

Submission by John Gregan

Comments on the “SUMMARY OF ELEMENTS” document

Membership Models

There are two different membership models proposed for consideration.

Model 1: Structural Membership Link

In each state and territory, Local and Regional Voices would be determined according to the Principles Based Framework.

Two National Voice members from each state, territory and the Torres Strait Islands determined by one of the following options:

Comment

If you are going to have two representatives from each Australian jurisdiction and the Torres Strait Islands I would suggest that one representative be chosen to represent those people still inhabiting traditional lands and the other one chosen by those people who have become urbanised. Each group would have different perspectives on what is important to them. I have read that there are often conflicting views between the urban and rural groups because of their different needs and perspectives and the above suggestion would give both groups a voice in this new process. Recognising those differences would be more realistic and similar to the Australian political system where the Nationalists represent the country people and the Liberals are more urban centric.

- Selection by Local and Regional Voices

Local and Regional Voices determine collectively the national representative for that state, territory or the Torres Strait Islands

OR

- State/territory level assemblies

Provision for state/territory/Torres Strait Islands assemblies, where they exist and are formed by drawing on Local and Regional Voices, to determine representatives to the National Voice

OR

- Hybrid Arrangement

1 national member determined by a special meeting of Local and Regional Voices; and 1 member determined by state/territory elected representative assemblies, where these exist. (option for 1 member for each of ACT and Torres Strait Islands, see below)

Comment

The above is not very clear. I would suggest that given that each State has Land Councils for people in rural areas then in each State the Land Councils each put up a candidate and all the eligible people

within the total various Land Council boundaries vote for the one representative for rural Aboriginal interests for that State.

For the urban area representative I would suggest the formation of cultural clubs along the lines of sporting and other clubs like the RSL in relevant urban areas both in the large metropolitans and country towns host to a large Aboriginal population. Such cultural clubs could have a national secretariat responsible for arranging for the election of a member to the National Voice, to complement the member elected from the Land Councils. Each club could nominate a candidate for election as an urban State representative to be elected by Aboriginal club members.

Whilst I appreciate that Aboriginal and Torres Strait Islander Australians do not want to be seen in the same light as migrants in “multiculturalism” clubs formed by migrant national groups, such clubs may form a template for urban Aboriginal cultural clubs where traditional languages and cultural elements could be promoted and provide a meeting place for individual urban Aborigines no longer physically part of remote communities and their organisations. In Canberra for instance there is the Hellenic Club, the German Club, the Burns (Scots) Club and several others. These provide venues for traditional weddings, feasts, cultural shows, political advocacy etc and at the same time permit access to the clubs by the general public, whilst maintaining ethnic control, presumably through a separate class of membership restricted to their own nationals.

Model 2: Direct Election

Two National Voice members from each state, territory and Torres Strait Islands determined by one of the following options:

- Direct election of members to the National Voice.
An election would be held in each state, territory and Torres Strait Islands
OR
- Potential to draw from elected state/territory/ Torres Strait Islands -level assemblies, where they exist, to determine representatives to the National Voice, should local Aboriginal and Torres Strait Islander people want this as the preferred method.

(option for 1 member for each of ACT and Torres Strait Islands, see below)

Comment

As mentioned above, direct election on a State wide basis would ignore the urban/rural separate situations and it would probably not work. I agree with the above option for one member for the ACT. The ACT which has an elected Aboriginal consultative group and no Land Council (as far as I know) could rely on direct election for one member to the national body. I understand that in the case of Torres Strait Islanders the majority identifying as such live on the mainland in urban settings, so that the Land Council(s) on the islands themselves could vote for one member whilst those in urban areas could form a national urban organisation to represent their concerns by their electing one member to the national body which would mean they have two representatives.

Options

The following options would apply to both model 1 and model 2.

Core membership numbers

a. 18 Members

States and NT: 2 members of different gender per jurisdiction

ACT and Torres Strait Islands: 2 members of different gender per jurisdiction

OR

b. 16 Members

States and NT: 2 members of different gender per jurisdiction

ACT and Torres Strait Islands: 1 member per jurisdiction, with rotating gender of members

Appointment of members

a. Maximum of two appointed members

If it is required, appointment co-considered by the National Voice and the Australian Government. Determined according to specific skills set or representative requirements.

