

## **Submission by Mark Leibler AC, Senior Partner, Arnold Bloch Leibler to the Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples**

**May 2018**

### **Opening statement**

*For more than a decade, Australia has been telling its First Peoples that the nation is finally ready to recognise them in its founding document – the Australian Constitution.*

*For more than a decade, we have considered and debated options for how this might be done in a way that is both likely to succeed at a referendum, and that accords with the aspirations of Aboriginal and Torres Strait Islander Peoples.*

*In May 2017, the proposal of a constitutionally enshrined advisory Voice to Parliament was unanimously supported by Aboriginal and Torres Strait Islander delegates to the historic National Constitutional Convention at Uluru.*

*As someone who has been involved in the Constitutional Recognition process for many years now, my view is that the proposal is a far more modest, reasonable and achievable option than any other that has emerged over the last decade.*

*The Uluru Statement identified the advisory Voice to Parliament as the only acceptable model because, without infringing on parliamentary sovereignty, it would constitutionally enshrine the opportunity for Aboriginal and Torres Strait Islander peoples to influence laws and policies that affect their lives – lives that on average remain poorer, sicker, harder and shorter than the lives of other Australians.*

*Is it asking too much of non-Aboriginal Australia and Australians that we support this aspiration? Are we so mean-spirited, so lacking in national ambition and imagination that we would tell Aboriginal and Torres Strait Islander peoples we reject their advice to the nation as to how they wish to be recognised?*

*The Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples was established to answer these fundamental questions.*

*The fact that the Committee has been instructed to consider the Uluru Statement from the Heart, including the proposed advisory Voice to Parliament, gives me hope and comfort that good sense and justice will prevail.*

*And the nation and all its peoples will be far richer as a result.*

## Introduction

- 1 Having served as Co-Chair of both the Referendum Council on Constitutional Recognition of Aboriginal and Torres Strait Islander Australians (December 2015 - June 2017) and the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Australians (December 2010 - January 2012), I am pleased to have this opportunity to provide some observations to assist the Committee with a deeply challenging task.
- 2 Consistent with the criteria for referendum success adopted by the advisory bodies that preceded it, the Committee is required to chart a way forward that achieves cross party support, is capable of being supported by an overwhelming majority of Australians and, most importantly, accords with the wishes of Aboriginal and Torres Strait Islander peoples.<sup>1</sup>
- 3 Given the Government's present rejection of the form of constitutional recognition that Aboriginal and Torres Strait Islander delegates unanimously endorsed at Uluru, following the most comprehensive and representative consultation process ever undertaken among Indigenous Australians, the Committee faces a near-impossible conundrum.
- 4 This is especially ironic as the Committee has been asked specifically to "examine the methods by which Aboriginal and Torres Strait Islander Peoples are currently consulted and engaged on policies and legislation which affect them ...",<sup>2</sup> and to consider "if, and how, self-determination can be advanced"<sup>3</sup> despite this question having been asked and answered in the Uluru Statement from the Heart as an expression of true self-determination.

## Summary of my recommendations

- 5 In my view, the only available path for the Committee to discharge its Resolution of Appointment is to recommend a process for building cross-party support for the model of recognition presented in the Uluru Statement from the Heart, which informed the recommendations of the Referendum Council.
- 6 As part of the Committee's work, I also recommend that it:
  - (a) consider discussing with the Uluru Position Working Group the value of some of the Uluru delegates presenting the Uluru Statement from the Heart in Parliament and speaking to the importance of it;
  - (b) consider the precise wording of a constitutional amendment to give effect to the Uluru Statement from the Heart;

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<sup>1</sup> Parliament of Australia, *Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples 2018 Resolution of Appointment* (1 March 2018). Note the Terms of Reference for the Expert Panel included these three elements and the Referendum Council adopted the Expert Panel's criteria for referendum success.

<sup>2</sup> Parliament of Australia, *Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples 2018 Resolution of Appointment* (1 March 2018).

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

- (c) further explore what the supporting legislation for a constitutionally enshrined Voice to Parliament might look like;
- (d) undertake polling to test community support for the Voice to Parliament on the basis of an accurate description of what is proposed; and
- (e) look objectively at whether criticisms related to the advisory body (by government and others) are sustainable.

**The Uluru Statement recommendations provide a unique opportunity for Australia**

- 7 The first priority in building cross-party and community support for the recommendations encapsulated in the Uluru Statement, in particular the advisory Voice to Parliament, is for Parliamentarians to truly understand the significance of what was achieved at Uluru. When they do, they will recognise the historic opportunity it presents to the nation to achieve a reconciled Australia.
- 8 To assist Parliamentarians on that journey, I would certainly encourage the Committee to consider discussing with the Uluru Position Working Group the value of some of the Uluru delegates presenting the Uluru Statement from the Heart in Parliament and speaking to the importance of it.
- 9 Although the Uluru Statement was presented to the Prime Minister and Opposition Leader at the Garma Festival last year, in my view the power of a direct address to Parliament should not be underestimated.
- 10 As a demonstration of such a moment, I draw to the Committee's attention the recent addresses by members of the Victorian Aboriginal Treaty Working Group to the Victorian Legislative Assembly in conjunction with the introduction of the Advancing the Treaty Process with Aboriginal Victorians Bill 2018. These powerful proceedings can be viewed online.<sup>4</sup>
- 11 Without wanting to repeat information of which the Committee is already keenly aware, Parliamentarians should be reminded that the Uluru Statement was the culmination of an inclusive, principled and focused consultation process, the like of which Australia has never seen.
- 12 With bipartisan support, the Referendum Council hosted a series of Indigenous-designed and led consultations, which placed the voices of Aboriginal and Torres Strait Islander people at the centre of our deliberations.
- 13 Twelve hundred delegates took part in the Indigenous-specific dialogues, from a total population of about 600,000 Aboriginal and Torres Strait Islander peoples nationally. We believe this to be the most proportionally significant consultation process ever undertaken with Indigenous Australians.

