



PO Box 968  
North Sydney  
NSW 2059

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Senator Patrick Dodson and Mr Julian Leeser MP  
Co-Chairs, Joint Select Committee on  
Constitutional Recognition Relating to  
Aboriginal and Torres Strait Islander Peoples

Via email: [jscctr@aph.gov.au](mailto:jscctr@aph.gov.au)

Dear Senator Dodson and Mr Leeser,

We write in response to the Interim Report of the Joint Select Committee (JSC). This response aims to answer questions asked in the Interim Report. This response further refines, and builds upon, the previous submission made to the JSC on 5 June containing four documents: *Hearing Indigenous Voices*, *Makarrata*, *Journey from the Heart*, and *A Fuller Declaration of Australia's Nationhood*. We refer the Committee to these documents as our substantive contribution to the public discussion as to how each of the policy objectives of constitutional recognition of Aboriginal and Torres Strait Islander peoples might be accomplished.

Before turning to the questions posed in the Interim Report, however, we would like to comment on a report of evidence that the JSC heard on Tuesday, 11 September 2018. We note that a transcript of that evidence is not yet available, however, we have read a report which suggests that the following remarks were made as part of oral evidence given to the JSC that day:<sup>1</sup>

“The referendum only needs to contain the broad contours or parameters of the voice to the constitution. . .

“The decision to defer is a well-known constitutional approach. . .

“This will be sufficient information, in our view, for the purposes of a public campaign and a successful referendum. . .

“It's better to leave the process initially in the hands of First Nations people, who themselves may seek the input and deliberation in the process on the appropriate questions from non-Indigenous Australians and technical experts. . .

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<sup>1</sup> <https://www.sbs.com.au/nitv/article/2018/09/12/our-mob-are-dying-leaders-urge-referendum-indigenous-voice>  
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“The desired function of the voice and what it can achieve within communities, for instance, are things that should be driven by First Nations, as they are uniquely placed to inform these questions.”

In response to these comments, we offer the following observations:

### **Detail required for successful referendum**

We have worked closely with people who were actively involved in successfully prosecuting the NO case during the 1999 republic referendum. They advise us that a referendum would be likely to fail if the YES case can provide nothing more than “broad contours or parameters” of the proposed change to the Constitution. If insufficient information is provided by the YES case, the NO case during the public campaign will argue vigorously that the voters should not give more power to politicians to decide how the new arrangements will work. In short, the decision not to resolve the detail before the referendum would be a gift to the NO case campaign, which would in all likelihood prevail and result in a majority of electors voting against the proposed change that would be presented as a “blank cheque for the politicians”.

### **First Nations people develop First Nations institutions**

It is perfectly reasonable to assert that First Nations people should develop First Nations institutions, and that they should be free to seek input from non-Indigenous experts in the process of developing their institutions. There is a difference, however, between processes for developing amendments to the Constitution and proposed statutes conferring public powers on First Nations institutions, on the one hand, and processes for developing First Nations institutions, on the other. Constitutional amendments and statutes enabling First Nations institutions to influence the exercise of public powers cannot simply be left to First Nations people for them to develop with appropriate input from others. The only legitimate process that will have the confidence of all Australians is a process that is initially in the hands of *both the Australian Parliament and First Nations people*. In other words:

- how the voice works *within* communities should be a matter for First Nations people within each of those communities to resolve
- how the voice influences the exercise of public power in its interactions with the Executive and the Parliament is a matter that needs to be resolved through a process that is driven by the Australian Parliament working in partnership with First Nations.

### **We suggest a compromise position:**

#### **Parliament and First Nations jointly develop detail about statute now, but defer design of First Nations institutions to First Nations process**

In our previous submission, we provided a draft Speaking for Country Bill. This bill offers a compromise position. The structure of local/regional organisations would be a matter for local/regional Indigenous peoples to resolve for themselves. The proposed statute conferring public powers upon these local/regional bodies, and their national affiliation, to provide advice to the Executive and the Parliament would be a matter for the Australian Parliament to develop in consultation with Indigenous people. This is the kind of compromise that is required: a constitutional amendment and a statute that clearly sets out what role Indigenous people will have in the development of laws and policies relating to Indigenous affairs, but which leaves in the hands of Indigenous peoples the process for developing the Indigenous bodies through which the statute enables Indigenous people to participate in Indigenous policymaking.

With this in mind, we offer our answers to the Interim Report’s specific questions as follows.

#### ***National voice: function and operation***

**1. What is the role of a national voice? How does it intersect with or differ from the role of any local/regional voice?**

The role of the national voice should be to ensure, through representation arrangements designed by the Parliament in consultation with Aboriginal and Torres Strait Islander peoples, that local/regional voices are heard at the national level.

**2. What powers and functions should the national voice have—only advice on laws made under section 122 and section 51(xxvi) or broader policy issues?**

The national voice should have two separate advisory functions.

The first function should be a guaranteed right to provide advice, and an obligation for that advice to be considered, when the Parliament is making laws with respect to Indigenous peoples under section 122 or section 51(xxvi) (*Designated Acts*), or legislative instruments under Designated Acts (*Designated Legislative Instruments*).<sup>2</sup> Respecting parliamentary sovereignty in this first function, a failure by the Parliament to consider advice in respect of Designated Acts or Designated Legislative Instruments would not invalidate the relevant legislation. The consequences of that failure would be political, not legal.

The second function should be a discretion given to the national voice to offer advice on broader policy issues where Indigenous peoples are affected in a special way, without imposing obligations either on the Voice to provide advice in any other matters, or for the Parliament and/or the Executive to have obligations in relation to such advice.

**3. Which legislation should The Voice have the power to advise on?**

In addition to the requirement that the national voice must be given an opportunity to provide advice on Designated Acts and Designated Legislative Instruments, the Voice should have a discretion to offer informal advice on legislation that it believes affects Indigenous peoples in a special way. The Parliament and/or the Executive should be able to refer legislation and/or other policy proposals to the Voice for advice when it is believed that this advice might be useful.

**4. During which part of the policy making process should The Voice provide its advice?**

A distinction needs to be made between the Voice's formal and informal roles in providing advice.

