



**Interim Report to the Australian Government:  
Indigenous Voice Co-Design Process  
January 2021**

**From the Heart Submission No.1**

***21 January 2021***



## ***We call for the establishment of a First Nations Voice enshrined in the Constitution.***

Aboriginal and Torres Strait Islander people and non-Indigenous Australians from all walks of life are accepting the Uluru Statement from the Heart's invitation to "walk with us in a movement of the Australian people for a better future".

From the Heart (<https://fromtheheart.com.au/>) is a movement of Australians, driven by a strong desire to achieve a successful referendum to enshrine an Aboriginal and Torres Strait Islander Voice to Parliament in the Constitution.

We welcome the government's Interim Co-Design Report and acknowledge the significant work undertaken by the three co-design committees, led by co-chairs Professor Marcia Langton AM and Professor Tom Calma AO. It was an arduous task to bring the vast historic body of work and the complexities of current practice together into a comprehensive report, especially during a global pandemic. We understand that co-design means the current proposals are not complete and that it is critical that Aboriginal and Torres Strait Islander people contribute their experience and ideas into this consultation process. Our submission is intended to be a constructive contribution to this important work.

Our submission can be summarised in three points:

1. The government must **honour its election commitment** to a referendum once the model for the **Voice has been settled**;
2. Enabling legislation for the Voice must be **passed after a referendum** has been held in the **next term of Parliament**; and
3. The membership model for the National Voice must ensure **previously unheard** Aboriginal and Torres Strait Islander people have the **same chance** of being selected as established leadership figures.

The co-design process was established to respond to the recommendations of the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples (JSC). The JSC itself was established to consider the recommendations of four previous processes that examined options for the constitutional recognition of Aboriginal and Torres Strait Islander peoples, including the Uluru Statement and the Referendum Council.

The co-design process was focused on the legislative design component. The Interim report means that legislative design has now entered the public consultation phase.

The second component arising from the JSC is constitutional enshrinement. The words of constitutional amendment need to be developed for submission to the Australian people at a referendum. This process must now begin.

Following this co-design process, it is imperative that we turn our minds to the constitutional and legislative arrangements to enact the Voice in a deliberate process. The legislative design of the Voice cannot be decoupled from its constitutional enshrinement.

A Voice enshrined in the Constitution is a fair, practical and safe proposal that will unify our nation.

We are pleased to make our submission in response to this Interim Voice Co-Design Report.

**Dean Parkin**  
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## Contents

Summary of key positions.....	3
1 Response to Interim Co-Design Proposals .....	4
1.1 National Voice Representation .....	4
1.1.1 Need and population distribution.....	4
1.1.2 Legitimacy .....	5
1.1.3 Giving Voice to the Unheard.....	6
1.1.4 Conclusion.....	6
1.2 Advice to Parliament and Government .....	7
1.3 Must not be a ‘third chamber’ of Parliament .....	7
1.4 Must not deliver programs or services .....	8
1.5 Must be independent from the Parliament and Government .....	9
2 Constitutional enshrinement .....	10
2.1 Constitutional enshrinement is the consensus position of Aboriginal and Torres Strait Islander people through the Uluru Statement from the Heart .....	10
2.2 Holding a referendum is an election commitment.....	10
2.3 There is bi-partisan commitment for constitutional recognition .....	11
2.4 The Australian people support constitutional enshrinement.....	11
2.5 There is no other desirable or viable option for constitutional reform.....	11
3 Legislative and constitutional sequencing to enact a Voice .....	13
3.1 Stage 2 must be a separate and deliberate process .....	13
3.2 Legislation must follow a referendum .....	14
ATTACHMENT 1: Final Report of the Joint Select Committee on Constitutional Recognition (extract) .....	15
ATTACHMENT 2: Coalition government 2019 election policy (extract) .....	16
ATTACHMENT 3: Address, Closing the Gap Statement to Parliament.....	17



## Summary of key positions

### 1. Response to Interim Co-Design Proposals

- The National Voice must be representative of the diverse populations and needs of Aboriginal and Torres Strait Islander people:
- The National Voice must speak to the Commonwealth Parliament and Government on policy and legislation.
- The National Voice must not be a 'third chamber' of Parliament.
- The National Voice must not deliver programs or services.
- The National Voice must act and operate independently from the Parliament and Government.

### 2. The National Voice must be enshrined in the Constitution

- Enabling legislation for the Voice must be passed after a referendum has been held in the next term of Parliament.
- For the avoidance of doubt, the National Voice must not be legislated or otherwise implemented before a referendum is held.

