

17 April 2023

Committee Secretary
Joint Select Committee on the
Aboriginal and Torres Strait Islander Voice Referendum
PO Box 6201 Canberra ACT 2600



Teela Reid
Senior Solicitor
First Nations Lawyer in Residence
University of Sydney Law School

Dear Secretary,

RE: INQUIRY INTO THE ABORIGINAL AND TORRES STRAIT ISLANDER VOICE REFERENDUM – CONSTITUTION ALTERATION (ABORIGINAL AND TORRES STRAIT ISLANDER VOICE) 2023

1. Thank you for the opportunity to provide this submission.
2. I do so foremost as a proud Wiradjuri and Wailwan woman. I am also a lawyer, advocate for the Uluru Statement from the Heart and a member of the Referendum Engagement Group convened by the Australian Government.
3. The purpose of this submission is to:
 - (i) Reiterate the mandate for the term “First Nations” to be enshrined in the Australian Constitution.
 - (ii) Distinguish the political decision to omit the term “First Nations”, from the legal debate.
 - (iii) Submit the term “First Nations” be adopted in the Constitutional alteration bill, referendum question and explanatory memorandum.

The Aboriginal and Torres Strait Islander mandate for a “First Nations Voice”

4. The mandate authorised in the Uluru Statement from the Heart calls for a **“First Nations Voice to Parliament enshrined in the Constitution”**.
5. This mandate is crucial because it is endorsed with the cultural authority of the Aboriginal and Torres Strait Islander participants engaged in the process that culminated in the Uluru Statement from the Heart. As part of this process, I was invited as a working group leader on section 51(xxvi), the Race Power, at the Sydney Constitutional dialogue. This unprecedented process involved a cross-section of the First Nations community who participated in good faith and should be commended.
6. The mandate to enshrine a “First Nations Voice” in the Constitution is the invitation the Australian people have overwhelmingly accepted. Australians from across the political spectrum are accustomed to the well-established practice of conducting Acknowledgments of Country to honour the First Nations lands and peoples. This

protocol is also consistent with Federal Laws with respect to Native Title determinations that recognise the traditional owners of the First Nations.

7. I note the Uluru statement itself uses the terms “Aboriginal and Torres Strait Islander tribes”, “first people”, “sovereign nations”, and I emphasise none of them should inform the wording of the amendment because they are not associated with the demand or mandate “to enshrine a First Nations Voice” in the Constitution.
8. While it is relevant, it does not matter whether the different terms used in the constitutional dialogue process or the Indigenous community more broadly are interchangeably “Aboriginal and Torres Strait Islander”, “Indigenous”, “first people”, or whether Indigenous people accept there are different terms used to define them.
9. I emphasise that any polling relied on by the Australian Government to adopt a form of words other than “First Nations” in the Constitutional amendment for a Voice is not consistent with the mandate in the Uluru Statement from the Heart, that specifically demands enshrining a “First Nations Voice” in the Constitution.
10. For the Australian Government to implement the Uluru Statement from the Heart in “good faith”, the Constitutional amendment must adopt the term “First Nations” as mandated, and put it to the Australian people at a referendum vote.
11. The omission of the term “First Nations” from the current Constitutional amendment is driven by politics, not law. It is a compromise that is both unnecessary and inconsistent with the mandate to enshrine a “First Nations Voice” in the Constitution.

The current Constitutional amendment

12. I accept the current amendment is legally sound:

Chapter IX— Recognition of Aboriginal and Torres Strait Islander Peoples

129 Aboriginal and Torres Strait Islander Voice

In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia:

- (i) There shall be a body, to be called the Aboriginal and Torres Strait Islander Voice;
- (ii) The Aboriginal and Torres Strait Islander Voice may make representation to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples;
- (iii) The Parliament shall, subject to this Constitution, have power to make laws with respect to matters relating to the Aboriginal and Torres Strait Islander Voice, including its composition, functions, powers and procedures.

13. However, I note the Uluru Statement from the Heart does not mandate;
 - a. the enshrinement of an “Aboriginal and Torres Strait Islander Voice”, or
 - b. the “recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia”.
14. These words above at (a) and (b) are clearly adopted for political reasons.
15. Further to this, much of the public debate has been dominated by Constitutional lawyers and politicians hypothetically mooted the inclusion of the “executive Government”, which has distracted from the language mandated by the cultural authority underpinning the Uluru Statement from Heart, to enshrine a “First Nations Voice.”
16. The term “First Nations” is inclusive of how Aboriginal and Torres Strait Islander peoples broadly define ourselves according to our traditional nations; such as Wiradjuri, Noongar, Yolngu, Yamatji, Gomeroi, Bundjalung etc. It is consistent with the fact that the Australian Constitution is a document of principle, not detail.
17. The most extraordinary aspect of the omission of the term “First Nations” in the current amendment, is it appears to be a compromise that was unnecessary. Particularly so given that Australians from across the political spectrum have accepted the term “First Nations” as evidenced in the people overwhelmingly embracing the vision within the Uluru Statement from the Heart; to “walk with us” to enshrine a “First Nations Voice” in the Constitution and “Makarrata” for a better future.
18. The Australian people are increasingly accepting the call to action at the heart of the Uluru Statement and understand the mandate. I have witnessed this tremendous goodwill firsthand as I travelled across the continent speaking to everyday Australians about the importance of reforms, particularly from the moment former Prime Minister Malcolm Turnbull told me on ABC Q&A national TV it “would go up in flames.”¹
19. It is arguable that the Australian Government is not acting in “good faith” when it claims to rely on the Uluru Statement from the Heart to trigger a referendum for the Voice, but refuses to adopt the mandated language of “First Nations” in the Constitutional amendment. There will be legal and political consequences to not acting in “good faith”, that are not yet ventilated.
20. The Australian Government risks misleading the public when it claims it is implementing the “First Nations Voice”, but the Constitutional amendment itself does not adopt the precise words.
21. For the Constitutional amendment to be consistent with the endorsement of the cultural authority of the Uluru Statement from the Heart, the mandated term “First Nations” must be inserted into the Voice Constitutional alteration bill, in both the Constitutional amendment and referendum question, as submitted at paragraphs 27, 32 and 33.

