

3 November 2018

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

Dear Secretary

Thank you for the opportunity to make a submission to the Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples (JSC). The authors of this submission are Aboriginal members of the Referendum Council who were responsible for the design and execution of the First Nations Regional Dialogues and the national constitutional convention and the technical advisors who assisted the Indigenous working groups in the First Nations Regional Dialogues and the national constitutional convention. We are solely responsible for the views and content in this submission.

### **Overview of the Submission**

The submission responds to the issues raised in the interim report of the JSC. In this submission we suggest a course of action for the JSC to consider as a pathway to a referendum. We provide:

- a) a proposed constitutional amendment to enshrine a First Nations Voice
- b) a referendum question and;
- c) a draft Bill that sets out in detail the proposed process for determining the design of the Voice.

The recommendations in this submission are based on the contributions of the Aboriginal and Torres Strait Islander dialogue participants and respects their ongoing right to self-determination.

This submission is set out in five parts:

- 1. Constitutional enshrinement:** The First Nations Voice must be constitutionally enshrined. Constitutional enshrinement is important for three reasons. It is the only reform that respects the consensus of Aboriginal and Torres Strait Islander peoples as expressed in the Uluru Statement From the Heart. It provides certainty and security for the Voice. It secures enduring popular legitimacy and accords the Voice its proper place in the constitutional

system, which will provide it with the necessary legitimacy and status to pursue its role.

2. **Referendum a priority:** The amendment to the Constitution to enshrine the Voice should be pursued as a matter of immediate priority. The Regional Dialogues, national constitutional convention and the Uluru Statement From the Heart provide sufficient authority and necessary detail to pursue constitutional reform now. For this purpose, we have drafted a proposed constitutional provision – section 129 of the Constitution – which is consistent with the Dialogues, Convention and the Uluru Statement (set out in **Appendix A**). This provision sets out the primary function of the Voice, and leaves the detail of its composition, functions, powers and procedures to Parliament to determine through the normal legislative process. We say that information regarding the process of designing a Voice should be the basis of the public education on the referendum explaining the process that follows a successful referendum.
3. **No proposed legislative model should accompany the referendum:** We rebut the argument that a proposed legislative model that sets out the detail of the Voice should accompany a referendum for constitutional change. This would be misleading because it would present a specific model to the Australian people as part of what they are voting on in the referendum, but that model would be subject to future amendment or even entire repeal and re-enactment at the discretion of the Parliament.
4. **Transparent process respecting self-determination:** Fourth, the *process* by which the design detail of the Voice can be developed should be set out in careful detail in a draft Bill that is released to the public in material that accompanies the referendum question. Parliament should pass a motion indicating its intention to pass the Bill should the referendum be successful. The process to design the First Nations Voice must be one that: (1) provides sufficient certainty for all parties prior to the referendum; (2) respects Aboriginal and Torres Strait Islander peoples’ right of self-determination; and (3) enables significant and appropriate non-Indigenous input into the end result.

We have set out in **Appendix B** a proposed draft *Designing the First Nations Voice Bill*.

**5. Designed in accordance with guiding ‘Design Principles’:** Finally, we recommend that the process for designing the detail of the Voice should be informed by a set of guiding ‘Design Principles’ that have been drawn from the Regional Dialogues, the Convention and the Uluru Statement. These Design Principles, contained in the draft *Designing the First Nations Voice Bill*, will provide a framework through which the design process can be led and monitored.

Below, we set out an explanation of how each of the steps in our proposed course of action are underpinned by the Regional Dialogues, the national constitutional convention and the Uluru Statement From the Heart, and how these steps are consistent with the ongoing right of First Nations to self-determination in matters that affect them. We refer to the Records of Meetings taken at each of the Dialogues, the notes taken in the working groups during the Dialogues, the Uluru Statement from the Heart and the Uluru Guiding Principles, and the Referendum Council's final report.

We conclude by explaining why this proposal meets the criteria of success set out in 1(d) of the Joint Select Committee's Terms of Reference.

## **PART 1: Constitutional enshrinement**

The Uluru Statement from the Heart called for 'a First Nations Voice enshrined in the Constitution'. The call for a Voice was the culmination of a process endorsed by the Australian Government aimed at eliciting from Aboriginal and Torres Strait Islander peoples what *meaningful* constitutional 'recognition' is to them. This is the first time since the Expert Panel process in 2011 a sample of Indigenous peoples were asked directly about how they wish to be recognised in the Constitution through a structured and principled process.

The call for a Voice to Parliament was an unambiguous affirmation of the importance of constitutional enshrinement, and the only proposal put forward for recognition of Aboriginal and Torres Strait Islander peoples in the Constitution. The Referendum Council endorsed this clear preference stating that in terms of respecting the wishes of Aboriginal and Torres Strait Islander people expressed through the Regional Dialogues, the establishment of the Voice was its 'single recommendation for constitutional amendment' to take advantage of the 'window of constitutional opportunity'.<sup>1</sup>

Constitutional enshrinement of the Voice presents an opportunity to capitalise on widespread support for constitutional reform and correct a glaring omission in our founding document. A constitutionally enshrined First Nations Voice would implement a practical improvement that respects Australia's system of parliamentary democracy and the right of First Nations peoples to self-determination, as expressed in the *United Nations Declaration on the Rights of Indigenous Peoples*.

There are three key reasons the First Nations Voice should be constitutionally enshrined:

- (1) it respects the deliberative process and consensus outcome of Uluru;*
- (2) it provides certainty and security; and*
- (3) it secures enduring popular legitimacy and accords the Voice the necessary status to achieve its functions.*

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<sup>1</sup> *Final Report of the Referendum Council (2017) 38*

(1) *Respects the deliberative process and consensus outcome of Uluru:* Taking the Voice proposal to a referendum respects the consensus view reached at the end of the Indigenous-led consultation process that was conducted in 2016-17 at the request of the Prime Minister.<sup>2</sup> The Regional Dialogues were, in the words of the Referendum Council, ‘the most proportionately significant consultation process that has ever been undertaken with First Peoples’.<sup>3</sup> They employed a carefully designed, deliberative model that successfully achieved a consensus outcome on a complex issue that has to date defied resolution. Many hundreds of people participated in good faith, working through the pros and cons of different proposals in working groups and plenaries, before arriving at the consensus outcome supported by the Uluru Convention. In particular the dialogue participants considered the potential for legislative, administrative and other forms of change to achieve structural reform, as compared with constitutional change, before emphatically embracing a constitutionally enshrined First Nations Voice.

(2) *Provides certainty and security:* Constitutionally enshrining the Voice would usher in a new era of stability and continuity in Aboriginal and Torres Strait Islander affairs. Over more than four decades, Australian governments have repeatedly seen the justice and common sense of providing a voice to Aboriginal and Torres Strait Islander people in the policy process, through bodies established on an administrative or even legislative footing.<sup>4</sup> But there has been no enduring commitment to institutional security. To date, there has been no protection against unilateral abolition of First Nations representative structures or against the instability, disempowerment and lack of certainty that follows.

