



Committee Secretary  
Joint Select Committee on Constitutional Recognition  
Relating to Aboriginal and Torres Strait Islander People  
PO Box 6021  
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21 September 2018

Dear Secretary

Thank you for the opportunity to make a further 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 the Directors, Professor Adrienne Stone and Associate Professor Kristen Rundle, with contributions from Professor Cheryl Saunders AO, Professor Kirsty Gover, Dr Shireen Morris, and with the assistance of Dr Anne Carter.

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

**21 September 2018**

**Introduction**

The Centre for Comparative Constitutional Studies ('CCCS') is a research centre of Melbourne Law School at the University of Melbourne. CCCS undertakes research, teaching and engagement in relation to the Australian constitutional system as well as comparative constitutional law.

We welcome the opportunity to make this further submission to the Joint Select Committee on Constitutional Recognition of indigenous People ('the Committee') in response to the Interim Report issued by the Committee in July 2018,<sup>1</sup> and our communications with the Committee at the Round Table held in Canberra on 18 September 2018.

**Summary**

In this submission we continue to endorse the proposal for a constitutionally enshrined Voice to Parliament as contained in the *Uluru Statement from the Heart (Uluru Statement)* and recommended by the Referendum Council. We make further submissions concerning the importance of this Voice to Parliament and the various mechanisms through which this Voice may be implemented. In particular, we make the following submissions:

**First**, we state the case for a **First Nations Voice to Parliament** (hereafter, 'the Voice') in terms of both the project of **constitutional recognition** and the importance of **consultation** to good public policy.

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<sup>1</sup> We wish to acknowledge that research assistance for the writing of this submission was supported by the Australian Research Council through the Laureate Program in Comparative Constitutional Law at Melbourne Law School.

**Second**, we make the case for the Voice to be **constitutionalised** and explain **why a legislated Voice**, even if intended as a preliminary step, **would jeopardise achievement of a constitutional Voice and thus the prospects of meaningful constitutional recognition**.

**Third**, we address the need for a **new chapter** of the Constitution to enshrine the Voice.

**Fourth**, we recommend a **'national' model** for enshrining the Voice in the Constitution, and propose a **draft provision** through which this national model could be included in the Constitution.

**Fifth**, we address some of the Committee's concerns about the scope, direction, and timing of the Voice's **advisory function**.

**Sixth**, we consider steps needed for a **successful referendum**.

**Seventh**, we outline steps which we consider important for the effective **implementation** of the Voice.

We are strongly of the view that further consultation with indigenous Australians is essential. For that reason, the proposals contained in this submission are **suggestive only**. Further consultation with indigenous Australians on each issue addressed will be imperative.

## **1. The Case for a First Nations Voice to Parliament**

### *1.1 A First Nations Voice as a Form of Recognition*

A First Nations Voice to Parliament forms a crucial aspect of the **recognition** of indigenous Australians. As explained in our First Submission, 'recognition' will be an important step towards a more just relationship between indigenous and non-indigenous Australians, as well as between indigenous peoples and the Australian State.

A Voice to Parliament was the participatory mechanism chosen by indigenous peoples in the landmark *Uluru Statement* in 2017. It has the advantages of being both symbolic and practical. As the *Uluru Statement* highlighted, the Voice will be a mechanism for **structural change**. It will provide a means by which indigenous Australians can be included and contribute to the

processes of Parliamentary democracy and will help to address the “torment of powerlessness” that was described in the *Uluru Statement*. To fail to deliver on a First Nations Voice would be highly detrimental in terms of the move towards recognition and the ongoing relationship between indigenous and non-indigenous Australians.

## 1.2 Consultation as an Aspect of Good Policy Making

The point of establishing a First Nations Voice to Parliament is to ensure that indigenous peoples will be **included and heard** in the making and administration of laws that directly affect them. This reflects the unique position of indigenous peoples within the Australian polity, and also reduces the risk that the Parliamentary process will be used to act upon indigenous Australians rather than to engage with them.

Effective consultation contains two aspects. First, it requires an **opportunity to be heard** and to make contributions to proposed laws and policies. Second, it requires that such contributions **have an effect** in terms of government decision-making. In this way, effective consultation can be viewed as an **aspect of good public-policy making**. Public policy that is grounded in genuine consultation is more likely to be properly informed and to be accepted by groups specifically consulted and the public more generally. The consultative mechanisms of the Voice, therefore, ensure that government policy is more likely to be accepted by Indigenous peoples across the country.