The Voice should provide informal advice to the Executive at the early stages of the policymaking process, to help develop policies that both realize Indigenous aspirations and address legitimate concerns of the Executive and other interested stakeholders.

This is in addition to the Voice's formal role in providing advice on a Designated Act or Designated Legislative Instrument that is tabled in both Houses of the Parliament. In an ideal world, the advice tabled in both Houses would indicate that the Executive has taken on board Indigenous concerns at an earlier stage, and that proposed legislation/legislative instrument addresses these concerns. The right to table formal advice in both Houses creates an incentive for the Executive to work constructively with the Voice at the earlier stages in the process, so that the formal advice to both Houses is broadly supportive of the proposed legislation/legislative instrument.

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<sup>2</sup> See Uphold & Recognise pamphlet *Hearing Indigenous Voices, Options for Discussion*, and the draft *Advisory Council for Aboriginal and Torres Strait Islander Affairs Bill 2018*, Divisions 2.3 and 2.4. (This draft bill implements the option of a constitutionally entrenched national entity that draws on local voices.)

**5. By which avenues should this advice be provided? When?**

The legislative framework should provide avenues for both formal advice and informal advice.

The avenues for informal advice should be provided earlier in the policymaking process, and should involve collaboration.

The avenue for formal advice should be provided later in the process, when proposed legislation is introduced into the Parliament. The formal advice is intended to ensure that both Houses hear directly from Indigenous voices and consider this advice when debating proposed legislation, but it is also intended to ensure that policymakers collaborate constructively with Indigenous voices earlier in the process of developing Indigenous policy, so that proposed laws are introduced into the Parliament with the support of Indigenous voices, rather than in opposition to them.

**6. How could The Voice advise the Executive in early stages of policy development?**

The legislative framework should make provision for the Voice to provide advice to the Executive in the early stages of the policy process, but it should not stipulate how this is to occur. Ministers should be given a discretion to interact with the Voice in the ways that seems most efficient to them, in the knowledge that later in the policy process the Voice will have the right to table advice in both Houses. Over time, conventions will develop that govern this process.

**7. Should the provision of advice be mandatory or discretionary? Why?**

It should be a mandatory requirement that the Voice be given an opportunity to provide advice on proposed laws made under section 122 or section 51(xxvi), although the Voice should be able to waive this right (in a timely fashion), should it choose to do so. This is the core purpose of the Voice, and it would undermine the whole process if both Houses were not required to consider advice on such proposed laws. (However, as noted, and respecting parliamentary sovereignty, a failure to comply with the advice mechanism will not affect the validity, operation or enforceability of any Designated Act or Designated Legislative Instrument.)

In other matters, there should be a discretion both for the Executive and/or the Parliament to request advice, and there should be a discretion for the Voice to offer advice when it believes that a proposed law or policy would affect Indigenous people in a special way, but the obligations on the Executive, the Parliament should be limited to an obligation to receive and acknowledge advice when the subject matter is not a proposed law under section 122 or section 51(xxvi).

**8. Should that advice be made public and if so how and when?**

Formal advice that is tabled in both Houses of the Parliament would be public. However, informal advice that is provided earlier in the policymaking process should be confidential, so that every opportunity can be used to collaborate at the earlier stages, including full and frank confidential advice, in the knowledge that advice will be made public at the final stage.

**9. How much time should The Voice be provided to advise in relation to legislation?**

The Voice must be required to provide formal advice within a timeframe that does not frustrate the operation of the Parliament. Assuming that the Voice has been engaged informally in providing advice at the earlier stages in the policymaking process, it should be a fairly efficient process for it to prepare formal advice to be tabled in both Houses at the second reading of a bill for a proposed law.

**10. How does the national body advise on legislation that needs a quick turnaround?**

A distinction needs to be made here between core legislation made under section 122 or section 51(xxvi) and other legislation.

In the case of other legislation, provision should be made for the Voice to provide advice on proposed laws that require a quick turnaround within a shorter timeframe than would be usual.

In the case of proposed laws under section 122 or section 51(xxvi), there should not be provision for a quick turnaround: such laws are passed rarely, but are at the core of the Voice's function, and such laws should not be rushed through the Parliament.

**11. How should issues of justiciability (challenge in the courts) be dealt with?**

Any constitutional provision should be drafted so as to avoid enabling challenge in the courts on constitutional grounds. Legislation should be drafted similarly. It should be clear within the legislation:

- (a) when advice must be considered;
- (b) the timeframe in which such advice must be offered; and
- (c) the mechanism through which it is certified that such advice was received and considered.

Whilst the legislation should require any tabled advice given by the Voice in respect of Designated Acts or Designated Legislative Instruments be considered, the failure to do so will not affect the validity, operation or enforcement of the relevant Act or legislative instrument.<sup>3</sup> That is, even failure to comply with these mandatory requirements will not be capable of challenge in the courts. In that way, the legislative mechanism for providing advice does not constitute a veto on proposed laws, and the failure to provide advice or the failure to consider advice given and tabled cannot invalidate an otherwise valid law.

**12. What matters should the national voice not deal with?**

The national voice should not deal with matters that do not impact Indigenous people in a special way. The national voice does not provide an Indigenous person with a "second Member of Parliament". The national voice is concerned with the development of laws and policies concerning Indigenous affairs.

Where a law or policy is neither

- (a) directed specifically at Indigenous people or Indigenous affairs; nor
- (b) a law or policy of general application that nevertheless impacts Indigenous people in a special way that other Australians will not be impacted,

the national voice should not deal with that matter, but rather, should help concerned Indigenous people refer the matter to their local MPs.

**13. Should the Voice be responsible for service delivery?**

No, the Voice should not be responsible for service delivery. It should be responsible for helping *advise* the Executive on the most effective means for service delivery in Indigenous communities.

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<sup>3</sup> See, for example, clause 16(3) and clause 17(5) of the draft Advisory Council for Aboriginal and Torres Strait Islander Affairs Bill 2018.