Participants in the Regional Dialogues frequently drew attention to the costs, the diminution of infrastructure and decision-making power and distress caused by governments unilaterally abolishing structures in which people had invested their time and faith. Participants also referred to the double standards that apply when compared to non-Indigenous institutions such as the Parliament that periodically run into political or other difficulties involving particular individuals.<sup>5</sup>

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<sup>2</sup> See Referendum Council Terms of Reference 1 under ‘Role’, *ibid* 46 which called for a ‘concurrent series of Indigenous-designed and led consultations.

<sup>3</sup> *Ibid* 10.

<sup>4</sup> ‘For too long, Canberra has been coming up with solutions that aren’t underpinned by a strong understanding of what is happening out in communities.’ The Hon Nigel Scullion, Minister for Indigenous Affairs, ‘Overcoming Indigenous Disadvantage Report Highlights Progress’, Media release, 17 November 2016.

<sup>5</sup> For instance:

**Ross River:** participants in the working group addressing the Voice proposal spoke of ATSIC, and while there was a sense that the electoral model for ATSIC had worked well, with local communities electing regional councils, there were a number of problems with the model. The most significant one was that ATSIC could be abolished by legislation. This meant that when mistakes and criticisms were made, the government didn’t let people learn and fix them, but

During the dialogues people repeatedly emphasised they wanted to escape this instability and uncertainty and achieve enduring structural change by constitutionally entrenching the Voice.<sup>6</sup>

(3) *Secures enduring popular legitimacy and accords the Voice its proper place:*

The Uluru Statement from the Heart was an invitation to the Australian people to walk with First Nations in a movement of the Australian people for a better future. Popular approval at a referendum will seal the legitimacy of the Voice and allow all Australians to participate in this unifying act of constructive reform.

Achieving the Voice through a referendum to change the Australian Constitution will endow the institution with the standing appropriate to such a historic step forward in the relationship between First Nations and the Australian Government because it will have been endorsed through popular sovereignty. Constitutional entrenchment will provide the Voice with constitutional status and authority. It is not intended for the Voice to have any form of veto power over the legislative process, and therefore it will rely upon political respect from other constitutional institutions (the Parliament and the Executive) to achieve positive influence. Constitutional enshrinement gives it legitimacy and status from which to build this positive political influence.

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abolished the entire organisation. They contrasted this to when politicians play up, and ‘you don’t see them close down the parliaments’.

**Brisbane:** A participant said ‘We lost ATSIC at the stroke of a pen. Would you abolish Westpac Bank if two or three of its directors were not doing the right thing? I don’t think so.’

<sup>6</sup> For instance:

**Melbourne:** it is important for it to be enshrined in the Constitution.

**Cairns:** There was strong agreement across the groups that the voice to parliament would be an important priority. There was support for it to be constitutionally protected, so it couldn’t be abolished like ATSIC had been.

**Ross River:** A strong view was that Aboriginal people should pursue strong constitutional reform to ensure that they are embedded in the Constitution.

‘Since the demise of ATSIC, we’ve had no say. If it’s embedded in the Constitution, it’s hard to get rid of.’

**Adelaide:** Finally, several people said that focusing on the Constitution is important because unless change is embedded deep in the system, structural change, governments will keep changing their minds and undoing reforms.

‘ATSIC was our peak representative body and so many people put so much effort into getting self-determination, only to have the rug pulled out from under us. Where does that come from? The Constitution.’

‘We have legislation that is constantly moved and changed to other people’s benefit. Anything put in place has to be locked down.’

**Brisbane:** The voice to the Parliament was a well supported option because it provides Aboriginal and Torres Strait Islander Peoples with a place in the democratic structure that can’t be abolished by politicians in Canberra.

## **PART 2: Referendum a priority**

The Regional Dialogues, Uluru First Nations Constitutional Convention and the Uluru Statement provides enough authority and necessary detail for the Joint Select Committee to recommend a constitutional referendum be pursued as a matter of immediate priority.

We submit for the Committee's consideration a new Chapter 9, section 129:

### **Chapter 9 First Nations**

#### **Section 129 The First Nations Voice**

- (1) There shall be a First Nations Voice.
- (2) The First Nations Voice shall present its views to Parliament and the Executive on matters relating to Aboriginal and Torres Strait Islander peoples.
- (3) The Parliament shall, subject to this Constitution, have power to make laws with respect to the composition, functions, powers and procedures of the First Nations Voice.

We also submit to the Committee a draft referendum question that captures the substance of this proposed amendment in general and direct terms:

Do you approve an alteration to the Constitution that establishes a First Nations Voice?

YES / NO

We believe this draft provision is consistent with the views that were expressed in the Dialogues, Convention and Uluru Statement for the following reasons:

- Subsection (1) establishes the *First Nations Voice*. This is the exact form called for in the Uluru Statement from the Heart.<sup>7</sup> Consistent with the Uluru Statement and the views expressed in the Regional Dialogues, it does not limit the Voice by describing it as a Voice 'to Parliament'.<sup>8</sup>

<sup>7</sup> Contrast the reference to 'Aboriginal and Torres Strait Islander' body, bodies, Voice or Voices in other provisions that have been suggested, such as those developed by Professor Anne Twomey, Greg McIntyre SC, Professor Rosalind Dixon and Uphold & Recognise.

<sup>8</sup> See further discussion of different functions the Voice might undertake that were considered by the Dialogues set out below.

As was repeatedly emphasised in the Regional Dialogues, the Voice will represent First Nations in accordance with their own determined processes to ensure cultural legitimacy within First Nations communities.<sup>9</sup> To ensure this, the detail of how the members of the Voice are selected to ensure First Nations representation will be determined by legislation, after full consultation with communities to ensure this legitimacy.

- Subsection (2) sets out the primary, but not only, function of the Voice: *to present its views to Parliament and the Executive on matters relating to Aboriginal and Torres Strait Islander peoples*. In accordance with the views expressed in the Regional Dialogues and the national constitutional convention, the function of the Voice is not described as ‘advisory’ or ‘consultative’ only.<sup>10</sup> The Voice is given a proactive, self-determined function of presenting its views, rather than waiting to be ‘engaged by’ or ‘consulted by’ the Parliament or the Executive.

Again, consistent with the calls in the Regional Dialogues it does not limit the Voice to a Voice ‘to Parliament’, but, rather, explains that its primary function will be to present its views to Parliament *and the Executive*. In this way, the

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<sup>9</sup> For instance, the Regional Dialogues said:

**Hobart:** A selection process should be put in place to ensure that the body is representative of Aboriginal and Torres Strait Islander Peoples.

**Darwin:** The body would need to be elected and connected to the community.

**Perth:** The Voice to Parliament received strong support. Groups discussed the need for any Voice to Parliament to be representative of our lands and waters across Australia, building on or incorporating existing regional and local decision-making bodies, as well as to represent men, women, youth, and children. This is underpinned by our cultural authority.

**Ross River:** This body must be representative for communities across Australia, and have legitimacy in remote as well as rural and urban areas. It must be a “*land-based representative body that represents us nationally*.” There was a suggestion that the voice needed to include representatives across generations, with young representatives as well as older leaders.