### 3. Two-stage process to establish the Voice:

- There should be a separate structured process to consider the constitutional, legislative and executive options to enact the National Voice following the completion of the Voice Co-Design Final Report. This process will result in:
  - An exposure draft bill for the Voice as per the final Co-Design report to give the Australian public a comprehensive look at the details of the Voice before a referendum is held;
  - A draft constitutional amendment for a new provision for a Voice that will then be put to the Australian people for a vote in a referendum; and
  - A pathway to a referendum in the next term of Parliament.



# 1 Response to Interim Co-Design Proposals

## 1.1 National Voice Representation

The interim Voice Co-Design Report proposes a maximum 18-person membership model for the National Voice which significantly understates the representation needed to achieve real change. The report considered a number of different models and determined that any model presented to government must include the following points<sup>1</sup>, in order of priority:

1. **Gender equity**, which is structurally guaranteed;
2. **'Workability'**, flexibility and efficiency, by restricting the membership to less than 20 people; and
3. **Representation** expressed in an arbitrary State/Territory (+ Torres Strait) equalisation model of two members per jurisdiction.

Crucially, these points make no reference to Need or account for the uneven distribution of Aboriginal and Torres Strait Islander populations across the country.

The Productivity Commission's Indigenous Evaluation Report published in October 2020 says "to design policies and programs that improve the lives of Aboriginal and Torres Strait Islander people, evidence is central"<sup>2</sup>. For a structural reform as important as a National Voice for Aboriginal and Torres Strait Islander people, the membership model must be robust and based on evidence.

In effect, there is no evidence base for the proposed 18-person State/Territory equalisation model and no clear case as to why it will produce optimal outcomes for Aboriginal and Torres Strait Islander people and taxpayers – only that it has gender balance and is bureaucratically efficient (at least in the short term).

### 1.1.1 Need and population distribution

Taking life expectancy as a proxy for Need, data from the Australian Institute for Health and Welfare (AIHW) shows that not only do Aboriginal and Torres Strait Islander people experience worse life expectancy outcomes in comparison to non-Indigenous Australians, there is disparity in outcomes<sup>3</sup> across Aboriginal and Torres Strait Islander populations depending on where they live<sup>4</sup>:

Location	% all Indigenous people	Male life expectancy (yrs)	Female life expectancy (yrs)
Major Cities	37%	71.1	76.5
Regions	44%	70.0	74.8
Remote	19%	65.9	69.6

<sup>1</sup> National Indigenous Australians Agency (2020). Indigenous Voice Co-Design Process: Interim Report to the Australian Government. [online] Indigenous Voice: Resources, p.30. Available at: <https://voice.niaa.gov.au/sites/default/files/2021-01/indigenous-voice-codesign-process-interim-report-2020.pdf> [Accessed 10 Jan. 2021].

<sup>2</sup> Productivity Commission (2020). *Indigenous Evaluation Strategy*. [online] p.2. Available at: <https://www.pc.gov.au/inquiries/completed/indigenous-evaluation/strategy/indigenous-evaluation-strategy.pdf> [Accessed 25 Nov. 2020].

<sup>3</sup> Australian Institute of Health and Welfare (2020). Indigenous life expectancy and deaths. [online] Available at: <https://www.aihw.gov.au/reports/australias-health/indigenous-life-expectancy-and-deaths> [Accessed 9 Nov. 2020].

<sup>4</sup> Australian Institute of Health and Welfare (2019). Profile of Indigenous Australians. [online] Available at: <https://www.aihw.gov.au/reports/australias-welfare/profile-of-indigenous-australians> [Accessed 9 Nov. 2020].

There is a strong Needs-based justification to give greater proportional representative Voice to people from Regional and Remote areas. Need must be structurally guaranteed and must take precedence over a vague notion of 'workability' and arbitrary State/Territory equalisation.

In fact, the arbitrary State/Territory equalisation model significantly under-represents those populations the National Voice should be prioritising:

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▪ <b>TAS has 3.5x</b> the proportional representation of WA which has 60% of its Indigenous population living in Regional & Remote.	▪ <b>77% of the NT</b> Indigenous population lives in Remote. Those with the highest need are significantly under-represented.	▪ <b>ACT has 35x</b> the proportional representation of NSW	▪ <b>TSI has 28x</b> the proportional representation of the rest of QLD
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This under-representation has significant implications for the effectiveness and legitimacy of the National Voice.

