

## **Submission in response to the Interim Report in regard to the proposed Consultative Council for Aboriginal People<sup>1</sup>**

Prof Bertus de Villiers (Law School, Curtin University)

### **Introduction**

This supplementary submission is in repose to the questions identified by the Committee in its Interim Report. Due to the limited time available to make the submission, there will not be in depth arguments about the merit of specific proposals. The response is made in *italics* to facilitate reading. If, however, the Committee wishes to receive additional information to explain the merit of each response or to refer to relevant case studies please do not hesitate to contact me. This input must be read with my previous submissions.

### **Questions to answer**

#### ***Function and operation***

- 1 What is the role of a national voice? How does it intersect with or differ from the role of any local/regional voice? *The national voice should be constrained by issues of national importance to the indigenous community as a whole. Jurisdictional conflicts where the national Voice may be in conflict with regional and local arrangements by indigenous people should be avoided. The principle of ‘subsidiarity’ should apply, namely that issues are resolved at the lowest possible level. The federal nature of Australia makes it ideal that the respective states and territories develop their own local recognition framework that suits their circumstances. This will also facilitate and encourage experimenting.*
- 2 What powers and functions should the national voice have—only advice on laws made under section 122 and section 51(xxvi) or broader policy issues? *Advise in regard to any matter that affects indigenous laws, culture and traditions as well as any matter in regard to which advice is sought or self-initiated advice. If the scope for obligatory referral is too wide, the Voice may become highly political and drawn out in its deliberations.*
- 3 Which legislation should the voice have the power to advise on? *There should be no enumerated list of legislation, rather general principles including a catch-all power that enables the Voice to given self-initiated advices. The time allowed for advices should not be statutorily prescribed because it may be too rigid and give rise to litigation. The Voice will fail or succeed based on the political culture of those involved, not due to legal prescriptions and litigation.*
- 4 How should issues of justiciability (challenge in the courts) be dealt with? *It should be made clear that the sovereignty of parliament is not impaired by any advices received or advices not sought.*
- 5 What matters should the national voice not deal with? *The matters on which its advice must be sought must be established by general definition and not by an enumerated ‘list’. A general catch-all powers could be for the Voice to give advice in regard to any other matter that impact on the laws, culture or customs of indigenous peoples. The foregoing will ensure that the Voice can self-initiate advice even if it is not called upon for advice.*

---

<sup>1</sup> 6 August 2018.

- 6 Should the voice be responsible for service delivery? *No. The Voice should not have its own executive arm. It may, however, in future develop a service capacity but that should be as a result of advices rather than at start-up.*
- 7 Should the voice have a say on the provision of services by government (state, territory, and local governments)? *Yes to the extent that the matter is not being dealt with at a state level. The principal role of the Voice should be in regard to matters within the domain of the federal parliament and government.*
- 8 Should the voice have the power to review government expenditure? *No, unless it forms part of its general advisory function. It must be unambiguous that the Voice is not a third chamber; a chamber of review; or a formal check and balance (legally justiciable) on the legislative or executive authorities.*
- 9 Should the voice have the power to self-initiate inquiries? *Yes.*
- 10 How could the voice review programs and service delivery? *Yes.*
- 11 How should the voice interact with the Parliament in a transparent, accountable manner representing the views of Aboriginal and Torres Strait Islander peoples across Australia? Should the advice from the voice be binding or advisory only? *The advices should be 'advices' and not binding in any way. No Act of Parliament may be challenged or reviewed on the basis of an advice not sought; not given; or given and not considered or not adhered to. See my previous submission in regard to ways in which the Voice can speak in parliament and submit reports to parliament.*

