



## Indigenous Voice

NATIONAL INDIGENOUS AUSTRALIANS AGENCY

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**30 April 2021**

## **ACKNOWLEDGEMENTS**

Save the Children Australia acknowledges Aboriginal and Torres Strait Islander peoples as the traditional owners and custodians of the land on which we work. We pay our respect to their Elders past, present and emerging.

This submission has been informed by consultation with Aboriginal and Torres Strait Islander staff at Save the Children Australia.

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## Contents

|  |           |
|--|-----------|
| <b>Introduction: First Nations Programs and Policy Positions .....</b>                 | <b>4</b>  |
| <b>Treaty and Truth-Telling under the Uluru Statement .....</b>                        | <b>6</b>  |
| <b>The National Voice to Parliament as a human rights and child rights issue .....</b> | <b>6</b>  |
| <b>Constitutional enshrinement of the National Voice to Parliament .....</b>           | <b>9</b>  |
| <b>Conclusion .....</b>  | <b>10</b> |

## Introduction: First Nations Programs and Policy Positions

Save the Children Australia welcomes the opportunity to provide a submission to the Indigenous Voice Discussion Paper from the National Indigenous Australians Agency (the **Discussion Paper**).<sup>1</sup> Save the Children has worked alongside Aboriginal and Torres Strait Islander communities for over 65 years. We recognise the importance of Aboriginal and Torres Strait Islander leadership and ownership in shaping culturally safe ways of working that reflect local needs and priorities. Over half of our direct programming is in Australia, supporting around 30,000 children and adults across 200 communities and locations in every State and the Northern Territory. This includes programs spanning early childhood development, family support services, school education engagement initiatives, and public health-informed youth justice programming.

As an organisation with children's rights at the centre of everything we do, we promote the rights and interests of First Nations peoples throughout our work. That is informed by the Convention on the Rights of the Child (the **CRC**), the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) and other relevant international human rights law. We support the Australian Council for International Development Practice Note on Effective Development Practice with Aboriginal and Torres Strait Islander Communities,<sup>2</sup> are a signatory to the Aboriginal Peak Organisations NT Partnership Principles<sup>3</sup> and the Western Australian Ngulla Boodjar (Our Land) Ngulla Moort (Our Family) Ngulla Kaartadjin (Our Knowledge) vision statement.<sup>4</sup>

Save the Children's comments in this submission are informed by our policy positions. Most importantly, that includes our support for the Uluru Statement from the Heart<sup>5</sup> (the **Uluru Statement**). The Uluru Statement includes a call for a constitutional change to enshrine a First Nations Voice in the Constitution that would empower Aboriginal and Torres Strait Islander people. Save the Children is also a signatory of the Redfern Statement,<sup>6</sup> which calls upon the Australian government to:

*Commit to addressing the unfinished business of reconciliation, by:*

- *Addressing and implementing the recommendations of the Council for Aboriginal Reconciliation, which includes an agreement making framework (treaty) and constitutional reform in consultation with Aboriginal and Torres Strait Islander peoples and communities.*

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<sup>1</sup> National Indigenous Australians Agency, 'Indigenous Voice: Discussion Paper', January 2021. Available at: <https://voice.niaa.gov.au/sites/default/files/2021-02/indigenous-voice-discussion-paper.pdf>.

<sup>2</sup> Australian Council for International Development, 'Effective Practice with Aboriginal and Torres Strait Islander Communities', February 2014. Available at: [https://acfid.asn.au/sites/site.acfid/files/resource\\_document/Effective-Development-Practice-with-Aboriginal-and-Torres-Strait-Islander-Communities.pdf](https://acfid.asn.au/sites/site.acfid/files/resource_document/Effective-Development-Practice-with-Aboriginal-and-Torres-Strait-Islander-Communities.pdf).

<sup>3</sup> Aboriginal Peak Organisations Northern Territory, 'Partnership Principles for working with Aboriginal organisations and communities in the Northern Territory', May 2017. Available at: <http://www.amsant.org.au/apont/wp-content/uploads/2015/02/21070504-APO-NT-Partnership-Principles-Updated-version.pdf>.

<sup>4</sup> West Australian Council of Social Service and Noongar Family Safety and Wellbeing Council, 'Partnering with Aboriginal Community Controlled Organisations to deliver trusted services with stronger outcomes for Aboriginal people', June 2019. Available at: <https://wacoss.org.au/wp-content/uploads/2019/06/Partnering-with-Aboriginal-Community-Controlled-Organisations-to-deliver-trusted-services-with-stronger-outcomes-Report-1.pdf>.