OR

b. No appointees

Member terms

a. 4 year terms

Staggered terms, with half the membership changed every two years. Limit of two consecutive terms.

OR

b. 3 year terms

Limit of two consecutive terms

Optional independent policy body

a. No separate policy body required

OR

b. Complementary independent Indigenous policy body

Subject matter experts to advise on specific issues. The National Voice, Government or Parliament may refer matters for advice.

Legal form of a National Voice

a. Commonwealth body

Independence guaranteed in legislation

OR

b. Private incorporated body

Recognised to perform statutory advice function under special legislation. National Voice members would appoint a CEO.

Comment

Under the proposal I have put forward above the membership would look as follows:

Qld	2
NSW	2
ACT	1
Vic	2
Tas	2
SA	2
WA	2
NT	2
TSI	2

17

In relationship to “core membership numbers” and gender, I consider the “b.” option preferable, i.e. rotating gender of members. If you went with option “a.” and also supported the concept of one member urban/one member rural + two genders (=4 members) you would end up with 4 members per jurisdiction instead of two and that would result in 36 members. If representation was based on gender only and not the rotation model then the ACT would require two members instead of one. Using the word “gender” these days has a wide variety of fluid interpretations and it may be clearer if you were to specify biological male (men) and biological female (women) if you wish to get the traditional concept of male and female representation, despite any criticism from some activist group.

In relation to “**Appointees**” I prefer option “b.” No appointees. Having appointees would seem to go against the concept of having a genuine voice from the grassroots who not only want their voices heard but who choose who will represent them. Having “appointees” smacks of paternalistic elitism, something which I understood was not liked by ATSI.

In relations to **Member terms** I think option “b.” of 3 year terms with a limit of two consecutive terms is better, because it would give the elected candidate 3 years to get experience in the job and then another 3 years to utilise the new understanding and expertise in carrying out the job even better.

I don’t support the creation of **separate policy body**. Instead a range of policy bodies and/or competent individuals could be invited to make policy submissions on relevant issues to be considered by the National Voice members in conjunction with their own policy viewpoints. The danger of a separate policy body is that it could become dominated and “captured” by academics and others with doctrinaire fixed views and could exercise more power and influence than the National Voice itself.

In relation to the legal form of a National Voice I think both options would be suitable but tend to lean towards it being a Commonwealth body. As to “independence guaranteed in legislation” I do not know what that means in real terms and its implications and so can offer no comment.

Common elements across models 1 and 2

The following elements are all agreed by the National Co-design Group.

Membership

- Membership Boundaries

State/territory boundaries and Torres Strait Islands

- Role

Full time co-chairs of different genders are elected by National Voice members. Part time general members.

- Eligibility

Minimum eligibility requirements set for National Voice members with **Ethics Council** option.

- Member Support

Induction training and ongoing professional development to be offered.

Comment

I agree with the above proposals. However, I do not know anything about an “Ethics Council option”. A simpler way would be to ensure that candidates for membership are “fit and proper persons” in the strict legal sense of that expression.

Functions

- Role

The National Voice will have a right and responsibility on behalf of Aboriginal and Torres Strait Islander Australians to advise Parliament and the Government with regard to any matters of national significance to Aboriginal and Torres Strait Islander Australians.

- Core functions and scope

National Voice to advise Commonwealth Parliament and Government on nationally significant matters of critical importance to the social, spiritual and economic wellbeing, or which has a significant or particular impact on Aboriginal and Torres Strait Islander Australians.

A National Voice would have a proactive, unencumbered scope to advise on priorities and issues as determined by the National Voice.

- Principles of advice

- Cannot be required by Parliament or Government to provide advice – can be requested to advise.
- National Voice will generally issue public advice, with discretion for informal discussion where appropriate.
- Issue advice with a clear position, with flexibility to reflect diversity of Aboriginal and Torres Strait Islander views or dissenting views.
- Issue periodic statements on the work of the National Voice.
- Two-way interaction between the National Voice and the Parliament and Government. The National Voice may ask for advice and information.