### **Structure and membership**

- 1 Who should be able to choose national representatives? *All persons who identify themselves as indigenous – no separate voters roll or identification required.*
- 2 By what process should they be chosen? *Candidates must be nominated with certain number of signatures to confirm they are indigenous. A limited period could be allowed for objections.*
- 3 How long should members serve? *Same term as federal parliament to ensure elections coincide. This will enhance participation in the elections.*
- 4 How does the voice ensure equal representation of men and women? *Not by legal prescription, but as a directive principle.*
- 5 How does the voice ensure both young people and elders are heard? *Not by legal prescription, but as a directive principle.*
- 6 What duties should such representatives have to their constituents? *This is not a parallel parliament. Accountability should reflect the 'advisory' nature of the Voice. There should be no formal 'duties' towards constituents other than a sincere effort to reflect their views and opinions. Note there is legal obligations – other than regular elections – that binds a member of parliament to represent the views of constituents.*
- 7 Should the voice have the power or obligation to conduct consultation or inquiries? *Yes for power; no for obligation.*
- 8 What mechanisms can be used to promote the active participation of Aboriginal and Torres Strait Islander peoples in the voice at the national level? *Regular elections; annual report to parliament; participation in committees; right to address federal parliament.*
- 9 How can local voices be effectively represented at the national level? *This body will not be a 'representative' voice as in a legislature. Representation and accountability must therefore be seen within the advisory functions of the Voice. It is essential that indigenous people are not removed (de facto) from the general political process as a result of the Voice.*

- 10 How should the national voice interact between existing representative bodies, in particular local/regional bodies and community-based organisations? *The principle of subsidiarity would ensure that local and state issues are addressed at those levels. The members of the Voice can liaise with interest groups, including PBC's, but no need for prescription or formal consultation.*
- 11 How would the voice interact with national Indigenous organisations with expertise in areas such as health, housing, and education? *By way of consultation and discussions – no need for prescription. It is essential that this body is **not seen** as a 'super-voice' that speaks for all indigenous people on all issues.*

### ***Establishment and implementation***

- 1 What is the relationship between the national voice and the local/regional voice? *Informal. The principle of subsidiarity would ensure that local and state issues are resolved at those levels and that the national Voice only give advices on national issues that affect indigenous people.*
- 2 What is the relationship between the national voice and the Minister for Indigenous Affairs, and other members of the Executive? How will it work? *There is no need to formalise the relationship. Once the Voice is established the political will of political leaders will determine its success or failure. The Voice may in appropriate circumstances form part of intergovernmental bodies, but this should not be prescribed.*
- 3 What is the most cost effective way the voice can be implemented? *As an advisory body without executive functions and a budget for consultations.*
- 4 What is the relationship with state, territory, and local government?
  - a. Should the voice have the power to advise the Council of Australian Governments? *Yes, there is no reason why the Voice should not as an important body be able to give advice to all levels of government and to policy bodies that impact on the lives of indigenous people. Care should be taken that the Voice does not impede on local relations between indigenous people and state and local authorities.*
- 5 Should the national voice be in the Constitution? If so, what should the Constitution say? *No. Please see my original submission in which I highlighted 8 reasons why the Vice should be created by statute and not by the Constitution.*

### **Local and regional voices**

#### ***Function and operation***

- 1 What is the role of a local/regional voice? How does it intersect with or differ from the role of the national voice? *Local and state-based voice should be unique to those jurisdictions and should not be prescribed by federal legislation.*
- 2 What powers and functions should a local/regional voice have? What matters should they not deal with? *This is a matter for local and state authorities.*
- 3 What is the relationship between the local/regional and national voices? *Only informal. It may be that joint working committees or joint consultation is established, but this should be spontaneous rather than as the result of prescription.*
- 4 What is their relationship with state, territory, and local government? *Only informal. At a later stage the relationship may become more structured, but for sake of simplicity and to 'get things going' it is proposed that the national Voice stands on its own legs.*
- 5 Should the voice be responsible for service delivery? *No.*