### 1.1.2 Legitimacy

The Joint Select Committee (JSC) on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples supported the proposition that a Voice could be<sup>17</sup>:

- Legitimate and credible among Aboriginal and Torres Strait Islander peoples in local and regional communities;
- Effective in advancing self-determination and achieving positive outcomes for those communities; and
- Capable of achieving the support of the overwhelming majority of Australians.

If the Voice is not legitimate and credible among Aboriginal and Torres Strait Islander people, it is unlikely non-Indigenous Australians will support the Voice, regardless of how bureaucratically efficient it is.

The Voice Co-Design Report suggests that the National Voice's legitimacy is primarily achieved in the way its members are selected i.e. "they must be selected by Aboriginal and Torres Strait Islander peoples and as much as possible have a connection to the local community level"<sup>5</sup>. It goes on to suggest "an effective linkage to Local and Regional Voices would be critical to:

- Enhance the legitimacy of the National Voice by showing a clear, credible link between communities and the advice of a National Voice.
- Ensure advice of a National Voice is grounded in the concerns and priorities of Aboriginal and Torres Strait Islander peoples and communities.
- Harness locally held knowledge to improve national law and policy design and decisions".

The need for effective linkages is correct but is fundamentally compromised by limiting the Voice to a maximum of 18 members. For example, it is not possible for two members from NSW to

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<sup>5</sup> National Indigenous Australians Agency (2020). Indigenous Voice Co-Design Process: Interim Report to the Australian Government. [online] Indigenous Voice: Resources, p.33. Available at: <https://voice.niaa.gov.au/sites/default/files/2021-01/indigenous-voice-codesign-process-interim-report-2020.pdf> [Accessed 10 Jan. 2021].

consistently achieve any of the above points for a population of more than 265,000 people that are spread across a land area that is four times the size of the United Kingdom<sup>6</sup>.

In addition to the *way* members are selected, legitimacy among Aboriginal and Torres Strait Islander people demands there must also be sufficient *scale* of membership to be appropriately representative.

### 1.1.3 Giving Voice to the Unheard

Rightly or wrongly, one of the key criticisms levelled at previous national ‘voices’ is that they entrenched the existing authority of Aboriginal and Torres Strait Islander ‘establishment’ figures. Or to put it another way, there has been insufficient structural opportunity for frontline and community-focused people to be directly involved in national-level deliberations.

Having sufficient scale of membership is necessary to ensure previously unheard Aboriginal and Torres Strait Islander people have the same chance of being selected/elected as established leadership figures – the community health worker in Halls Creek should have the same chance of being selected/elected to the National Voice as the leader of a national peak organisation.

It is not sufficient that people connected to Local Voices have a say in the selection/election of their National representatives. Restricting the number of representatives to the National Voice to two per State and Territory significantly increases the likelihood that only people with existing authority and profile will be selected/elected to the National Voice.

The strongest way for Local and Regional linkages to exist with the National Voice is to ensure there is adequate membership provision for frontline and community-focused people to be selected/elected to the National Voice.

### 1.1.4 Conclusion

A National Voice representative model must be based on population distribution and Need that gives greater proportional Voice to Aboriginal and Torres Strait Islander people living in Remote and Regional areas. There must be a structural opportunity for frontline and community-focused people to be directly involved in national-level deliberations.

The operational mechanics of establishing, organising and administering a larger group of Aboriginal and Torres Strait Islander peoples is an easier challenge than ensuring the Voice is genuinely representative of Aboriginal and Torres Strait Islander peoples and their diverse needs.

Without genuine representation, the legitimacy and credibility of the Voice will be compromised from the outset.

A properly constituted National Voice is a productivity measure that will pay its way in high multiples of its operational cost over time. Or to put it another way, the short-term savings in operational costs by having a smaller, less representative Voice not focused on Need will pale into insignificance by the long-term policy and legislative productivity efficiencies of a properly constituted Voice, not to mention the improved outcomes for Aboriginal and Torres Strait Islander people and the flow-on benefit to all Australians.

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<sup>6</sup> Australian Government | Geoscience Australia. Area of Australia – States and Territories. [online] Available at: <https://www.ga.gov.au/scientific-topics/national-location-information/dimensions/area-of-australia-states-and-territories> [Accessed 9 Nov. 2020].





## 1.2 Advice to Parliament and Government

From the Heart agrees with the following position of the National Co-Design Group:

Further, legislative and policy processes cannot be separated and generally the best opportunity to influence and advise on proposed laws and policies is in the early stages of policy development. The National Co-design Group stated the National Voice should be involved, where appropriate, in the legislative and policy processes from the beginning to the end, at multiple points. This would necessarily require providing advice to both the Parliament and Australian Government<sup>7</sup>.