**Brisbane:** The body needs to be representative of grassroots. Not a handpicked organisation like the Indigenous Advisory Council. It needs to be elected by grassroots and consult back with the community.

The structure of the body needs to respect Aboriginal cultural heritage – *‘the oldest governance structure on the planet’*.

**Adelaide:** The Aboriginal Voice could be drawn from the First Nations and reflect the song lines of the country.

<sup>10</sup> This stands in direct contrast from language used in other provisions that have been suggested, which reference an ‘advisory’ function, see, for instance, those of Professor Twomey, Mr McIntyre SC, and Uphold & Recognise. At the Dialogues, much concern was expressed with the idea of the body being merely “advisory”. See for instance, the Regional Dialogues:

**Hobart:** Supported a powerful representative body with the consensus that a body must be stronger than just an advisory body to Parliament.

**Broome:** Someone suggested that the Parliament would need to be compelled to respond to the advice of the Body, and there was discussion of giving the body the right to address the Parliament.

**Dubbo:** There was a strong view that the Indigenous body must have real power: the power to make a difference.

**Melbourne:** There was a concern that the body could become a tokenistic process. Hence, it must be more than advisory and consultative.

**Brisbane:** The body needs to be more than just advisory.

Voice will have input into the development of policy as well as legislation and will be able to present its own proposals to the Executive and Parliament for new policies, laws and amendments.<sup>11</sup>

Consistent with the understanding that the Voice should not have the power of veto or be a ‘third chamber’ of Parliament,<sup>12</sup> the proposal gives the Voice the function of presenting its views, but imposes no concomitant obligation on the Parliament.<sup>13</sup> The proposal leaves to legislation the extent to which, and how, the Parliament and the Executive might respond to the views presented by the Voice, and the powers of the Voice to fulfill its functions.<sup>14</sup>

The primary function of the Voice is restricted to *matters relating to Aboriginal and Torres Strait Islander peoples*. This will, as was intended by the Regional Dialogues, capture laws that are introduced under the races power (section 51(xxvi)) and the territories power (section 122),<sup>15</sup> as well as laws that might appear to be of general application but that particularly affect Aboriginal and Torres Strait Islander peoples.

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<sup>11</sup> See, for instance discussion in the Working Groups during the Dialogues:

**Broome:** The body might be able to be involved not just in providing advice on laws, but also co-designing policies ...

**Dubbo:** The body might have other functions, including, advising government ministers in different portfolios (education, land, treasury)...

**Melbourne:** One suggestion was that the body could ... generate its own proposals for allocation of funding...

**Cairns:** The group discussed other possible functions the body could perform, particularly around the proactive development of policy, and the introduction of Bills. There was a discussion about whether the body should be involved in working with the bureaucracy/public sector, or whether it needed to be operating at a higher level than this.

<sup>12</sup> Contrast Prime Minister Turnbull’s reference to the Voice: ‘It would inevitably become seen as a third chamber of parliament.’ See further:

<https://www.malcolmturnbull.com.au/media/response-to-referendum-councils-report-on-constitutional-recognition>

And a similar reference by Prime Minister Morrison:

<https://www.theguardian.com/australia-news/2018/sep/26/scott-morrison-claims-indigenous-voice-to-parliament-would-be-a-third-chamber>

<sup>13</sup> Indeed, the *ex ante* Voice proposal was seen in the Dialogues as the best way of ensuring these powers were used to pass laws for the benefit of Aboriginal and Torres Strait Islander peoples, rather than rely on an *ex post* racial non-discrimination clause: Regional Dialogues Reference.

<sup>14</sup> See, for instance discussion in the Working Groups during the Dialogues:

**Perth:** The body also needs to have sufficient powers – the power to call Ministers, heads of department, public servants, and demand information that is relevant to it.

**Broome:** Someone suggested that the Parliament would need to be compelled to respond to the advice of the Body, and there was discussion of giving the body the right to address the Parliament.

**Thursday Island:** Members of the body should be given the right to address Parliament on its report and advice.

<sup>15</sup> Every working group discussed how the Voice would operate as a “front end” political limit on the Parliament’s powers to pass laws that affect Aboriginal and Torres Strait Islander peoples (under both s 51(xxvi) and s 122). They appreciated that this model would be no guarantee that these powers would not be used against them in the future in a negatively discriminatory way, but that it would create a limit through political empowerment, which would hopefully achieve better designed policies in the future.



The provision is not limited to the races and territories powers for three reasons. First, such a limited function would not reflect the true gamut of legislation that particularly affects Aboriginal and Torres Strait Islander peoples. The intention of the Voice is to provide a vehicle for self-determination and so should be capable of addressing all matters of ‘economic, social and cultural development’ impacting First Nations (in accordance with article 3 of the *UN Declaration on the Rights of Indigenous Peoples*). Second, limiting the function in this way would prove constitutionally difficult in that the question of whether a law is ‘with respect to’ a head of power is not determined definitively at the time of its passage, but, rather, when the High Court has been asked to decide. Third, it is not intended that the Voice will have a power of veto, or the power to delay legislative or executive decision-making. As such, the breadth of the Voice’s function to present its views does not interfere with the legislative or executive function.

The Voice has political power to present views on matters affecting its constituents’ interests. Of course, the Voice will itself have to determine which issues it wishes to prioritise to be properly representative of First Nations views. As a matter of political necessity, it will address issues that are of concern to its constituencies, and not spend its time and resources on irrelevant matters. It will have to prioritise issues to ensure it has the greatest political effectiveness. If it fails to perform these functions well, the penalty for the Voice will be political: members may not be reselected by their constituencies, and the body will be subject to government and public criticism.

- Subsection (3) provides for the detailed design of the Voice to be left to the Parliament, that is:

*The Parliament shall, subject to this Constitution, have power to make laws with respect to the composition, functions, powers and procedures of the First Nations Voice.*

The above provision makes it clear that the detail of the Voice will not be included in the Constitution but be determined by Parliament. This will ensure flexibility of the Voice to adapt to changing needs of First Nations.

This provision will also allow the Parliament to confer other functions on the Voice by legislation. These functions should be determined in dialogue with First Nations, and, indeed, once the Voice is operational, it would provide the vehicle for such input. A number of suggestions with respect to additional functions were made in the Regional Dialogues, although full consideration of the issue was not the objective of that process nor was consensus achieved. For instance, in the Regional Dialogues it was suggested that the Voice could be involved in: co-designing policies, advising Ministers, reviewing, monitoring and overseeing funding coming into communities or distributing that funding, and auditing and

evaluating service delivery in Aboriginal and Torres Strait Islander affairs.<sup>16</sup> There was some discussion about whether the body also needed to be involved in advising State and Territory, and local governments, functions which could be conferred on the Voice via legislation.<sup>17</sup> In several of the working groups at the Dialogue, there was some discussion that the Voice could have an international role, connecting Aboriginal and Torres Strait Islander people with other First Nations across the world.<sup>18</sup>

While there is no requirement for this design to be undertaken with the participation of Aboriginal and Torres Strait Islander peoples, once the Voice is established, its constitutional function of presenting its views would be engaged before any changes to the Voice are made. Further, as we explain below, at the point of establishing the Voice, we propose that the Parliament pass a motion indicating its intention to pass a piece of legislation guaranteeing the initial design of the Voice will be through a process that is Indigenous-led with appropriate non-Indigenous involvement. This would be consistent with the Dialogues, for

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<sup>16</sup> See, for instance discussion in the Working Groups during the Dialogues:

**Broome:** The body might be able to be involved not just in providing advice on laws, but also co-designing policies and service delivery – in areas such as health, education, housing, social issues – and evaluating service delivery – education, health etc.