<sup>4</sup> Parliament of Victoria, 'Advancing the Treaty Process with Aboriginal Victorians' (28 March 2018) <<https://www.youtube.com/watch?v=jh1w9YWJXdU&feature=youtu.be>>.

- 14 It is a measure of the spectacular success of the process that, not only was complete consensus reached, the final Statement was agreed in an atmosphere of great pride, profound hope and keen awareness that something remarkable had been achieved.
- 15 The participants unequivocally and unanimously agreed that to be recognised, Aboriginal and Torres Strait Islander peoples must be consulted and engaged on policies and legislation that affect them by way of a constitutionally enshrined First Nations Voice.
- 16 One of the delegates, Thomas Mayor, described it in a recent publication as “a line in the sand for constitutional recognition.”<sup>5</sup> I commend this publication to the Committee and attach it as an **Annexure** to this submission.
- 17 Similarly, Professor Cheryl Saunders described the Uluru Convention as a “constitutional moment”,<sup>6</sup> and stated that such moments are “rare and need to be seized”.<sup>7</sup>
- 18 I was privileged to be at Uluru to observe the final days of the National Convention and the adoption of the Uluru Statement from the Heart.
- 19 As a lawyer, I am a creature of instruction, and the instruction on what Aboriginal and Torres Strait Islander Peoples want and expect from constitutional recognition was made clear at Uluru. For my part I am duty bound to convey that instruction wherever and whenever I can. My aim is to fulfil this duty by continuing to encourage Parliamentarians from across the political spectrum, and members of the wider community, to recognise and embrace the opportunity presented by the Uluru Statement from the Heart.
- 20 As a supporter of Indigenous empowerment, I understand the critical importance of Aboriginal and Torres Strait Islander people being given the power and afforded the respect to provide their *free, prior and informed consent* to any and all decisions that may affect them. This fundamental principle underpins the United Nations Declaration on the Rights of Indigenous Peoples. The Uluru Statement from the Heart reflects a true embodiment of this sacred principle.
- 21 In substance, also, the call for an advisory body, which gives Aboriginal and Torres Strait Islander people a means to be consulted respectfully on policies and laws that affect them, represents an exciting opportunity for the nation. An opportunity to simultaneously tackle the interconnection between practical and symbolic aspects of reconciliation.

### **Why other options for recognition were rejected**

- 22 It has been said that those involved in the Indigenous consultations will need to provide a more detailed explanation to the Committee as to why other

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<sup>5</sup> Thomas Mayor, ‘Constitutional reform: a line was drawn in the red sand at Uluru’, *NITV*, 10 April 2018 <<https://www.sbs.com.au/nitv/article/2018/04/10/constitutional-reform-line-was-drawn-red-sand-uluru>>.

<sup>6</sup> Uluru Statement from the Heart at Melbourne Law School (Melbourne Law School, 2018) 0:22:00.

<sup>7</sup> *Ibid.*

models of recognition considered through our consultations, and those undertaken by the Expert Panel, were rejected.

- 23 My colleagues, Patricia Anderson and Professor Megan Davis, who led the consultations, are better placed than I am to do this and I urge the Committee to be guided by them on the detail of this aspect of the Committee's inquiry.
- 24 In summary, the idea of a declaration of recognition inserted as a preamble to, or within, the Constitution was rejected because delegates were concerned it might undermine, rather than bolster, the status of First Peoples, who have never ceded sovereignty and have not yet had the opportunity to negotiate a formal agreement with the Commonwealth. A further concern with this proposal was that the content of any statement of acknowledgement in the Constitution would not meet the aspiration of truth telling.
- 25 The option of developing a declaration outside of the Constitution, however, was seen as having the potential to unite and inspire the nation.
- 26 Proposals for removing or ameliorating the so-called "race power" contained in section 51 (xxvi) were either rejected or ranked low because the change would not guarantee that Parliament could be prevented from making discriminatory laws.
- 27 The section was seen as having delivered significant positives in the form of heritage protection, land rights and native title that could be placed at risk if the section was to be removed.
- 28 Section 51 (xxvi) was the essential achievement of the 1967 referendum and the mostly beneficial legislation that has flowed from it convinced delegates to oppose the deletion of this historically significant provision.
- 29 Another option for change, the deletion of section 25, which contemplates the possibility of a state government excluding a group of Australians from voting on the basis of race, was seen as a "dead letter", and in any event, any attempt to apply it would fall foul of racial discrimination legislation.
- 30 The option of inserting a new provision into the Constitution prohibiting discrimination on the basis of race was determined by delegates to be a "shield", vulnerable to interpretation by the High Court, whereas a voice to Parliament was viewed as a "sword".
- 31 Moreover, it was considered very unlikely that such a provision could secure cross-party support.
- 32 Ultimately, in my view pursuing any of the other models that were considered but rejected at Uluru would involve vastly more complex constitutional change than the constitutionally enshrined advisory body. But more importantly, those alternatives do not have the consensus backing of Aboriginal and Torres Strait Islander peoples.

