Senator Patrick Dodson and Mr Julian Leeser MP (Chairs)
Joint Select Committee on Constitutional Recognition
Relating to Aboriginal and Torres Strait Islander Peoples
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Dear Committee Members,

We present this submission jointly, as postgraduate law students at Monash University (City Campus). We firstly acknowledge that we live, work, study and travel on the traditional lands of the Kulin Nation in Naarm (Melbourne), and pay our respect to the Boonwurrung/Bunurong and Woiwurrung/Wurundjeri peoples who are the Traditional Custodians of this place. We acknowledge that this land has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.[1]

Australian Political and Legal Framework

Before we proceed it is important to acknowledge the inherent power imbalance created by and upheld by the Australian legal system in place today. Broadly speaking, the Australian public is not versed sufficiently enough in this legal and political history - and so any constitutional or legislative discussion needs to be understood in the context of unequal power relationships and educational biases. Many people in contemporary Australia, politicians included, have benefitted for generations from a system that has privileged white institutions[2] (namely as by-products of the British Government who colonised Australia).

The Hon. Michael Kirby (Justice of the High Court of Australia 1996-2009) points outs that "it is a sombre reflection on the limitations of legislative democracy, as it has operated in Australia, that none of the elected parliaments, colonial, state or federal, saw fit, during the long drought of the law, to repair and correct fully the fundamental legal principle that stood in the way...to enforce the hypothesis of *terra nullius*...that action was taken not by elected parliaments of the Australian nation [but] by a majority of Justices of the High Court of Australia."[3] We, as a nation, are now at a decisive moment and have the opportunity to remedy (in part) these past injustices through legislative and constitutional reform.

We note that Aboriginal and Torres Strait Islander peoples took no part in the formation of the Australian Federation in 1901. In 1967, the constitutional amendments removed offensive provisions aimed at excluding Aboriginal and Torres Strait Islander peoples, however they did nothing to form an inclusive approach to future governance and decision-making processes and did little to change the racist views that existed at the formation of the Federation (and that influenced the document as a whole). As a way forward, the *Uluru Statement From The Heart* (June 2017) presents recommendations to remedy this and should be reconsidered.

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[1] *Uluru Statement From The Heart* (National Constitutional Convention, 2017).

[2] R Maxwell, *Report: Change how we define Indigenous people (Koori Mail, Ed 677, 30/5/18*), p.6.

[3] M Kirby, Foreword, in V Marshall, *Overturning Aqua nullius: Securing Aboriginal Water Rights,* (Aboriginal Studies Press, 2017), pp.vi-vii.

International Standards

The Declaration on the Rights of Indigenous Peoples (UNDRIP) affirms the minimum standards for the survival, dignity, security and well-being of Indigenous peoples worldwide. The UNDRIP was adopted in 2007 and the Australian Government announced its support of the Declaration in 2009 but little (if any) action has been taken.

Presently, Australia has not fully incorporated this document into Australian law, but it is nevertheless among the leading human rights documents supporting standards regarding Indigenous Peoples (along with the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights - both of which represent the international legal standard of human rights in international law).[4] Indigenous peoples have the right to participate in decision-making. This is an integral part of the right to self-determination, which is an international legal principle 'of the highest order',[5] reflected in its status as customary international law. The right to self-determination also features in key human rights treaties and declarations, including the ICCPR and the ICESCR, as well as the UNDRIP.

In order to give effect to this right, several democratic states already have in place representative mechanisms, allowing Indigenous peoples to have a voice to parliament. For example, in New Zealand, the Maori have had legislatively guaranteed representation in parliament since 1867. The number of Maori seats in parliament varies with the proportion of Maori registered on the Maori electoral roll, and anyone of Maori descent is eligible to vote for Maori seats. This promotes political representation from the Maori people themselves within parliament. Also in place is the New Zealand Maori Council which is a representative and consultative body for Maori people.

Similarly, in Norway, Sweden and Finland, the Sami people are accorded a political status and right to participate in political decision-making through Sami Parliaments. These 'parliaments' are a form of consultative assembly or representative advisory body which is granted special responsibilities relating to Sami matters, such as managing of Sami schools and language projects. It also reviews and reports on Sami conditions.

Past Recommendations

We also note that the Committee has been given the task of considering the recommendations of a number of bodies and committees, going back to 2012, and we hope that the committee seeks to implement constitutional reform that is relevant, responsive and respectful of our First Nations' voices first and foremost - and that which are not merely of recognition or symbolic in nature. However, prior to these reports under consideration, there has been a long history of Indigenous and non-Indigenous people calling for such reform which should not be overlooked. This includes (but is not limited to):

- Aborigines Conference (1938)
- Referendum and preceding campaigns (1967)
- Barunga Statement (1988)
- Constitution Commission's Report (1988)

[4] M Castan, *Constitutional Recognition, Self-Determination and an Indigenous Representative Body,* (Indigenous Law Bulletin vol 8, issue 19, 2015) p.15.