**Dubbo:** The body might have other functions, including, driving Treaty negotiations; advising government ministers in different portfolios (education, land, treasury); reviewing, monitoring and overseeing funding coming into communities; and being able to respond to emergencies in communities (it was important that communities were able to access members of the body).

**Melbourne:** Questions were raised as to how the voice/body would relate to the treaty process – and whether it could protect and progress that process. Questions were raised as to what other functions the body could have. One suggestion was that the body could hold hearings like Senate Estimates hearings, or generate its own proposals for allocation of funding. One suggestion was that the funding could be a guaranteed percentage of GDP. There were concerns that if the body is given service delivery functions, this would create a conflict of interest with its oversight functions. A suggestion was to create a separate body in charge of funding allocation and service delivery.

**Cairns:** The group discussed other possible functions the body could perform, particularly around the proactive development of policy, and the introduction of Bills. There was a discussion about whether the body should be involved in working with the bureaucracy/public sector, or whether it needed to be operating at a higher level than this. Another suggested function was administering Aboriginal and Torres Strait Islander funding and programs.

**Ross River:** The group also thought the body should be given other functions. They suggested that the body should be able to scrutinise funding allocations – both in Aboriginal affairs and in relation to the federal funding across the federation (to ensure horizontal fiscal equalization). They also thought that the body might be able to play a role in negotiating any future treaty or treaties.

<sup>17</sup> See, for instance:

**Cairns:** The working group emphasised that the body would need to have a function in advising the state and territory governments, as well as local governments, in addition to its national role.

<sup>18</sup> See, for instance:

**Thursday Island:** The body could be a way of achieving representation internationally (at the UN) and also connecting with other First Nations people internationally.

**Hobart:** The body could have an international voice.

instance, the Brisbane Dialogue indicated: “The Aboriginal and Torres Strait Islander People need to be consulted on the model.”

*Justiciability of the proposed provision:* We think it would be unlikely that the Court would consider the provision justiciable, and particularly the function of the Voice described in subsection (2). It is our view that this provision will likely be viewed by the Court as an intramural proceeding between the Voice and the Parliament and between the Voice and the Executive. With respect to the Parliament, the Voice is engaged in a pre-legislative process, and the High Court has previously expressed its reluctance to intervene in such processes.<sup>19</sup> With respect to the Executive, it is unlikely that the provision will be justiciable as it intentionally contains no corresponding obligation on the Executive to act. This would mean the question of when the Voice’s function of providing its views is engaged would be a matter to be determined between the Voice and the Parliament, and the Voice and the Executive.

### **PART 3: No particular legislative model should accompany the referendum**

Consistently with the practice of constitutional deferral, the detail of the Voice should be determined *after* the referendum. The detail should be left to an Indigenous-led consultation process that is then subject to parliamentary oversight. The detail of this process should be determined before the Referendum and should inform the public debate leading up to the referendum. We explain how this should be achieved in Part 4 of this submission.

In our view, the substantive detail of the design of the Voice should *not* be developed before the referendum. Consistent with the practice of constitutional deferral,<sup>20</sup> it is both usual and desirable that the detail of constitutional institutions is not precisely determined at the point of constitutional change. Rather, the broad parameters of the institutions are enshrined in the Constitution, with the detail determined later in legislation. Enshrining only the broad parameters of the institution means that their detail can be more informed, and the flexibility of legislation ensures that it is capable of adapting to change as society evolves.

Examples of constitutional deferral include the High Court of Australia, established by section 71 of the Constitution, but the *detail* of which was not determined by Parliament until two years after Federation through the *Judiciary Act 1903* (Cth). Another analogy specifically on Indigenous constitutional recognition can be drawn from Canada. When Canada enacted constitutional protection for Aboriginal and treaty rights in s 35 of its *Constitution Act 1982*, it also mandated that a further process had to occur within one year – a constitutional conference between First

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<sup>19</sup> See, for instance, the Court’s approach to section 53, and the powers of the Houses with respect to ‘proposed laws’: *Osborne v Commonwealth* (1911) 12 CLR 321, 336 (Griffith CJ); *Western Australia v Commonwealth* (1995) 183 CLR 373, 482 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

<sup>20</sup> See further Rosalind Dixon and Tom Ginsburg, ‘Deciding not to decide: Deferral in constitutional design’ (2011) 9 *International Journal of Constitutional Law* 636.

Ministers and Aboriginal peoples – to help define the nature and extent of those rights.<sup>21</sup> That constitutional conference resulted in greater definition of the constitutional recognition achieved a year earlier and led to additional constitutional conferences on Aboriginal and treaty rights.<sup>22</sup> Of course, the Canadian form of constitutional recognition is different to a First Nations Voice, as it focuses on the judicial protection of Indigenous rights rather than on giving Indigenous peoples a voice in the political process. The key lesson is that, when there is broad agreement on the general form that Indigenous constitutional recognition should take, it can be a useful strategy to constitutionalise it at a relatively high level of generality while setting up a further process to help define the detail after the constitutional changes have been enacted.

Relatedly, regarding the treaty negotiations in Victoria, while the parties are yet to settle on the precise form that the treaty (or treaties) will take, all parties have been able to commit to the broad goal of a treaty and to the statutory enshrinement of a detailed process for negotiating its detail.<sup>23</sup>

We believe that presenting to the Australian public an ‘exposure draft’ setting out a model of what the Voice might look like, should the referendum be successful, has the capacity to mislead the public. The referendum pertains *only* to the constitutional words and not the legislative detail. That legislative detail will likely change and evolve. The referendum debate should be informed by what is being constitutionally entrenched: the broad parameters of the body and empowering Parliament to determine the detail of the composition, functions, powers and procedure of it. The people of Australia are not being asked to vote for a particular design of the Voice, say, ‘Model A’. What they are being asked to vote upon is more like an enabling provision that will allow the Parliament to select ‘Model A’, or ‘Model B’, or ‘Model C’, or ‘Model X’, in the future. Indeed, it would be misleading to say to the Australian people that they should vote ‘YES’ in a referendum for a particular model. That model might not be enacted by the Parliament for any number of reasons. Even if it is enacted, it might be amended, to a greater or lesser degree, so it is ‘Model AA’. It might be entirely repealed and replaced so it is ‘Model B’. Because of the way the proposed provision is framed, Parliament has a wide discretion in choosing the model for the Voice into the future. Indeed, as we explained above, because of the limits of justiciability inherent in the clause, there is likely to be little, if any, judicial interference with Parliament’s power to determine these matters.