### **Revisiting the Government's concerns**

- 33 In its initial media release and subsequent statements rejecting the Referendum Council's recommendation for a representative advisory body as outlined in the Uluru Statement, the Government has put forward five central reasons for its decision.
- 34 The reasons, as best as I can presently understand them, are:
- (a) that the advisory body "would inevitably be seen as a third chamber of Parliament";<sup>8</sup>
  - (b) that it represents a new idea, not raised previously in deliberations on constitutional recognition;<sup>9</sup>
  - (c) that the recommendation lacks sufficient detail;<sup>10</sup>
  - (d) that it is "contrary to the principles of equality of citizenship in Australia";<sup>11</sup> and
  - (e) that it has no "realistic prospect of being supported by a majority of Australians in a majority of States".<sup>12</sup>
- 35 I will address these concerns one by one.

*"Third chamber"*

- 36 Any perception that the Voice to Parliament would represent a third chamber is misconceived. Whatever the source of this misconception, it is imperative that this myth be dispelled once and for all to build cross-party and community support.
- 37 The 'third chamber' criticism is not one that can be reasonably maintained. All proponents of the Voice to Parliament agree that the body would have no power of veto on proposed legislation and its advice would not be binding on either House of Parliament.
- 38 Instead the advisory body would be dependent upon Parliament's genuine engagement and political will to consult effectively, with constitutional enshrinement offering some important protection against the body being abolished or defunded.
- 39 Proponents of the Voice to Parliament, including vastly experienced lawyers from different ends of the political spectrum, have also emphasised that because it will be up to the Parliament to determine the roles, composition and powers of the advisory body, there is no risk whatsoever that it would

<sup>8</sup> Department of Prime Minister and Cabinet (Cth), 'Response to Referendum Council's report on Constitutional Recognition' (Media Release, 26 October 2017).

<sup>9</sup> Ibid.

<sup>10</sup> Prime Minister of Australia, 'Press conference with the Right Honourable Jacinda Ardern, Prime Minister of New Zealand' (Transcript, 5 November 2017).

<sup>11</sup> Ibid.

<sup>12</sup> Department of Prime Minister and Cabinet (Cth), 'Response to Referendum Council's report on Constitutional Recognition' (Media Release, 26 October 2017).

undermine current parliamentary processes. It would create the opportunity for a dialogue with Parliament, but leave parliamentary sovereignty completely and utterly undiminished.<sup>13</sup>

- 40 It should be remembered that the membership of the Referendum Council included five lawyers, including a former Chief Justice of the High Court no less, as well as former federal and state politicians. With one exception, members of the Referendum Council were wholly united in our belief that the type of advisory body called for in the Uluru Statement could be established with no adverse consequences to the smooth operation of the Parliament, including in relation to questions of justiciability.
- 41 Quite the contrary, it would provide Parliamentarians with valuable input to help ensure that laws and public policy decisions concerning Aboriginal and Torres Strait Islander Australians yield better outcomes than has been the case to date.

*A "new idea"*

- 42 To suggest that the notion of Aboriginal and Torres Strait Islander peoples having a proper say in their own affairs is new is to ignore the persistent advocacy of Aboriginal and Torres Strait Islander Australians over countless generations and the unprecedented nature of the Referendum Council dialogues.
- 43 It also ignores the principles enshrined in the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**), which Australia acceded to nearly a decade ago. As is discussed further below, the UNDRIP requires institutions to obtain the free, prior and informed consent of Indigenous peoples before adopting and implementing measures that may affect them.
- 44 The enduring call by Indigenous Australians for a greater voice in their affairs is set out in the Referendum Council report, but I would certainly encourage the Committee to remind Parliamentarians of some of the key moments in this long and continuous struggle, including:
- William Cooper's petition to King George V (1937);<sup>14</sup>
  - the Yirrkala bark petitions (1963);<sup>15</sup>
  - the Larrakia petition (1972);<sup>16</sup> and
  - the Barunga Statement (1988).<sup>17</sup>

<sup>13</sup> Melissa Castan, 'Constitutional Recognition, Self-Determination and an Indigenous Representative Body' (2015) 8 Indigenous Law Bulletin 19, 15.

<sup>14</sup> National Archives of Australia, *Petition by the Aboriginal Advancement League to His Majesty the King* (1937) <<http://www.naa.gov.au/collection/fact-sheets/fs268.aspx>>.

<sup>15</sup> Museum of Australian Democracy, *Yirrkala bark petitions* (1963) <<https://www.foundingdocs.gov.au/item-did-104.html>>.

