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Submission to the Indigenous Voice Co-Design Process

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Introduction

This submission argues against prematurely legislating a First Nations voice before first holding a referendum to implement the concomitant constitutional guarantee. Pursuing legislation before the appropriate constitutional amendment empowering and requiring the existence of a First Nations voice would dishonour the Uluru Statement and kill off chances of constitutionalising the institution.

The first part of this submission re-caps the history and premise of Indigenous constitutional recognition, explaining why Indigenous people seek a First Nations constitutional voice as a remedy to Indigenous constitutional exclusion and disempowerment. It reiterates the importance of a *constitutionally guaranteed* voice, as called for by the Uluru Statement, and distinguishes the Inter-State Commission. It argues that, without constitutional underpinning, a First Nations voice would be weak, ineffective and short-lived, just like the transient Indigenous bodies of the past.

The second part explains why Australians can unite behind a First Nations constitutional voice: it is a 'modest yet profound' proposal, intended to have practical impact to improve outcomes in Indigenous affairs. It explains why government's previous concerns can now be answered, and reminds us why this is the *only* proposal that can win a recognition referendum. Over 80% of Australians say they would vote 'yes' to a First Nations constitutional voice, with support growing across the political spectrum. Further, more Australians support a constitutionalised voice than a merely legislated voice.

The third part explains why prematurely legislating a First Nations voice, before implementing the concomitant constitutional guarantee through a referendum, would destroy chances of constitutionalising the institution. Absent a new constitutional amendment empowering and requiring the institution, legislation establishing a voice would rely on s 51(xxvi), the race power – the power originally intended to control and exclude the 'inferior' and 'coloured' peoples;[1] which supported the Native Title Act but also enabled the winding back of native title rights after the *Wik* decision; and which likely supported the enactment and then the abolition of ATSIC. Using the race power, or any other existing constitutional power, to establish a First Nations voice would mean the institution can easily be abolished. It would be an act of bad faith, setting the institution up to fail.

It would also be bad strategy if constitutionalisation is the ultimate aim – which it must be. Prematurely legislating a voice would confuse the public and dissipate the momentum and productive tension currently driving the campaign for a constitutionalised voice. Indigenous people especially should oppose legislating first. Accepting a merely legislated voice without the constitutional guarantee, in the hopes that constitutional entrenchment will follow, would be like accepting the Apology without

[1] *Official Record of the Debates of the Australasian Federal Convention*, Third Session, Melbourne, 20 January – 17 March 1898, 227 – 43.

compensation all over again. Indigenous Australians are still waiting for just restitution. We must learn from past mistakes. Legislating first will mean constitutional entrenchment never happens.

The fourth part proposes that, after the co-design process is complete, legislation setting up a First Nations voice should be drafted then set aside until after a successful referendum on a First Nations voice. It recommends a process to settle the words of a constitutional amendment giving effect to the Uluru Statement's call for a First Nations constitutional voice.

1. Why Do Indigenous Australians Seek Substantive *Constitutional* Recognition?

Indigenous Constitutional Exclusion

Australia's Constitution has been overwhelmingly successful, presiding over an enduring, stable and prosperous democracy. Indigenous Australians, however, have largely not shared in Australia's success and prosperity. While the Constitution has worked well to protect the rights and ensure the wellbeing of most Australians, it has not worked well to protect the rights and ensure the wellbeing of Indigenous Australians.

As Brennan J explained, Indigenous dispossession "underwrote the development of the nation".[2] Each crucial moment of our nation's founding history has failed to recognise a just place for the original owners. In 1770, Lieutenant James Cook declared possession of the east coast on behalf of the British Crown, without the required Indigenous consent.[3] On 26 January 1788, Arthur Phillip asserted British sovereignty, ignoring preceding First Nations sovereignty. Though Phillip was instructed to treat the 'the Natives' with "amity and kindness",[4] that day marked the beginning of a long trajectory of discrimination, dispossession and destruction for Indigenous peoples.

In 1901, the Constitution united the colonies to create Australia, without the representation of Indigenous peoples. It was drafted, as Patrick Dodson described, "in the spirit of *terra nullius".*[5] There were no First Nations delegates among the 'founding fathers' at the constitutional conventions, and Indigenous people had no say in its terms. While the Constitution embodied a negotiated union of Australia's historic political communities – the former colonies – there was no agreed inclusion of the most ancient of political communities – the First Nations.

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[2] *M abo v Queensland (No 2)* (1992) 175 CLR 1, 65.
[3] The Royal Instructions required Cook to obtain "the consent of the Natives" before claiming possession: Secret Instructions to Captain Cook (30 June 1768): <http://foundingdocs.gov.au/resources/transcripts/nsw1_doc_1768.pdf>.
[4] Governor Phillip's Instructions 25 April 1787 (UK): www.foundingdocs.gov.au/resources/transcripts/nsw2_doc_1787.rtf .
[5] Patrick Dodson, speech delivered at the Position of Indigenous People in National Constitutions Conference, Canberra, 4 June 1993, quoted in B Attwood and A Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (2nd ed, 2007) 146-147.

The result was a power-sharing compact which established for Indigenous people a position of perpetual powerlessness. The Constitution included no clauses to protect Indigenous rights or guarantee them equality before the law. It contained no provisions for specific Indigenous representation, nor any structural accommodation establishing the appropriate level of Indigenous authority over Indigenous affairs. There was the opposite: clauses which discriminated against and explicitly excluded Indigenous people.[6]

As a result of this power imbalance, the Constitution presided over many laws and policies discriminating against Indigenous people. There were unofficial policies of frontier killing of Indigenous people,[7] official policies which included forced removal of Indigenous people into protective missions,[8] as well as laws and policies denying equal voting rights in some jurisdictions,[9] denying equal wages,[10] dictating who Indigenous people could marry and controlling where they could live,[11] and denying equal property rights.[12]

Though the worst discrimination is past, Indigenous constitutional powerlessness continues. It is evident in repeated national failures to close the gap and embedded Indigenous disadvantage that persists today.

1967 Did Not Fix the Problem

The 1967 vote was a historic referendum win, but as Kirby J explained, the "dregs of the cup of that victory" were not properly appreciated.[13] Though symbolically powerful, the referendum did not fix the fundamental problem that the Constitution gives Australian parliaments and governments immense power, while providing Indigenous people no structural power over their own affairs.