**14. Should The Voice have a say on the provision of services by government (state, territory, and local governments)?**

Generally, no. However, if requested by a State or Territory, the Voice could have a role in advising on how state, territory and local governments can establish partnerships with local and regional Indigenous communities, so that those services can be delivered in a way that local and regional communities are satisfied responds to their particular needs and circumstances. In other words, if a State or Territory government decides to opt into the legislative scheme for the Voice, the Voice might exercise a role to ensure that the voices of the local and regional communities are heard at the State or Territory level, when agreements for service provision are being negotiated.

**15. Should The Voice have the power to review government expenditure?**

The Voice should not have the power to review government expenditure. If requested by the responsible Minister, it could potentially help facilitate a process through which local/regional communities enter into agreements with federal/state/territory governments about how government funds will be allocated within their communities.

**16. Should The Voice have the power to self-initiate inquiries?**

The Voice should have the power to initiate its own inquiries, where doing so will help it to develop proposals as part of its advice to the Executive and the Parliament.

**17. How could The Voice review programs and service delivery?**

If requested by the responsible Minister, or if a state government opts into the legislative scheme, the Voice could facilitate a process through which federal and state governments enter into agreements with regional/local Indigenous communities, to ensure that programs and services are delivered in the best possible way within each community, and then facilitate review of these agreements.

**18. How should The Voice interact with the Parliament in a transparent, accountable manner representing the views of Aboriginal and Torres Strait Islander peoples across Australia? Should the advice from The Voice be binding or advisory only?**

Advice to the Parliament should be advisory only—for it to be otherwise would be to undermine the sovereignty of Parliament.

The Voice should not be a ‘peak body’ that determines policy for Indigenous peoples. Rather, it should be a conduit, to ensure that the Parliament understands the views of Indigenous peoples.

Where there is Indigenous consensus, the Parliament should be advised of this consensus; where there are divergent views, the formal advice to Parliament should reflect those divergent views.

There are two options for achieving this—a top-down approach or a bottom-up approach:

- In a top-down model (where there is a Constitutionally entrenched national entity drawing on local voices), the national voice is accountable to local/regional communities because its members are chosen at a national conference of delegates from local/regional communities.
- In a bottom-up model, where the Constitution and legislation makes provision for local entities, and letting those entities affiliate of their own accord, the national voice is accountable to local/regional communities because it is a voluntary affiliation of those local/regional voices.

**19. What resources would be required for the operation of an effective voice?**

An assessment of resourcing is premature until the final model for the Voice is chosen. Its infrastructure can then be costed. However, on any view, the resourcing model would be the minimum necessary to ensure that the legislated objects of the Voice can be achieved. The resourcing required by the Voice would then be exposed for ongoing public scrutiny through its governance and administrative arrangements (corporate plan and annual report) and oversight by the parliamentary committee process.

**20. What governance mechanisms should oversee the national voice?**

We have set out, for discussion, potential governance mechanisms for the top-down model in the draft *Advisory Council for Aboriginal and Torres Strait Islander Affairs Bill 2018* and for the bottom-up model in the draft *Speaking for Country Bill 2018*.<sup>4</sup>

**21. How are internal disputes resolved?**

Although consultation with Indigenous communities will be required to determine suitable internal dispute resolution procedures, for illustrative purposes, precedent for mechanisms for dealing with disputes, including internal disputes within Aboriginal and Torres Strait Islander organisations, is set out in the internal governance provisions in Part 3.2 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.

**22. If members of The Voice act in a way as to bring The Voice into disrepute, what is the procedure for removing them?**

Although consultation with Indigenous communities will be required to determine suitable procedures for the removal of members of the Voice, there are illustrative mechanisms, consistent with sound corporate governance practices, for the removal of members of the Voice, set out in Part 6-2, Division 249 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.

*National voice: Structure and membership*

**23. Who should be able to choose national representatives?**

A national voice for Indigenous peoples should be accountable to local/regional Indigenous communities. So it should be the local/regional communities who choose the members of the national voice.

**24. By what process should they be chosen?**

There are two options for how local/regional communities choose members of the national voice. Either,

- each local/regional community chooses a member of the national voice, or
- the local and regional communities send delegates to a national conference, and the delegates at the national conference together choose the members of the national body.

These options are set out in *Hearing Indigenous Voices*, which is included in our previous submission.

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<sup>4</sup> See Uphold & Recognise pamphlet *Hearing Indigenous Voices, Options for Discussion*, and the draft *Advisory Council for Aboriginal and Torres Strait Islander Affairs Bill 2018*.

**25. How long should members serve?**

The duration of membership should be stipulated in legislation, but it should be longer than the duration of a Commonwealth Parliament, in order to provide continuity. In other words, membership should be for a period greater than three years.

**26. How does The Voice ensure equal representation of men and women?**

The legislation may stipulate that there should be equal representation of men and women, but it should leave it to local/regional communities to decide what would be the best way of ensuring equal representation, given the particular circumstances of their community.

**27. How does The Voice ensure both young people and elders are heard?**

The legislation may stipulate that the voices of young people and elders must be heard, but it should leave it to local/regional communities to decide what would be the best way of ensuring that young people and elders are heard, given the particular circumstances of their community.

**28. What duties should such representatives have to their constituents?**

It would be a fundamental mistake to conceive of the national voice as comprising representatives and constituents, for such language usurps the unique relationship of parliamentarians to their electors. The duty of members of the national voice should be to ensure that the national voice hears the full range of local and regional voices amongst Indigenous peoples, and that it advises the Executive and the Parliament accordingly. It should be a conduit for ensuring local and regional voices are heard at the national level, when Indigenous law and policy is being formulated. It should not be the role of the national voice to determine a position for Indigenous people: it is not a 'peak body' that determines policy for Indigenous peoples, but rather a conduit, to ensure that the Parliament understands the views of Indigenous peoples.

**29. Should The Voice have the power or obligation to conduct consultation or inquiries?**

It is central to the Voice's core function that it should provide advice to the Parliament and the Executive about the perspectives on policy proposals in local/regional communities. To this end, it is vital that there is consultation with local/regional communities before providing advice to the Executive or the Parliament.

It is anticipated that the relationship between the Voice and the Executive will be a 'two-way street': The Voice will provide advice on government proposals, but the Voice will also be able to make proposals for the government to consider. To this end, the Voice should be able to conduct inquiries as part of the process of developing proposals for the government's consideration.