<sup>16</sup> Virtual Reading Room, *Larrakia petition to the Queen* (1972) <<http://vrroom.naa.gov.au/print/?ID=19522>>.

<sup>17</sup> Australian Institute of Aboriginal and Torres Strait Islander Studies, *Barunga Statement* (1998) <<http://aiatsis.gov.au/collections/collections-online/digitised-collections/treaty/barunga-statement>>.

- 45 Embedded in each of these aspirational moments is an unwavering determination to enshrine the inherent right of Aboriginal and Torres Strait Islander Australians to have their opinions listened to and respected.
- 46 That Aboriginal and Torres Strait Islander Australians should now call for constitutional enshrinement of a voice should come as no surprise, given the withdrawal of government support for previous representative structures and failure to address these clear calls for recognition.
- 47 As Mr Thomas Mayor put it, although there has been “a long discussion in this country about recognition, and recognising us in the Constitution... there had never been the question asked of our people.”<sup>18</sup> According to Mr Mayor, one of the great drivers of hope at Uluru was that something more could be achieved, unlike previous aspirational moments that are “hanging up on a wall in Parliament just gathering dust but not having been implemented.”<sup>19</sup>
- 48 It has genuinely surprised me that members of the Government appear not to be aware of the extensive work undertaken by Professor Anne Twomey, whose drafting of a constitutional provision for the establishment of an Indigenous advisory body in 2015 was described at the time as “the missing piece of the puzzle”<sup>20</sup> in constitutional recognition.
- 49 Professor Twomey’s work picked up on submissions that the Cape York Institute provided to the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples in late 2014 and early 2015, and its proposal for the formation of an Indigenous constitutional body nominated by Aboriginal and Torres Strait Islander people to advise the Parliament on laws and policies.<sup>21</sup> This concept of respectful consultation was subsequently assessed as a very welcome and achievable suggestion by a number of constitutional law experts.<sup>22</sup>

### *Insufficient detail*

- 50 The ‘insufficient detail’ criticism is arguably the weakest of all the arguments against the establishment of the advisory body.
- 51 The Uluru Statement and the Referendum Council report deliberately and advisedly did not detail the form or operation of the body because, to achieve the desired objectives of the proposal, and give the Parliament and the people

<sup>18</sup> Uluru Statement from the Heart at Melbourne Law School (Melbourne Law School, 2018) 0:08:40.

<sup>19</sup> Uluru Statement from the Heart at Melbourne Law School (Melbourne Law School, 2018) 0:08:00.

<sup>20</sup> Damien Freeman, ‘Twomey’s sensible pathway to practical indigenous recognition’ *The Australian*, 13 June 2015; See, e.g. Anne Twomey, ‘Putting words to the tune of Indigenous constitutional recognition’ *The Conversation* 20 May 2015; Anne Twomey, ‘An Indigenous advisory body: Addressing the concerns about justiciability and parliamentary sovereignty’ (2015) 8 *Indigenous Law Bulletin* 19, 6.

<sup>21</sup> Cape York Institute, Submission to the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, October 2014; Cape York Institute, Supplementary Submission to the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, January 2015.

<sup>22</sup> See, e.g. Cheryl Saunders, ‘Indigenous Constitutional Recognition: The Concept of Consultation’ 8 *Indigenous Law Bulletin* 19, 19; Melissa Castan, ‘Constitutional Recognition, Self-Determination and an Indigenous Representative Body’ (2015) 8 *Indigenous Law Bulletin* 19, 15; David Freeman and Shireen Morris (eds), *The Forgotten People: Liberal and conservative approaches to recognising indigenous peoples* (Melbourne University Press, 2016).



of Australia confidence in it, the detail needs to be developed by the Parliament in respectful dialogue with Aboriginal and Torres Strait Islander people. It was blatantly obvious to the Uluru delegates and to the members of the Referendum Council that if such detail was in fact earlier prescribed it would be disrespectful to the institution of Parliament and constitute a clear over-reach.

52 Therefore, rather than recommending complete adoption of Professor Twomey's model or the 'Cape York' model, the Uluru Statement and Referendum Council report made a more general recommendation for a Voice to Parliament, deferring to the right of Parliament to determine the detail for itself beyond Constitutional prescriptions.

53 In summary, as Professor Twomey has made clear, it would simply not be appropriate to set out in the Constitution the detail of such a body's composition or internal procedures:

*Just as the Constitution leaves it substantially to legislation to determine how members of parliament are elected and the powers and procedures of the parliament, so too this amendment would leave such matters to the parliament to determine, in collaboration with Aboriginal and Torres Strait Islander people.*<sup>23</sup>

54 In any case, as a matter of practical reality, the Council's tenure did not allow time for the recommendation to be further developed, given that the Uluru Statement was agreed to at the end of May 2017 and the Council's deadline was 30 June 2017.

55 The Council did however commission a report by the Cape York Institute, which it provided to the Prime Minister and Leader of the Opposition in July 2017.<sup>24</sup>

56 In my view, consideration of the precise wording of a constitutional amendment to give effect to the Uluru Statement from the Heart is important work to be done by the Committee in fulfilment of its terms of appointment.

57 Further exploration of what the supporting legislation might look like would also be an extremely useful exercise for the Committee to undertake.

