



Committee Secretary
Joint Select Committee on Constitutional Recognition
Relating to Aboriginal and Torres Strait Islander People
PO Box 6021
Parliament House
Canberra ACT 2600

By e-mail: jscr@aph.gov.au

5 October 2018

Dear Secretary

Thank you for the opportunity to make a supplementary submission to this Committee.

We make this submission in our capacity as members of the Centre for Comparative Constitutional Studies ('CCCS') and academic staff of the Melbourne Law School, University of Melbourne. We are solely responsible for its content.

This submission has been prepared on behalf of CCCS by Professor Adrienne Stone, Professor Cheryl Saunders AO, and Associate Professor Kristen Rundle.

If you have any questions relating to the submission, or if we can be of any further assistance, please do not hesitate to contact us.

Yours sincerely

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Centre for Comparative Constitutional Studies

Supplementary Submission to the Joint Select Committee Inquiry into Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples

5 October 2018

Introduction

The Centre for Comparative Constitutional Studies ('CCCS') is a research centre of Melbourne Law School at the University of Melbourne. We welcome the opportunity to make this supplementary submission to the Joint Select Committee on Constitutional Recognition of Indigenous People ('the Committee').¹

We offer this supplementary submission to aid the Committee's deliberations on **two questions**:

1. How the proposal for a First Nations Voice enshrined in the Constitution ('the Voice') might be developed in the aftermath of the Committee's inquiry, so as to ensure that it is fit for purpose and to maximise the chances of success at referendum; and
2. The implications of placing the amendment in a new chapter in the Constitution.

1. Developing the Voice proposal

(a) The need for further engagement

As it reaches the conclusion of its inquiry process, the Committee has before it many different suggestions for how the Voice might be envisaged and for the form of the constitutional provision that supports it.

However, neither Indigenous Australians, nor the wider Australian public, have had the opportunity to consider those different suggestions with a view to elaborating the concept of the Voice, and how it could operate in practice.

We note the expectation of the Referendum Council, which we share, that Indigenous peoples would be involved in the design of any model for the Voice and the supporting constitutional amendment.² It is also important that non-Indigenous Australians are actively involved in the decision-making process so as to ensure their ownership of the proposal and to deepen the significance of recognition. We are inclined to think that an Indigenous engagement process should take place first, to be followed by involvement of the broader Australian community.

¹ See also our written submissions of 15 June 2018 and 21 September 2018, alongside evidence given before the Committee by CCCS members Professor Cheryl Saunders and Professor Adrienne Stone on 6 July 2018 (Perth public hearing), Professor Adrienne Stone and Associate Professor Kristen Rundle on 18 September 2018 (Round Table, Canberra) and Associate Professor Kristen Rundle on 26 September 2018 (Melbourne public hearing).

² Final Report of the Referendum Council, 30 June 2017, p 30.

These two further rounds of public engagement, both Indigenous and non-Indigenous, should not engage with details of drafting. Rather, their purpose would be to resolve questions of significant principle that have not so far been examined in this way. We accept that these processes will take time, but we consider this to be justified by the high importance of these issues to the future cohesion of Australia.

From our perspective, it would be ideal if the Committee were to recommend constitutional recognition through the form of the Voice in principle, to be developed along the lines that we briefly sketch below.

(b) A model for further engagement

The Indigenous engagement process we propose would address the following five questions:

- 1. How should the Voice be constituted?**
- 2. How should the Voice work at the Commonwealth level (interaction with Parliament, the Executive and agencies of various kinds)?**
- 3. How, if at all, should the Voice work at the level of the States and Territories?**
- 4. How should the Voice interact with existing / evolving / future indigenous bodies, both regional and national?**
- 5. What are the implications of the answers to these questions for the terms of the constitutional amendment?**

To address these five questions, we recommend that a process comprised of the following stages be commenced in 2019.

Stage 1: Indigenous engagement

Indigenous groups and governance institutions operate primarily at the local and regional levels. Recognising this, the Referendum Council inquiry that led to the proposal for the Voice placed regional dialogues at its centre.

We recommend a further regional dialogues process on the questions stated above. The dialogues should be run along the same, highly successful lines as the earlier process and supported by advance provision of short, accessible briefing documentation on each of the questions. They should culminate in a collective meeting, to reach an agreed position.

Stage 2: Wider public engagement

The findings of the process conducted in Stage 1 would form the basis for a wider public discussion of the Voice in Stage 2, as a means of informing understanding, ensuring a dialogue and, if necessary, adjusting the model.

There are a number of ways through which this wider public engagement could be facilitated. One possibility is a Citizens' Assembly (or series of Assemblies) of the kind recently conducted in Ireland, for which the original Australian constitutional conventions were an early prototype. Another option would be a series of even more localised meetings around the country.

Stage 3: From principles to drafting

Stage 3 of the process would move from decisions on points of principle (indicated by Stages 1 and 2) to drafting a possible model for the Voice. This process would address both questions of constitutional drafting for the proposed amendment, and questions of legislative drafting necessary to establish and operationalise the Voice.

2. The implications of placing the amendment in a new chapter in the Constitution

We have recommended that any amendment to the Constitution be placed in a new Chapter, which we suggest should be Chapter IV.³ The advantage of this placement is that it leaves other Chapters undisturbed and is consistent with the current state of Australian constitutional law.

Specifically:

1. The High Court has recognised that the separate provisions of Chapters I, II and III give rise to an implication of separation of powers. This is the only ‘implication’ in the Constitution that relies upon the current structure of the Chapters. We therefore think it is advisable to leave these Chapters intact.
2. The two other ‘structural implications’ recognised by the High Court (the implication of representative and responsible government and the federal implications protecting the states and to a lesser extent the Commonwealth) are consistent with and would be untouched by an amendment in this form.

This understanding of the amendment could be further reinforced in a series of documents that surround the amendment including reports of this Committee and in any statement of the ‘Yes Case’. Such documents would be taken into account by the High Court on any relevant question of constitutional interpretation.

³ Centre for Comparative Constitutional Studies, Further Submission to the Joint Select Committee Inquiry into Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, 21 September 2018, p 7.