#### **PART 4: Transparent design process**

The Regional Dialogues, the national constitutional convention and the Uluru Statement provide authority and sufficient detail to put to a referendum now a

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<sup>21</sup> *Constitution Act 1982* (Canada) s 37.

<sup>22</sup> See further John Borrows, *Freedom and Indigenous Constitutionalism* (University of Toronto Press, 2016) 120–5.

<sup>23</sup> *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic).

constitutional amendment enshrining the First Nations Voice. They also provide authority and sufficient detail on the broad principles that should guide the design of a First Nations Voice, as we discuss further in Part 5 of this submission. However, a further process is required to determine the detail of what the First Nations Voice looks like.

The process to design the Voice should take place after a successful referendum has been held, with the detail of the Voice ultimately being enacted in federal legislation. What can and should be determined prior to the referendum is the process by which the design of the Voice will be worked out. Before the referendum, the Voice design process should be set out in a draft Bill that is endorsed in a motion by Parliament and released to the public alongside the referendum question. Setting out the Voice design process in detail before the referendum will provide sufficient certainty and confidence to First Nations, the Parliament, the Executive, the States and the Australian people to approve the constitutional amendment. In **Appendix B**, we have provided a draft *Designing the First Nations Voice Bill* to demonstrate what this process might look like. While the full detail of the process can be seen in the draft Bill, in brief, it involves the following:

- The process for designing the Voice will be overseen by a Voice Design Council.
- The Voice Design Council should be populated by non-parliamentary members of the Prime Minister's Expert Panel on the Recognition of Aboriginal and Torres Strait Islander peoples in the Constitution and the Referendum Council. This ensures continuity from the previous processes that have been undertaken and to harness the depth of knowledge that has been gained through these processes. Additional appointments may be made to ensure geographic representation across the States and Territories, as well as equal gender representation and equal Indigenous and non-Indigenous membership.
- The Indigenous members of the Council will constitute an Indigenous Steering Committee, who will take primary responsibility for coordinating the process, guided by the advice of the full Council.
- Twelve Voice Design Dialogues with First Nations delegates from around the country will deliberate on the design of the First Nations Voice.
- Following the Dialogues, a National Convention comprising 10 delegates from each Dialogue will convene to synthesise the work of the Dialogues into principles for drafting a Bill to establish the Voice.
- The Council's Indigenous Steering Committee will oversee the preparation of a draft Bill establishing the First Nations Voice by the Office of Parliamentary Counsel, in accordance with the Drafting Principles determined at the National Convention.

- The work of the Indigenous Steering Committee and the delegates to the Dialogues and National Convention will be guided by a set of Design Principles drawn from the work undertaken by the Referendum Council (see Part 5, below).
- The Council will produce a final report that details the process undertaken and includes a copy of a draft Bill establishing the First Nations Voice. This report will be tabled in the Commonwealth Parliament.
- A Parliamentary Joint Committee will consider the Council's Report and the draft Bill and, after conducting a full parliamentary inquiry and receiving further input from the wider Australian community, recommend whether the Bill should be passed by Parliament.
- Parliament will have the final say on what form the First Nations Voice takes.

The process for designing the First Nations Voice is just as important as the form that the Voice ultimately takes. To be legitimate and effective, the process cannot be rushed or imposed upon Aboriginal and Torres Strait Islander peoples. Above all, the process must be underpinned by respect for Aboriginal and Torres Strait Islander peoples' right of self-determination. The right to self-determination was one of the central Guiding Principles to emerge from the First Nations Constitutional Dialogues and a principle emphasised by the Uluru Statement from the Heart.<sup>24</sup> It is also at the core of the *United Nations Declaration on the Rights of Indigenous Peoples*.

The right to self-determination has a *constitutive aspect* that is engaged at moments when new governing institutions are being created. This constitutive dimension of self-determination 'imposes requirements of participation and consent such that the end result in the political order can be said to reflect the collective will of the people, or peoples, concerned'.<sup>25</sup> In other words, when new governing institutions for Indigenous peoples are being created, they must, if they are to uphold self-determination, come into being through a process that involves the participation and obtains the consent of the Indigenous peoples concerned.

To respect Aboriginal and Torres Strait Islander peoples' right of self-determination, the creation of a First Nations Voice must come about through an Indigenous-led process that involves extensive participation and deliberation by representatives of First Nations from around the country. This process must be something like that which produced the Uluru Statement from the Heart and the demand for a First Nations Voice itself. It is not enough for Aboriginal and Torres Strait Islander

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<sup>24</sup> According to the third Guiding Principle from the Regional Dialogues, as endorsed at the Uluru Convention, any option for constitutional reform should only proceed where it '[a]dvances self-determination and the standards established under the *United Nations Declaration on the Rights of Indigenous Peoples*'. According to the Uluru Statement, its proposals for constitutional reform are intended to achieve 'a better future for our children based on justice and self-determination'. See Referendum Council, *Final Report of the Referendum Council* (30 June 2017) i, 22.

<sup>25</sup> S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2nd ed, 2004) 104–5.

peoples to be merely consulted in a process that is led by Parliament or the Executive. While the current process being undertaken by the Joint Select Committee is incredibly valuable in receiving a diversity of views, both Indigenous and non-Indigenous, on constitutional reform, it does not meet the level of Indigenous participation and deliberation required to satisfy the right of self-determination.

It is also important that there is non-Indigenous input into the process of designing a First Nations Voice. The creation of a First Nations Voice effects a change not only to the arrangements governing Aboriginal and Torres Strait Islander peoples but also to the governing arrangements of Australia as a whole. Non-Indigenous people from across Australia must therefore also be able to have a genuine and significant say on how the Voice will operate in relation to the established institutions of Australian government.

We submit that our proposed process to design the First Nations Voice is one that: (1) provides sufficient certainty for all parties prior to the referendum, and can form part of the referendum's public education campaign; (2) respects Aboriginal and Torres Strait Islander peoples' right of self-determination; and (3) enables significant and appropriate non-Indigenous input into the end result.

*(1) Sufficient certainty on the post-referendum process for designing the Voice:* The Bill provides all parties – First Nations, the Parliament, the Executive, the States and the Australian people – sufficient certainty on the process by which the First Nations Voice will be designed after the referendum. The process draws on the success of and is modelled on the Indigenous-designed and Indigenous-led dialogues and Convention established by the Referendum Council, while incorporating significant input from non-Indigenous Australia.

The level of detail contained in the Bill, both in terms of process and the Design Principles for creating the Voice, as well as knowledge of the previous success of the Referendum Council's process, allows all parties to understand the consequences of voting YES at referendum. In our submission, coupled with the necessary information about the general objectives of the constitutionalised First Nations Voice, a detailed process proposal provides sufficient detail to form an important platform of the referendum's public education campaign.