### *Unequal citizenship*

58 The Prime Minister has stated that to establish a national advisory body for Aboriginal and Torres Strait Islander peoples is "contrary to the principles of equality of citizenship in Australia."<sup>25</sup>

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<sup>23</sup> Professor Anne Twomey, 'Putting words to the tune of Indigenous constitutional recognition' *The Conversation* 20 May 2015.

<sup>24</sup> Cape York Institute for Policy and Leadership, 'Report to the Referendum Council: A First Nations Voice in the Constitution' (June 2017) < <https://www.referendumcouncil.org.au/> >.

<sup>25</sup> Prime Minister of Australia, 'Press conference with the Right Honourable Jacinda Ardern, Prime Minister of New Zealand' (Transcript, 5 November 2017).

- 59 The unique place and constitutional position of Australia's first peoples cannot be questioned.
- 60 The Constitution allocates the Commonwealth Parliament specific legislative power to make 'special laws' with respect to the people of any race. In substance, this power has been relied upon to make laws with respect to Aboriginal and Torres Strait Islander peoples. There is compelling force in the argument that this distinct power must be coupled with the opportunity and authority to seek to influence how that power is exercised. I am confident that, when properly understood in this context, Australian civil society would not view this as favouritism, unless of course that is the way the politicians choose to frame it.
- 61 The importance of genuine partnership and collaboration between Indigenous and non-Indigenous Australians is reflected in the Closing the Gap strategy, established a decade ago in an effort to redress blatantly apparent inequality between the life chances of Aboriginal and Torres Strait Islander Australians compared with other Australians.
- 62 On any measure and in any substantive sense - whether it be health, education, housing or incarceration - Australia does not currently provide Aboriginal and Torres Strait Islander peoples with equality of citizenship.
- 63 As Senator Patrick Dodson has acknowledged, the disappointing outcomes of the Closing the Gap strategy, demonstrate that governments have been unable to meet the strategy's original statement of intent by truly collaborating with Aboriginal and Torres Strait Islander peoples.<sup>26</sup>
- 64 In terms of opportunities to influence government decision making, there is already a multitude of organisations advising government that have distinct cultural or religious composition.<sup>27</sup> The difference with the advisory body that the Uluru Statement contemplates is that its existence would be enshrined in the Constitution. But even that is not unique in Australia.<sup>28</sup>

*Impossible to achieve at referendum*

- 65 Presumably the government reached the conclusion that the establishment of an Aboriginal and Torres Strait Islander advisory body would not be supported by the Australian people at a referendum based on the findings of private polling. The legitimacy of this presumption is not clear without knowing what people were asked.
- 66 Certainly statements from the Indigenous Affairs Minister that "I don't need evidence...we have done a lot of polling, not on this particular matter,

<sup>26</sup> Sky News, 'Failure to collaborate on Closing the Gap "disappointing": Dodson' (10 February 2018) <[https://www.skynews.com.au/details/\\_5730825816001](https://www.skynews.com.au/details/_5730825816001)>.

<sup>27</sup> Including for example the National Multicultural Advisory Group, the Australian Multicultural Council and the Religious Advisory Committee to the Services.

<sup>28</sup> See section 77 of the *Constitution of Queensland 2001* (Qld). This section of the Queensland Constitution provides for the Minister responsible for Local Government matters to consult a body representing local governments before relevant Bills are introduced to Parliament.

because it was never a matter that was contemplated..."<sup>29</sup> and "it's our instinct"<sup>30</sup> do a real disservice and risk incalculable damage to a properly informed progression of the national debate.

- 67 What we do know as a matter of public record is that the most recent Australian Constitutional Values Survey, conducted in August 2017 by a team led by Griffith University, the University of New South Wales, University of Sydney and the Australian National University found widespread support for Indigenous constitutional recognition, including the Voice to Parliament proposal (61 per cent).<sup>31</sup>
- 68 A poll conducted by Essential Research a week after the Uluru Statement was issued, asking people whether they supported or opposed the Statement's recommendations, found that each measure had greater support than opposition, with the most popular being enshrining a Voice to Parliament.<sup>32</sup>
- 69 This poll aligns with the Referendum Council's consultations with the wider community, which made it clear that non-Indigenous people are most likely to support a model that is supported by Aboriginal and Torres Strait Islander people - the very people sought to be recognised.<sup>33</sup>
- 70 If Parliament allocates the time and resources for the proposal to be developed, and then gives the Australian people the information and the opportunity to make their own decision, there is every reason to believe a referendum on this issue would succeed.
- 71 Up to date polling should be undertaken, with support from the Committee, on the basis of an accurate description of what is proposed.
- 72 If the Committee feels compelled to pursue a form of recognition that was considered and rejected through the Referendum Council's Indigenous consultation process, not only would it be disrespectful in the extreme but it would have *no* chance of success at a referendum.
- 73 If the Government made its decision for fear that the proposal may be voted down, they should not be pursuing an earlier model that has zero chance of success.

## Conclusion

<sup>29</sup> ABC Radio National, 'Government rejects Constitutional Indigenous voice to Parliament', *RN Drive*, 26 October 2017 (Nigel Scullion) <<http://www.abc.net.au/radionational/programs/drive/government-rejects-constitutional-indigenous-voice-to-parliament/9090304>>.