By amending s 51(xxvi), the race power, the 1967 referendum conferred upon the Commonwealth unilateral power to make laws about Indigenous people. However, it did not include any provision to guarantee Indigenous peoples a voice in the making of laws made about them, or any clause to ensure such laws would be just. As a 3% extreme minority, Indigenous Australians have a limited capacity to influence political decisions and law-making about their rights through ordinary processes. This is the

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[6] E.g. ss 25, 127, s 51(xxvi).
[7] Rosalind Kidd, *The Way We Civilize: Aboriginal Affairs – the Untold Story* (University of Queensland Press, 2005); Noel Pearson also writes of the attempted genocide of Indigenous Tasmanians in Noel Pearson, *A Rightful Place: Race, Recognition and a More Complete Commonwealth* (Black Inc, Quarterly Essay 55, 2014) 16-23.
[8] Australian Human Rights Commission, *Bringing Them Home: the Stolen Children Report*, 1997.
[9] E.g. *The Commonwealth Franchise Act 1902* (Cth) section 4 provided: "No aboriginal native of Australia Asia Africa or the Islands of the Pacifi c except New Zealand shall be entitled to have his name placed on an Electoral Roll unless so entitled under section forty-one of the Constitution." Indigenous Australians did not achieve full formal equality in voting rights until 1983.
[10] Commonwealth of Australia, *Unfinished Business: Indigenous Stolen Wages report*, 2006; *Bligh and others v State of Queensland* [1996] HREOCA 28.
[11] The Protection Acts empowered appointed protectors and boards to control many day-to-day aspects of Indigenous people's lives. See e.g. *Aborigines Protection Act 1886 (WA)*, *Aborigines Protection Act 1869 (Vic)*, *Aboriginals Preservation and Protection Act 1939 (Qld).*
[12] Full discussion in *Mabo*.
[13] Michael Kirby, 'Constitutional Law and Indigenous Australians: Challenge for a Parched Continent' (2012) 15 *Southern Cross University Law Review* 3, 5.

'elephant and the mouse' problem which characterises Indigenous affairs. As the Uluru Statement laments, "this is the torment of our powerlessness".

The 1967 referendum did not alter the race power's discriminatory capacity. While the race power has supported beneficial laws recognising Indigenous rights, like the *Native Title Act* (NTA) in 1993 and the establishment of the Aboriginal and Torres Strait Islander Commission (ATSIC) in 1990, it can also be used to trample and wind back Indigenous rights.[14] The race power enabled the watering down of the NTA after the *Wik* decision in 1998. It likely enabled the abolition of ATSIC in 2005.

The point is, merely legislated recognition of Indigenous rights can be legislated away. The race power is not the only problem in this respect: many other Commonwealth powers also enable the discriminatory trampling of Indigenous rights. For example, the Northern Territory Intervention, which many argued was discriminatory and initially suspended the *Racial Discrimination Act 1975 (Cth)* (RDA),[15] was enacted under s 122, the territories power. That the RDA has been suspended several times in recent decades, each time in relation only to Indigenous people,[16] is further evidence of Indigenous constitutional powerlessness.

Indigenous constitutional powerlessness is the problem Indigenous constitutional recognition seeks to fix. It cannot be fixed by a merely legislated First Nations voice, which is always vulnerable to abolition. Lacking constitutional status, such a voice would be weak, ineffective and transient – just like the Indigenous bodies of the past.

Indigenous Advocacy for Constitutional Empowerment

Indigenous people seek more than a static, symbolic statement of no operational effect.[17] They seek 'serious constitutional reform'[18] to ensure past wrongs are not repeated.

The need for an empowered Indigenous voice in their affairs has a long history in First Nations advocacy.[19] In 1927, Fred Maynard wrote to the New South Wales Premier asking for the control of Indigenous affairs to be transferred to an Indigenous board.[20] In 1933, Joe Anderson, otherwise known as King Burraga, Chief of the Thurawal tribe near Sydney, also argued for self-determination and sought

[14] *Kartinyeri v The Commonwealth* (1998) 195 CLR 337.
[15] The *Northern Territory Emergency Response Act 2007* (Cth), s 132.
[16] E.g. the *Hindmarsh Island Bridge Act 1997* (Cth) displaced the application of the RDA. See also, *Native Title Amendment Act 1998* (Cth); *Northern Territory Emergency Response Act 2007* (Cth) s 132.
[17] Shireen Morris and Noel Pearson, 'Indigenous constitutional recognition: paths to failure and possible paths to success' (2017) 91(5) *Australian Law Journal* 350.
[18] Galarrwuy Yunupingu, 'Truth, Tradition and Tomorrow', *The Monthly*, 2008.
[19] For a history of this advocacy see Shireen Morris, 'The Argument for a Constitutional Procedure for Parliament to Consult with Indigenous Peoples when Making Laws for Indigenous Affairs', (2015) 26 *Public Law Review* 166, 170-173.
[20] A history of Aboriginal Sydney, 'Australian Aboriginal Progressive Association Writes a Letter of Protest to the NSW Premier' <http://www.historyofaboriginalsydney.edu.au/north-west/australianaboriginal-progressive-association-writes-letter-protest-nsw-premier>.

Indigenous representation in Parliament.[21] In 1937, Aboriginal Victorian man, William Cooper, petitioned the British King asking for reserved Indigenous seats in Parliament. In 1963, the Yirrkala Bark Petitions pleaded for the government to listen to Yolngu people before making decisions about their land and their lives. In 1972 the Aboriginal Tent Embassy argued for Aboriginal control of Aboriginal affairs, which included a demand that the Northern Territory Parliament be made up predominantly of Indigenous representatives.[22]

In 1988, Yolngu leader Galarrwuy Yunupingu presented the Barunga Statement to then Prime Minister, Bob Hawke. It called for a treaty, Aboriginal control of their affairs, and for a national elected Aboriginal and Islander organisation to oversee Aboriginal and Islander affairs. While a treaty was not achieved, the Barunga Statement's call for an Indigenous elected body helped drive momentum for the establishment of ATSIC.

ATSIC was legislated into existence by the Australian Labor Party (ALP) in 1990 but abolished in 2005 by the Liberal government with ALP support. Its destruction was easy, because the institution was not underpinned by any constitutional guarantee.