To provide maximum value for both the Parliament and Government, and to Aboriginal and Torres Strait Islander people, the National Voice must have the capacity to independently commission and manage its own policy and legal advice, including from governments, Aboriginal and Torres Strait Islander peak organisations and service providers, and other experts.

## 1.3 Must not be a 'third chamber' of Parliament

Aboriginal and Torres Strait Islander people, through the Referendum Council Regional Dialogues, the National Constitutional Convention and the Uluru Statement from the Heart, never suggested the Voice should be a 'third chamber' of the Parliament. This was reinforced by former Chief Justice of Australia, the Hon Murray Gleeson AC QC:

It is unlikely that Parliament will propose a change to the Constitution in aid of Indigenous recognition if the effect of the change will be to curtail its own legislative power.

That appears to have been well understood by the supporters of the Voice. What is proposed is a [V]oice to Parliament, not a [V]oice in Parliament. The recommendation of the Referendum Council deliberately left it to the Parliament to establish the contemplated representative body<sup>8</sup>.

To retain parliamentary supremacy, the enabling legislation for the Voice should ensure:

1. It does not have a power to veto or block the business of the Parliament;
2. It cannot introduce or debate legislation in the Parliament; and
3. Its advice is non-justiciable, which means a failure to consult and engage the National Voice would not be capable of being challenged in a court and would not affect the validity of the relevant law or policy.

Ultimately, the power to enact the Voice so that it is not a 'third chamber' rests with the Parliament itself.

<sup>7</sup> National Indigenous Australians Agency (2020). Indigenous Voice Co-Design Process: Interim Report to the Australian Government. [online] Indigenous Voice: Resources, p.46. Available at: <https://voice.niaa.gov.au/sites/default/files/2021-01/indigenous-voice-codesign-process-interim-report-2020.pdf> [Accessed 10 Jan. 2021].

<sup>8</sup> Gleeson AC QC, M. (2018). Recognition In Keeping With The Constitution: A Worthwhile Project. [online] p.12. Available at: [https://cdn.brandfolder.io/3RTTK3BV/as/putr90-7ew1ns-5sgfef/Indigenous\\_Recognition\\_-\\_Murray\\_Gleeson.pdf](https://cdn.brandfolder.io/3RTTK3BV/as/putr90-7ew1ns-5sgfef/Indigenous_Recognition_-_Murray_Gleeson.pdf) [Accessed 3 Nov. 2020].





## 1.4 Must not deliver programs or services

The primary function of the National Voice is to advise the Parliament and Government on legislation and policy that have an acute and particular impact on Aboriginal and Torres Strait Islander peoples. As part of this function, the National Voice would be able to initiate advice on any issue, including policy advice to governments.

There were different views through the Referendum Council Regional Dialogues about a potential service delivery function for a Voice to Parliament. Some people expressed significant dissatisfaction with the failure of existing program and service delivery to close the gap but there were concerns that a service delivery function in a Voice would represent a conflict of interest with its primary advisory function.

Reaching a substantial consensus of Aboriginal and Torres Strait Islander peoples' views on this issue was not the purpose of the Referendum Council. It was not a role for the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples and this Voice Co-Design process has not sought to specifically seek a similar consensus. As such, there is no authoritative source of advice from Aboriginal and Torres Strait Islander people to provide direction on a proposed program and service delivery function for a Voice.

With this in mind, From the Heart agrees with the interim report that the National Voice should not directly deliver programs and services. The main reasons for this include:

1. In addition to government agencies, program and service delivery is the responsibility of existing Aboriginal and Torres Strait Islander local, regional and national organisations, including peak organisations. Rather than duplicating or competing with these organisations that have established delivery expertise, the National Voice can support their work by advising the Parliament and Government about reforming and refining policy and legislative settings.
2. A program and service delivery function risks the integrity of the two-way accountability role the National Voice should play because:
  - a) Holding the Parliament and Government to account for achieving improved outcomes is difficult if the Voice is itself directly responsible for achieving improved outcomes through programs and services; and
  - b) The National Voice's accountability to its Aboriginal and Torres Strait Islander constituents is potentially conflicted if it is also competing to deliver programs and services.

While mechanisms can be put in place to manage both conflicts (perceived or actual), it is more suitable to remove the risk entirely.