- Local and Regional Advice Linkage Mechanism

Advice link between the levels of an Indigenous Voice
National Voice will:

- Engage with Local and Regional Voices, and state assemblies where they exist, for community input into policy development.
- Provide feedback to local and regional on how advice has been used.

Local and Regional Voices will advise on:

- Systemic issues associated with national policies and programs
- Local and regional input and advice on national policies and programs.
- Matters of national importance.

Comment

Role: I agree with the basic role but it should not be exclusive, so that individual Aboriginal and Torres Strait Islander Australians can make their views known to Parliament and the Government, just as other Australians can, in relation to matters affecting them as citizens.

Core functions and scope: I agree with the statement “National Voice to advise Commonwealth Parliament and Government on nationally significant matters of critical importance to the social, spiritual and economic wellbeing, or which has a significant or particular impact on Aboriginal and

Torres Strait Islander Australians. “ It should also apply to State and Territory governments as well, given that States have the constitutional heads of power over education and health for example, both of which are important areas of concern and a focus for Aboriginal and Torres Strait Islander Australians. One sees these days a lot of ignorant media criticism directed at the Commonwealth on issues which are the prime responsibility of the States.

Principles of advice: The subtle distinction implicit in the first point - “Cannot be required by Parliament or Government to provide advice – can be requested to advise. “ - is lost on me. It looks like that the Government can request to be advised, implying that the advice provided has to be accepted by the government without question. This would seem to clash with the last dot point, viz: “Two-way interaction between the National Voice and the Parliament and Government. The National Voice may ask for advice and information.” It is hardly a two-way interaction if the National Voice can “ask for advice and information” whilst the Parliament or Government is unable to ask the same of the National Voice. Under no circumstances should Parliament and the Government be compelled to accept the advice.

Dot items 3 and 4 are straightforward but dot item 2 - “National Voice will generally issue public advice, with discretion for informal discussion where appropriate”. – seems unusual. If the National Voice is created by Parliament I would have thought that it would be subject to the same rules as similarly created entities, and that any initial advice should in the first instance be provided to Parliament or the Commonwealth for discussion and assessment internally and then the outcome be made public. If it is not done that way and the National Voice could go to the media prior to discussions with the Government, it could be seen as politicising the process.

Local and Regional Advice Linkage Mechanism: The proposals in this section are reasonable and I can see no issue with them.

Parliament and the Australian Government

Parliament and the Australian Government 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.

Parliament and the Australian Government to engage as early as possible in development of policy and laws.

The obligation would be non-justiciable, nor affect the validity of any laws.

Three transparency mechanisms would apply:

- Tabling

Advice must be tabled on issues that have been referred to the National Voice. Informal advice is not tabled.

- Parliamentary Committee

Establish a new parliamentary committee to examine engagement and consideration of advice.

- Statement on Bills

Statement of consultation provided with Bills, addressing engagement with a National Voice.

Comment

In a democracy such as ours you can't **oblige** "Parliament and the Australian Government to consult the National Voice.. " That can happen in a totalitarian system like previously in Iraq under Saddam Hussein or currently in Syria where a minority group controls the legislature. Whilst acknowledging that the above is a summary of the proposal it would have been useful to know exactly what constitutes examples of a "narrow range of proposed laws which are exclusive to Aboriginal and Torres Strait Islander people ... " I note here that the expression - "Aboriginal and Torres Strait Islander Australians" - that appeared earlier in the text has now become "Aboriginal and Torres Strait Islander people". The latter expression is derived from a North American construct from about 2010 and it may not be appropriate for a unified Australian polity, whereas the earlier one appears quite acceptable.

Similarly, I do not think it appropriate in our democracy that Parliament and the Australian Government should be obliged "to engage as early as possible in development of policy and laws" and that "the obligation would be non-justiciable, nor affect the validity of any laws." – particularly given that the reader of this document is given no examples of any policies or proposed laws.