The Importance of a Constitutional Guarantee

The history above demonstrates why Indigenous advocates have consistently called for their rights and interests to be recognised *in the Constitution*. Changing the Constitution is difficult. Section 128 requires a double majority referendum, which means a majority of voters in a majority of states must vote 'yes' for any change. The difficulty of amendment means that once a reform is approved by the Australian people and put into the Constitution, it is hard to remove. A constitutional reform is therefore more 'locked in' than legislative reform. A constitutional guarantee is an enduring, intergenerational promise. As Yolgnu elder, Galarrwuy Yunupingu, explained in 1998, constitutional reform is important to Indigenous people because:

> Our Yolgnu law is more like your Balanda Constitution than Balanda legislation or statutory law. It doesn't change at the whim of short-term political expediency. It protects the principles which go to make up the very essence of who we are and how we should manage the most precious things about our culture and our society. Changing it is a very serious business…If our Indigenous rights were recognised in the Constitution, it would not be so easy for Governments to change the laws all the time, and wipe out our rights…

Patrick Dodson further explained in 1999:

[21] See Bain Attwood and Andrew Markus, *Thinking Black: William Cooper and the Australian Aborigines' League* (Aboriginal Studies Press 2004) 36; Heather Goodall, *Invasion to Embassy: Aboriginal Politics in NSW 1770 – 1972* (Sydney University Press 2006) 204.
[22] J Newfong, The Aboriginal Embassy – Its purpose and aims: < https://www.nma.gov.au/__data/assets/pdf_fi le/0003/384384/f63.pdf >.

> It may be a harsh thing to say, but many actions of Australian Governments have given Aboriginal people little faith in the promises Governments make in relation to protecting and defending the rights of Indigenous Australians. That is why we need a formal Agreement that recognises and guarantees the rights of Indigenous Australians within the Australian Constitution.[23]

This is why Indigenous people seek recognition of their rights and interests in the Constitution, because the Constitution – the nation's power-sharing compact – is the only instrument that can genuinely address the 'torment of powerlessness' that besets Indigenous peoples in their relationship with the Australian state.

It is not only Indigenous people who acknowledge the importance of Indigenous recognition occurring within the Constitution, however. Australia's contemporary commitment to recognising Indigenous peoples in the Constitution began with Liberal Prime Minister John Howard's promise in 2007, which was matched by the ALP under Kevin Rudd and continued by Julia Gillard. Efforts towards Indigenous constitutional recognition have continued since then with the Expert Panel in 2012, a Joint Select Committee in 2014-2015, the Referendum Council in 2017, and the Joint Select Committee of 2018 which recommended the current co-design process.

These efforts reflect the fact that recognition of Indigenous peoples is rightly done in the nation's founding document. The Australian Constitution sets up the nation's institutional architecture. An institution representing the voices of the First Nations has a rightful place in the Australian Constitution.

Distinguishing the Inter-State Commission

Those seeking to undercut arguments for constitutional entrenchment of a First Nations voice are likely to point to the Inter-State Commission to argue that a constitutional imperative is no guarantee that an institution will exist. Section 101 of the Constitution mandates the existence of an Inter-State Commission with adjudicatory powers. Despite this constitutional requirement, no Inter-State Commission has existed for most of Australia's history.

The Inter-State Commission is a constitutional outlier. Many other important institutions are required by the Constitution and operate effectively. These include the Senate under s 7, the House of Representatives under s 24 and the High Court under s 71. Nonetheless, it is true that constitutional clauses do not always guarantee Parliament will follow the rules contained in them, just as the existence of a constitution does not always entail the existence of the institutions mandated by it. Constitutions, institutions and the authority of constitutional provisions depend on political will, public support and respect for the rule of law. Such political will and public endorsement are often generated and consolidated through constitutional amendment procedures. This is why a constitutional referendum is so

[23] Patrick Dodson, 'Until the Chains are Broken', Vincent Lingiari Memorial Lecture, Darwin, 8 September 1999.

important: it will imbue a First Nations voice with popular endorsement, which will help ensure the institution's longevity and authority.

A constitutionally guaranteed First Nations voice can be distinguished from the Inter-State Commission on several grounds. First, the Commission's utility waned after the 1915 *Wheat Case*,[24] which was a key reason for the Commission's failure.[25] The establishing Act allocated the Commission many judicial-sounding powers, but the High Court decided that the powers conferred on the Commission by the Constitution were not of a judicial nature – despite the adjudicatory language of s 101. The institution suffered and faded as a result of judicial intervention. Key driving factors were the Commission's role as a watchdog of section 92 – a justiciable provision guaranteeing freedom of inter-State trade – as well as the need for judicial adjudication of s 101. Constitutional justiciability did not work in the Commission's favour. In contrast to the Commission, however, the clause requiring the establishment of a First Nations voice is intended to be non-justiciable.[26] This fundamentally distinguishes this proposal from the Inter-State Commission.

Similarly, a First Nations voice is intended to be advisory and consultative – there are no adjudicatory powers to complicate matters. The Commission's adjudicatory powers meant that other institutional authorities felt especially threatened by its existence: there was opposition from State governments, interest groups, the federal government and the High Court. The only interest group lobbying to keep the Commission were the Commissioners, and their voices were not politically strong enough – they did not represent a genuine political constituency. A First Nations voice would be totally different. Rather than an adjudicatory body, it would be a *political* voice for Indigenous people, who are a real interest group and a distinct political and constitutional constituency. Indigenous Australians would be the constituency politically driving and lobbying for the body's existence – supported by all Australians who would have voted for constitutional recognition of this institution through a referendum.

Further, the proposed constitutional institution is likely to carry a more powerful and specific popular endorsement than the Inter-State Commission. The Commission was just one part of the 1901 *Constitution* which, as a whole, was endorsed by the people. There was no special or particular popular endorsement directed at the Commission. A contemporary Indigenous recognition referendum would be different. If the Australian people vote to amend the Constitution to establish a First Nations voice, there will be a highly specific, contemporary political directive from the Australian people for the Indigenous body to function and operate effectively. This would place an onerous responsibility on the Parliament to follow the constitutional requirement, as directed by the Australian people through a contemporary, single-issue referendum. Despite non-justiciability, it would be extremely difficult for Parliament to ignore

[24] *New South Wales v Commonwealth* (1915) 20 CLR 54.
[25] Stephen Gageler, 'The Inter-State Commission and the Regulation of Trade and Commerce under the Australian Constitution' (2017) 28 (3) *Public Law Review* 205, 215-216.
[26] Referendum Council report, 38.

this powerful political, moral and constitutional imperative. If it did, Indigenous Australians and the Australian people would demand Parliament adhere to the constitutional requirement.[27]

2. Australians Can Unite Behind a First Nations Constitutional Voice

This is a 'Modest Yet Profound' Proposal

While the idea of an Indigenous constitutional voice in Indigenous affairs has a long history in First Nations advocacy, the recent iteration of the concept arose from 2014 when Cape York Institute engaged with constitutional conservatives to develop common ground in the Indigenous constitutional recognition debate.[28] This collaboration emerged because the Expert Panel's proposed racial non-discrimination clause, proposed in 2012, had not won the necessary political support for a successful referendum, due to conservative concerns about empowering the High Court, creating legal uncertainty and undermining parliamentary supremacy.[29] We therefore went in search of an alternative idea that would address such objections, while realising Indigenous aspirations for substantive constitutional change over minimalism.