In Parts 4, 5, 6 and 7 below, we address the need for additional consultation with indigenous groups in relation to particular models for incorporating the Indigenous Voice to Parliament in the Constitution, as well as in the referendum and implementation processes. We also note that in our view the Voice should **not be regarded as an exclusive model of consultation**. Existing and emerging channels of consultation should be respected and not, unless sought by the relevant groups, collapsed into the channels provided by the Voice.<sup>2</sup> This is in keeping with models used successfully in Canada and New Zealand, where national pan-Indigenous representative bodies (the Assembly of First Nations and the New Zealand Maori Council respectively) complement but do not displace the relationships between traditional owner

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<sup>2</sup> Parliament of the Commonwealth of Australia, Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Interim Report* (July 2018) [hereafter, ‘Interim Report’], [3.64].

communities and governments. Local Indigenous groups should be consulted directly about matters that impact on their interests.

We also note the questions posed by the Committee in its Interim Report<sup>3</sup> with respect to when and how indigenous peoples should be consulted in relation to the co-design of the Voice. Among these questions is who should **oversee** this consultation. We suggest that this oversight could be done by a small group of persons drawn, for example, from participants from the Uluru convention aided, as appropriate, by technical experts.

## 2. The Case for the Voice to be Constitutionalised

As emphasised in our First Submission, we reiterate the importance of the proposed Voice to Parliament being **entrenched in the Commonwealth Constitution**.

Giving the Voice constitutional status is vital to ensure it meets its symbolic and practical potential. Symbolically, constitutional status is appropriate to the significance of the change. Practically, constitutional status ensures that Indigenous participation and consultation will be **protected** into the future. It thus provides the best foundation for meaningful **recognition**.

A **purely legislative mechanism**, without any constitutional status, would leave the Voice to Parliament vulnerable to changes in political will. For example:

- Without any constitutional provision for the Voice to Parliament, there is a risk that the body will be dominated by partisan political issues or will be **eroded entirely**. As outlined in our First Submission, the experience of ATSIC, and the institutional challenges it faced, underscores the importance of the Voice being constitutionalised.
- A purely legislative response would fail to capitalise on the unique and unprecedented **consensus** captured by the *Uluru Statement*. We addressed the conditions of this consensus in our first submission.<sup>4</sup> The significance of this moment in Australian

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<sup>3</sup> Interim Report at p 123.

<sup>4</sup> Centre for Comparative Constitutional Studies, Submission to the Joint Select Committee Inquiry into Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples (15 June 2018), [1.2], [2.2], [2.4].

history suggests that constitutional change should be prioritised. The political will for constitutional change may fluctuate over time, and a failure to deliver on the promise of the *Uluru Statement* may lead to a further erosion of trust between Indigenous and non-indigenous Australians, and between indigenous Australians and the institutions of Australian Government. The **constitutional moment** created at Uluru must be seized upon.<sup>5</sup>

- The suggestion to adopt a legislative model as a preliminary step, with a view to later constitutional entrenchment is highly impracticable and will likely greatly complicate the task of achieving constitutional recognition. Following legislative enactment, there is a **high risk that the Voice will never be constitutionalised for the following reasons:**
  - **First**, once legislation has been passed there may be little political incentive to pursue constitutional change, and the momentum of the *Uluru Statement* may have passed.
  - **Second**, once a legislated body is operating, the task of achieving the kind of consensus will be complicated by the inevitable political contestation that attends the action of all governmental bodies, even the most successful and high functioning. It will be very difficult to separate the argument for a Voice from political contestation about particular positions taken by the Voice.
  - **Third**, comparative experience also shows that it is rare for an institution to be constitutionalised *after* it has been established by legislation.<sup>6</sup>

It is highly unlikely therefore that a legislative Voice would be a constructive preliminary step. It would likely signal a **permanent end to prospects for a constitutional Voice.**

Finally, we reiterate the widely made point that a constitutional Voice is the best way of guaranteeing its independence and longevity and of **effecting meaningful structural change**

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<sup>5</sup> Centre for Comparative Constitutional Studies, Submission to the Joint Select Committee Inquiry into Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples (15 June 2018), [1.2].