**30. What mechanisms can be used to promote the active participation of Aboriginal and Torres Strait Islander peoples in The Voice at the national level?**

In order for the Voice to be authentic and have the confidence of Indigenous peoples, it must have both a national and a local/regional dimension. The best way to promote the active participation of Indigenous people at the national level is through strengthening the local/regional dimension of the Voice. (One way of achieving such participation is set out in the *Speaking for Country Bill* in *Hearing Indigenous Voices*, which is included in our previous submission.) In this way, Indigenous people who are actively engaged in their local/regional communities will see the Voice's national dimension as a means of enabling them to participate more fully in national affairs.

**31. How can local voices be effectively represented at the national level?**

There are two ways in which local voices can be effectively represented at the national level:

- If a top-down approach is adopted, the members of the national voice are selected by a national conference of delegates sent from local/regional organisations. The national voice is then accountable to the national conference of local/regional delegates.
- If a bottom-up approach is adopted, local/regional voices are established, and these can voluntarily affiliate to form a national voice, which is a conduit to transmit advice from the local/regional bodies to the Parliament and the Executive.

**32. How should the national voice interact between existing representative bodies, in particular local/regional bodies and community-based organisations?**

On the top-down approach, existing representative local/regional bodies and community-based organisations should send delegates to the national conference that selects members of the national voice, and these existing bodies then form part of the national conference to which the national voice is accountable.

On the bottom-up approach, it would be for the local/regional voices to decide how their national affiliation is to interact with existing representative bodies, and to provide for this in the constitution of the national affiliation.

**33. How would The Voice interact with national Indigenous organisations with expertise in areas such as health, housing, and education?**

Organisations with expertise in specialised areas of Indigenous affairs should be integrated into the network of organisations to which the Voice is accountable, along with representative bodies, so these specialist organisations could be accredited to send delegates to the national conference that chooses the members of the national body.

*National voice: Establishment and implementation*

**34. What is the relationship between the national voice and the local/regional voice?**

Any meaningful Indigenous voice must have both a national dimension and a local dimension:

- it must ensure that local/regional voices are heard at the national level, and
- it must ensure that those who speak for Indigenous people at the national level are accountable to local/regional communities.

For this reason, it does not make sense to separate the national and local/regional voices. They need to be understood as two dimensions of an authentic Indigenous voice in Australian public life.

**35. What is the relationship between the national voice and the Minister for Indigenous Affairs, and other members of the Executive? How will it work?**

The legislation should explicitly recognise that the Indigenous voice will establish an informal advisory relationship with the Minister for Indigenous Affairs and other members of the Executive. The details of how this would work should not be codified in legislation. It would be best to let

conventions develop over time, as ministers and the national voice develop a constructive working relationship.

**36. What is the most cost-effective way The Voice can be implemented?**

As noted above in relation to resourcing (paragraph 19) an assessment of resourcing and cost is premature until the final model for the Voice is chosen. Its infrastructure can then be costed. However, on any view, the resourcing model and costs for that model would be the minimum necessary to ensure that the legislated objects of the Voice can be achieved. The resourcing required by the Voice and the expenditure of its funds would then be exposed for ongoing public scrutiny through its governance and administrative arrangements (corporate plan and annual report) and oversight by the parliamentary committee process.

**37. What is the relationship with state, territory, and local government?**

The Commonwealth Parliament will pass legislation establishing the Voice. This legislation should explicitly state that, although state and territory governments are under no obligation to establish any sort of relationship with the Voice, they may choose to confer functions on the Voice at the state, territory or local level, with the consent of the federal minister, if he/she is satisfied that this is consistent with the national interest, and that the Voice itself is prepared to accept such additional functions. We have suggested drafting to implement this opt-in approach, for example, in clause 11 of the *Advisory Council for Aboriginal and Torres Strait Islander Affairs Bill* (top-down model) and in clause 18(1)(c) of the *Speaking for Country Bill 2018* (bottom-up model). Drafting for these options is set out in *Hearing Indigenous Voices*, which is included in our previous submission.

**38. Should The Voice have the power to advise the Council of Australian Governments?**

The advisory role of the Voice is to ensure that local and regional voices of Indigenous peoples are heard when laws and policies concerning Indigenous affairs are being developed. If the Council of Australian Governments is involved in the development of some aspect of Indigenous policy, then it would be appropriate for the Voice to provide informal advice in order to ensure that the policy proposed by the Council has been developed having due regard for the advice from local and regional Indigenous communities.

**39. Should the national voice be in the Constitution? If so, what should the Constitution say?**

Consistent with the intent of the Uluru Statement from the Heart, the Constitution should be amended to provide for the Parliament and the Executive to receive advice from Indigenous voices, but the amendment should explicitly give the Parliament the right to decide the details of how the Parliament and the Executive are to receive and consider advice from Indigenous voices.

***Local and regional voices: Function and operation***

**40. What is the role of a local/regional voice? How does it intersect with or differ from the role of the national voice?**

The role of a local/regional voice is to speak for a local/regional community, and to ensure that voices within that community are heard and considered before decisions are made that affect that community. The role of the national voice is to ensure that Indigenous voices are heard at the national level when laws and policies concerning Indigenous affairs are being developed. This means that the national voice has a role in ensuring that the local/regional voices are heard at the national level when matters are being discussed that affect a local/regional community in a special

way. A national voice is only authentic when it serves as a conduit for local/regional voices. But it has to ensure that these local/regional voices are heard in a way that is effective and efficient at the national level.

**41. What powers and functions should a local/regional voice have? What matters should they not deal with?**

Local/regional voices should have two sets of functions.

First, they should ensure that the voices of Indigenous people in local/regional communities are heard when decisions about Indigenous policy are being determined at the state/territory/local level (should the relevant State or Territory choose to opt into the scheme established by federal legislation).

Secondly, they should facilitate agreements between state/territory/local governments and local/regional Indigenous communities for the provision of services within those communities.

Where there are matters that are best dealt with at the national level, they should engage with the Executive and the Parliament through the national voice, which is the conduit for the local/regional voices at the national level.