The collaboration gave rise to the alternative proposal for a constitutionally guaranteed Indigenous voice in Indigenous affairs. Professor Anne Twomey put forward constitutional drafting that would establish a constitutionally guaranteed Indigenous advisory body,[30] to empower Indigenous people with a political voice in their affairs. This proposal seeks to explicitly address the previously expressed concerns in relation to a racial non-discrimination clause:[31] there is no veto, the amendment would be non-justiciable, it would eliminate legal uncertainty or any risk of laws being struck down, and parliamentary supremacy would be upheld. The proposed clause would transfer no power to the High Court – instead it would constitutionally empower Indigenous peoples *themselves* to have a fair say in decisions made about them. While the institution's existence would be constitutionally guaranteed, the details of the institution would be for Parliament to determine and could evolve as necessary.

The Uluru Statement endorsed this self-determinative, empowering approach to Indigenous constitutional recognition. In May 2017, following a series of regional dialogues, Indigenous Australians formed an unprecedented national consensus on how they want to be constitutionally recognised. Their consensus

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[27] For more detailed arguments distinguishing the Inter-State Commission, see Shireen Morris, *A First Nations Voice in the Australian Constitution* (Hart Publish 2020) 255-262; Shireen Morris, 'A Constitutional Duty for Parliament to Consult with Indigenous Peoples' (2015) 26 *Public Law Review* 166, 186-189.

[28] For more on this engagement with constitutional conservatives, see Noel Pearson, *A Rightful Place: Race, Recognition and a More Complete Commonwealth* (Black Inc., Quarterly Essay 55, 2014), 65-66; Noel Pearson, 'Foreword' in Damien Freeman and Shireen Morris (eds), *The Forgotten People: Liberal and Conservative Approaches to Recognising Indigenous Peoples* (Melbourne University Press, 2016); Shireen Morris, *Radical Heart: three stories make us one* (MUP, 2018).

[29] For an exploration of these objections, see Shireen Morris, 'Undemocratic, Uncertain and Politically Unviable? An Analysis of and Response to Objections to a Proposed Racial Non-Discrimination Clause as Part of Constitutional Reforms for Indigenous Recognition' (2014) 40 *Monash University Law Review* 488.

[30] Anne Twomey, 'Putting words to the tune of Indigenous constitutional recognition', *The Conversation*, 20 May 2015.

[31] These concerns are explained in Shireen Morris, 'Undemocratic, Uncertain and Politically Unviable? An Analysis of and Response to Objections to a Proposed Racial Non-Discrimination Clause as Part of Constitutional Reforms for Indigenous Recognition' (2014) 40 *Monash University Law Review* 488.

called for a singular constitutional reform: a First Nations voice in the Constitution.[32] It was a historic moment. Most Indigenous advocacy of the past emanated from particular regions: never before had a national Indigenous consensus position been realised.

The consensus stepped away from removal of references to 'race' and insertion of symbolic statements. It also moved away from a racial non-discrimination clause as a means of achieving constitutional empowerment through litigation.[33] The shift was sensible: a First Nations voice is in alignment with Australian constitutional culture and design — more so than the insertion of poetic statements into what is fundamentally a practical rulebook of government[34] and more so than insertion of a racial non-discrimination clause into Australia's bill of rights-free Constitution.[35]

Australia's Constitution is all about voices: the federal system provides mechanisms for the historic political communities (the former colonies) to always be heard by the might of the majority. It ensures that even the smallest former colonies, like Tasmania, are guaranteed an equal voice in the Senate. There are more Indigenous Australians than Tasmanians.[36] Yet there are no constitutional mechanisms for Indigenous peoples to be specifically heard in their affairs, even in laws and policies made directly about them. In seeking to rectify this, the Uluru Statement makes a reasonable and constitutionally congruent request.[37]

A First Nations Voice Will Empower Indigenous People to Close the Gap

Prime Minister Scott Morrison has repeatedly suggested that the most important focus in Indigenous affairs should be practical matters, like addressing Indigenous youth suicide, child removal and domestic violence.[38] On this, Morrison will find agreement with Indigenous Australians: the Uluru Statement seeks empowering structural reform through a guaranteed voice precisely because

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[32] It also called for a Makarrata Commission, set up in legislation, to oversee First Nations agreement-making with government and truth-telling about history.
[33] See Expert Panel on Constitution Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, 2012 ('Expert Panel'); Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Final Report*, 2015.
[34] Sir Anthony Mason, 'The *Australian Constitution* in Retrospect and Prospect' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds) *Reflections on the Australian Constitution* (Federation Press, 2003) 8.
[35] For discussion of objections to this proposal, see Shireen Morris, 'Undemocratic, Uncertain and Politically Unviable? An Analysis of and Response to Objections to a Proposed Racial Non-Discrimination Clause as Part of Constitutional Reforms for Indigenous Recognition' (2014) 40(2) *Monash University Law Review* 488.
[36] In 2019, the Tasmanian population was 519,166: Population Australia, 'Population of Tasmania 2019' (Web Page) <http://www.population.net.au/population-of-tasmania/>. The 2016 Census reported the Indigenous population as 649,200: Australian Bureau of Statistics, 'Census: Aboriginal and Torres Strait Islander population' (Web Page, 27 June 2017) <http://www.abs.gov.au/ausstats/abs@.nsf/MediaRealesesByCatalogue/02D50FAA9987D6B7CA25814800087E03?OpenDocument>.
[37] For more on the argument for a First Nations voice, see Shireen Morris, *A First Nations Voice in the Australian Constitution* (Hart Publishing, 2020); Shireen Morris, 'The Torment of Our Powerlessness: Indigenous Constitutional Vulnerability and the Uluru Statement's Call for a First Nations Voice' (2018) 41(3) *University of New South Wales Law Journal* 629; Shireen Morris, 'The Argument for a Constitutional Procedure for Parliament to Consult with Indigenous Peoples when Making Laws for Indigenous Affairs', (2015) 26 *Public Law Review* 166.
[38] Lorena Allam, '"Unfinished Business ": What the Parties Offer Indigenous Voters in the 2019 Election ' , *T he Guardian* (20 April 2019) https://www.theguardian.com/australia-news/2019/apr/20/unfi nished-business-what-the-parties-offer-indigenous-voters-in-the-2019-election.