<sup>6</sup> Contrary to a suggestion to the Committee Roundtable on 18 September 2018 by Associate Professor Matthew Stubbs the Canadian Charter of Rights and Freedoms ('Charter') is not a constitutionalised form of the prior legislative Canadian Bill of Rights (CBOR). On the contrary, the Charter takes a very different form from the CBOR, and part of the rationale for the Charter was the widely perceived failure of the CBOR.

in the relationship between indigenous Australians and our governing institutions.<sup>7</sup> Government will have considerable latitude in the way it responds to the Voice. What is important is that the **channel itself will be constitutionally guaranteed**. This guarantee is a crucial step towards remedying the ‘torment of powerlessness’ underscoring the demand of the Uluru Statement for a structural solution to a structural problem.

### 3. A New Chapter for the Constitution

We recommend that a new chapter should be added to the Constitution to house the provision which establishes the Voice. The placement of the Voice in a new Chapter appropriately recognises the structural nature of this reform.

Two options might be considered:

**Option 1:** Insert a new **Chapter 1A**, directly following the end of the current Chapter 1.

**Option 2:** Insert a new **Chapter 4**, and renumber current Chapters 4, 5 and 6 of the Constitution as Chapters 5, 6 and 7.

Our preference is for a **new Chapter 4**, to preserve the integrity of the organisational structure of Chapters 1-3.

### 4. Enshrining the Voice in the Constitution

The proposals contained in this Part are suggestive only. None are intended to displace proper consultation with indigenous Australians on each question.

#### 4.1 *The model*

Two broad methods through which the Voice may be provided for in the Constitution have been proposed in deliberations so far. The first is a **‘national’ model** that would enshrine single, national First Nations entity in the Constitution. The second is a **‘local / regional’ model**

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<sup>7</sup> Centre for Comparative Constitutional Studies, Submission to the Joint Select Committee Inquiry into Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples (15 June 2018), [3.3].

that would enshrine local and/or regional First Nations entities in the Constitution, rather than a national entity.

Subject to the views of indigenous peoples, we think that the **national model** would have the advantage of simplicity of structure. The national character of the Voice would mean that it is representative of First Nations across the country. It could be **connected to local and regional First Nations groups** through procedures outlined in legislation and developed by the Voice in partnership with local and regional First Nations groups. This would enable a **multiplicity of First Nations voices** to be expressed through the Voice.

Provided that it is designed in a way that ensures the participation of local and regional groups, including existing groups, **we would recommend this structure**. On balance, it seems the most straightforward approach. The question for institutional design becomes how best to facilitate the ‘channelling’ and ‘funnelling’ functions of the Voice between the constitutional and legislative mechanisms through which it is established and given operation. We recommend **keeping the constitutional details minimal** and elaborating the **key operational details through legislation**.

In preferring the national model, we note that decisions affecting Aboriginal and Torres Strait Islanders, for which consultation is desirable, are taken by the Commonwealth Parliament and the Commonwealth government, as well as and by the governments of the States and Territories. The primary focus of the proposal for a Voice is in relation to decisions of the Commonwealth Parliament and, by extension, the Executive government responsible to that Parliament. We further address the limitations of Commonwealth power in Part 5. The point for present emphasis, however, is that we envisage the role given to the national Voice would see it operate in a way that draws, as appropriate, on the views of First Nations peoples in local and regional groups. The **procedures developed** by the Voice for this purpose could extend the **advantages of consultation to States, Territories and local government** as well. In this way, the Voice offers an opportunity for empowering indigenous Australians in their relationships with government at *all* levels, federal, state, regional and local.



#### 4.2 *The constitutional provision*

We have reviewed the proposals put forward by Professor Anne Twomey and Professor Rosalind Dixon. However, we wish to draw the attention of the Committee to a 2015 formulation proposed by Allens Linklater, which was further amended by **Dr Shireen Morris** in her submission to the Committee's present inquiry:<sup>8</sup>

There shall be a First Peoples Council established by Parliament to advise Parliament and the Executive on proposed laws and other matters relating to Aboriginal and Torres Strait Islander peoples under procedures to be determined by Parliament, and with such powers, processes and functions as may be determined by Parliament.

We highlight **two important features** of this model:

- It extends the Voice's advisory function to the Executive as well as the Parliament, which we consider essential: we return to explain the importance of this in Part 5, below.<sup>9</sup>
- The inclusion of the phrase 'proposed laws' signals the non-justiciability of the provision. The phrase 'and other matters relating to' also safeguards a possible extension of the Voice's advisory role to the post-legislative stage (see further Part 5).

We however prefer the phrase '**First Nations Voice**' to 'First Peoples Council', as this was the language reflected in the *Uluru Statement*. Incorporating this minor change, the provision could read:

There shall be a First Nations Voice established by Parliament to advise Parliament and the Executive on proposed laws and other matters relating to Aboriginal and Torres Strait Islander peoples under procedures to be determined by Parliament, and with such powers, processes and functions as may be determined by Parliament.