In relation to the three transparency mechanisms which would apply to the process the following comments are made:

Tabling: "Advice must be tabled on issues that have been referred to the National Voice. Informal advice is not tabled." This is unclear. I presume the advice is tabled in Parliament and that the advice had been requested by Parliament or the advice has been given to Parliament (without Parliament's request) following issues being referred to the National Voice by its constituents – I presume both types of referral are covered by this mechanism.

Parliamentary Committee: It would seem inappropriate that the National Voice would proffer its advice to a Parliamentary committee, often full of people hostile to the Government, rather than to the Government of the day. After all, they are the ones who make the decision and would have in place a Minister whose role it was to deal with issues relevant to Aboriginal and Torres Strait Islander Australians. Such a proposed process, involving a Parliamentary committee, would only delay any action on issues requiring attention.

Statement on Bills: I see no problem with this proposal, provided the Bills are concerned only with the narrow range of issues affecting only Aboriginal and Torres Strait Islander Australians and not other Australians.

Policy and Expert Input

- Panel of Experts

A panel of qualified people and experts for the National Voice to draw upon as required and constitute to undertake a specific inquiry or task.

- National Voice Committees

The National Voice has the power to establish committees to support the National Voice in considering policy matters or perspectives. Committees provide the opportunity to bring in external views and expertise.

- Youth and Disability Advisory Groups

Permanent standing committees specified in establishing legislation comprised of non-National Voice members.

- Engagement with Stakeholders

Central principle of not replacing or undermining existing bodies and structures. The Parliament and Government is expected to continue engaging with stakeholders, and the National Voice will not be a gatekeeper.

The National Voice would engage with peak bodies and other subject matter expert organisations. This role is intended to both ensure the advice from the National Voice is well informed and developed, and draws on the partnerships with key stakeholders, as well as amplify the advice of key Aboriginal and Torres Strait Islander stakeholders and experts.

Comment

Panel of Experts: Such a panel should be convened on an ad-hoc short term basis for a specific issue, rather than a standing committee with a fixed membership, to enable flexibility in address a wide range of issues.

National Voice Committees: Such committees should be comprised only of members of the National Voice and not outsiders, in much the same way as Parliamentary committees are comprised of elected MPs or Senators. Such National Voice committees would still have the ability and opportunity to access external views and expertise in much the same way as Parliamentary committees.

Youth and Disability Advisory Groups: External groups of non-National Voice members established in legislation? If the National Voice is established in legislation with the ability to consult widely with external expertise, there is no need for such groups to be also legislated.

Engagement with Stakeholders: This seems to be a reasonable provision and is already covered by the Panel of Experts and National Voice Committees, previously discussed.

Not included

The National Voice:

- **Will not deliver Government programs**
- Will **not** provide mediation or facilitation between Aboriginal and Torres Strait Islander organisations
- Will **not** be a clearing house for research
- Will **not** be an escalation point for the local and regional operational issues, nor provide mediation or facilitation between government and Local and Regional Voices on specific issues
- Will **not** replace existing bodies or structures
- Will **not** undertake program evaluations, but could identify matters where evaluation may be needed or how evaluations could be more effective

Comment

The above proposals are all sensible and allow the National Voice to maintain its focus on its core function. I would suggest an additional proposal, as follows:

- Will **not** allow itself to be unduly influenced or controlled by non- Aboriginal and Torres Strait Islander Australian persons or organisations.

Comments on the “PROPOSAL EXPLAINER : National Voice advice to the Australian Parliament and Government” document

What matters would be covered by the obligation and expectation?

The success of the proposed National Voice would depend on its relationship with the Australian Parliament and Government. This can't be manufactured by setting prescriptive requirements. However, formal requirements play a role, including providing clarity to the Australian Parliament and Government, and raising the standing of the proposed National Voice.