Indigenous people want long-term improvement in practical outcomes. They too want to close the gap. That is why they reject merely symbolic recognition. But without substantive and empowering constitutional reform though a First Nations voice, Australia will not close the gap on Indigenous disadvantage. Constitutional reform is urgent because closing the gap is urgent.

The worst indicator of Indigenous powerlessness is incarceration. The fact that 3% of Australia's population make up around 29% of our prison population is evidence of the structural problem. As NSW State Coroner, Teresa O'Sullivan, recently explained:

> We cannot separate the issue of First Nations deaths in custody from the over-representation of First Nations people within the criminal justice system, nor can we separate it from the colonial history of this nation.
>
> A key theme in the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) 30 years ago, and one also reflected in its 339 recommendations, was the importance of self-determination. To quote directly from the report: "The whole thrust of this report is directed towards the empowerment of Aboriginal society on the basis of their deeply held desire, their demonstrated capacity, their democratic right to exercise, according to circumstances, maximum control over their own lives and that of their communities."
>
> Today, 30 years after the RCIADIC report was tabled, those words still hold such force. Self-determination for First Nations people is still lacking in this country. This unfinished business cannot be separated from anything else that is done to try to prevent the deaths of First Nations people in custody.
>
> This is the reason I often draw on the words in the Uluru Statement from the Heart in my coronial findings when a First Nations person dies in custody: "Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are aliened from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future. These dimensions of our crisis tell plainly the structural nature of our problem. This is the torment of our powerlessness."
>
> The Uluru Statement represents an invitation from First Nations people to all Australians that we cannot ignore if we are serious about preventing Aboriginal deaths in custody.
>
> By accepting the Statement's invitation, creating and supporting the processes that will give full effect to the Statement, and ensuring First Nations people have a say in what happens to First Nations families in relation to criminal justice issues, healthcare, and

> social policies, we will ultimately reduce the unacceptable numbers of First Nations deaths in custody.[39]

A First Nations constitutional voice would facilitate Indigenous self-determination, which in essence, is the Indigenous right to take responsibility. Only by Indigenous people taking responsibility can our nation hope to close the gap.

Empowering Indigenous people to take responsibility in their affairs would also support Australia's human rights compliance. Australia endorsed the UN Declaration on the Rights of Indigenous Peoples (DRIP) in 2009, but we have yet to meaningfully implement its principles. Article 18 of DRIP provides that:

> Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19 similarly requires that:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

All parties agree that Indigenous people must be empowered to take charge of their affairs, to improve outcomes. Through a First Nations constitutional voice we will make real the Indigenous right to take responsibility.

We Can Now Proactively Answer Government's Previous Concerns

Despite agreeing that government should 'do things with Indigenous people, not to them', former Prime Minister Malcolm Turnbull in 2017 prematurely rejected the Uluru Statement. A primary reason given was that the proposed reform lacked detail, because the Referendum Council had "provided no guidance" as to how the First Nations voice "would be elected or how the diversity of Indigenous circumstance and experience could be fairly or democratically represented."[40]

The proposal for a First Nations constitutional voice defers design detail to Parliament to determine in collaboration with Indigenous people, demonstrating respect for parliamentary supremacy. This is a

[39] Teresa O'Sullivan, 'Read the State Coroner's full statement on Indigenous deaths in custody', *Sydney Morning Herald,* 12 April 2021: https://www.smh.com.au/national/nsw/read-the-state-coroner-s-full-statement-on-indigenous-deaths-in-custody-20210411-p57i6h.html.

[40] Prime Minister, Attorney-General, Minister for Indigenous Affairs, 'Response to Referendum Council's Report on Constitutional Recognition', Media Release, 26 October 2017 <https://ministers.pmc.gov.au/scullion/2017/response-referendum-councils-report-constitutional-recognition>.

strength of the proposal, in keeping with the Australian constitutional approach to institutional design. Accordingly, developing the institutional detail required government leadership and collaboration.

The 'no detail' complaint is now being addressed through this co-design process. There is more work to be done, however, to settle the words of a constitutional amendment empowering and requiring Parliament to establish a First Nations voice. In Section 4, we propose a process by which Indigenous people and government can agree on constitutional drafting.

The former Prime Minister also suggested a First Nations voice would breach principles of equality, incorrectly describing the proposal as a 'third chamber of Parliament' that Australians would reject at referendum. No 'third chamber of Parliament' was proposed. The Referendum Council recommended a First Nations voice to Parliament (not *in* Parliament), which would be established by Parliament and would have no power to make or veto laws. National Party member, Barnaby Joyce, who initially touted the misleading 'third chamber of Parliament' phrase, has since admitted the mischaracterisation and apologised unreservedly.[41]

Turnbull's equality claim was also misleading: Australia's Constitution enshrines no principle of equality. Instead, it enables and promotes discrimination. This is why Indigenous people want a guaranteed voice in political decision making – to prevent the discriminatory treatment the Constitution has historically enabled. The former Prime Minister's claim that Australians would reject a First Nations voice at referendum is also refuted by independent polling, as shown below.

Turnbull's rejection of the Uluru Statement was premature. It was not the last word. The 2018 Joint Select Committee on Indigenous constitutional recognition correctly endorsed a First Nations constitutional voice as the only pathway forward for Indigenous constitutional recognition.[42] That Committee recommended the co-design process currently being undertaken. But this process was always meant to be part of the journey to constitutional recognition of a First Nations voice. It cannot be separated from constitutional reform.

Constitutional Minimalism Will Fail, but Only a Constitutional Voice Can Win

The last decade of work on Indigenous constitutional recognition means we have all moved on from the idea of a minimalist, purely symbolic preamble (complete with 'no legal effect' clause) which failed abysmally in 1999. Those still pushing for a purely symbolic Indigenous recognition referendum, in the belief that this is the only way to win a recognition referendum, are misguided. The purely symbolic approach would fail again today, because it does not accord with Indigenous wishes. Australians will not vote 'yes' to a form of Indigenous recognition that Indigenous people do not want. Further, the history of

[41] Amy Remeikis, 'Barnaby Joyce 'Apologises' for Calling Indigenous Voice a Third Chamber of Parliament', *The Guardian* (18 July 2019) <https://www.theguardian.com/australia-news/2019/jul/18/barnaby-joyce-apologises-for-calling-indigenous-voice-a-third-chamber-of-parliament>.
[42] Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, Final Report (November 2018).