Explanatory memorandum

22. Additionally, the Explanatory Memorandum omits the term “First Nations Voice”.

¹ <https://www.abc.net.au/ganda/pm-malcolm-turnbull-on-qa/10649814>

23. I attach the current Explanatory Memorandum to this submission [**Attachment A**].
24. In the Explanatory Memorandum where the Uluru Statement is referenced in relation to the Voice, the term “First Nations” is erased. This further demonstrates the lack of “good faith” by the Australian Government when it comes to engaging in the referendum process as a genuine act of reconciliation, and justifies community concerns about lack of trust in the Government.
25. The Explanatory Memorandum must be transparent, as it is critical for the future interpretation and understanding of the consequences of the Constitutional Voice.
26. The Explanatory Memorandum must:
- (i) Include the term “First Nations Voice”, consistent with the Uluru Statement from the Heart,
 - (ii) Where the term “First Peoples” is stated, be altered to state “First Nations Peoples”,
 - (iii) Confirm the Attorney- General’s assurance that enshrining the Voice does not cede or impact Aboriginal and Torres Strait Islander Sovereignty.
 - (iv) Include the language of “treaty” as envisioned.

Proposed change to be consistent with the mandate in the Uluru Statement from the Heart

27. I submit the current Constitutional amendment be altered to consistently reflect the mandate as written in the Uluru Statement from the Heart, as follows;

Chapter IX— Recognition of Aboriginal and Torres Strait Islander Peoples

129 Aboriginal and Torres Strait Islander Voice

In recognition of Aboriginal and Torres Strait Islander peoples as the First Nations Peoples of Australia:

- (i) There shall be a body, to be called the Aboriginal and Torres Strait Islander Voice;
- (ii) The Aboriginal and Torres Strait Islander Voice may make representation to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples;
- (iii) The Parliament shall, subject to this Constitution, have power to make laws with respect to matters relating to the Aboriginal and Torres Strait Islander Voice, including its composition, functions, powers and procedures.

28. The proposal above to simply insert the term “Nations” in the amendment is culturally mandated and modest. It is inclusive and consistent with the wishes of Aboriginal and Torres Strait Islander peoples, as expressed in the Uluru Statement from the Heart.
29. The term “First Nations”, as inserted above, is politically viable because it is acceptable within both the Indigenous and Non-Indigenous community. This is substantiated by the Australian people’s acceptance of the Uluru Statement from the Heart and can only add to a successful referendum process.
30. On 7 March 2023, the Australian Labor Government appointed an “**Ambassador for First Nations People**”,² who is specifically tasked with five Terms of Reference, including to “establish international First Nations dialogues on Voice, Treaty and Truth with likeminded countries to share experiences and knowledge of reconciliation processes and other First Nations issues, starting with New Zealand and Canada”. This indicates acceptance by the Australian Government that there is no legal or political implication with the term “First Nations People”. Recently, it also celebrated the establishment of the South Australian “First Nations Voice to Parliament”.³
31. As a matter of principle, inserting the term “First Nations” is Constitutionally sound and safe.
32. Furthermore, I submit all references in the Constitutional alteration bill where the term “First Peoples” is stated, be altered to state “First Nations Peoples”.

Referendum Question

33. The Constitutional alteration bill does not prescribe the referendum question. However, the simplicity of the proposals at paragraphs 26, 27 and 32 to insert “First Nations” into the Constitutional amendment and Explanatory Memorandum allows for the referendum question to be easily altered as follows:

A PROPOSED LAW: To alter the Constitution to recognise the First Nations Peoples of Australia by establishing an Aboriginal and Torres Strait Islander voice.

Do you approve of this alteration?

Conclusion

34. The term “First Nations” must be inserted into the Constitutional alteration bill for the referendum that proposes the Voice amendment and question to be consistent with the cultural authority underpinning the Uluru Statement from the Heart.
35. For the Australian Government to genuinely act in “good faith” negotiations now and into the future, it must adopt the form of words “First Nations” in the Constitutional

² <https://www.dfat.gov.au/international-relations/themes/indigenous-peoples/ambassador-first-nations-people#:~:text=Mr%20Justin%20Mohamed%20was%20announced,Dodson%20on%207%20March%202023.>

³ <https://www.agd.sa.gov.au/aboriginal-affairs-and-reconciliation/first-nations-voice-to-the-south-australian-parliament/first-nations-voice-model>

alteration bill and referendum question (submitted at paragraphs 27, 32, 33), as well as the Explanatory Memorandum (submitted at paragraph 26).

36. A failure to do so is misrepresenting the Voice to the Australian public in our quest for fair and frank reconciliation, between the people of Australia and the First Nations Peoples.
37. The Voice referendum process lacks legitimacy when it does not stay true to the language “First Nations” that is specifically mandated in the Uluru Statement from the Heart.
38. I am available to provide oral submissions.

Kind Regards,



Teela Reid
Wiradjuri & Wailwan,
Senior Solicitor, Aboriginal Land Rights & Native Title,
Chalk & Behrendt
First Nations Lawyer in Residence,
University of Sydney Law School