[5] S James Anaya, Indigenous People in International Law (Oxford University Press, 2nd ed, 2004), p. 97.

- Social Justice Package submissions for Aboriginal and Torres Strait Islander Commission, *Recognition, Rights and Reform: Report to Government on Native Title Social Justice Measures*; Council for Aboriginal Reconciliation, *Going Forward – Social Justice For The First Australians* (1995)
- Referendum on the preamble of the Constitution (1999)
- Council for Aboriginal Reconciliation Report (2000)
- 2020 Summit (2008)
- Social Justice Report (2008)
- Australian Human Rights Commission Submission to the National Human Rights Consultation (2009)

Constitutional Recognition and Structural Reform

In 2017, the Referendum Council built on the work by the Expert Panel and the Joint Select Committee, maintaining that any proposed reform should:

- Contribute to a more unified and reconciled nation;
- Be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples;
- Be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums; and
- Be technically and legally sound.

When the proposed reforms were introduced at the National Constitution Convention in 2017, delegates were asked to consider the proposals alongside an additional 10 Guiding Principles for constitutional reform.[6] These 10 Guiding Principles were underpinned by key international human rights instruments, as well as previous requests made by First Nations.[7] The subsequent Uluru Statement from the Heart would appear to meet these principles.

We regret that the Uluru Statement has been met with objections from the current government. We highlight the work of Shireen Norris, who has considered these objections, and responded in turn by pointing to the Uluru Statement's strengths.[8]

First and foremost, the Uluru Statement has been put forth with the broad and unprecedented consensus and support of representatives of Aboriginal and Torres Strait Islander communities.

Further, the Uluru Statement from the Heart proposes a legally sound Voice to Parliament, which does not amount to a third chamber of Parliament.[9] A constitutionally enshrined First Nations Voice to Parliament would consist of an Indigenous representative body that operates outside Parliament and Government. This voice would offer an opportunity for First Nations to respond to laws and policies that exclusively and/or disproportionately affect the lives of Aboriginal and Torres Strait Islander peoples.

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[6] Referendum Council, *Final Report of the Referendum Council* (30 June 2017), p. 22.
[7] Ibid.
[8] S Norris, False Equality, in S Norris (ed), *A Rightful Place: A Roadmap to Recognition* (Black Inc, 2017), p. 209.
[9] A Twomey, *Submission on the Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples* (25 May 2018).

Another strength of the Voice to Parliament is that it is true to the pragmatic nature of the Australian Constitution. Norris has further illustrated this point, by highlighting its capacity to mediate different interests within a unified nation through checks and balances, to create a democratic system where minority voices are heard.[10] The Voice to Parliament is a necessary structural reform that would begin to address historical wrongs, and empower First Nations to meaningfully participate in Government processes that affect their lives. To include a First Nations voice would rectify their omission in the original drafting process, and begin to strengthen our unity as a nation.[11]

It bears repeating that Australia profoundly lags in meeting international obligations with respect to Indigenous rights. There are several countries that Australia could turn to for a clear illustration of how successful this reform could be – comparable democracies with substantial Indigenous populations, which uphold and protect the right to self-determination, and to participate in the nations democratic processes through a guaranteed First Nations voice.[12]

A First Nations Voice to Parliament is a modest proposal, which moves away from emotional and symbolic words, in favour of practical change.[13] The proposed Voice to Parliament would help create a fairer relationship, and would be a step in the right direction of ensuring substantive equality for all Australians. We support the opportunity for Australia to become a democracy that constitutionally recognises the cultural and spiritual sovereignty[14] of First Nations peoples, and guarantees their inherent rights and unique status,[15] to have a say on laws and policies that affect their interests.

Concluding Remarks

As noted by Megan Davis, the Uluru Statement was addressed to the Australian people, not Australian politicians.[16] As Australians, we support the Uluru Statement's three reforms for meaningful recognition – Voice, Treaty and Truth. In a referendum, we would vote in support of a constitutionally enshrined First Nations Voice to Parliament, and the establishment of a Makarrata Commission to oversee treaty-making and truth-telling, and we believe that a vast majority of Australians would do the same.

Sincerely,

Libby Gott
Emily Domingo
Sally Shera-Jones

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[10] S Norris (2017) above n8 at 221.
[11] S Norris (2017) above n8 at 222-223.
[12] S Norris (2017) above n8 at 231.
[13] S Norris (2017) above n8 at 230.
[14] The Uluru Statement from the Heart, 2017.
[15] S Grant, in S. Norris (ed), *A Rightful Place: A Roadmap to Recognition* (Black Inc, 2017), p. 252.
[16] M Davis, The Long Road to Uluru, in J. Schultz and S. Phillips (eds) *Griffith Review Edition 60: First Things First* (April 2018).