<sup>5</sup> Uluru Statement from the Heart, May 2017. Available at: <https://ulurustatement.org/the-statement>.

<sup>6</sup> Aboriginal and Torres Strait Islander Peak Organisations Unite, 'The Redfern Statement', 9 June 2016. Available at: <https://www.reconciliation.org.au/wp-content/uploads/2017/11/The-Redfern-Statement.pdf>.

Save the Children also supports the recommendations put forward by non-government organisations through the “*Joint NGO Submission on behalf of the Australian NGO Coalition*”<sup>7</sup> (the **Joint NGO Submission**) as part of Australia’s Third Cycle Universal Periodic Review before the United Nations Human Rights Council. The Joint NGO Submission was endorsed by over 200 organisations, including Aboriginal and Torres Strait Islander peak bodies. Save the Children is an Advisory Committee member of the Australian NGO Coalition and has led on children’s rights. The Joint NGO Submission recommended that:

*Australia must hold a referendum to revise the Constitution to recognise Aboriginal and Torres Strait Islander Peoples' rights, remove racist elements and include an anti-discrimination clause. Australia must establish an Aboriginal and Torres Strait Islander elected representative Voice to Parliament and establish a Makarrata and Truth and Justice Commission to develop a treaty with the First Peoples of Australia.*

Additionally, in the context of considering the Discussion Paper, Save the Children acknowledges the multiple reports and inquiries into constitutional recognition that have taken place over the last decade. That includes “*Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*”<sup>8</sup> (the **Expert Panel**), “*Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples*” in 2015<sup>9</sup> (the **2015 Joint Select Committee Report**), “*Final Report of the Referendum Council*”<sup>10</sup> (the **Referendum Council Report**), the “*Joint Select Committee on Constitutional Recognition relation to Aboriginal and Torres Strait Islander Peoples*”<sup>11</sup> in 2018 (the **2018 Joint Select Committee Interim Report**), among others.

Save the Children emphasises the critical importance of consultation with Aboriginal and Torres Strait Islander communities and organisations in considering what design the National Voice should take, and a design process undertaken in true partnership. We make this submission with a respectful awareness of the wisdom and insights that Aboriginal and Torres Strait Islander peoples have shared about the importance of a Voice to Parliament, together with a process of agreement-making (Treaty) and truth-telling, towards a reconciled Australia, and particularly recognises Aboriginal and Torres Strait Islander peoples’ leadership and authority on these matters. While Save the Children does not have a position on the detail for the model of the Voice to Parliament, which should be a decision for First Nations peoples, Save the Children strongly supports the ask from First Nations peoples for a Voice to Parliament to be enshrined in the Constitution as outlined in the Uluru Statement.

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<sup>7</sup> Australian UPR NGO Coalition, ‘Joint NGO Submission on behalf of the Australian NGO Coalition’, April 2020. Available at: <https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/602b2a925246cb1b62bc23a4/1613441688187/UPR+++Australian+NGO+Coalition+Submission+-+domestic+publication+version+-+July+2020+%28new%29.pdf>.

<sup>8</sup> Report of the Expert Panel, ‘Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution’, January 2012. Available at: [https://antar.org.au/sites/default/files/expert\\_panel\\_report.pdf](https://antar.org.au/sites/default/files/expert_panel_report.pdf).

<sup>9</sup> Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, ‘Final Report’, June 2015. Available at: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/2015\\_Constitutional\\_Recognition\\_of\\_Aboriginal\\_and\\_Torres\\_Strait\\_Islander\\_Peoples/Constitutional\\_Recognition/Final\\_Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/2015_Constitutional_Recognition_of_Aboriginal_and_Torres_Strait_Islander_Peoples/Constitutional_Recognition/Final_Report).

<sup>10</sup> Referendum Council, ‘Final Report of the Referendum Council’, 30 June 2017. Available at: [https://www.referendumcouncil.org.au/sites/default/files/report\\_attachments/Referendum\\_Council\\_Final\\_Report.pdf](https://www.referendumcouncil.org.au/sites/default/files/report_attachments/Referendum_Council_Final_Report.pdf).

