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Voice Secretariat
Reply Paid 83380
CANBERRA ACT 2601

By email: Co-designVoice@niaa.gov.au

Dear Sir/Madam,

We welcome the opportunity to provide feedback in relation to the National and Local & Regional Indigenous Voice proposals.

About us

Maurice Blackburn is Australia's largest plaintiff law firm, with 33 permanent offices and 30 visiting offices, throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions.

Maurice Blackburn employs over 1000 staff, including approximately 330 lawyers who provide advice and assistance to thousands of clients each year. These advice services are often provided free of charge, as it is firm policy in many areas to give the first consultation for free. The firm also has a substantial social justice practice.

Maurice Blackburn has a proud history of partnering with Aboriginal and Torres Strait Islander communities. We represent First Nations clients in matters in all of our core practice areas, including institutional abuse, negligent medical care, workplace injury and discrimination, and in claims against the government. We also represent First Nations communities in cases run by our Social Justice Practice, including those that relate to the protection of land and cultural heritage.

We successfully challenged the Commonwealth Government and the Northern Land Council over plans for a radioactive waste dump on Indigenous land in the Northern Territory known as Muckaty Station.

We have also acted on behalf of the Adnyamathanha Traditional Lands Association, who successfully opposed the placement of a radioactive waste facility on their traditional land in the Flinders Ranges.

Maurice Blackburn continues to investigate allegations of cultural heritage desecration across multiple states in Australia.

Maurice Blackburn's Rights and Reconciliation Committee

Maurice Blackburn has a Rights and Reconciliation Committee that works to help overcome the division, inequality and inequity that exists between First Nations people and non-indigenous Australians.

The Committee's projects include public interest litigation of significance to First Nations people, relationship building with Aboriginal and Torres Strait Islander groups, and implementing internal policies to increase the cultural competency of staff and to promote reconciliation.

The Rights and Reconciliation Committee, on behalf of Maurice Blackburn, is grateful for the opportunity to provide a submission in response to the Interim Report.

We are pleased to offer the National Co-Design Group our insights, which are directly derived from our legal work in the field, and the lived experience of our clients.

Introductory Remarks

The Uluru Statement from the Heart (**the Uluru Statement**) gives all Australians instructions as to what First Nations people are seeking in an Indigenous Voice to Parliament.

The Uluru Statement tells us that the Voice should be enshrined in the Constitution, because only "substantive constitutional change and structural reform" will ensure First Nations people have power over their destiny.

We acknowledge that not all Aboriginal and Torres Strait Islander peoples were consulted during the Regional Dialogues and other processes that led to the creation of the Uluru Statement. It cannot, therefore, be said to be a comprehensive expression of all First Nations' peoples.

However, it must be acknowledged that the Uluru Statement is, without doubt, the most comprehensive summation of First Nations peoples' desires for change in recent times. Maurice Blackburn believes the Uluru Statement is a powerful and important expression of the desire for constitutional reform by Aboriginal and Torres Strait Islander Peoples.

We also believe that any proposal for reform must embody the aspirations of Australia's First Nations peoples themselves.

Our Submission

We do not profess to speak for First Nations people as they have already spoken. Our submission is limited to offering our perspective, as lawyers, as to whether or not the proposals put forward meet the expectations set out in the Uluru Statement.

Based on our legal expertise and experience working with Aboriginal and Torres Strait Islander communities, we believe the two proposed models for the Voice outlined in the Interim Report *do not* meet the expectations set out in the Uluru Statement nor do they meet the expectations of the broader Australian community who support the Uluru Statement.

The opportunity to create a Voice to Parliament is a watershed moment for all Australians. That opportunity will not be served by either of these two proposals. In our view, these proposals will not be effective at achieving the aims set out in the Uluru Statement.

We have identified five core concerns with respect to the two proposals. These are detailed below.

i. Lack of constitutional protection

The Uluru Statement clearly seeks constitutional reform for First Nations' people to be heard on issues that affect them, highlighting the reality that in many cases, the usual representative democratic process fails.

Maurice Blackburn believes there needs to be a mechanism put in place to protect the Voice from abolition, even if it expresses views that are different from the government of the day or becomes politically unpopular. Constitutional entrenchment of the Voice to Parliament would protect the Voice as a long-term body.

Both of the proposed models are silent on constitutional protection of the Voice. Given this, we believe the models fail to meet the goals set out in the Uluru Statement.