## 1.5 Must be independent from the Parliament and Government

Independence from government was a key design principle for the Voice coming from the Referendum Council Regional Dialogues, the National Constitutional Convention and the Uluru Statement from the Heart<sup>9</sup>. In practice, independence for the National Voice means operating:

- Freely from actual or perceived risks of being abolished by a government;
- In a self-determined way;
- With sufficient and secure long-term operational funding; and
- With its own policy and legal advice.

To ensure it operates independently from government, the National Voice must:

1. Be enshrined in the Constitution so that it:
  - a. Cannot be unilaterally abolished by governments; and
  - b. Carries a powerful moral mandate from the Australian people through a historic referendum;
2. Have a membership that is determined by Aboriginal and Torres Strait Islander people, not appointments made by ministers or government;
3. Have sufficient and secure long-term operational funding, which includes ensuring there is sufficient financial capacity to be strongly accountable to the Regional and Local Voices; and
4. Have the capacity to independently commission and manage its own policy and legal advice, including from governments, Aboriginal and Torres Strait Islander peak organisations and service providers, and other experts.

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<sup>9</sup> Anderson AO, P. et al (2018). Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, Submission 479. [online] Submissions received by the Committee. Available at: <https://www.aph.gov.au/DocumentStore.ashx?id=797348c1-a197-451b-96d2-2c19042643ac&subid=662831> [Accessed 3 Nov. 2020].

## 2 Constitutional enshrinement

### 2.1 Constitutional enshrinement is the consensus position of Aboriginal and Torres Strait Islander people through the Uluru Statement from the Heart

In the last nine years, there have been six government-endorsed processes to examine the issue of constitutional reform relating to Aboriginal and Torres Strait Islander peoples and nine reports produced, including this Interim Voice Co-Design Report<sup>10</sup>. Only one represents a substantial consensus of Aboriginal and Torres Strait Islander people – the Uluru Statement from the Heart.

The poetic beauty and grounded reforms of the Uluru Statement came from a historic and unprecedented process:

The [Regional] Dialogues engaged 1200 Aboriginal and Torres Strait Islander delegates – an average of 100 delegates from each Dialogue – out of a population of approximately 600,000 people nationally. This is the most proportionately significant consultation process that has ever been undertaken with First Peoples. Indeed, it engaged a greater proportion of the relevant population than the constitutional convention debates of the 1800s, from which First Peoples were excluded<sup>11</sup>.

Fourteen words from the Uluru Statement carry a clear mandate:

We call for the establishment of a First Nations Voice enshrined in the Constitution<sup>12</sup>.

It is time these words are heard and acted upon through a referendum.

### 2.2 Holding a referendum is an election commitment

As part of its *Our Plan to Support Indigenous Australians* policy platform that it took to the 2019 election, the Coalition made a commitment that “a referendum will be held once a model has been settled, consistent with the recommendations of the Joint Select Committee”<sup>13</sup>.

Prime Minister Scott Morrison confirmed the government’s commitment to its election promise in his 2020 Closing the Gap speech to the Parliament:

The [Joint Select] Committee did not make recommendations as to the legal form of the Voice, constitutional or legislation.

It recommended considering this matter after the process of co-design is complete and that’s what we are doing. We support finalising co-design first<sup>14</sup>.

<sup>10</sup> Davis, M. (2020). Constitutional recognition for Indigenous Australians must involve structural change, not mere symbolism. [online] The Conversation. Available at: <https://theconversation.com/constitutional-recognition-for-indigenous-australians-must-involve-structural-change-not-mere-symbolism-131751> [Accessed 6 Nov. 2020].

<sup>11</sup> Referendum Council (2017). Final Report of the Referendum Council. [online] Available at: [https://www.referendumcouncil.org.au/sites/default/files/report\\_attachments/Referendum\\_Council\\_Final\\_Report.pdf](https://www.referendumcouncil.org.au/sites/default/files/report_attachments/Referendum_Council_Final_Report.pdf) [Accessed 9 Nov. 2020].

<sup>12</sup> From the Heart (2017). Uluru Statement from the Heart. [online] From the Heart. Available at: <https://fromtheheart.com.au/uluru-statement/the-statement/> [Accessed 9 Nov. 2020].

<sup>13</sup> Coalition Government (2019). Our Plan to Support Indigenous Australians. [online] ParlInfo. Available at: <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;orderBy=date-efirst;page=0;query=%22support%20indigenous%20australians%22%20Content%3ALiberal%20Date%3A01%2F05%2F2019%20%3E%3E%2031%2F07%2F2019;rec=1;resCount=Default> [Accessed 5 Nov. 2020].