**42. What is the relationship between the local/regional and national voices?**

The local/regional and national voices are really two dimensions of the Indigenous voice in Australia. The national dimension ensures that the local/regional voices are heard in national affairs, and the local/regional dimension ensures that the national voice remains accountable to local/regional communities. In addition, the national voice can assist in ensuring that there is an appropriate framework in place for local/regional voices to help facilitate agreements between local/regional communities and state/territory/local governments (should the relevant State or Territory choose to opt into the scheme established by federal legislation).

**43. What is their relationship with state, territory, and local government?**

Local/regional voices should have two roles in relation to state, territory and local government:

- First, they are a conduit for providing advice when state, territory, and local governments are developing laws and policies relating to Indigenous affairs. In this respect, the local/regional voices ensure that state, territory and local governments receive advice about what people in local/regional communities think, and help develop policies that are responsive to their concerns.
- Secondly, the local/regional voices are able to help state, territory and local governments negotiate agreements with local/regional communities.

**44. Should The Voice be responsible for service delivery?**

The local/regional voice should be responsible for facilitating the negotiation of agreements between state/territory/local governments and local/regional communities for the delivery of services within those communities (should the relevant State or Territory choose to opt into the scheme established by federal legislation). It is not necessarily the role of the local/regional voice to deliver services

within the local/regional community, but to help the government and the community reach agreement about how services should be provided within that community.

**45. Should The Voice have a say on the provision of services by government?**

The role of the local/regional Voice is to help the government negotiate an agreement with the local/regional community for how services should be provided within that community. The Voice is a conduit for ensuring that the government receives advice about what people within the local/regional community are thinking.

**46. What are the governance mechanisms that oversee local and regional voices?**

Each local/regional community should develop a governance mechanism for its local/regional voice which is responsive to the unique circumstances of the people within that community, such as the examples discussed in paragraph 67 below.

**47. Should there be an adaptable national template of model rules for organisations to adapt? If so, what should they look like?**

There should be a national commission that accredits local/regional organisations, and certifies that they have adequate governance mechanisms. Whilst it may be helpful to develop a set of suggestions, it should not be expected that a single template would be able to be adapted to the very different cultural, geographical and historical circumstances of local and regional communities across Australia, and so they should be given the latitude to adopt quite different governance mechanisms, providing they are responsive to the local/regional circumstances and consistent with governance expectations shared by the wider Australian community.

**48. How are internal disputes resolved?**

See our submission above in relation to the national voice, paragraph 21.

**49. If members of The Voice act in a way as to bring The Voice into disrepute, what is the procedure for removing them?**

See our submission above in relation to the national voice, paragraph 22.

**50. Should the local and/or regional voice have the right to provide advice direct to the Commonwealth Parliament or Australian Government?**

The national voice should, ideally, be a conduit for transmitting to the Parliament and the Executive advice from local/regional communities. The point of this is not to silence local voices, but to provide a streamlined system that enables the Government to hear all voices through a single mechanism: as discussed in paragraph 18 above, where there is Indigenous consensus, the Parliament should be advised of this consensus; where there are divergent views, the formal advice to Parliament should reflect those divergent views. The national voice should be accountable to the local/regional voices either because it is a voluntary affiliation of the local/regional voices (on the bottom-up model), or because it is chosen by a national conference of delegates sent by local/regional communities (on the top-down model).

**51. Should local voices have broader roles than just providing advice?**

Local/regional voices could take on broader roles that are compatible with their advisory role. This needs to be addressed on a case-by-case basis, through local/regional agreement-making between Indigenous peoples and governments concerned.

## *Local and regional voices: Structure and membership*

### **52. How should a local or regional area be determined? Are there any existing boundaries that could be used?**

There are existing regional boundaries that could be used as a starting point for determining local/regional areas. Most notably, the Aboriginal and Torres Strait Islander Commission had a regional structure that was widely regarded as providing appropriate regional boundaries. Although that regional structure could be used as a starting point, an independent agency will be required to determine boundaries of local/regional areas, having regard to a range of factors.

This agency would then need to oversee the process through which the Indigenous peoples within the locale or region work together to form an organisation that can represent the Indigenous people within the region, having regard to the particular circumstances of Indigenous people residing in the area and those outside the area who assert a traditional association with the area. The independent agency would then have a statutory role in certifying that the new organisation has been formed in consultation with all Indigenous stakeholders, and that they are satisfied that its structure is capable of responding to the particular circumstances of the people within the locale/region. The agency would also have a role in certifying that the proposed governance arrangements meet the expectations of the wider Australian community.

An approach to this question has been set out in our draft *Speaking for Country Bill 2018*, in particular the structure and function of the Recognition Commission, and its function in determining the appropriate number of Districts (a geographical area determined by the Commission) and the names and boundaries of those Districts. This approach is set out in *Hearing Indigenous Voices*, which is included in our previous submission.

### **53. How could local/regional voices be constituted to best represent the traditions, practices and interests of local communities?**

The constitution of each local/regional voice must be developed through a process of consultation with the local/regional community, through which structures can be identified which are in keeping with the traditions, practices and interests of the local/regional communities.

### **54. Is there one model to serve as a template or should each voice be designed to local needs and cultural priorities?**

In order for a local/regional voice to be authentic, its constitution must be designed in a way that responds to the local needs and cultural priorities of the Indigenous people within that community. Whilst there will be similarities that emerge as these local/regional voices are established, it will not be possible to develop a single model to serve as a template for all local/regional voices.

### **55. Should the local and regional voices be existing bodies with a new mandate or should they be new bodies?**

Whether an existing body can be transformed into a local/regional voice, or whether a new body needs to be created, can only be established through consultation with the local/regional community as part of the process for drafting the constitution for the local/regional voice. What matters is that an independent accreditation commission is satisfied that the arrangements for the existing body's new mandate or the mandate for the new body has the broad support of the local/regional

community, and that the arrangements meet the governance standards expected by the wider Australian community.