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<sup>8</sup> Dated 11 June 2018.

<sup>9</sup> See further our discussion in section 5, below.

### 4.3. General observations on design

We also offer the following **general observations** that bear upon the design of the Voice:

**First**, in settling the **detail** of the model, and the **wording of the proposed constitutional provision**, it is imperative that **further consultation** with indigenous groups be conducted. The ultimate design of the Voice must be led by indigenous Australians at each stage.

**Second**, the **role assigned to existing indigenous organisations** must be given careful consideration and tailored to existing arrangements and capabilities.<sup>10</sup> In some instances this might require the development of new capabilities within these organisations.

**Third**, in keeping with the Committee's observation in its Interim Report that the participation of local or regional voices must be 'designed to local needs and cultural priorities',<sup>11</sup> the Voice itself must be given powers determine the features of its internal procedures.

**Fourth**, as stated in our first submission:

- Details for the implementation of the Voice should be left to Parliament to enact through *legislation*;<sup>12</sup>
- The implementation of the Voice should be *non-justiciable*;<sup>13</sup>
- The Voice's function should be advisory only and therefore *non-binding*. It should not have any veto power.<sup>14</sup>

## 5. The Voice's Advisory Function: Scope, Direction and Timing

In this Part we address a number of questions raised by the Committee in its Interim Report about the scope and other details of the Voice's advisory function.

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<sup>10</sup> This issue preoccupied considerable space in the Interim Report: see especially pp 61-84.

<sup>11</sup> Interim Report, p 121.

<sup>12</sup> See further Part 5, below.

<sup>13</sup> Centre for Comparative Constitutional Studies, Submission to the Joint Select Committee Inquiry into Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples (15 June 2018), [5].

<sup>14</sup> Centre for Comparative Constitutional Studies, Submission to the Joint Select Committee Inquiry into Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples (15 June 2018), [4.1].

### 5.1. *The Voice's advisory function: Parliament*

The reference to 'proposed laws'<sup>15</sup> covers **bills before the Commonwealth Parliament**. This would clearly include laws supported by s 51(xxvi) and s 122 of the Constitution and proposed laws of general application likely to have a significant or disproportionate impact on indigenous Australians.

**Scope of Advice:** The advisory function of the Voice to Parliament should:

- Not depend on the invitation of Parliament: the advisory function should be **self-initiating**.<sup>16</sup>
- Be provided **on the initiative of the Voice**: advice-giving should not be mandatory;
- Available to **all parliamentary institutions** (the House of Representatives, the Senate, and particular Committees);
- **Contributed** to the decision-making process from an **early stage** in policy formulation: for example, through requirements to include reference to the views of the Voice in submissions to Cabinet for new legislation, and additions to the terms of reference for relevant Senate Scrutiny committees (see further 5.2, below).

**Levels of Government:** We acknowledge that some of the legal arrangements that bear most heavily upon indigenous Australians, such as the criminal justice system, are usually matters of **State** jurisdiction. A national Voice established to perform an advisory function to the Commonwealth Parliament will not have direct influence on matters that lie within the legislative competence of the States. However, we also note the following:

- The Commonwealth should consult the Voice on questions relevant to First Nations peoples being handled through **intergovernmental arrangements**, including funding arrangements.

**Procedures:** Among the procedural devices that need to be considered to make the Voice's advisory function to Parliament effective include:

- Whether advice should be **tabled** before the Parliament;

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<sup>15</sup> See the formulation of the possible constitutional amendment outlined in Part 4, above.

<sup>16</sup> In making these points we address questions raised by the Committee at p 119 of the Interim Report.

- Whether representatives of the Voice should have the capacity **to address** the Parliament (on its invitation or otherwise);
- The need for **trigger mechanisms** to ensure that the Voice is notified of relevant bills proposed to come before the Parliament;
- Provision for an **appropriate timeframe** within which to provide advice that accommodates the role of the Voice as a channel for a multiplicity of First Nations voices that might seek to be heard on a proposed law, at the same time as respecting the demands of the parliamentary timetable.

### *5.2. The Voice's advisory function: Executive (policy-making)*

As indicated in the formulation of the possible constitutional provision that we proposed in Part 4, it is our strong view that the wording any constitutional provision through which the Voice might be established and guaranteed should refer explicitly to **'Parliament and the Executive'**. Effective consultation requires an advisory function at the **policy-making stage**. This should extend to including advice from the Voice in **Cabinet submissions** for proposed new laws.