*(2) Respecting Aboriginal and Torres Strait Islander peoples' right of self-determination:* The process established by the *Designing the First Nations Voice Bill* is underpinned by respect for Aboriginal and Torres Strait Islander peoples' right of self-determination. The Bill establishes an Indigenous-led process by giving primary responsibility for overseeing the process to an Indigenous Steering Committee. The Bill also enables extensive participation and deliberation by representatives of First Nations in mandating 12 Dialogues on the design of the Voice, followed by a National Convention bringing together delegates from all 12 Dialogues. Here, the Bill draws heavily on the success of the Referendum Council process, which likewise undertook 12 Regional Dialogues and a National Convention overseen by the Referendum Council's Indigenous members. After the National Convention on the

Voice has produced Drafting Principles to guide the detailed design of the Voice, the Indigenous Steering Committee will then oversee the preparation of a draft Bill underpinned by those Drafting Principles. Finally, when the draft Bill is under consideration by the Parliamentary Joint Committee, the Parliamentary Joint Committee must hold hearings in each of the 12 regions where the Voice Design Dialogues took place. This requirement will give Aboriginal and Torres Strait Islander people from each of the Dialogues a further chance to provide input into the final stages of the design process.

All of these measures are an embodiment of the right of self-determination. They will ensure that the First Nations Voice is created through an Indigenous-led process that involves the extensive and intensive participation of Aboriginal and Torres Strait Islander peoples and obtains their consent to the end result.

*(3) Enabling significant and appropriate non-Indigenous input:* The Bill provides significant and genuine opportunities for non-Indigenous input into the design of the First Nations Voice. The Voice Design Council provides equal representation to Indigenous and non-Indigenous members and provides geographic representation across State and Territory, and equal gender representation. With its significant non-Indigenous representation, the Council as a whole will provide advice throughout the entire Voice design process, from the initial stages of establishing the Dialogues and National Convention through to the preparation of the draft Bill for a Voice and the preparation of a final report.

Non-Indigenous input is also built into the work of the Parliamentary Joint Committee. This is because, in the first instance, the Committee will consist of members of both Houses of Parliament who represent the Australian people as a whole. The Parliamentary Joint Committee process will also be able to invite submissions and evidence from key non-Indigenous stakeholders, as well as input from the general public.

Most significant of all, it will ultimately be up to the representatives of the Australian people – the members of Parliament – to determine what final form the First Nations Voice takes on the basis of the work undertaken by the Voice Design Council and the Parliamentary Joint Committee as well as the views of their constituents.

## **PART 5: Designed in accordance with guiding ‘Design Principles’**

The proposed process set out in the *Designing the First Nations Voice Bill* requires the work of the Indigenous Steering Committee as well as the participants at the Voice Design Dialogues and the Voice Design Convention to be guided by a set of ‘Design Principles’ that are set out in the Bill (see clauses 15 and 16). These principles are distilled from the Referendum Council Regional Dialogues and the Uluru Convention. In particular, they develop the ten Guiding Principles that were endorsed at the Uluru Convention to guide the deliberation over the final reforms set out in the Uluru Statement:



1. Does not diminish Aboriginal sovereignty and Torres Strait Islander sovereignty.
2. Involves substantive, structural reform.
3. Advances self-determination and the standards established under the United Nations Declaration on the Rights of Indigenous Peoples.
4. Recognises the status and rights of First Nations.
5. Tells the truth of history.
6. Does not foreclose on future advancement.
7. Does not waste the opportunity of reform.
8. Provides a mechanism for First Nations agreement-making.
9. Has the support of First Nations.
10. Does not interfere with current and future legal arrangements.

Using principles derived from the Regional Dialogues and Uluru Convention process reflects a continued commitment to answering the call of the Uluru Statement from the Heart and honouring the contribution of the Aboriginal and Torres Strait Islander communities that provided input throughout the Dialogues. It ensures that the process continues to be an exercise of self-determination for Aboriginal and Torres Strait Islander peoples.

The Design Principles proposed for the Voice design process are set out below, with an explanation in the footnote as to how each connects with the Uluru Guiding Principles and the Regional Dialogues:

The Voice must:

- (a) give effect to the right of self-determination of Aboriginal and Torres Strait Islander peoples;<sup>26</sup>
- (b) have cultural legitimacy;<sup>27</sup>

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<sup>26</sup> This is consistent with the Uluru Guiding Principle (3) Advances self-determination and the standards established under the United Nations Declaration on the Rights of Indigenous Peoples. Dialogues in Hobart, Broome, Darwin, Perth, Sydney, Cairns, Ross River, Adelaide, Torres Strait, and Canberra referred to self-determination. (See Referendum Council Final Report, page 24). For instance:

**Adelaide:** Those who came before us marched and died for us and now it's time to achieve what we've been fighting for since invasion: self-determination.

<sup>27</sup> This is consistent with the Uluru Guiding Principle (3) Advances self-determination and the standards established under the United Nations Declaration on the Rights of Indigenous Peoples; (4) Recognises the status and rights of First Nations; and (9) has the support of First Nations.

For instance:

**Adelaide:** The body must represent communities across Australia and have legitimacy in remote, rural and urban areas.

**Ross River:** The Aboriginal Voice could be drawn from the First Nations and reflect the song lines of the country.

- (c) be independent of government;<sup>28</sup>
- (d) have a structure that appropriately reflects local diversity;<sup>29</sup>
- (e) be accountable to Aboriginal and Torres Strait Islander people;<sup>30</sup>
- (f) be proactive;<sup>31</sup>
- (g) be capable of effectively achieving its functions;<sup>32</sup>
- (h) be subject to periodic review to ensure it remains responsive to the needs of Aboriginal and Torres Strait peoples.<sup>33</sup>

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<sup>28</sup> This is consistent with the Uluru Guiding Principle (3) Advances self-determination and the standards established under the United Nations Declaration on the Rights of Indigenous Peoples; (4) Recognises the status and rights of First Nations; and (9) has the support of First Nations.

For instance:

**Brisbane:** The body needs to be representative of grassroots. Not a handpicked organisation like the Indigenous Advisory Council.

<sup>29</sup> This is consistent with the Uluru Guiding Principle (3) Advances self-determination and the standards established under the United Nations Declaration on the Rights of Indigenous Peoples; and (9) has the support of First Nations.

For instance:

**Darwin:** The body would need to be elected and connected to the community.

<sup>30</sup> This is consistent with the Uluru Guiding Principle (3) Advances self-determination and the standards established under the United Nations Declaration on the Rights of Indigenous Peoples; and (9) has the support of First Nations.

For instance:

**Brisbane:** It needs to be elected by grassroots and consult back with the community.

<sup>31</sup> This is consistent with the Uluru Guiding Principle (7) Does not waste the Opportunity of Reform.

See above references to the Regional Dialogues as to how the Voice might be proactive at notes 16-18.

<sup>32</sup> This is consistent with the Uluru Guiding Principle (7) Does not waste the Opportunity of Reform.

See, for instance, discussion in the Working Groups:

**Hobart:** Must have permanency – must be funded and changing it must be very hard

**Dubbo:** There was agreement that the body needed to be adequately resourced and economically independent. This could be achieved by creating a fund for Aboriginal affairs (eg, through a percentage of land tax or GST). The body needs to be majority staffed by Aboriginal people...