<sup>14</sup> Prime Minister Scott Morrison (2020). Address, Closing the Gap Statement to Parliament. [online] Prime Minister of Australia. Available at: <https://www.pm.gov.au/media/address-closing-gap-statement-parliament> [Accessed 5 Nov. 2020].

These commitments to the Australian people and the Parliament recognise the importance of the constitutional enshrinement of the Voice and must be honoured.

### 2.3 There is bi-partisan commitment for constitutional recognition

At the last election, Labor committed to “establish[ing] a Voice for First Nations people and seek[ing] the support of the Australian people for that Voice to be enshrined in the Constitution”<sup>15</sup>.

This commitment was reinforced by Opposition Leader Anthony Albanese in his Closing the Gap statement to the Parliament in February 2020:

We have before us an opportunity for bipartisanship that we cannot afford to miss. Our international credibility is linked to our integrity with First Nations people. The minister and the Prime Minister have the opportunity to do something that they will be remembered for, and we will support them. However, as Linda Burney has put it, there is a danger that the Uluru [S]tatement will end up being remembered as a noble moment but not a turning point, and we cannot allow that to happen. At its most basic level, the denial of a constitutionally enshrined voice is a denial of the Australian instinct for a fair go<sup>16</sup>.

### 2.4 The Australian people support constitutional enshrinement

Research commissioned by From the Heart and conducted by C|T Group in June 2020 shows the majority Australians (56%) would vote ‘Yes’ in a referendum to enshrine a Voice in the Constitution. Those against represent a small minority (17%) with just over a quarter undecided at the time of the survey. Research conducted in March 2020 shows a large majority of Aboriginal and Torres Strait Islander people are willing to back a Voice at a referendum (71%).

The research shows Australians see a constitutionally-enshrined Voice as a:

- ‘Fair-go’ for Aboriginal and Torres Strait Islander people;
- Practical reform; and
- Legally safe reform.

The research also shows Australians think it is time we made this change for our nation.

### 2.5 There is no other desirable or viable option for constitutional reform

Other proposals for constitutional reform have been considered and rejected by Aboriginal and Torres Strait Islander peoples through the Uluru Statement.

A statement of acknowledgement has been comprehensively rejected as symbolism that has no practical impact on the lives of Aboriginal and Torres Strait Islander people. Other proposals such as simply removing references to ‘race’ and/or replacing them with references to ‘Aboriginal and Torres Strait Islander peoples’ have been similarly rejected on the basis they do nothing to advance the day-to-day lives of Aboriginal and Torres Strait Islander people.

While such proposals have merit, on their own and absent Constitutional underpinning of the Voice they are unacceptable and will be rejected. Pursuing these options after Aboriginal and Torres Strait

<sup>15</sup> ALP (2019). A Fair Go For First Nations People: Labor’s Plan. [online] A Fair Go For First Australians. Available at: <https://alp.us12.list-manage.com/track/click?u=942ebc4c1cf8fc522a4f4c50e&id=fb4238db7c&e=551552b6c2> [Accessed 6 Nov. 2020].

<sup>16</sup> Albanese, A. (2020). Ministerial Statements – Closing the Gap. [online] Anthony Albanese MP. Available at: <https://anthonyalbanese.com.au/ministerial-statements-closing-the-gap-wednesday-12-february-2020> [Accessed 6 Nov. 2020].



Islander people have already rejected them risks being seen as yet another example of a top-down government 'knowing what's best'. Prime Minister Scott Morrison acknowledged this was a fundamental failing of governments' relationship with Aboriginal and Torres Strait Islander people:

We perpetuated an ingrained way of thinking, passed down over two centuries and more, and it was the belief that we knew better than our Indigenous peoples. We don't. We also thought we understood their problems better than they did. We don't<sup>14</sup>.

The Uluru Statement called for a Voice that is enshrined in the Constitution. There is no other proposal that has a similar mandate to the Uluru Statement.

There is no mandate for a merely legislated Voice.

There is no mandate for constitutional symbolism.

Neither of these options should be considered and seen as an 'easy way out' or ticking-the-box on the Uluru Statement.

### 3 Legislative and constitutional sequencing to enact a Voice

From the Heart supports the Prime Minister's commitment and the government's policy for a two-stage process to establish the Voice.

#### Stage 1: Co-Design of the form and function of the Voice

The Voice Co-Design process is the government's response to the first recommendation of the Joint Select Committee (JSC) on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples (see Attachment 1).