- 6 Should the voice have a say on the provision of services by government? *Yes, as an advisory body.*
- 7 What are the governance mechanisms that oversee local and regional voices? *The state and local voices can function in accordance with their mandate. The national Voice should be aimed at national issues and policies. A conflict of jurisdiction and 'battle for turf' between national and state voice must be averted. The national legislation could anticipate state-based 'voices', but should not prescriptive the composition, nature or functions thereof.*
  - a. Should there be an adaptable national template of model rules for organisations to adapt? If so, what should they look like? *No. In light of the federal nature of Australia it is best to allow and encourage experimenting at state and local levels. There is no one size fits all approach available.*
  - b. How are internal disputes resolved? *By informal mediation; elections and negotiations. A minimalist rather than a maximalist approach in institutional design is recommended.*
  - c. If members of the voice act in a way as to bring the voice into disrepute, what is the procedure for removing them? *The Voice can have internal rules to deal with this issue.*
- 8 Should the local and/or regional voice have the right to provide advice direct to the Commonwealth Parliament or Australian Government? *Yes. As an advisory group advices can be made to government or to parliament. That is consistent with the current democratic practices of Australia. The Voice is, however, not an additional chamber of parliament.*
- 9 Should local voices have broader roles than just providing advice? *No. And even if they do, it is a matter for the local and state authorities – not for the national Voice.*

#### **1 *Structure and membership***

- 2 How should a local or regional area be determined? Are there any existing boundaries that could be used? *Ideally regions should be used that are generally accepted by indigenous communities.*
- 3 How could local/regional voices be constituted to best represent the traditions, practices and interests of local communities? *Local and regional voices must be for the relevant states and territories to organise.*
- 4 Is there one model to serve as a template or should each voice be designed to local needs and cultural priorities? *No.*
- 5 Should the local and regional voices be existing bodies with a new mandate or should they be new bodies? *The national legislation should not prescribe local or regional matters. National legislation may anticipate state-based 'voices', but without prescribing their composition, functions or powers.*
- 6 How should the local voice interact between existing representative bodies, in particular local bodies, such as native title bodies? *See above.*
- 7 Who should be able to choose local/regional representatives? *See above.*
- 8 By what process should they be chosen? *See above.*
- 9 How long should members serve? *See above.*
- 10 How do the voices ensure equal representation of men and women? *See above.*
- 11 How do the voices ensure both young people and elders are heard? *See above.*

#### ***Establishment and implementation***

- 1 What should the relationship be between local/regional voices and the Commonwealth Parliament and Australian government? *Only informal.*

- 2 What is the relationship with state, territory, and local governments? *Only informal.*
- 3 What resources would be required for effective operation of local or regional voices? *To the discretion of states and territories.*
- 4 What is the most cost effective way the voice can be implemented? *Let each state voice develop its own dynamics; consultations; etc. Do not attempt to prescribe or to design a national system.*
- 5 Should the local/regional voice be entrenched in the Constitution? If so, what should the Constitution say? *No. See above.*

### **General**

- 1 What is the most appropriate and effective means for constitutional recognition of Aboriginal and Torres Strait Islander peoples? *Through an Act of Parliament.*
- 2 Should The Voice (local, regional, or national) be constitutionally entrenched, enacted by legislation, both, or either? Why? *See my previous submission in which I set out 8 reasons why constitutional entrenchment should not be pursued.*
- 3 What order should the implementation of The Voice (local, regional, or national) proceed?
  - a. Should a referendum or statute to establish The Voice (local, regional, or national) come first? *No – parliament can enact a law.*
  - b. Should consultation to co-design The Voice (local, regional, or national) precede or follow legislation or a referendum? *Parliament can invite further submissions but then it must enact a law. Amendments can always be made. Getting the process underway is more important than achieving perfection.*
  - c. Should some provision be made in relation to the possibility of an unsuccessful referendum? *No referendum is recommended.*
  - d. What benefits and challenges do these alternative approaches present? *See my original submission.*
- 4 What should a constitutional provision for The Voice (local, regional, or national) encompass? Why? *If there is a constitutional amendment it should not create institutions but only recognise indigenous people as the original occupiers of the land called Australia but no substantive Voice should be in the Constitution (for reasons explained previously).*
  - a. Should it acknowledge the unique status of Aboriginal and Torres Strait Islander peoples, their enduring presence, languages, cultures, and heritage? If so, how?
  - b. Should it ensure the non-justiciability of the structure or function of The Voice? How could it do this and why is it important?
  - c. Should it describe the structure and functions of The Voice? Why?
  - d. What provision should it make for possible local, regional, and national elements of The Voice?