Australian constitutional reform demonstrates that Australian voters favour practical reform over symbolism. Not one successful constitutional change has been merely symbolic – all have fixed practical problems.

A minimalist, purely symbolic approach to constitutional recognition would be opposed on three powerful fronts:

1. It would be opposed by the majority of Indigenous people, who continue to make clear that they seek practical reform to empower Indigenous people – not just a symbolic statement with no operational effect. The Uluru Statement comprehensively rejected a merely symbolic, minimalist approach to Indigenous constitutional recognition.

2. It would be opposed by constitutional conservatives, who correctly view the Constitution as a practical rulebook, an inappropriate place for uncertain symbolic language which may yield unintended consequences when interpreted by the High Court. Constitutional conservatives have run many well organised and successful 'no' campaigns in the past. They would do so again to uphold the Constitution and prevent the transfer of power to the High Court.

3. Australians prefer practical reform over empty symbolism. Given likely opposition from Indigenous advocates and constitutional conservatives, and given the proclivity of voters to favour practical action over empty symbolism, the Australian people would also vote 'no' to a purely symbolic amendment. This result would be a deserved and just result.

It is crucial to remember the lessons of the failed republic referendum. During that campaign, the direct electionists joined forces with the monarchists to successfully oppose constitutional reform for Australia to become a republic. The alliance demonstrated the way in which people who might ordinarily disagree with each other can unite against a common enemy in the context of a referendum campaign.[43] In the recognition debate, constitutional symbolism would become the common enemy Indigenous advocates and constitutional conservatives. It would animate an alliance between Indigenous people seeking substantive reform over decorative words, and constitutional conservatives seeking to uphold the Constitution and protect it from uncertainty. This would kill the referendum.

With the right model, however, these two groups unite as passionate advocates for constitutional recognition. A First Nations constitutional voice has won the support of Indigenous people through the Uluru Statement, but also the support of key constitutional conservatives who describe the reform as 'modest yet profound'.[44] The proposal has been advocated by constitutional conservatives like Liberal MP

[43] See further, Shireen Morris, 'Towards an Affirmational Republic' *UNSW Law Journal* (2020, forthcoming).
[44] See Greg Craven, 'Noel Pearson's indigenous recognition plan profound and practical', *The Australian,* 25 May 2015.

Julian Leeser[45] (who successfully opposed a republic, opposed a bill of rights, and opposed the push for local government referendum) and Professor Greg Craven,[46] and endorsed by right-leaning advocates like radio host Alan Jones,[47] former Liberal Premier Jeff Kennett,[48] and journalist Chris Kenny.[49] On a First Nations constitutional voice, these right-wing leaders strangely find themselves in furious agreement with progressives like author Thomas Keneally,[50] former Labor Prime Minister Kevin Rudd[51] and lawyer Julian Burnside.[52] No other constitutional reform proposal could prompt ALP Minister, Chris Bowen, to publicly congratulate his right-wing rivals, constitutional conservatives, for their support of the Uluru Statement.[53] This is not the case for any other model for Indigenous constitutional recognition.

The Australian people are also amenable to a First Nations constitutional voice. A 2017 Omnipoll showed 61 per cent of Australians would vote 'yes' to the proposal[54] and a February 2018 Newspoll showed 57 per cent support.[55] By July 2019, research showed support at 66 per cent,[56] despite opposition from government, and by November 2020 that figure had grown to 81%.[57] Research in 2021 shows that more Australians support a constitutionalised First Nations voice, than a body enacted merely by legislation.[58]

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[45] See Julian Leeser's chapter, 'Uphold and Recognise' in Damien Freeman and Shireen Morris (eds), *The Forgotten People: liberal and conservative approaches to recognising indigenous peoples* (2016, MUP).
[46] http://www.upholdandrecognise.com/blog/2016/12/8/greg-craven-we-need-to-work-out-how-indigenous-voices-can-be-heard
[47] https://www.smh.com.au/entertainment/tv-and-radio/qa-recap-old-foes-alan-jones-and-kevin-rudd-finally-find-common-ground-20171031-gzbew1.html
[48] http://www.upholdandrecognise.com/blog/2017/5/30/jeff-kennett-recognise-uphold-but-also-celebrate
[49] https://www.theaustralian.com.au/opinion/mundane-end-to-historic-reform-to-recognise-indigenouse-australians/news-story/34805b59dd516345718c2af50a36005b and https://www.theaustralian.com.au/opinion/columnists/chris-kenny/indigenous-recognition-greatest-missed-opportunity-of-pms-leadership/news-story/bd2888fd0e932f23489a473b88a19157
[50] http://www.upholdandrecognise.com/blog/2016/12/8/guest-blog-thomas-keneally
[51] https://www.smh.com.au/entertainment/tv-and-radio/qa-recap-old-foes-alan-jones-and-kevin-rudd-finally-find-common-ground-20171031-gzbew1.html
[52] He signed this petition: https://www.acoss.org.au/supportfirstnations/
[53] Bowen said: "And I actually want to pay credit to some constitutional Conservatives who you would expect to reject this. People like Professor Greg Craven, who has put a lot of thought into what might work and have written a book about it, The Forgotten People, about what might work. Now, it is not a third chamber of parliament. I'm sorry, Josh, it is fundamentally dishonest to call it a third chamber of parliament." http://www.abc.net.au/tv/qanda/txt/s4796228.htm
[54] Calla Wahlquist, 'Most Australians Would Support Indigenous Voice to Parliament Plan that Turnbull Rejected', *The Guardian* (online 30 October 2017) <https://www.theguardian.com/australia-news/2017/oct/30/most-australians-support-indigenous-voice-to-parliament-plan-that-turnbull-rejected>
[55] Simon Benson, 'Bill Shorten Raising Voice a Winner With Voters: Newspoll' *The Australian* (online20 February 2018) <https://www.theaustralian.com.au/nation/bill-shorten-raising-voice-a-winner-with-voters-newspoll/news-story/3d6ee299780b7ac6901df9ccdfa16cc5>.
[56] Katherine Murphy, 'Essential Poll: Majority of Australians Want Indigenous Recognition and Voice to Parliament', *The Guardian* (online 12 July 2019) <https://www.theguardian.com/australia-news/2019/jul/12/essential-poll-majority-of-australians-want-indigenous-recognition-and-voice-to-parliament>. Earlier, in May 2019, research showed 64% support: Isabella Higgins and Sarah Collard, 'Federal Election 2019: Vote Compass Finds Australians Are Ready to Back Indigenous "Voice to Parliament"', *ABC News* (online 3 May 2019) <https://www.abc.net.au/news/2019-05-03/vote-compass-federal-election-voice-to-parliament/11071384>.
[57] Lorena Allam, 'More Australians want an Indigenous voice protected in constitution, survey suggests', *The Guardian* (online 30 November 2020) <https://www.theguardian.com/australia-news/2020/nov/30/more-australians-want-an-indigenous-voice-protected-in-constitution-survey-suggests>.
[58] Australian Constitutional Values Survey, 2021: https://www.cqu.edu.au/__data/assets/pdf_file/0021/190092/australian-constitutional-values-survey-2021.pdf