**56. How should the local voice interact between existing representative bodies, in particular local bodies, such as native title bodies?**

The way in which the local/regional voice interacts with existing bodies needs to be determined on a case-by-case basis as part of the consultation process within the local/regional community for determining the local/regional voice's constitution, as the circumstances of different communities will result in different settlements with existing bodies within those communities.

**57. Who should be able to choose local/regional representatives?**

There are broadly two groups of people who are interested in a local/regional Indigenous community:

- (a) the Indigenous people who reside in that locale/region, irrespective of whether they have a traditional association with country there, or country in some other locale/region;
- (b) the Indigenous people who claim traditional custodianship of country within that locale/region, irrespective of whether they currently reside there.

A process of consultation within each local/regional community will be required in order to determine the best way of resolving the competing claims of these two groups given the particular historical, geographical and cultural circumstances of the local/regional community.

**58. By what process should they be chosen?**

The process of consultation within the community should determine how members of the local/regional voice are to be chosen. An independent accreditation commission should be satisfied that the proposed arrangements for choosing members have the support of the broad sweep of the local/regional community and are also consistent with governance expectations of the wider Australian community.

**59. How long should members serve?**

Ideally, members should serve for a period longer than the length of a federal/state/territory legislature (i.e. greater than three or four years, depending on the term of the respective parliament), to ensure continuity, however, the local/regional community should determine precise tenure arrangements that respond to their particular circumstances.

**60. How do the voices ensure equal representation of men and women?**

The statutory regime might express an aspiration that local/regional voices should ensure they have equal representation of men and women; however, it should be left to the local/regional community to determine the best way of achieving this within their community, having regard to the particular circumstances of their community.

**61. How do the voices ensure both young people and elders are heard?**

The statutory regime might express an aspiration that local/regional voices should ensure that the voices of young people and elders are heard, however, it should be left to the local/regional

community to determine the best way of achieving this within their community, having regard to the particular circumstances of their community.

**62. What mechanisms can be used to promote the active participation of Aboriginal and Torres Strait Islander peoples in The Voice at the local/regional level?**

The statutory regime might express an aspiration that active participation of Indigenous peoples in their local/regional voices should be promoted, however, it should be left to the local/regional community to determine the best way of achieving this within their community, having regard to the particular circumstances of their community.

*Local and regional voices: Establishment and implementation*

**63. What should the relationship be between local/regional voices and the Commonwealth Parliament and Australian government?**

The Commonwealth Parliament and the Australian Government need to receive advice from local/regional voices when they are making laws and policies that affect local/regional Indigenous communities in a special way. There needs to be a conduit, however, or a single channel through which the Parliament and the Executive receives advice from local/regional voices. It is for this reason that the national voice needs to be both accountable to local/regional communities and a conduit/channel for local/regional voices in Indigenous affairs. Where local/regional voices speak with one voice, the national voice should communicate that to the Parliament and/or the Executive. Where different voices express different opinions, the national voice should have a duty to communicate the different views of different local/regional voices, but it must provide one piece of advice that reflects the range of different voices. The Parliament and Executive cannot be expected to deal with a plethora of local/regional voices in addition to the national voice that is accountable to those local/regional communities and is charged with responsibility for advising the Executive and Parliament on the views of those communities.

**64. What resources would be required for effective operation of local or regional voices?**

See our submission above in relation to a national voice (paragraph 19).

**65. What is the most cost-effective way The Voice can be implemented?**

See our submission above in relation to a national voice (paragraph 19).

**66. Should the local/regional voice be entrenched in the Constitution? If so, what should the Constitution say?**

Yes. In the bottom-up model, the Constitution should be amended to require the Parliament to establish local/regional voices, and the Constitution then leaves it to the Parliament to decide how these are established, and how they are to affiliate to form a national voice. See our proposed *Constitutional Alteration (Recognising Indigenous Peoples) Bill 2018* and our proposed *Speaking for Country Bill 2018*. These options are set out in *Hearing Indigenous Voices*, which is included in our previous submission.

In a bottom-up model, s 51(xxvi) of the Constitution might be amended to incorporate local indigenous bodies as local entities of the Voice. Some work has been done to model this structure.<sup>5</sup>

## *General*

### **67. What is the most appropriate and effective means for constitutional recognition of Aboriginal and Torres Strait Islander peoples?**

The most appropriate and effective means for recognising Aboriginal and Torres Strait Islander peoples in the Constitution is a clause that recognises the need for them to have a voice in their own affairs, but which does not undermine the sovereignty of Parliament, and leaves the Parliament with a free hand to determine how this is implemented in practice. In cooperation with the members of our policy unit's Advisory Council and Allens Lawyers, we have drafted two options for constitutional amendment for the Committee to consider, and we commend that drafting to the Committee. These options are set out in *Hearing Indigenous Voices*, which is included in our previous submission.

It is important to note the different needs of individual communities. These differences arise from a variety of factors, including the different ways settlement has impacted upon each community. There are also vast differences where communities are more or less homogenous, have existing local governance structures in place (e.g. a land council), and especially where traditional elders exercise authority in relation to issues relating to organisation and management of local communities. Different local circumstances, therefore, require different structures. We advocate strongly against a "one size fits all" model of constitutional recognition. The Voice would ideally be designed in consultation with those communities, and varied with local circumstances in mind.

In pursuit of this goal, local models might draw on existing models which function well. For example, the Murdi Paaki Regional Assembly (MPRA) in Western NSW has a regional governance model which has produced strong strategic engagement and co-ordination between communities and government service providers. This has been based around strong local leadership models, in both youth and elders, has produced (generally) good outcomes, and draws on a structure which might be loosely replicated elsewhere.

The corporate structure of the Torres Strait Regional Council (TSIRC) has supported good local governance in that community. This has, similarly to the MPRA, developed out of interface with government service providers. Its corporate structure promotes community leadership and local governance. The TSIRC provides strategic modelling for development in partnership with community needs, and this would therefore also be a model for a local Voice that should guide decision making based on differing local needs.