#### Stage 2: Constitutional, legislative and executive enactment of the Voice

The JSC's second recommendation relating to the Voice was that "following a process of co-design, the Australian Government consider, in a deliberate and timely manner, legislative, executive and constitutional options to establish The Voice"<sup>17</sup>.

The government has committed to implementing this second recommendation.

#### 3.1 Stage 2 must be a separate and deliberate process

The Terms of Reference for the Co-Design Senior Advisory Group (SAG) established to advise Minister Ken Wyatt on the Voice design explicitly exclude it from "making recommendations as a Group through this co-design process on constitutional recognition, including determining the referendum question or when a referendum should be held"<sup>18</sup>. As such, the existing Co-Design Committees are not the appropriate mechanism to undertake Stage 2.

Following the conclusion of the Co-Design Committees' work and the release of the final recommendations, the government should announce a separate, newly formed process to lead Stage 2 that:

- Has the necessary expertise, including independent constitutional law expertise;
- Is jointly led with Aboriginal and Torres Strait Islander experts; and
- Includes experts who were directly involved on the Expert Panel on Constitutional Recognition of Indigenous Australians and the Referendum Council to maintain continuity with prior work

This Stage 2 process will have three key objectives:

- Work with the government on developing an exposure draft bill for the Voice as per the final Co-Design report:
  - The purpose of the exposure draft bill will be to give the Australian public a comprehensive look at the details of the Voice before a referendum is held
  - It will give assurance about what people will be voting on prior to a referendum

<sup>17</sup> Dodson, P. and Leeser, J. (2018). Final Report, Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples. [online] Recommendations. Available at: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Former\\_Committees/Constitutional\\_Recognition\\_2018/ConstRecognition/Final\\_Report/section?id=committees%2freportjnt%2f024213%2f26813](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Constitutional_Recognition_2018/ConstRecognition/Final_Report/section?id=committees%2freportjnt%2f024213%2f26813) [Accessed 5 Nov. 2020].

<sup>18</sup> National Indigenous Australians Agency (2019). Terms of Reference, Senior Advisory Group. [online] Indigenous Voice: Resources. Available at: <https://voice.niaa.gov.au/sites/default/files/2020-09/senior-advisory-group-tor-sept20.pdf> [Accessed 5 Nov. 2020].

- Once a successful referendum is held, the draft bill will be passed to create the enabling legislation for a Voice
- Draft constitutional amendment to create a new provision for a Voice that will then be put to the Australian people for a vote in a referendum
- Deliver upon the government's election commitment by outlining the pathway to a referendum in the next term of Parliament.

### 3.2 Legislation must follow a referendum

The SAG recommended the Australian Government confirming its “commitment to implementing the Indigenous Voice after consultation...will provide stakeholders with confidence in the process and longevity of the establishment, in whatever form it may take.”<sup>19</sup> However, the establishment form of the Voice is the critical issue. Any move to implement the Voice through legislation before a referendum represents a critical risk to the success of the Voice and a generational opportunity for meaningful constitutional reform.

Since former Prime Minister John Howard made the case for constitutional recognition in 2007, governments of both persuasions have retained bi-partisan commitment:

I believe we must find room in our national life to formally recognise the special status of Aboriginal and Torres Strait Islanders as the first peoples of our nation. We must recognise the distinctiveness of Indigenous identity and culture and the right of Indigenous people to preserve that heritage<sup>20</sup>.

None of the six government processes conducted in the 14 years since have contemplated a legislated try-before-you-buy approach to constitutional recognition. These processes have focused on the finding the most meaningful form of recognition. Howard marked the direction; the Uluru Statement provided the destination. It would be incongruous now, in the second decade of hard travel, to ignore the map and steer constitutional recognition into a legislative cul-de-sac. More so, it is entirely unnecessary; parliaments will retain the power to amend a Voice through legislation following a successful referendum - should the need emerge over time - while the ongoing existence of a Voice is assured.

It's a fair go and it's time we made it happen.

<sup>19</sup> National Indigenous Australians Agency (2020). Indigenous Voice Co-Design Process: Interim Report to the Australian Government. [online] Indigenous Voice: Resources, p.158. Available at: <https://voice.niaa.gov.au/sites/default/files/2021-01/indigenous-voice-codesign-process-interim-report-2020.pdf> [Accessed 10 Jan. 2021].