Support for a First Nations constitutional voice is getting stronger and stronger, notwithstanding lack of political leadership. It should be noted that in the same sex marriage postal survey, around 60% of Australian voted 'yes', with the Prime Minister advocating *for* marriage equality. In the Indigenous recognition debate, research now shows that around 80% of Australians would vote 'yes' to a First Nations constitutional voice, despite past government negativity. With positive leadership, this support would be higher.

Minimalism cannot win a referendum. But the Uluru Statement's call for a constitutional voice can unite black and white, and left and right. It is the only proposal that unites Australians in this way. It is the only proposal that can win a recognition referendum.

3. Why Legislating First is the Wrong Approach

While a First Nations constitutional voice is the only proposal that can win a recognition referendum, legislating the institution before enacting the concomitant constitutional guarantee would kill off chances at ever achieving constitutional recognition of a First Nations voice. Such a flawed strategy would legally, politically and morally undermine efforts at achieving this constitutional reform. The Uluru Statement's call for a permanent, constitutionally enshrined First Nations voice cannot be fulfilled by a merely legislated institution. To the contrary, legislating without the connecting constitutional reform – even as a temporary measure – will ensure constitutional status for the institution is never achieved.

Consider the perverse constitutional reality prematurely legislating a First Nations voice would entail. Absent a new constitutional provision specifically empowering and requiring Parliament to establish a First Nations voice, the legislation would rely on s 51(xxvi), the race power: the same race power the colonial founders inserted to control and exclude the 'inferior' and 'coloured' peoples under the White Australia Policy;[59] the same race power that, despite the 1967 amendments, has supported the winding back of Indigenous rights,[60] and the watering down of the NTA after the *Wik* decision; the same race power that supported the establishment then later the abolition ATSIC. Patrick Dodson once described the race power as being "infected with the cancer of racism". Surely this is the incorrect basis on which to try to permanently reconfigure the relationship between Indigenous peoples and the state. This would not be starting a fresh, fairer relationship; it would be repeating past mistakes.

Legislating a First Nations voice using the race power, or any other relevant existing powers, could render forever redundant any future constitutional amendment urging the existence of First Nations voice. It would also be an act of bad faith. Without any constitutional guarantee weighing against abolition of the institution, what would stop future politicians trampling the rights of the Indigenous 3% to score political

[59] *Official Record of the Debates of the Australasian Federal Convention*, Third Session, Melbourne, 20 January – 17 March 1898, 227 – 43.
[60] *Kartinyeri v The Commonwealth* (1998) 195 CLR 337.

points, as they have many times in the past? What would stop a future government abolishing the institution, just like occurred with ATSIC?

Constitutional status entails the authority that comes from endorsement of the Australian people through a referendum. This popular endorsement is necessary to ensure this institution's authority, independence, effectiveness and longevity. By contrast, history shows that merely legislated Indigenous bodies are short lived and lack influence and independence. How can a First Nations voice be robust in its advice and advocacy if it is vulnerable to legislative abolition? Such a voice would be timid and ineffective. Its members would be constantly worrying about pleasing the government of the day, so as to ensure the body's existence, rather than giving the frank and fearless advice necessary to improve outcomes in Indigenous affairs.

To make this institution effective, we must learn from ATSIC's weaknesses. While ATSIC was intended to provide advice to government, this was not mandated or facilitated by authoritative rules and processes. A First Nations voice must improve on this experience by ensuring the body carries constitutional status, and ideally, a constitutional mandate to provide non-binding advice to government and Parliament. This would ensure the body is permanent, and its advice independent and authoritative.

The National Congress of Australia's First Peoples (Congress) provides another salient example of what happens to Indigenous bodies when they lack constitutional underpinning. Before it was defunded, the Congress attempted to fill the gap left by ATSIC. But it was not even a statutory body: it was a private corporation. While the Congress website asserted that it did not "depend upon the good will of parliament or the government of the day" to function, in reality the organisation was wholly reliant on government support.[61] Yet there was no legal requirement for Congress to be supported by government, and no legal mandate for Congress to advise Parliament or government. Congress representatives often complained of lack of engagement from government,[62] before the organisation finally folded due to defunding.

The list of short-lived Indigenous representative bodies does not end with ATSIC or Congress. There was also the National Aboriginal Consultative Committee (NACC,1972-1977) and the National Aboriginal Conference (NAC,1977-1985). Let us not forget the Indigenous Advisory Council (IAC), which presumably still exists (though its advocacy is rarely heard). Even in Queensland, while past Indigenous advisory bodies are numerous, none has enjoyed (State) constitutional status. Such bodies have included:

- Aboriginal and Torres Strait Islander Overview Committee, 1992
- Aboriginal Justice Advisory Committee, 1993

[61] National Congress of Australia' s First Peoples, *The National Congress of Australia's First Peoples* https://web.archive.org/web/20190310003710/http://nationalcongress.com.au/about-us/.
[62] Anna Henderson, 'Prime Minister' s Office Confirms Plans to Meet with Indigenous Congress, After Accusations of Bias', *ABC News* (15 March 2016) <https://www.abc.net.au/news/2016-03-15/pm-confirms-plans-to-meet-with-indigenous-congress/7247170>.