Maurice Blackburn encourages the National Co-Design Group to be forthright in embedding Constitutional entrenchment of the Voice to Parliament in the proposals.

ii. Narrow range of matters

The Interim Report has outlined that under both of the proposals, the Government would be obliged to consult and engage with the Voice on a "narrow range of matters"[1]. This obligation to consult would allow for policies and laws to be developed in partnership with the Voice to ensure the needs and aspirations of First Nations people are reflected in laws and policies that affect them.

It is not apparent to us in what way the Government would be obligated to consult and engage with the Voice.

It is also unclear how matters that "affect" First Nations peoples[2] will be identified for consultation. It is concerning that the Voice may remain unconsulted in relation to matters that are determined to fall outside of the scope of the "narrow range of matters".

It is difficult to see how a consultative process that is narrow in its scope, and is undefined in its application, could be a valid or meaningful exercise.

[1] https://voice.niaa.gov.au/sites/default/files/2021-02/indigenous-voice-codesign-process-interim-report-2020.pdf: See for example pages 16, 32, 50 and 51
[2] Ibid: see for example pages 3, 32, 50 and 53

Maurice Blackburn encourages the National Co-Design Group to advocate for greater clarity in relation to the identification of matters to be drawn into the consultative process.

iii. Non - Justiciability

We also note that, under both proposals, the obligation to consult would be non-justiciable. If implemented, this would mean that there would be no legal mechanism through which to hold the Government accountable for the way in which it engages with the Voice.

In other words, there is no way apparent to us to challenge a decision by the Government not to consult the Voice in relation to certain matters (regardless of how significant the law may be for First Nations people) nor is there any apparent way to compel the Government to substantively consider the advice given to it by the Voice in matters that are raised in the consultative process.

We appreciate that transparency mechanisms have been proposed (see section iv below), and that the intent of those mechanisms is to ensure that the Government proves it has appropriately consulted with the Voice. However, if a right of appeal does not exist (justiciability), then the Government in effect becomes its own referee.

Put another way, there is no apparent safeguard proposed in either proposal to prevent the Government from simply stating any reason whatsoever, valid or not, for not consulting with the Voice on any occasion it so chooses, or for not acting on submissions raised by the Voice in matters that they are consulted on. This could manifest as an overt statement, or could take the form of a hollow consultation process dressed up to be genuine.

Our concern is that matters of significance to First Nations peoples may not be identified for consultation, and secondly, that any advice that is provided to the Government could simply be ignored.

Assuming that the obligation on the Government to consult and engage with the Voice becomes justiciable, it will be important to ensure that such an obligation is associated with consulting and engaging with the Voice on an appropriately broad range of matters, such that the consultation occurs on topics which will serve the broader aims stated in the Uluru Statement.

The Uluru Statement calls for substantive, structural reform. We are concerned that the non-justiciability of the Government's obligation to consult and engage with the Voice, will not achieve this end.

Maurice Blackburn encourages the National Co-Design Group to insist that those matters of significance to First Nations peoples be identified for consultation and clearly articulated, and that a process is enshrined such that any advice that is provided to the Government cannot be ignored.

iv. Insufficient transparency on consultation

The Interim Report proposes a number of transparency mechanisms to help ensure that the Voice is appropriately consulted[3]. These include tabling the Voice's formal advice in Parliament, having the Voice's advice considered by a parliamentary committee, and including a statement about the Voice's formal advice and consultation when a proposed law is introduced in Parliament.

Our concern relates to whether these measures would go far enough in giving confidence to First Nations peoples, as well as to the general public, that the advice given by the Voice has been appropriately considered.

In 2018, the Law Institute of Victoria wrote in its submission to the Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples[4] that the goals of the Uluru Statement will only be achieved if a "substantive obligation" is placed on the Federal Parliament to consider the Voice's advice.[5]

The LIV submitted that even if the Voice is enshrined in the Constitution, additional amendment to the Constitution will be required to ensure that the Parliament considers the advice of the Voice in circumstances when they are making laws with respect to First Nations people for whom it is deemed *necessary* to make special laws under section 51(xxvi) of the Constitution.

Maurice Blackburn shares the LIV's concerns, and urges the National Co-Design Group to consider the possible Constitutional and legislative solutions to this issue outlined by the LIV in its submission.

The importance of transparency on consultation is highlighted by the repeal of the *Racial Discrimination Act 1975* (Cth) under Northern Territory intervention. Such intervention emphasises that advice and consultation does not necessarily have any meaningful effect on the making of laws, in the absence of any determinative powers in relation to same.