**Perth:** The body needs to have financial independence, it can't be dependent on government funding or it will lose its independence. It could be funded by a trust, or a membership fee from Aboriginal organisations.

**Sydney:** The group also discussed how to guarantee funding to any representative body – perhaps through a guaranteed cut of GST, or constitutionally guaranteed resources to fulfill the functions assigned to it.

**Ross River:** there was concern expressed about the lack of guaranteed funding sources to Congress, and they asked whether funding could be guaranteed in some way for a constitutional body.

**Brisbane:** The body needs to have guaranteed funding. One way of guaranteeing funding that was discussed was through a percentage of taxes (land taxes, water taxes). Funding for the body and programs should be linked to reparations for theft of land. It was also suggested that the body could takeover responsibility for the funding that had been allocated to the IAS

## **PART 6: Conclusion**

In conclusion, the proposed course of action that we have recommended has been carefully designed to meet the criteria set by the Joint Select Committee's terms of reference. In particular:

### ***1. Contribute to a more unified and reconciled nation;***

The proposal for a referendum to enshrine the First Nations Voice, followed by an Indigenous-led design process with significant and appropriate non-Indigenous input, will contribute to a more unified and reconciled nation in two ways. First, the substantive structural change of a First Nations Voice itself will enable Aboriginal and Torres Strait Islander peoples to participate fully and equally in the political life of the country, thereby achieving 'a fuller expression of Australia's nationhood' as envisaged in the Uluru Statement. Second, engaging Indigenous and non-Indigenous Australia in an important constitutional moment of reform followed by an inclusive and participatory process of institutional design will bring Australians together while respecting and demonstrating the empowering possibility of self-determination for First Nations.

### ***2. Be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples;***

We believe that the proposed course of action is capable of being supported by an overwhelming majority of Australians from across the political and social spectrums. In the first instance, all Australians can be confident of the proposal's legitimacy among Aboriginal and Torres Strait Islander peoples due to the highly participatory, deliberative and consensual process by which it was developed. We believe that non-Indigenous Australians will support a considered and practical proposal that represents the unprecedented consensus position among Aboriginal and Torres Strait Islander people about what meaningful recognition means to them.

Second, the proposal is consistent with the principles underlying the Australian Constitution especially the principle of parliamentary sovereignty. Settling the detail of the First Nations Voice will ultimately be a matter for Parliament to determine by legislation. While the Voice itself will empower Aboriginal and Torres Strait Islander peoples to have a say in matters affecting them, it will not have the power of veto over legislation or constitute a 'third chamber' of Parliament.

Third, the proposal provides the public with sufficient certainty about what they will be voting on in the referendum: a constitutionally enshrined First Nations

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<sup>33</sup> This is consistent with the Uluru Guiding Principle (3) Advances self-determination and the standards established under the United Nations Declaration on the Rights of Indigenous Peoples; and (9) has the support of First Nations.

Voice that will present its views on Indigenous affairs to Parliament and the Executive, as well as a transparent process for designing the detail of the Voice after the referendum.

Fourth, the process for designing the detail of the Voice will enable significant and appropriate input from non-Indigenous Australians.

**3. *Be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums;***

We believe that the proposed course of action is capable of being supported by an overwhelming majority of Australians from across the political and social spectrums for three key reasons.

The first is that we believe the call in the Uluru Statement for a constitutionally enshrined First Nations Voice represents the most significant call from Aboriginal and Torres Strait Islander people for meaningful structural reform that will benefit not just First Nations but all Australians. We believe that a proposal that cleaves closely to this call has enormous political power and, with a properly developed campaign, the capacity for drawing the respect and support across all Australian people.

The second is that the proposed design process – Indigenous-led with significant and appropriate non-Indigenous input – will provide the majority of Australians with sufficient understanding of what they are voting YES for at a referendum.

The third is the consistency of the proposal with underlying principles of the Australian constitution and its respect for parliamentary sovereignty over Indigenous affairs. While the proposal is to empower Aboriginal and Torres Strait Islander peoples to have a Voice in matters that affect them, it is not intended to have a veto power or be, as mis-described by now two Prime Ministers, a ‘third chamber’.

**4. *Be technically and legally sound;***

The proposed course of action is technically and legally sound for two key reasons. The first is that the proposal is congruent with the underlying principles of the Australian Constitution, in particular, parliamentary sovereignty. The second is that the proposed provision has been drafted with the benefit of the insight from a number of constitutional experts, including a number of the authors of this submission, as well as those constitutional experts who have previously provided proposed constitutional provisions for consideration.

In terms of the process for determining the detail of the Voice, the proposed *Designing the First Nations Voice Bill* is technically sound as it is based on the successful process that was undertaken by the Referendum Council in 2016–2017.

**5. *Engage with key stakeholders, including Aboriginal and Torres Strait Islander peoples and organisations; and***

The proposed referendum provision, referendum question and detailed process for designing the Voice have been developed from the views expressed in the Regional Dialogues, the Uluru Convention, and the Uluru Statement, thus respect the wishes of Aboriginal and Torres Strait Islanders peoples and organisations as expressed in those key processes.

The proposed process for designing the Voice engages from the first step with non-Indigenous Australians, the other key stakeholders in this process, giving them significant and appropriate input into the Voice design. In the appointment of the Voice Design Council, the process also has key input from the Commonwealth Government and Opposition, as well as State and Territory governments and oppositions. Parliament's role remains central, both through the recommended parliamentary committee process for examining the draft Bill on a First Nations Voice and through the fact that the final decision on the Voice's design will rest with Parliament.

6. ***Advise on the possible steps that could be taken to ensure the referendum has the best possible chance of success, including proposals for a constitutional convention or other mechanism for raising awareness in the broader community.***

We have provided a detailed course of action, including the proposed drafting for a constitutional provision, referendum question and a process of further design to be endorsed by the Parliament and released to the public during a referendum campaign. For the reasons set out in this submission, we think this proposed course of action has a high prospect of success.

Yours sincerely,

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Noel Pearson, Cape York Partnership

Professor Megan Davis, University of New South Wales

Associate Professor Sean Brennan, University of New South Wales

Associate Professor Gabrielle Appleby, University of New South Wales

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## **APPENDIX A**

### **Chapter 9 The First Nations Voice**

#### **Section 129 The First Nations Voice**

- (1) There shall be a First Nations Voice.
- (2) The First Nations Voice shall present its views to Parliament and the Executive on matters relating to Aboriginal and Torres Strait Islander peoples.
- (3) The Parliament shall, subject to this Constitution, have power to make laws with respect to the composition, functions, powers and procedures of the First Nations Voice.

\* \* \*

#### **Referendum Question:**

Do you approve an alteration to the Constitution that establishes a First Nations Voice?

YES / NO

## APPENDIX B

### *Designing the First Nations Voice Bill*

#### PART 1 – INTRODUCTION

##### **1 Long Title**

An Act for the process of designing the First Nations Voice.

##### **2 Object**

The object of this Act is to provide the process for designing the First Nations Voice as established by section 129 of the Constitution.

##### **3 Definitions**

**Aboriginal and Torres Strait Islander persons** includes an Aboriginal person, a Torres Strait Islander, or a person of Aboriginal and Torres Strait Islander descent.