<sup>11</sup> Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, ‘Interim Report’, July 2018. Available at: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Former\\_Committees/Constitutional\\_Recognition\\_2018/Constitutional\\_Recognition/Interim\\_Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Constitutional_Recognition_2018/Constitutional_Recognition/Interim_Report).

## Treaty and Truth-Telling under the Uluru Statement

Save the Children fully supports the combined objectives of the Uluru Statement. That is, firstly, the need for constitutional change through enshrining a First Nations Voice in the Constitution that would empower Aboriginal and Torres Strait Islander peoples. Secondly, legislative change that involves the establishment of a Makarrata Commission. The Makarrata Commission would supervise a process of agreement-making with Australian governments. Thirdly, the Makarrata Commission would also oversee a process of truth-telling about Australia's history and colonisation.

Save the Children is disappointed that “[m]aking recommendations as a Group through this co-design process on the establishment of a Makarrata Commission (as called for by the Uluru Statement from the Heart), agreement making, treaty and truth-telling” was deemed in the “Interim Report to the Australian Government”<sup>12</sup> (the **Interim Report**) to be out of scope for the Senior Advisory Group. Save the Children considers these components as essential to be considered at the same time.

**Recommendation 1:** The design of the National Voice to Parliament must be consistent with the Uluru Statement. It should include the ability to promote Treaty and truth-telling as part of the Makarrata Commission.

## The National Voice to Parliament as a human rights and child rights issue

Save the Children strongly supports the need for fundamental change to policies, laws and our Constitution that are reflective of UNDRIP and Australia's obligations under human rights treaties, especially the CRC. The right to self-determination includes a recognition that Aboriginal and Torres Strait Islander peoples, through their representatives, have a right to be consulted about and participate in decision-making concerning legislative and policy changes affecting their rights and interests. This position is consistent with international human rights law and UNDRIP. Article 3 of UNDRIP states:

*Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*

UNDRIP Article 4 expands on this further, stating that:

*Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.*

UNDRIP recognises the need to respect and promote the rights of Indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States. Article 18 of UNDRIP emphasises the importance genuine Indigenous participation and consultation in political decisions about their rights. Of additional relevance are Articles 5, 19, 23, 27 and 28 of UNDRIP. A Voice to Parliament would go some way to giving effect to, and implementing, UNDRIP.

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<sup>12</sup> National Indigenous Australians Agency, 'Indigenous Voice Co-Design Process: Interim Report to the Australian Government', October 2020, Appendix B, p3. Available at: <https://voice.niaa.gov.au/sites/default/files/2021-02/indigenous-voice-codesign-process-interim-report-2020.pdf>.

The CRC is unique in that it specifically references Indigenous children, being the first human rights treaty to do so. The preamble of the CRC requires states parties to take “*due account of the importance and cultural values of each people for the protection and harmonious development of the child*”. Additionally, Articles 17, 29 and 30 all make specific mention of the rights of Indigenous children, including protections to have regard to their linguistic needs, access to education and not being denied rights to enjoy their own culture. The role of education of Indigenous children is intrinsic to the protection and promotion of the right to self-determination, as noted by the United Nations Committee on the Rights of the Child in “*General Comment No. 11 (2009): Indigenous children and their rights under the Convention*”:<sup>13</sup>

*The education of Indigenous children contributes both to their individual and community development as well as to their participation in the wider society. Quality education enables Indigenous children to exercise and enjoy economic, social and cultural rights for their personal benefit as well as for the benefit of their community. Furthermore, it strengthens children’s ability to exercise their civil rights in order to influence political policy processes for improved protection of human rights. Thus, the implementation of the right to education of Indigenous children is an essential means of achieving individual empowerment and self-determination of Indigenous peoples.*

It also goes on to note the important role of the State party in respecting the rights of the views of the child, whether as an individual or a group. With respect to Indigenous children as a group, the United Nations Committee on the Rights of the Child states that:<sup>14</sup>

*...the State party plays an important role in promoting their participation and should ensure that they are consulted on all matters affecting them. The State party should design special strategies to guarantee that their participation is effective.*

This would include special strategies such as the Voice to Parliament, ensuring that the views of Aboriginal and Torres Strait Islander children are given due weight in accordance with Article 12 of the CRC. Article 12 states that:

- 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
- 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*

Importantly, the United Nations Committee on the Rights of the Child has recognised that special measures through legislation and policies for the protection of Indigenous children should be undertaken in consultation with communities and with the participation of children in the consultation process, as provided for by Article 12 of the CRC. Such consultations should be carried

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<sup>13</sup> United Nations Committee on the Rights of the Child, ‘General Comment No. 11 (2009): Indigenous Children and their rights under the Convention’, 12 February 2009, GRC/G/GC/11, p13. Available at: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11).