<sup>30</sup> Ibid.

<sup>31</sup> Griffith University, *Survey: support for Indigenous recognition underestimated* (30 October 2017) <<https://app.secure.griffith.edu.au/news/2017/10/30/survey-shows-support-for-indigenous-recognition-underestimated/>>.

<sup>32</sup> Essential Media Communications, *Uluru Statement* (6 June 2017) Essential Report <<http://www.essentialvision.com.au/uluru-statement>>.

<sup>33</sup> Referendum Council, *Final Report of the Referendum Council* (2017), p 35.

- 74 Given that no-one has questioned or could question the legitimacy of the Referendum Council's Indigenous consultation process, and given that Co-Chair Julian Leaser has said the Joint Committee will not seek to repeat this process,<sup>34</sup> to adhere to its Resolution of Appointment, the Committee has two options:
- to recommend that the Australian Parliament not proceed with constitutional recognition at this time because the criteria for referendum success noted above cannot be reconciled; or
  - to recommend a process for building cross-party support for the model of recognition presented in the Uluru Statement from the Heart, which informed the recommendations of the Referendum Council.
- 75 I sincerely believe the second option is the only viable option for the Committee, for the Federal Parliament and for the sake of the whole nation.
- 76 The Committee must look objectively at whether criticisms related to the advisory body (by government and others) are really sustainable.
- 77 The Committee's Resolution of Appointment asks it to consider the Uluru Statement and final report of the Referendum Council. This leaves open the real prospect that once the Parliament has the opportunity to properly reflect on the proposal, the Government might be persuaded to reconsider its present position.
- 78 If it were otherwise, these recommendations would not form part of the Committee's Resolution of Appointment. Moreover, there is a great deal of support for the Uluru Statement from the conservative side of politics, including Committee Co-Chair Julian Leaser MP,<sup>35</sup> Greg Craven AO,<sup>36</sup> Dr Damien Freeman,<sup>37</sup> Alan Jones AO<sup>38</sup> and Jeff Kennett AC.<sup>39</sup>
- 79 It is the prerogative of governments to be allowed to change their minds as and when it is deemed to be for the benefit of the nation. This has occurred on multiple occasions in the past.
- 80 Policy shifts in line with prevailing community sentiment is one of the hallmarks of a truly healthy democracy, a fact most recently acknowledged by the Prime Minister in his pithy comment on the announcement of the Banking

<sup>34</sup> Rachel Baxendale, 'Bipartisan support key to indigenous affairs overhaul Julian Leaser' *The Australian*, 1 April 2018.

<sup>35</sup> See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 22 June 2017, 75869 (Julian Leaser, Member for Berowra).

<sup>36</sup> See, eg, Uphold and Recognise, *Launch: "This Whispering in Our Hearts"*, (1 August 2017) <<http://www.upholdandrecognise.com/events/2017/8/1/this-whispering-in-our-hearts>>.

<sup>37</sup> See, eg, Stephen Fitzpatrick, 'PM challenged to deliver indigenous voice, treaty' *The Australian*, 27 May 2017.

<sup>38</sup> See, eg, 'Q&A: Alan Jones criticises the government for rejecting the Voice to Parliament. *ABC News* (online), 31 October 2017 <<http://www.abc.net.au/news/2017-10-31/q&a-rudd-jones-is-turnbull-out-of-depth-as-pm/9100596>>.

<sup>39</sup> See, eg, Jeff Kennett, 'Jeff Kennett: Recognise, uphold but also celebrate indigenous Australians' *The Herald Sun* 31 May 2017, 22.

Royal Commission that the "...government's policy remains the same until it's changed..."<sup>40</sup>

- 81 An informed and respectful reconsideration by the Government of all that the Uluru Statement provides and symbolises represents a historic opportunity to reinforce Australia's democracy and, the health and wellbeing of our nation.

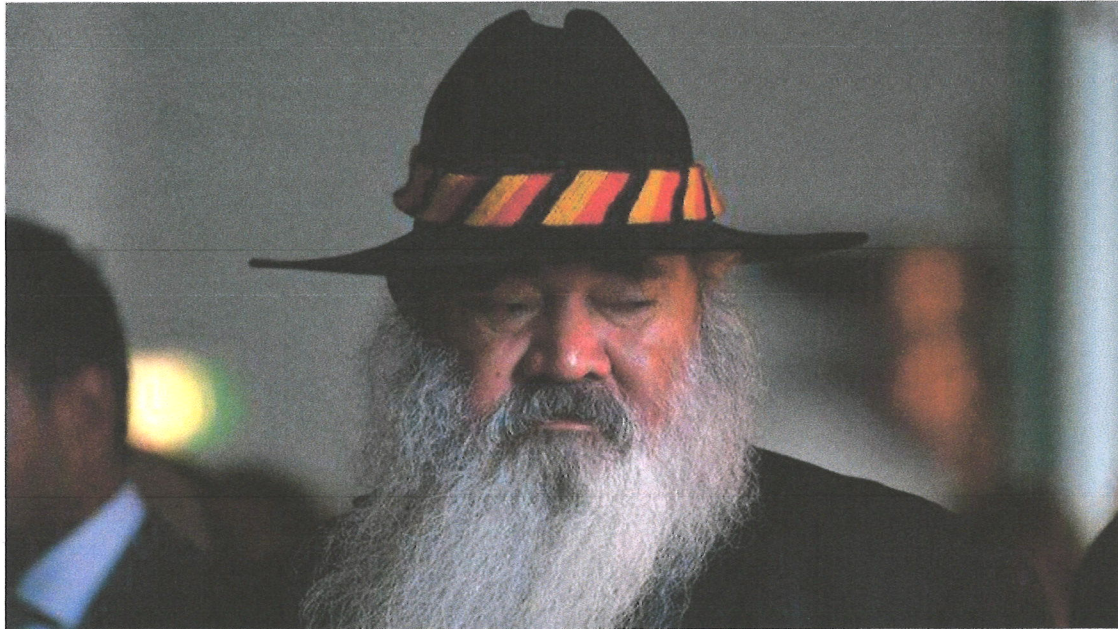
I would be very pleased to expand on any aspect of this submission in person at the Committee's convenience.

