 5-6. Indigenous Voice Co-design Interim Report (2020) 32, 51

<sup>4</sup> Indigenous Voice Co-design Interim Report (2020) 39.

<sup>5</sup> <https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/estimates-aboriginal-and-torres-strait-islander-australians/latest-release>

It is also unclear how utilising state boundaries would fit with the proposal to have between 25–35 Local and Regional Voices. State and territory boundaries do not necessarily align with Indigenous community boundaries. For example, some native title determinations and the traditional country of First Nations peoples straddle a state or territory boundary, eg Yorta Yorta (Vic/NSW), Miriurrung Gajerrong (WA/NT). Some well-established regional organisations also straddle state boundaries, for example the Murray Lower Darling Rivers Indigenous Nations which extends from New South Wales into northern Victoria. As it currently appears in the Interim Report, for Local and Regional Voices to be able to choose their state representatives, they themselves would have to be within a state or territory boundary.

The rationale that ‘selecting members based on states may better facilitate engagement with them by the National Voice members’ also does not acknowledge that National Voice members, by virtue of the very existence of the states and territories, would likely be familiar with the services provided by the state or territory in which they live, particularly given the unlikelihood of having no state or territory without a resident on the National Voice.

Ultimately, the National Voice should reflect, as far as practicable, the way that Aboriginal and Torres Strait Islander peoples organise themselves socially and as political units, rather than be required to conform to the colonial structures imposed on them. This would be an important recognition of Indigenous self-determination and would be evidence of the Australian polity’s support of the *United Nations Declaration on the Rights of Indigenous Peoples*, in particular articles 3, 5, 18 and 19, being put into action.

It is imperative that the Voice structures be representative of all of the First Nations communities concerned. Traditional authority structures should be respected. There should be a balance of members from the Eldership, young emerging leaders, traditional owners, men and women and so on. This is not inconsistent with choosing members by election, but it will be necessary to identify sub-categories such as those mentioned into which candidates must fall. There are examples of First Nations representative structures having members chosen by election which are representative in this way.

We support a mandated gender balance in the National Voice. It is important that women are not portrayed as an inherently vulnerable group, but as equal participants. As June Oscar notes in the landmark report produced by the Australian Human Rights Commission in December 2020, ‘our women on the ground know what they are talking about, that they are leaders, survivors, teachers and healers. They carry with them a wealth of inherited, lived and learnt expertise’. She goes on to say, ‘our women’s voices need to be elevated to the spaces of decision-making, because what they know matters in forming meaningful and effective policy and legislation.’<sup>6</sup> Given this, a gender balance should also be reflected in the Local and Regional Voices.

We also support the inclusion of permanent youth and disability advisory groups. What is missing, however, is a mandated permanent Elders group. The mandated inclusion of such a group would reflect the vitally important role of Elders under traditional law and custom, and would increase the legitimacy and cultural authority of the National Voice.

### Eligibility criteria to stand as a candidate

Aboriginal and Torres Strait Islander peoples are the most highly incarcerated peoples on the planet, therefore it is important to ensure that the eligibility criteria for membership of the Voice (both National, and Local and Regional Voices) do not unduly preclude a person from becoming a member of the Voice. Indeed, as Dr Larkin notes in her submission ‘those who have direct experiences with systemic issues in the criminal justice system and who understand how they continue to silence First

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<sup>6</sup> Australian Human Rights Commission, *Wiyi Yani U Thangani (Women’s Voices): Securing our Rights, Securing our Future Report* (December 2020) 10.

Nations voices, are some of the most important people to have a seat at the decision-making table, so the real work and reform can begin.<sup>7</sup>

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<sup>7</sup> Submission #406, 8.

## RESOURCING

Resourcing of both levels of the Voice is imperative to enable them to properly consult with Indigenous communities. The establishment of the Voice requires a new financial commitment from Treasury, not the use of existing funds already dedicated to Indigenous policies, programs and communities. Funding, staffing and resources must be provided to support this process, such that it does not take away from existing services and programs. Funding must be sustainable and long term, not able to be discontinued at the whim of the government of the day. Accordingly, there needs to be a funding guarantee included in legislation establishing the Voice in order for the Voice to fulfil its mandate and perform its functions effectively.

It is important to note that the Indigenous Voice is one part of broader systemic change that is required to improve outcomes for Aboriginal and Torres Strait Islander communities. Care must be taken to ensure that work that is done on establishing the Indigenous Voice is not at the expense of the funding and delivery of services on the ground to improve the lives of indigenous people. It is not an 'either/or' situation. The design and implementation of the Voice needs to be considered in the context of service delivery needs, Closing the Gap targets, and the overarching project of self-determination, within the framework of the *United Nations Declaration on the Rights of Indigenous Peoples*.

In closing, we wish to acknowledge the expertise and calibre of the Indigenous leaders on the Senior Advisory Group and the Co-Design Groups who have carriage of the current process, and the good faith in which they are carrying out the consultation. We note the narrow remit that these groups have been given and that much of our submission goes beyond that remit. It is incumbent on organisations such as ours to keep constitutional enshrinement on the agenda as a fundamental element in achieving a meaningful Voice to Parliament. We sincerely hope that the depth of feeling on this issue expressed in this and other submissions is conveyed to the Government in the Final Report.

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