Comment

First the reader is told that the “Australian Parliament and Government would be *obliged* to ask for advice on a very narrow range of proposed laws that are exclusively relate (sic) to Aboriginal and Torres Strait Islander Australians” without any examples of the narrow range. Then we are told that the “Australian Parliament and Government would be *expected* to ask for advice on a broader range of issues that are important to Aboriginal and Torres Strait Islander Australians”. Some commentators have already said that just about all Commonwealth legislation, including that which would cover all citizens, irrespective of their race, would come under these two proposed requirements and Parliament would get bogged down as a result. I agree with that opinion and believe for all intents and purposes that to activist lawyers, politicians and journalists the words *obliged* and *expected* have the same effect. Hence I would suggest that the mandated “*expected*” requirement be deleted. If the National Voice wanted to comment on a piece universal type proposed legislation then they could do so like any other interested body but that should not result in delaying such legislation. The National Voice, as I understand, is an advisory body, not a legislative body.

What would be covered by the *obligation*?

The proposed obligation on the Australian Parliament and Government to consult would cover a very narrow range of proposed laws which exclusively relate to Aboriginal and Torres Strait Islander Australians. It is only fair that Aboriginal and Torres Strait Islander people are consulted on matters which the Parliament has an ability to make laws that exclusively impact them.

The exact definition of this is still being developed. Some of the ideas that have been put forward include:

- Proposed laws which rely on section 51(xxvi) of the Constitution, which allows Parliament to make special laws for certain 'races'. This power is mainly used to make laws applying to Aboriginal and Torres Strait Islander Australians.
- Laws which are "special measures" under the *Racial Discrimination Act 1975*. Special measures are laws which treat a group of people differently, and which are made for the benefit of that group.

Comment

Whether the proposed legislation for the National Voice is based on either option above (s.51(xxvi) or the *Racial Discrimination Act 1975* there needs to be an "sunset clause" built in, for say, nine or twelve years after which the legislation and the success or otherwise of its aims can be assessed and a decision made as to whether it needs to be re-enacted or not.

I would prefer the basis to be the "special measures" under the *Racial Discrimination Act 1975*, although I do not know the section in our Constitution that underpins that legislation. When we had the Referendum in 1967 that removed the clause "other than the aboriginal race in any State" from s.51(xxvi) it was the time when South Africa was exhibiting the gross injustices inherent in race-based legislation and many of us felt that this section (s.51(xxvi)) was an overhang from our colonial past and should be deleted in its entirety. We were then told that it needed to be retained in the new form because the States also had the power to pass laws specifically dealing with Aborigines and that the Commonwealth needed to have a similar specific power so that, if the a State were to enact unacceptable and/or discriminatory legislation against Aborigines, the Commonwealth could override and invalidate such State legislation using its power set out in s.109 of the Constitution and use the new s.51(xxvi) to make positive laws. The other issue was the counting of Aborigines in the Census. So it was a dilemma for many voters who did not want Australia to be "racist" but we wanted the Aborigines to be full citizens and counted in the census and so voted "Yes".

The Afrikaner "experiment" in South Africa showed that race based legislation creates disunity and violence in a modern nation state and showed that what counts is a common citizenship and allegiance to the nation state, with all citizens being equal under the law. A similar form of legislative separatism was found in the original negotiated Constitution used in post-Independence Zimbabwe where there were "reserved seats" in Parliament for "European whites". They ticked all the

separatist boxes, including – belonging to a different culture which differed from the majority African culture, etc. This justification was not tenable as the majority of Africans had been gone through the same modern education system as had the whites and had embraced democracy and the nation state model. Not long into the new Zimbabwe these reserved seats were abolished as being incompatible with democracy in a modern nation state and “one man, one vote” was the unifying motto at the time as well as the adoption of English as the official (and unifying) language. Zambia, like many newly African independent nations, had English as its official language and the national motto was “One Zambia, One Nation” which emphasised the desire for unity by the four or five major ethnic and different language groups that had been amalgamated with the British colonial boundaries. Before being colonised by the British in the late 19th century, large swathes of what is now modern Zambia had been colonised by the Zulus from South Africa and so when the British left the fear was that old historical hatreds between the various ethnic groups that had been suppressed by so called Pax Britannica would re-emerge and destroy the unity of the new modern country. This would only happen if people wallowed in the past and did not move on to a better joint future and put the past behind them. I was working in Zambia at much of the time these changes were taking pace in southern Africa and I asked some Zambian colleagues whether they would ever split the country back into the different countries based on the traditional boundaries of the various ethnic groups. They said no, because what they inherited was a modern nation state with one economy and if they tried to break up the country into its precolonial parts it was cause wars because the whole country was often dependent on another part of the country to generate income that was then used for the benefit of the whole country. They cited the example of Katanga in the Congo. After Independence Katanga tried to secede from the rest of the country. The copper-rich Katanga with its highly developed mining sector was funding the development of infrastructure etc in other parts of the country which were still in the early stages of economic development and the secession attempt was violently opposed and eventually quashed and unity was restored.