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<sup>40</sup> Prime Minister of Australia, 'Press conference with the Hon. Scott Morrison MP, Treasurer - Banks and Financial Services Royal Commission, Sam Dastyari and same-sex marriage' (Transcript, 30 November 2017).

10 Apr 2018 - 12:46pm

## Constitutional reform: a line was drawn in the red sand at Uluru



Pat Dodson is jointly heading an inquiry into constitutional recognition for Indigenous people. (AAP)

OPINION: Can Julian Leeser, Patrick Dodson and the Joint Select Committee propose anything more substantive than that of the First Nations' referendum council?, writes Uluru delegate Thomas Mayor.

By Thomas Mayor

10 Apr 2018 - 12:39 PM UPDATED 10 Apr 2018 - 12:46 PM

On 26 May last year, at the culmination of 13 regional dialogues that involved more than 1300 Aboriginal and Torres Strait Islander Peoples, we answered a very important question about what we would support as recognition in the constitution.

The participants unequivocally proposed that to be recognised, we must be empowered so we are heard. We asked to be consulted and engaged on policies and legislation that affects us through a constitutionally enshrined First Nations Voice. The call for a constitutional voice was also the most popular reform in submissions from the wider public.

The proposal was a line in the sand for constitutional recognition. In all 13 regional dialogues with participants from more than 100 First Nations, mere symbolic recognition, which would change nothing for our people, was rejected. The Referendum Council heard us, and they



informed Government that the substantive recognition we asked for through a constitutional Voice was a “take it or leave it proposition”.



‘Uluru Statement from the Heart’ called for the establishment of a ‘First Nations Voice’ in the Australian Constitution (NITV)

And when Malcolm Turnbull dismissed the proposition for a First Nations Voice in October last year - we did not take no for an answer. Public pressure saw a new [Joint Select Committee](#) established that includes the Uluru Statement in its Terms of Reference. The Committee is now taking submissions.

The Uluru Statement carries the weight of an unprecedented First Nations process that was more proportionately representative than any other constitutional dialogue in the nation’s history. Therefore, it must be respected for what it is: the majority will of the First Nations of Australia on how we want to be recognised.

We did not ask for tinkering with the race clauses. We asked for a constitutionally guaranteed voice. Not a veto. Not a third chamber. Just a voice.

The current *Joint Select Committee* co-chaired by Julian Leeser and Patrick Dodson must understand this fact. We did not ask for symbolic words in the Constitution. We did not ask for tinkering with the race clauses. We asked for a constitutionally guaranteed voice. Not a veto. Not a third chamber. Just a voice. This is a modest, yet profound request. We can still make this happen, and [polling](#) shows the Australian people believe we can too.