<sup>14</sup> Ibid, p9.

out in a manner which is “...culturally appropriate, guarantees availability of information to all parties and ensures interactive communication and dialogue”.<sup>15</sup>

Save the Children is mindful that decision making structures of public sector organisations often fail to appropriately provide full and meaningful participation of children and representation of their views. It will be important to ensure that consultation with children is not a one-off process in the development of the Voice to Parliament. Consistent with the CRC and UNDRIP, Aboriginal and Torres Strait Islander children should be consulted at all stages of the process, through design, development and implementation, ensuring a wide cross section of views.

However, despite the clear interrelation between human rights, children’s rights and rights of Aboriginal and Torres Strait Islander peoples in supporting self-determination and their views being respected, the necessary steps have still not been taken in Australia to give effect to these rights in policy, laws and the Constitution. For example, Australia does not support self-determination or fully recognise the rights of Aboriginal and Torres Strait Islander peoples. UNDRIP has not been fully incorporated into domestic law, even though some amendments have taken place in States and Territories to give effect to UNDRIP.<sup>16</sup> Nor have steps been taken to ensure that scrutiny of Bills, Acts or other human rights matters by the Federal Parliament through the Parliamentary Joint Committee on Human Rights are considered in a manner compatible with UNDRIP. Furthermore, the CRC has not been fully incorporated into Australian domestic law and policy<sup>17</sup> and Australia has yet to ratify the Third Optional Protocol to the CRC on a communications procedure.<sup>18</sup>

These measures, in addition to the Voice to Parliament, are critical to ensuring that the rights of Aboriginal and Torres Strait Islander peoples, including children, are given fuller effect. The Voice to Parliament on its own will not be sufficient to give effect to Australia’s binding international law obligations, as well as those which are non-binding, but arise from authoritative international agreements. There remains clear policy and legislative gaps which the Commonwealth, States and Territories have failed to deliver on.

**Recommendation 2:** Alongside the development of the National Voice to Parliament, Australia must incorporate the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) into domestic law. That should involve the development of a plan and an independent body to oversee its implementation, in partnership and consultation with Aboriginal and Torres Strait Islander peoples. The plan should involve including UNDRIP in the *Human Rights (Parliamentary Scrutiny) Act 2011*, among other measures.

<sup>15</sup> Ibid, p5.

<sup>16</sup> For example, section 27 of the *Human Rights Act 2004 (ACT)* and section 28 of the *Human Rights Act 2019 (Queensland)*. Section 27(2)(a) and section 28(2)(a) respectively, reflect the aspirations of article 31 of UNDRIP, which recognises the right of Indigenous peoples to maintain, control and develop their cultural heritage and traditional knowledge.

<sup>17</sup> Ibid n7. Save the Children also notes that during Australia’s recent Third Cycle Universal Periodic Review hearing on 20 January 2021, that Greece, Qatar, Romania and Slovenia called upon Australia to incorporate the Convention on the Rights of the Child into domestic legislation. Australia has not fully incorporated the Convention on the Rights of the Child into domestic legislation and policy, and does not have a national plan, strategy or policy for children that comprehensively protects children’s rights. For further information on the Third Cycle Universal Periodic Review outcomes, see Save the Children Australia, ‘Save the Children feedback on Universal Periodic Review outcomes’, 3 March 2021. Available at: [https://www.savethechildren.org.au/getmedia/68fde643-1c8f-4b51-bf03-9c3755f3f737/2021-03-03-letter-agd-save-the-children-simon-henderson-\(1\).aspx](https://www.savethechildren.org.au/getmedia/68fde643-1c8f-4b51-bf03-9c3755f3f737/2021-03-03-letter-agd-save-the-children-simon-henderson-(1).aspx).

<sup>18</sup> Further to n16, Albania, Cyprus, El Salvador, Italy, North Macedonia, Slovakia and Ukraine called on Australia to ratify the Third Optional Protocol to the Convention on the Rights of the Child on a communications procedure.



**Recommendation 3:** Australia must ensure that the National Voice to Parliament is reflective of the views of Aboriginal and Torres Strait Islander children, in a manner consistent with the Convention on the Rights of the Child and the United Nations Declaration on the Rights of Indigenous Peoples. Proposals should be made available in languages designed for children and consultation undertaken in a way that promotes children's voices and participation.