We also draw the Secretariat's attention to our submission[6] to the parliamentary inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia[7], in which our core message was that there is insufficient legal protection of the cultural heritage of Aboriginal and Torres Strait Islander people, inadequate genuine consultation, and inadequate legal remedies available where cultural heritage desecration has occurred.

Maurice Blackburn encourages the National Co-Design Group to advocate for the implementation of a consultative process whereby the powers and functions of the Voice to Parliament are not weakened by its designed application. Substantive obligation is required if we are to achieve a more unified and reconciled nation.

[3] Ibid: p.54
[4] https://www.aph.gov.au/constitutionalrecognition
[5] https://www.liv.asn.au/getattachment/94b249ad-96aa-42e0-8d2d-fe62a2f8a0d2/20180904-Memo-to-LCA---ALHR---RAC---Constitutional-Recognition---FINAL-(PDF).pdf.aspx: p.2
[6] https://www.aph.gov.au/DocumentStore.ashx?id=c47924af-573e-451a-8817-9627aad3ea6d&subId=690811
[7] https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Northern_Australia/CavesatJuukanGorge

v. Ensuring representation

Maurice Blackburn supports the principles outlined in the Interim Report about ensuring representative diversity of the First Nations community. For example, we support the formation of advisory groups to the Voice, including those representative of young people and of people with disability.

We are concerned, however, that the two proposals may not give enough detail about how the models will ensure that the Voice properly reflects the diversity within First Nations communities around Australia.

Maurice Blackburn would welcome more detail about the processes that will be used to appoint people to particular roles within the National, Regional and Local Voices, to ensure that people who may hold less popular views, who may be quieter or who may have less experience engaging with bureaucracy do not remain unheard.

Maurice Blackburn encourages the National Co-Design Group to ensure that the proposals give enough detail about how the models will ensure that the Voice properly reflects the diversity within First Nations communities around Australia.

How a Voice to Parliament would help – a case study

In our extensive experience representing First Nations peoples and communities in their legal cases, we have witnessed the unjust outcomes and harm that can be caused by Australian laws that do not effectively respond to the views and lived experiences of Aboriginal and Torres Strait Islander peoples.

Below we present a case study, along with the learnings from that which may inform the National Co-Design Group's process.

Case Study – Nuclear Waste Proposals

Maurice Blackburn has assisted two First Nations communities who were each in dispute with the Australian Government about the proposal to dump radioactive nuclear waste on their lands.

In both of these cases, we learned that our clients felt strongly that the Government did not adequately value the views of the Aboriginal community. Where there were formal consultation procedures in place, our experience and that of our clients tells us that often these procedures are treated as a formality rather than a process through which the community may be meaningfully engaged.

Often community consultation is done in a perfunctory manner, with little engagement by the Government or its associated contractors. This gives rise to a perception that consultation is a 'box-ticking' exercise rather than genuine dialogue and engagement.

The themes from the above case study highlight the importance of genuine and meaningful community consultation, and this should inform the approach when establishing a Voice which intends to improve the lives of First Nations people.

Conversely, an Indigenous Voice that does not meet the goals of the Uluru Statement runs the risk of causing further harm and damage to the relationship between First Nations communities and the Government.

Concluding Remarks

Maurice Blackburn's Rights and Reconciliation Committee is pleased to have had the opportunity to share our legal expertise and experiences in this consultation. We trust that the National Co-Design Group will give our submissions appropriate consideration.

Our main message is that, based on our legal expertise and experience working with Aboriginal and Torres Strait Islander communities, the two proposed models for the Voice outlined in the Interim Report do not meet the expectations set out in the Uluru Statement nor do they meet the expectations of the broader Australian community who support the Uluru Statement. We encourage the National Co-Design Group to be more strident in advocating for a design for the Voice to Parliament which more closely reflects the principles outlined in the Uluru Statement.

We would be delighted to speak directly to the National Co-Design Group, or the Voice Secretariat in more detail about these issues, or other matters identified by the Group if that would be helpful.

Please do not hesitate to contact me and my Rights and Reconciliation Committee colleagues on 03 9431 7533 or at LFitch@mauriceblackburn.com.au if we can further assist with the National Co-Design Group's important work.

Yours faithfully,

Lachlan Fitch
Principal Lawyer
Maurice Blackburn

On behalf of the Maurice Blackburn Rights and Reconciliation Committee