### **68. Should The Voice (local, regional, or national) be constitutionally entrenched, enacted by legislation, both, or either? Why?**

Yes. The Constitution should impose an obligation on the Parliament to establish a voice for Indigenous peoples, but leave the Parliament to determine how this will operate in practice. The constitutional guarantee is important, because it imposes an obligation on the Parliament. At the

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<sup>5</sup> Warren Mundine, "Practical Recognition from the Mobs' Perspective" in: Uphold & Recognise Monograph Series v3 (May 2017) <[http://www.upholdandrecognise.com/s/Mundine-Practical\\_Recognition.pdf](http://www.upholdandrecognise.com/s/Mundine-Practical_Recognition.pdf)>

same time, it leaves the Parliament with the discretion to determine the best way of hearing Indigenous voices, and leaves the Parliament free to revise these arrangements from time to time. This means that the Parliament can reform the way Indigenous voices are heard, from time to time, but also means that existing arrangements must be reformed rather than abolished: there would need to be some statutory regime to ensure that the Parliament and the Executive hears Indigenous voices. It would also mean that such statutory regime as might be in place from time to time cannot be challenged in the courts.

**69. What order should the implementation of The Voice (local, regional, or national) proceed?**

In order for an Indigenous voice to have legitimacy, it must have both a national and a local/regional dimension. So provision must be made for both dimensions. This can be done in one of two ways:

(a) legislation establishes local/regional voices and makes provision for those voices to affiliate voluntarily to provide a national voice that has a statutory right to provide advice at the national level to the Parliament and the Executive;

(b) legislation establishes a national voice with a statutory right to provide advice and makes provision for that voice to be accountable to existing and/or new local/regional voices who send delegates to a national conference that selects members of the national voice, and through which the national voice is accountable to local/regional communities.

**70. Should a referendum or statute to establish The Voice (local, regional, or national) come first?**

Yes. The requirement for a mechanism to ensure that the Parliament and the Executive hear Indigenous voices could have a constitutional foundation, or its authority is founded in a statute enacted under section 51(xxvi). However, the Uluru Statement has made it very clear that the Indigenous consensus is for the new mechanism to have a constitutional foundation. If the Parliament is committed to honouring the Uluru Statement, then there needs to be a package including a constitution alteration and a statute to provide the detail for implementing the constitution alteration, and these need to be developed simultaneously.

**71. Should consultation to co-design The Voice (local, regional, or national) precede or follow legislation or a referendum?**

The consultation should be understood as a two-staged process.

Legislation to ensure that the Parliament and the Executive hears Indigenous voices would authorise the creation of new entities at the national and local/regional level. Consultation about the legislation (and the constitution alteration) should precede the legislation or referendum.

After the enabling legislation has been passed (and a successful referendum held), the second phase of consultation should take place within each local/regional community about the best form for the local/regional voice for that locale/region which is established under the legislation.

**72. Should some provision be made in relation to the possibility of an unsuccessful referendum**

The Uluru Statement from the Heart is the clearest indicator of what Indigenous peoples want. Any alternative proposal/s would need to be called for by Indigenous peoples themselves. Given the lack of any such proposal/s, we have no view on whether alternatives to this process should be pursued.

**73. What benefits and challenges do these alternative approaches present?**

As per paragraph 72.

**74. What should a constitutional provision for The Voice (local, regional, or national) encompass? Why?**

The constitutional provision should contain the minimum provisions necessary in order to impose an obligation on the Parliament. It should not encompass anything more than that, lest it unnecessarily erode the sovereignty of Parliament or introduce language that creates a greater degree of uncertainty in the High Court's interpretation of the Constitution. We refer the Committee to the Constitutional amendments proposed in the original Uphold & Recognise submission, *Hearing Indigenous Voices*.

**75. Should it acknowledge the unique status of Aboriginal and Torres Strait Islander peoples, their enduring presence, languages, cultures, and heritage? If so, how?**

No. The unique status of Aboriginal and Torres Strait Islander peoples, their enduring presence, languages, cultures, and heritage, should be acknowledged in a declaration outside the Constitution, as recommended by the Referendum Council. This is necessary in order to ensure that the acknowledgement is sufficiently rich as to provide a meaningful statement and at the same time ensure that this meaningful statement does not introduce uncertainty into the High Court's interpretation of the Constitution, which is what would likely happen if a sufficiently rich statement were introduced into the Constitution. These issues are discussed in greater detail in *A Fuller Declaration of Australia's Nationhood*, which is included in our previous submission.

**76. Should it ensure the non-justiciability of the structure or function of The Voice? How could it do this and why is it important?**

An essential design feature of the structure and function of the mechanism for hearing Indigenous voices is that it should not be justiciable. It would be inappropriate to insert a non-justiciability clause. Instead, the new clause in the Constitution should be drafted in a manner that renders it non-justiciable, such as proposed by Professor Anne Twomey (and as set out in the proposed section 60A of the Constitution: see our submission at page 32), by referring to "proposed laws" and generally leaving the Parliament with a free hand to determine the substantive arrangements. In addition, as we have referred to above, the implementation legislation would ensure that parliamentary sovereignty is respected.

**77. Should it describe the structure and functions of The Voice? Why?**

The provision in the Constitution should not describe the structure and functions of the mechanism for hearing Indigenous voices. Rather, the Constitution should stipulate two things: that the Parliament must determine the structure and functions of the mechanism for hearing Indigenous voices; and whether the mechanism should be 'bottom-up' or 'top-down'. In other words, the Constitution should either stipulate that the Parliament shall establish local bodies, and leave the Parliament and the local bodies to work out how they affiliate to produce a national voice, or the Constitution should stipulate that the Parliament must establish a national body, and leave the Parliament to work out how the national body is accountable to, and becomes a conduit for, local/regional communities.

**78. What provision should it make for possible local, regional, and national elements of The Voice?**

Further consultation may be required to determine whether Indigenous people favour a top-down or bottom-up approach. If they favour a bottom-up approach, then the Constitution should make

provision for the Parliament to establish local/regional bodies, and leave the Parliament and the local/regional bodies to determine how the national dimension is established. If they favour a top-down approach, then the Constitution should make provision for the Parliament to establish a national body, and leave the Parliament to determine with local/regional communities how the local/regional dimension is established in order to make the national body accountable to, and reflective of, local/regional communities.