As a result of the above experience I would suggest that if, at the end of nine or twelve years of activities by the National Voice, the Commonwealth and the States and Territories, the goals for the betterment of Aboriginal and Torres Strait Islander Australians had been attained then there should be a referendum to delete s.51(xxvi) and the States and the States should remove from their Constitutions any power to regulate the lives of Aboriginal and Torres Strait Islander Australians, separate from other Australians. I know that the Land Rights legislation is underpinned by s.51(xxvi) and to preserve that after s.51(xxvi) is removed there may be another part of the Constitution which could underpin Land Rights. Alternatively, if that is not possible, then s.51(xxvi) could be replaced by a clause allowing the Commonwealth to specify various forms of land tenure, including “Native Title”.

Formal requests for advice on proposed legislation

The Australian Parliament and Government would be able to formally request the proposed National Voice provide advice on a piece of proposed legislation. The advice of the proposed National Voice could be tabled in the Australian Parliament, which would make it part of the official public record.

Proposed transparency mechanisms would ensure a public record of whether the proposed National Voice has been consulted. Three complementary transparency mechanisms are proposed:

- When Members of Parliament propose new legislation, they could be required to provide a statement explaining whether they have asked the National Voice for advice.
- A committee of Parliament could be established to examine consultation with the National Voice.
- Certain formal advice of the National Voice would be tabled in the Australian Parliament, which would make it part of the official record.

Comment

In relation to dot point 1, I don't see why an MP should be forced to consult the National Voice before proposing new legislation. I thought the idea that the National Voice was to be consulted only on a very narrow range of legislation specific to Aboriginal and Torres Strait Islander Australians and not ALL legislation proposed in Parliament. If that were to be the case then Parliament would become almost unworkable. There are already enough external constraints on it by unelected bodies.

In relation to dot point 2, I do not support the establishment of " A committee of Parliament could be established to examine consultation with the National Voice." Consultation with the National Voice is a function of the Government of the day, not a multi-party committee, as I outlined earlier in this submission.

In relation to dot point 3, if the National Voice is created by Commonwealth legislation then the reporting mechanism back to Parliament should be the same as any other body created by Commonwealth legislation such as ACCC and ASIC.

Comments on the “PROPOSAL EXPLAINER : Potential for a National Voice Independent Indigenous Policy Body

Design features of a potential independent Indigenous policy body

The National Co-design Group considered proposed detail for an independent Indigenous policy body option. The body could be similar to the Productivity Commission in terms of independent policy research, inquiries and advice.

Both the National Co-design Group and the Senior Advisory Group considered the pros and cons set out above during stage one of the Indigenous Voice co-design process.

The majority view of the National Co-design Group was a preference not to support the option for an independent Indigenous policy body in the Indigenous Voice proposals. But they agreed the option should be included to allow further discussion and to seek community views.

The Senior Advisory Group did not support the option for an independent Indigenous policy body. The Senior Advisory Group was particularly concerned about perceived duplication with other existing bodies and the proposed National Voice. They also agreed that other elements of the proposed National Voice created the right framework without the need for a separate policy body. This includes the inclusion of an expert panel, a disability advisory group and a youth advisory group.

Comment

I note from the above that both the National Co-design Group and the Senior Advisory Group do not support the creation of an “independent Indigenous policy body” for various reasons. I agree with their views and consider it important to base policy more on feedback from all Aboriginal and Torres Strait Islander Australians, and not just a narrow spectrum of academics and activists, valuable as their opinions may be.