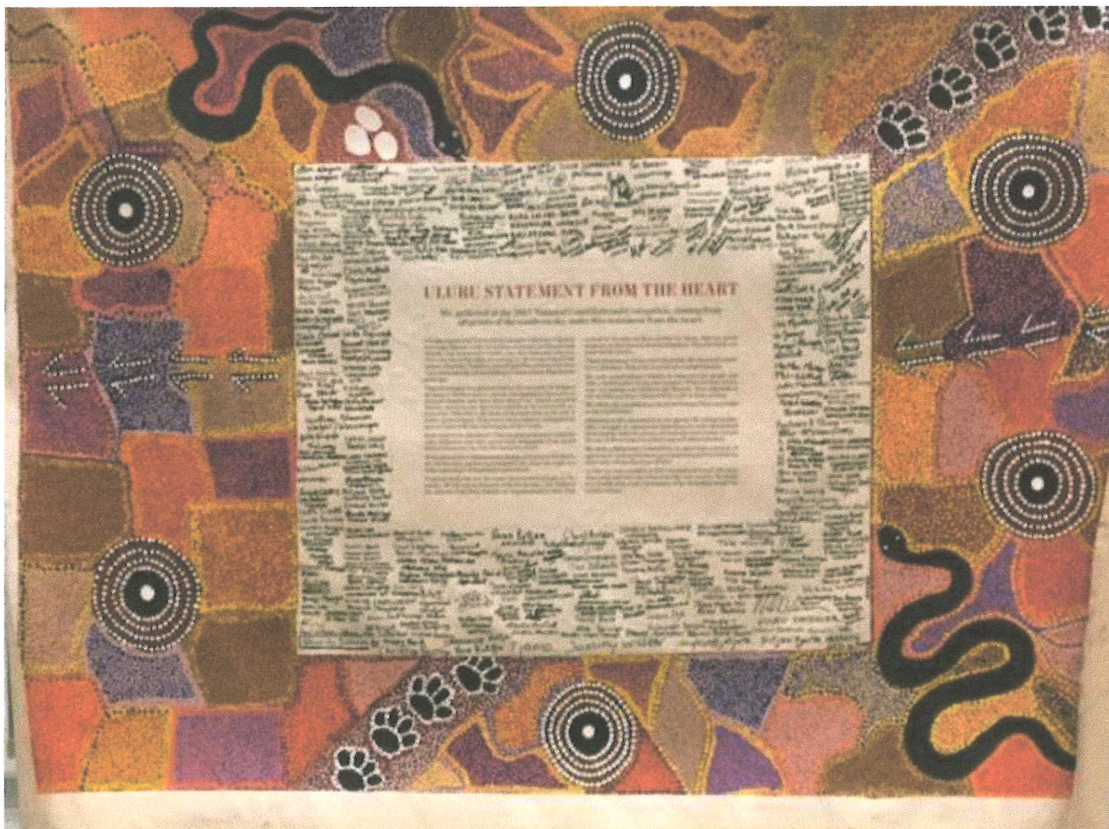
My people have been asking for a voice in our affairs for a long time. The history of our struggle includes [William Cooper’s petition](#) for Aboriginal representation, which was sent to the King but never made it past parliament. The [1938 Day of Mourning](#) called for Aboriginal representation, the [Yolgnu Bark Petitions](#) in the 60s called for fairer consultation and the



right to be heard, the Larrakia Petition in the 70s asked for political representation and a treaty, and the 1988 Barunga Statement asked for an Aboriginal representative body and a treaty. The Uluru Statement is the first time a national First Nations consensus position has been achieved. It, too, asks for a voice and a Makarrata Commission.

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The Uluru Statement's call for a voice is modest, because it respects parliamentary supremacy. As the Referendum Council makes clear, no veto is proposed and Parliament would determine the design and details of the voice, in consultation the First Nations. This reform is also profound. I explain my view of why the Voice can make a difference in an article published in [IndigenousX](#). In short, a constitutionally enshrined Voice has the ability to change Indigenous affairs for the better. Together we can improve outcomes.



This beautiful generous and wise document is a 'constitutional moment' which we should not let pass #UluruStatement. (Twitter / @Harriemantell)

If this Committee fails we will have wasted another opportunity for direly needed systemic reform, and another generation will be lost. Suicide, family violence, incarceration rates, unemployment, all ultimately come from one root cause — systemic powerlessness. We can't properly work with government to fix these things unless we have a fair and empowered voice in decisions made about us.

An [article](#) last week in The Australian, reported the Committee's co-chair, Julian Leeser, saying "there was no point persisting with a proposal that would not win government support." He said "we should aim for this to try and be the last committee on this issue." I



hope it will be too, but the only way to achieve this is to implement the Uluru Statement. Either it is a constitutionally guaranteed voice, in a form that should be properly discussed and negotiated between the First Nations and government, or there can be no referendum. Indigenous people will reject mere minimalism, and the Australian people will too – just like in 1999.

Julian Leeser and Patrick Dodson both need to understand this. There is a way through here, and it will only happen if we work together. I believe we can achieve the Uluru Statement in a way that takes on board political concerns. We are willing to work with you. But government must also hear us: we want our voices to be heard, and this needs to be constitutionally guaranteed. We have waited too long already.

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Senator Pat Dodson put it like this to the ABC last week: "The parliament now has a real challenge, it cannot come out with a weak-kneed response, it has to come away out of this period with something clear which will give heart not only to First Nations people but also to the nation of Australia." I agree.

Anything less than what is requested in the Uluru Statement from the Heart is a "weak-kneed" response. Anything less will not give heart to the Indigenous and Non-Indigenous Australians who support a constitutionally enshrined Voice and a Makarrata Commission.

The line was drawn in the red sand of Mutitjulu. Our claims were endorsed with standing acclamation and the tears of so many First Nations leaders at Uluru.

Now the LNP and the Labor Party must step up. Leeser and Dodson individually must step up, because Indigenous people are not letting you off the hook, and nor are Australians. I believe Dodson's heart is in the right place. I think Leeser's heart is probably in the right place too. Let us now put our political heads together and find a way to achieve the Uluru Statement from the Heart.

*Thomas Mayor is a Zenadth Kes man who lives on Larrakia land in Darwin. He is the elected branch secretary for the Northern Territory Branch of the Maritime Union of Australia and the President of the NT Trades & Labour Council. Thomas was elected from the Darwin Dialogue on Constitutional reform to participate in the Uluru Convention. Follow Thomas [@tommayor11](https://twitter.com/tommayor11)*