**Council Report** means the report of the Council issued under section 13 of this Act.

**Council** means the Voice Design Council established by section 4 of this Act.

**Design Principles** means the principles set out in section 16 of this Act.

**Dialogues** means the First Nations Voice Design Dialogues set out in section 10 of this Act.

**ISC** means the Indigenous Steering Committee established by section 7 of this Act.

**Joint Parliamentary Committee** means the Joint Parliamentary Committee on Voice Design established by section 14 of this Act.

**National Convention** means the First Nations Voice Design Convention set out in section 11 of this Act.

**Voice** means the First Nations Voice established by section 129 of the Constitution.



## **The Voice Design Council**

### **4 Establishment of the Voice Design Council**

There is established by this Act a body by the name of the Voice Design Council.

### **5 Functions of the Council**

The functions of the Council are:

- (a) to advise the ISC on the design of the Voice Dialogues and the National Convention in accordance with sections 10 and 11 of this Act;
- (b) to advise the ISC on the draft Bill in accordance with section 12 of this Act;
- (c) prepare the Council Report in accordance with section 13 of this Act.

### **6 Membership of the Council**

- (1) As soon as reasonably practicable after the commencement of this Act, the Prime Minister shall, with the agreement of the Leader of the Opposition, appoint eminent persons to be members of the Council.
- (2) No person shall be appointed who is currently a member of any Australian parliament.
- (3) Subject to (2), membership of the Council must include, with their consent, former members of the Prime Minister's Expert Panel on the Recognition of Aboriginal and Torres Strait Islander Peoples in the Constitution and the Referendum Council to ensure continuity of process and design.
- (4) In addition, the Minister may appoint up to 6 additional members to ensure the Council reasonably reflects the geographical diversity across the States and Territories, has equal gender representation, and an equal number of Indigenous and non-Indigenous members.
- (5) The members must co-operate with each other to achieve the objective of this Act.
- (6) There shall be payable to the members of the Council as remuneration such sum as the Governor-General determines from time to time.

### **7 Indigenous Steering Committee**

- (1) The Council shall have an Indigenous Steering Committee.

- (2) The ISC shall comprise those members of the Council who are Aboriginal and Torres Strait Islander persons.
- (3) The ISC shall perform the following functions:
  - (a) designing, organising and supporting the Voice Dialogues in accordance with section 10 of this Act;
  - (b) designing, organising and supporting the National Convention in accordance with section 11 of this Act;
  - (c) instructing the Office of Parliamentary Counsel to prepare a draft Bill for the design of the First Nations Voice in accordance with section 12 of this Act.

## **8 Staff**

- (1) The Council shall have a Secretariat comprising the staff necessary to assist the Council in performing its functions.
- (2) The ISC shall have a Secretariat comprising the staff necessary to assist the ISC in performing its functions.
- (3) The staff necessary to assist the Council and the ISC shall be persons engaged under the *Public Service Act 1999*.

## **9 Money payable to the Council**

- (1) There is payable to the Council such money as is appropriated by the Parliament for the functions of the Council.
- (2) The money of the Council is to be applied for payment or discharge of the costs, expenses and other obligations incurred by the Council in the performance of its functions.

## **PART 2 – PROCESS**

### **10 First Nations Voice Design Dialogues**

- (1) Within 6 months of its appointment, the ISC will design a series of 12 First Nations Voice Design Dialogues, to be conducted with Aboriginal and Torres Strait Islander communities across Australia.
- (2) At the request of the ISC, the Council will provide advice to the ISC on the design of the Dialogues.
- (3) Once the design of the Dialogues has been settled, the ISC will inform the Council and organise and oversee the conduct of the Dialogues. The

Dialogues must be conducted within 12 months of the Council being informed that the design has been settled.

- (4) Informed by the Design Principles set out in section 16, the purpose of each Dialogue is to elicit Aboriginal and Torres Strait Islander views on the design of the Voice, including:
  - (a) membership of the Voice;
  - (b) the functions of the Voice;
  - (c) the role of the Voice at the national, State and Territory, and local levels;
  - (d) the relationship between the Voice and the Parliament, the Executive, and other entities;
  - (e) the funding and resources of the Voice;
  - (f) the internal governance of the Voice.
- (5) Each Dialogue will endorse a record of the meeting setting out the views on the matters set out in sub-section (4).
- (6) Each Dialogue will select 10 participants to represent the Dialogue at the National Convention.

## **11 First Nations Voice Design Convention**

- (1) The ISC will design a First Nations Voice Design Convention to take place within two months of the conclusion of the final Dialogue.
- (2) At the request of the ISC, the Council will provide advice to the ISC on the design of the Convention.
- (3) The purpose of the National Convention is to endorse Drafting Principles that synthesise the views captured in the records of meetings of the Dialogues.

## **12 Draft Bill**

- (1) The ISC is responsible for settling the draft Bill that sets out the detailed design of the Voice.
- (2) Following the National Convention, the ISC will instruct the Office of Parliamentary Counsel to prepare a draft Bill implementing the Drafting Principles.
- (3) The Council will provide advice to the ISC on the draft Bill before it is finally settled.

- (4) The ISC must finally settle the draft Bill within three months of the finish of the National Convention. Once the draft Bill is settled, the ISC will present the Bill to the Council.

### **13 Council Report**

- (1) Within three months of receiving the draft Bill, the Council will issue a Council Report that includes:
  - (a) the detail of the process followed to produce the draft Bill;
  - (b) a copy of the draft Bill;
  - (c) an explanatory memorandum for the draft Bill.
- (2) The Council Report will be tabled in both Houses of Parliament.

### **14 Parliamentary Joint Committee on Voice Design**

- (1) As soon as practicable after the Council Report is tabled, and no more than 10 sitting days after it has been tabled, the Houses will refer the Council Report to a joint committee of members of the Parliament, to be known as the Parliamentary Joint Committee on Voice Design.
- (2) The Committee is to be appointed according to the practice of the Parliament and shall consist of 10 members:
  - (a) 5 members of the Senate appointed by the Senate;
  - (b) 5 members of the House of Representatives appointed by that House.
- (3) Within six months of receiving the Council Report, the Committee will report to the Parliament recommending whether the draft Bill should be passed by the Parliament.
- (4) The Committee's proceedings must include hearings in each of the 12 regions where the Dialogues were conducted.

## **PART 3 –DESIGN PRINCIPLES**

### **15 Function of Design Principles**

The work of the ISC and the participants at the Voice Dialogues and the National Convention shall be guided by the Design Principles set out in section 16 of this Act.

## **16 Voice Design principles**

The Voice must:

- (a) give effect to the right of self-determination of Aboriginal and Torres Strait Islander peoples;
- (b) be independent of government;
- (c) have a structure that appropriately reflects local diversity;
- (d) be accountable to Aboriginal and Torres Strait Islander people;
- (e) be proactive;
- (f) be capable of effectively achieving its functions;
- (g) be subject to periodic review to ensure it remains responsive to the needs of Aboriginal and Torres Strait peoples.