Referring explicitly to 'the Executive' in the constitutional provision is designed to ensure the consultation of indigenous Australians before the introduction of any proposed laws before the Parliament. Specifically, consultation at this stage will be both preventative and proactive. It will enable the identification of problems for indigenous peoples at the policy-making stage and prevent problems arising before matters reach the parliament.

Legislation could address the procedural and other measures necessary for the Voice's advisory function to the Executive. The same procedural mechanisms as would be needed for the Voice's advisory function to Parliament.<sup>17</sup>

The connection between the advisory function of the Voice with respect to bills before the Parliament and its advisory function with respect to policy-making must be emphasised. Each requires the other. Only if **both of these channels of advice are secured** could understandings reached at the policy-making stage be properly reflected in the legislative drafting stage.

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<sup>17</sup> For an extended formulation, see the bullet points at 5.1, above.

### 5.3. A secondary function? The Voice and monitoring administration

We submit that consideration should also be given to a role for the Voice in **monitoring the administration of laws** likely to have a specific or disproportionate impact on indigenous Australians relative to other Australians.

The need for this ‘secondary function’ arises from the **link between policy-making and administration**. For example, monitoring of the administration of laws affecting indigenous Australians may prove crucial to the identification of issues that could benefit from further investigation at the policy-making stage for proposed new laws. Monitoring could also expose the need for reform of administrative arrangements that might require only non-legislative change.<sup>18</sup>

To enable this secondary function for the Voice, the **constitutional provision** should refer to both ‘proposed laws’ and ‘other matters relating to Aboriginal and Torres Strait Islander affairs’ (or similar phrase). This will indicate that the Voice’s advisory function might extend into the post-legislative stage, a matter for final determination by Parliament.

## 6. The way forward to a successful referendum

A successful referendum will require at least:

- a **technically sound** proposed amendment;
- **sufficient support** within the indigenous community; and
- widespread and preferably bi-partisan **political mobilisation** and support before the referendum in a manner that to ensure understanding of the proposal by the community as a whole at all levels of government and by the community

We consider it also desirable that there be **draft legislation to accompany** the proposal.<sup>19</sup>

Further, we consider it essential that measures be adopted to supplement the requirements

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<sup>18</sup> We note that the extent to which establishing the Voice will require redevelopment of capabilities and transformation of relationships across government systems was acknowledged by the Committee in its Interim Report at [2.41]-[2.43]. See also [3.74].

<sup>19</sup> See Interim Report, [7.34].

of the *Referendum (Machinery Provisions) Act 1984*. In particular, given the subject matter of this amendment, **preparation of the Yes / No case must include proper input from indigenous groups**. In our view, nothing in section 11(2) of the Act suggests any obstacle to this input. The section requires only that the Yes / No case be ‘authorised’ by the Parliament.

## 7. Steps for Implementation

A successful referendum will place considerable political and moral pressure on Parliament to create the Voice that would follow a successful referendum.<sup>20</sup> On **more specific steps** that would be needed to ensure effective implementation of the Voice, we note the following:

- There must be extensive **availability of information** about the Voice’s role, functions and operating procedures to ensure understanding at all levels of government and by the community;
- There must be **cultural change** at all levels of government;
- **Extensive consultation** with respect to the enactment of **legislation** to give the Voice operation will be required;
- **Oversight of the implementation process**<sup>21</sup> by a group of persons that include appropriate representation from indigenous communities and which are not dominated by Executive government actors would be appropriate;
- The Voice should also be able to **devise its own procedures** to support its functions;
- Any **representative** features of the implementation process must be determined by indigenous peoples;
- The potential for **existing indigenous governance institutions** to contribute to the functioning of the Voice should be closely examined and embraced where appropriate;<sup>22</sup>
- **Proper funding and staffing** of the Voice will be imperative.

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<sup>20</sup> See our extended submission on this point in our First Submission: Centre for Comparative Constitutional Studies, Submission to the Joint Select Committee Inquiry into Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples (15 June 2018), [5].

<sup>21</sup> We respond here to the Committee’s question at p 123 of its Interim Report: ‘Should there be a body tasked with overseeing the implementation of the Voice (local, regional, or national)? If so, what structure and responsibilities should it have? How would it be created?’

<sup>22</sup> See also our points on the role of existing organisations in Part 4, above.