<sup>20</sup> Howard, J. (2007). The Right Time: Constitutional Recognition for Indigenous Australians. [online] Available at: [https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/L41P6/upload\\_binary/L41p62.pdf;fileType=application%2Fpdf#search=%22media/pressrel/L41P6%22](https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/L41P6/upload_binary/L41p62.pdf;fileType=application%2Fpdf#search=%22media/pressrel/L41P6%22) [Accessed 19 Jan. 2021].





## **ATTACHMENT 1: Final Report of the Joint Select Committee on Constitutional Recognition (extract)**

### **Recommendation 1**

2.314 In order to achieve a design for The Voice that best suits the needs and aspirations of Aboriginal and Torres Strait Islander peoples, the Committee recommends that the Australian Government initiate a process of co-design with Aboriginal and Torres Strait Islander peoples.

The co-design process should:

- Consider national, regional and local elements of The Voice and how they interconnect;
- Be conducted by a group comprising a majority of Aboriginal and Torres Strait Islander peoples, and officials or appointees of the Australian Government;
- Be conducted on a full-time basis and engage with Aboriginal and Torres Strait Islander communities and organisations across Australia, including remote, regional, and urban communities;
- Outline and discuss possible options for the local, regional, and national elements of The Voice, including the structure, membership, functions, and operation of The Voice, but with a principal focus on the local bodies and regional bodies and their design and implementation;
- Consider the principles, models, and design questions identified by this Committee as a starting point for consultation documents; and
- Report to the Government within the term of the 46th Parliament with sufficient time to give The Voice legal form.

### **Recommendation 2**

3.152 The Committee recommends that, following a process of co-design, the Australian Government consider, in a deliberate and timely manner, legislative, executive and constitutional options to establish The Voice.



## ATTACHMENT 2: Coalition government 2019 election policy (extract)

### Support Indigenous Australians, 15 May 2019

The Joint Select Committee recommended that further work was needed to clarify a model for constitutional recognition and how it could best suit the needs and aspirations of Aboriginal and Torres Strait Islander Australians.

We are committed to recognising Aboriginal and Torres Strait Islander Australians in the Constitution at the same time as delivering practical outcomes to improve the lives of Aboriginal and Torres Strait Islander communities. But there needs to be more work done on what model we take to a referendum and what a voice to parliament would be - which is why we are funding a consultation process with Aboriginal and Torres Strait Islander Australians. This process will develop up a question for a referendum and what a referendum will deliver – because no one can answer what a voice to parliament actually is at the moment.

To deliver on this recommendation, the Morrison Government is providing \$7.3 million for the comprehensive co-design of models to improve local and regional decision making and options for constitutional recognition. This work will commence immediately to provide a model and pathway to a successful referendum.

The key issue that we keep hearing is what is this Voice, the ALP cannot tell us what the Voice might look like and how it might operate. We believe if Australians don't understand what they're voting for in a referendum, they will vote no, and endanger this important issue for another generation.

The Government will engage and consult with Indigenous communities, organisations and leaders across Australia to deliver this important work.

A referendum will be held once a model has been settled, consistent with the recommendations of the Joint Select Committee.

And we have allocated \$160 million in the Budget to run a referendum, with funding remaining in the Contingency Reserve until a referendum model has been determined.



## **ATTACHMENT 3: Address, Closing the Gap Statement to Parliament**

### **Prime Minister of Australia, 12 February 2020 (extract)**

Finally, Mr Speaker, I want to be clear, as Prime Minister I respect their honest yearn for Constitutional Recognition.

In 2018, the Joint Select Committee into Constitutional Recognition relating to Aboriginal and Torres Strait Islander peoples delivered a bipartisan report. Our Government adopted the four bi-partisan recommendations in this report.

In particular, *JSCCR Recommendation 1*.

*In order to design a voice that best meets the needs and aspirations of Aboriginal and Torres Strait Islander peoples, the Committee recommends a process of co-design between Aboriginal and Torres Strait Islander peoples and government be initiated in communities across Australia to design a voice that can help deliver practical outcomes for that community.*

This is our Government's policy.

It is clear from the Committee's report that more work needs to be done on a voice proposal.

The Government has always supported giving Indigenous people more of a say at the local level.

We support the process of co-design of the voice because if we are going to change the lives of Aboriginal and Torres Strait Islander Peoples on the ground, we need their buy-in to the matters and policies that affect them.

The Committee did not make recommendations as to the legal form of the Voice, constitutional or legislation.

It recommended considering this matter after the process of co-design is complete and that's what we are doing. We support finalising co-design first.