- Indigenous Advisory Council (IAC) which replaced the two previous bodies, 1997
- Aboriginal and Torres Strait Islander Advisory Board which replaced the IAC, 1999
- Community Justice Reference Group, 2008
- National Indigenous Law and Justice Advisory Body, 2009
- Queensland Aboriginal and Torres Strait Islander Advisory Council, 2009.

Is this co-design process going to add yet another insignificant, temporary addition to the long, sad list of Indigenous representative and advisory bodies that have lived and died in Australia? Without constitutional underpinning, a merely legislated voice would be just another federal ATSIC or NCAFP or NACC or NAC or IAC, forever haunted by the ghosts of these long-forgotten acronyms and destined for the same graveyard. Such a voice would be weak, vulnerable and transient.

This would be an insult to the Uluru Statement and the First Nations of this country. In asking for a constitutionally enshrined voice, the Uluru Statement asked for a *constitutional guarantee* that Indigenous voices would always be heard in their affairs. They asked for a *constitutional promise* that a First Nations voice will always exist. They did not ask for a legislated voice that can be abolished on political whim. While the details of the institution obviously require legislative flexibility, a constitutional guarantee is required for stability, authority and longevity of the institution.

In terms of political strategy, prematurely legislating a First Nations voice would undercut chances of achieving a constitutionally guaranteed First Nations voice. Legislating first will dissipate the productive tension and momentum that now propels the public and political drive for a First Nations voice. Currently, there is a clear gap that the public can see needs to be filled. But legislating a voice without constitutional amendment will irrevocably confuse the issue: the institution's existence will ostensibly negate the need for constitutional reform. Opponents would point to the legislated institution to argue on the one hand that no constitutional reform is needed because an Indigenous voice already exists; on the other hand, they would point to imperfections in the institution (for no institution composed of imperfect humans can be perfect) to contend it is not worthy of constitutional recognition. Worse, individuals on the legislated voice will likely become targets for constitutional no-campaigners. This would put immense pressure on the body and its members. It is setting the institution up to fail.

Morally, legislating a First Nations voice to 'road-test' it before we put a constitutional amendment to the people is like asking Indigenous people to audition for their rightful place in Australia's Constitution. As though 233 years of exclusion, discrimination and non-recognition is not enough – now the First Nations must prove they are worthy before being afforded a constitutionally recognised voice in their own affairs. It is unconscionable and unfair.

Finally, accepting legislation first without the concomitant constitutional guarantee, in the hope that the required constitutional reform can be achieved down the track, would be a serious strategic mistake on the part of Indigenous people. Indigenous Australians must learn from past errors. In 2007, we accepted

the Apology, even though it came with no compensation. We took the beads and trinkets, hoping substantive restitution would come later. We are still waiting for just compensation. Let's not make the same mistake today. We must hold out for the concomitant constitutional guarantee.

4. Settling the Words of the Constitutional Amendment

The nation needs a clear process for settling the words of a constitutional amendment empowering and requiring a First Nations voice. Various constitutional experts and Indigenous leaders over the years have explored what the words could be. There are already many proposed options for consideration. What is now needed is political leadership and a clear process for negotiation between Indigenous people and government to finalise what form of words should be put to the people.

We propose that, after the co-design process, the legislation setting up the First Nations voice should be drafted then set aside until after a successful referendum on a First Nations voice. Either concurrently with the co-design process, or after it is completed, Australia should undertake a process to finalise the words of the constitutional amendment establishing a First Nations voice. This amendment should then be put to referendum. Subsequent to a successful referendum, the legislation setting up the First Nations voice should be enacted and the reforms implemented, with the clear blessing of the Australian people.

A suggested process for finalising the words of the constitutional amendment is as follows:

1. Concurrently with the co-design process, or after it is completed, a Constitutional Drafting Options Committee should be established in a bipartisan fashion by the government and the opposition. It should be made up of Indigenous and Non-Indigenous leaders and experts who have been involved in this debate, and who have demonstrated appropriate knowledge, expertise and experience of the various options for constitutional amendments requiring the establishment of a First Nations voice. Government should call for nominations and applications, and then should choose members of the Committee in consultation with the Opposition, on the basis of experience and merit and ensuring fair gender and ethnic balance reflecting the diversity of Australia.
2. In line with the Referendum Council's recommendations, the Constitutional Drafting Options Committee should put forward three contrasting options for constitutional drafting, each of which must:
    a. Give effect to the Uluru Statement's call for a constitutionally guaranteed First Nations voice
    b. Respect parliamentary supremacy through non-justiciability and avoidance of any veto
    c. Minimise legal uncertainty
    d. Not constitute a third chamber of Parliament.

After the Committee puts forward its three contrasting options for constitutional drafting, there should be a process of formal negotiation between Indigenous leaders (who must of course have the appropriate supports and professional advice) and multiparty political representatives. The Indigenous

representatives would include the Indigenous members of the Constitutional Drafting Options Committee, plus other Indigenous people who can apply to be on the negotiating team, chosen on the basis of merit by the Indigenous members of the Committee. The political representatives should include the Prime Minister, the Minister for Indigenous Australians and the Attorney-General, as well as representatives from the Opposition and the Greens, to ensure the resultant constitutional amendment enjoys multiparty support.

We recommend that a retired judge should be engaged to oversee the negotiation process, and to act as a mediator and facilitator. The negotiation process should use the options generated by the Committee as a guide for and to stimulate discussion, but should not be limited by those options if alternative and new ideas emerge through the negotiations. The negotiation process should enable the parties to come to an agreement on the words of the amendment to be put to referendum.

Conclusion

Prematurely legislating a First Nations voice without the connected constitutional imprimatur would be a mistake – legally, politically and morally. We hope Committee members, political leaders across the spectrum, Indigenous people and all Australians will take on board these arguments. To be successful and to instigate lasting change, a First Nations voice requires the blessing of the Australian people through a constitutional referendum. We must now do the work to settle the words of the appropriate constitutional guarantee.

Closing the gap requires structural and constitutional empowerment of Indigenous people. It requires substantive reform that is permanent and enduring. Only by implementing the necessary lasting reform for Indigenous responsibility, empowerment and self-determination will we be able to reconcile, achieve justice and finally close the gap. This requires more than just legislation. It requires a constitutional promise that First Nations voices will always be heard in their affairs. We must not accept second best.

Cape York Partnership acknowledges the Traditional Owners of Australia and we pay respects to Elders both past and present. We work for reconciliation, recognition and a First Nations voice in the Constitution, as called for in the Uluru Statement from the Heart.

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