**79. What provision should it make for the provision of advice to different levels of government?**

The Constitution should not require the new arrangements to provide advice to state/territory/local governments, nor should it limit this possibility in any way. It should leave open the possibility that the Parliament can provide for state/territory legislatures to confer functions with the consent of the federal minister.

**80. How could a constitutional provision for The Voice (local, regional, or national) safeguard its longevity?**

A constitutional provision could require the Parliament to make provision for the Parliament and the Executive to hear Indigenous voices. The Parliament would still retain the right to reform the Voice, but it would be under a constitutional obligation to maintain some form of a voice, rather than simply abolishing the Voice completely. This balances the need for a guarantee with the need for flexibility.

**81. What should a statutory provision for The Voice (local, regional, or national) encompass? Why?**

On the bottom-up approach, the statutory provision for hearing Indigenous voices should do two things:

- (a) it should allow local/regional communities the discretion to establish local/regional voices in a way that is most responsive to local circumstances; and
- (b) it should make provision for how these local bodies are to be accredited, and then how they are able to ensure that their advice is received at the national level.

On the top-down approach, the statutory provision for hearing Indigenous voices should make provision for:

- (a) how local/regional organisations can send delegates to a national conference, which selects members of the national body, and to which the national body is accountable; and
- (b) how advice is provided both informally to the Executive and formally to the Parliament.

**82. How could a statutory provision for The Voice (local, regional, or national) safeguard its longevity?**

A statutory provision without a constitutional provision could not guarantee the Voice's longevity, as an ordinary statute can always be repealed by a later one.

**83. What provision should it make for possible local, regional, and national elements of The Voice?**

Provision should be made to ensure that the mechanism for providing advice to the Parliament and the Executive has both a local/regional dimension and a national dimension. The question is whether to provide for this through a bottom-up mechanism, which prioritises the local/regional dimension, or a top-down mechanism, which prioritises the national dimension. Either way, an authentic Indigenous voice must possess both dimensions.

**84. What provision should it make for the provision of advice to different levels of government?**

The Commonwealth legislation should make provision for how advice can be provided to the federal Parliament and Executive. It should leave state/territory legislatures to decide how advice should be provided at state/territory/local levels, with provision that the state/territory legislatures may confer functions on the body or bodies established under the federal legislation with the approval of the federal minister and the body or bodies concerned.

**85. When and how should Aboriginal and Torres Strait Islander peoples be consulted in relation to the co-design of The Voice (local, regional, or national)?**

On the bottom-up approach, there should be a two-stage process for consultation with Indigenous peoples.

In the first stage, there should be consultation with all Indigenous peoples about how the enabling legislation (and constitution alteration) should be drafted.

In the second stage, the people within each local/regional community need to be consulted about how the local/regional voice for their community should operate.

**86. Who should oversee this consultation?**

The first stage of consultation requires the Parliament and the Indigenous peoples to work together in a process of consultation, and an independent person should be appointed to oversee this process of consultation.

The second stage of consultation requires consultation within the local/regional community, and this should be overseen by an accreditation commission established by the legislation that is the result of the first stage of consultation. See paragraph 92 below for further discussion of this commission's role.

**87. How should proposals for The Voice (local, regional, or national) be formulated for consultation?**

In the first stage, Indigenous peoples need to be asked to determine whether they would prefer a bottom-up or a top-down approach.

Once they have decided that, they need to be presented with a set of bottom-up models, or top-down models, in order to refine the specific model through which they would like to achieve their chosen approach.

Once the model is identified, the consultation process can then undergo a process of revising the model for the preferred approach.

After the enabling legislation is passed, the second stage of consultation can occur, in which local/regional communities are consulted about how they want to establish their local/regional voices pursuant to the new statutory regime.

**88. How should consensus of Aboriginal and Torres Strait Islander peoples be ascertained?**

Two separate approaches are required.

Initially, the Parliament has to work with Indigenous peoples from across the country, to ensure that they have all been consulted in the process for drafting enabling legislation that has consensus across different communities.

In the second stage of consultation, there needs to be consultation within a specific local/regional community, to work out what arrangements for a local/regional voice would gain consensus within that community. As discussed in paragraph 92 below, this process should be overseen by an accreditation commission.

**89. How should the words for any constitutional amendment and referendum question be settled?**

The words of any proposed constitutional amendment and referendum question should be settled in consultation with representatives of Indigenous peoples, constitutional lawyers, and federal parliamentarians, who will have to prosecute the case for a successful referendum.

**90. What transitional arrangements are necessary to implement The Voice?**

See paragraphs 91 and 92, below.

**91. Should there be an interim Voice? If so, what structure and functions should it have?**

A decision about any interim voice would be contingent upon determining a timeline for implementing a permanent voice. If the timeline were short, then, although some transitional arrangements might be required, it would seem unnecessary to adopt an interim voice. If the timeline is longer, then there might be a case for adopting an interim voice.

**92. Should there be a body tasked with overseeing the implementation of The Voice (local, regional, or national)? If so, what structure and responsibilities should it have? How would it be created?**

There should be a body tasked with overseeing various aspects of the implementation of the Voice. As far as possible, Indigenous peoples should determine arrangements for their local/regional voices, and also aspects of how the national voice will operate.

To this end, there needs to be an independent body authorised by the enabling legislation to accredit entities established by Indigenous peoples. For example, in a bottom-up model provided in *Hearing Indigenous Voices*, we have suggested in the draft *Speaking for Country Bill 2018*, the creation of a Recognition Commission, with one of its functions being the recognition of Country Group Organisations (as defined in that Bill).

The purpose of this accreditation body should be twofold:

- first, it is responsible for ensuring that proposed arrangements have the support of a broad section of the Indigenous peoples affected by them;

- secondly, to ensure that the proposed arrangements are broadly in keeping with governance expectations that are accepted by the wider Australian community.

We hope that this submission has provided a useful response to the questions contained in the Committee's interim report. We welcome any further questions or points of clarification.

Sincerely,

A handwritten signature in black ink, appearing to be 'Sean Gordon', with a stylized, looping initial 'S' and a horizontal line extending to the right.

Michael Casey  
PM Glynn Institute, Australian Catholic University

Sean Gordon  
Uphold & Recognise