**Recommendation 4:** Australia must fully incorporate the Convention on the Rights of the Child into domestic legislation and policy.

**Recommendation 5:** Australia must ratify the Third Optional Protocol to the Convention on the Rights of the Child on a communications procedure.

## Constitutional enshrinement of the National Voice to Parliament

As noted above, Save the Children is supportive of the Uluru Statement, which calls for a Voice to Parliament to be enshrined in the Constitution as outlined in the Uluru Statement. Nothing less than this will answer the invitation of the Uluru Statement and meet the expectations of all Australians that have endorsed it. It is important to recognise that the Uluru Statement supported a voice that is constitutionally entrenched, to ensure that it could not be removed unless by a future constitutional referendum. Disappointingly, the proposed models put forward in the Discussion Paper make no mention of constitutional protection.

As noted by Professor Megan Davis, the design of the two mechanisms outlined in the Interim Report, and subsequently contained in the Discussion Paper, *"distracts from, and obscures"* the crucial aspect of the Uluru Statement, that *"...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"*.<sup>19</sup> A First Nations Voice enshrined in the Constitution would ensure that Indigenous affairs are taken away from the challenges so often posed by parliamentary politics. Instead it would ensure that there is a legitimacy and dialogue surrounding the important role of First Nations peoples and all Australian people in upholding our commitments under international human rights law.

Save the Children also strongly rejects any suggestion that constitutional enshrinement of a Voice to Parliament would represent a third chamber of Parliament.<sup>20</sup> Such comments are a mischaracterisation of the Uluru Statement. Proponents of a Voice to Parliament have made it clear that it would not possess a power of veto on proposed legislation or be able to vote on the passage of legislation. If established, the body would have its views tabled in Parliament, in the same way that many other bodies, such as the Australian Human Rights Commission or the

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<sup>19</sup> Professor Megan Davis, 'Voice at a crossroads', The Monthly, March 2021. Available at:

<https://www.themonthly.com.au/issue/2021/march/1614517200/megan-davis/voice-crossroads#mtr>.

<sup>20</sup> Joint Media Release, The Hon. Malcolm Turnbull MP, Prime Minister, Senator The Hon. George Brandis QC, Attorney-General, and Senator The Hon. Nigel Scullion, Minister for Indigenous Affairs, 'Response to Referendum Council's report on Constitutional Recognition', 26 October 2017. Available at:

<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F5596294%22>.

Productivity Commission, already fulfil such roles.<sup>21</sup> In doing so, giving a voice to Indigenous views that is currently not provided for in Parliament, such that lawmakers can be better informed when they enact laws.

**Recommendation 6:** The Voice to Parliament must be enshrined in the Constitution, consistent with the Uluru Statement.

## Conclusion

Save the Children supports a strong Voice to Parliament that is reflective of Australia's commitments under UNDRIP, international human rights law, and respects the views of Aboriginal and Torres Strait Islander peoples, including children. It is critical that the Voice to Parliament is enshrined in the Constitution and reflective of the views of First Nations peoples as outlined in the Uluru Statement. The Australian government must ensure that the design of the Voice to Parliament involves consultation and cooperation with Aboriginal and Torres Strait Islander communities and organisations to the fullest extent possible. At the same time, the Commonwealth, States and Territories need to respond to other significant gaps in policy and legislation that continue to disempower Aboriginal and Torres Strait Islander children, especially in fulfilling rights to self-determination and to respect their views.

Now is the time to act on providing substantive change, avoiding the politics of incrementalism, on the road to constitutional recognition and the development of the Voice to Parliament. An ambitious approach that embraces the views of First Nations peoples, reflecting the substantive work that has been conducted on constitutional recognition through the many reports and process conducted over the last decade. The crossroads we are at and the path we choose to take will say much about how Australia chooses to reconcile with the legacy of colonialism and dispossession of First Nations peoples, and the future we see for Australia and all Australians.

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<sup>21</sup> Professor Anne Twomey, Opinion, 'Why an Indigenous Voice would not be 'third chamber' of Parliament', Sydney Morning Herald, 28 May 2019. Available at: <https://www.smh.com.au/national/why-an-indigenous-voice-would-not-be-third-chamber-of-parliament-20190526-p51r7t.html>.