

PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

Final report

Joint Select Committee on Constitutional Recognition relating to
Aboriginal and Torres Strait Islander Peoples

November 2018
CANBERRA

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Foreword

The *Statement from the Heart* delivered at Uluru last May contains the aspirational statement:

We seek constitutional reforms to empower our people and take *a rightful place* in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.

The idea of constitutional recognition has a deep emotional pull.

It is part of a broader project of reconciliation and recognition of the unique status of Aboriginal and Torres Strait Islander peoples in our nation.

We have kept the inspiration of the *Statement from the Heart* and our shared personal commitments to support and achieve constitutional recognition at the forefront of our minds while co-chairing this Committee.

We have set significant differences aside and worked together to focus on what we might achieve in this Committee.

Beyond the poetry of the *Statement from the Heart* is the prose of political reality—the need to ensure that our recommendations provide for a form of constitutional recognition that is legitimate and acceptable to Aboriginal and Torres Strait Islander peoples as well as our parliamentary colleagues across the spectrum, and ultimately to the Australian people.

Although the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander peoples was asked to consider the work of the Expert Panel, the former Joint Select Committee, the *Statement from the Heart* and the Referendum Council, the *Statement from the Heart* was a major turning point in the debate.

Not only did it bring a new element, The Voice, into the debate but it rejected much that had gone before in terms of proposals for constitutional recognition.

The rejection of all previous proposals was a shame because there were previous proposals which would command broad political support; but we acknowledge that at Uluru they seem to have been taken off the table.

At the centre of the *Statement from the Heart* is The Voice. The Voice is the matter on which we have focused most of the efforts of this Committee.

The recommendations of this report build on the work of the interim report of this Committee. We raised questions in that report, to which there were some responses, but not as many as we hoped.

In the interim report we flagged that the next step would be co-design of The Voice involving:

... a process of deep consultations between the Australian Government and Aboriginal and Torres Strait Islander peoples in every community across the country, in order to ensure that the detail of The Voice and related proposals are authentic for each community across Australia.

That is what we promised and that is what we have delivered in this final report.

Since the interim report a division of opinion has emerged as to the political tactics that should be used to achieve constitutional recognition.

Some have argued that there should be a referendum passed as the first step. Others consider that legislation should be developed to establish The Voice by an Act of Parliament and, once that is done, the Government should proceed to a referendum to entrench the guarantee of The Voice in the Constitution.

Others have argued for an extended process to educate the public before either legislation or referendum. Lawyers have provided various models and have taken positions on one side or another.

But these are just matters of political tactics.

The key point of this report is that The Voice should become a reality, that it will be co-designed with government by Aboriginal and Torres Strait Islander peoples for Aboriginal and Torres Strait Islander peoples right across the nation.

After the design process is complete the legal form of The Voice can then be worked out. It will be easier to work out the legal form The Voice should take once there is clarity on what The Voice looks like.

Leaving aside any questions of the need to build further political consensus, it is difficult to proceed to referendum today on The Voice when this Committee has received no fewer than 18 different versions of constitutional amendments which might be put at a referendum.

Our political judgements as to the best approach may differ. However, we fully understand that to succeed a referendum must be passed by a majority of the Australian people and a majority of people in a majority of states. This is a high bar—achieved on only eight occasions in the last 117 years and never without strong bipartisan support.

The Co-Chairs come from different political party perspectives and have been working to seek common ground.

Senator Dodson comes to the work of this Committee from the Australian Labor Party which has committed to the establishment of The Voice and to taking it to the people in a referendum. His party has also committed to a Makaratta Commission for truth-telling and agreement making.

Mr Leeser comes to the work of this Committee from the Liberal and National Party Coalition Government, which, while supporting constitutional recognition, has expressed concerns over the role and function of a Voice to the Federal Parliament instead preferring the establishment of local bodies in the first instance.

Both of us have worked to find a shared, agreed position on what could be possible for the major parties to agree and which could gain the support of the Federal Parliament, including the cross-benches.

The commitment to a Voice, and the commitment to co-design of that Voice are significant steps for the Parliament to discuss and consider. They are significant steps towards a bipartisan and agreed approach to advancing the cause of constitutional recognition.

Finally, since the interim report the Committee has heard significant evidence about truth-telling, a matter raised in the *Statement from the Heart*.

We believe there is a strong desire among all Australians to know more about the history, traditions and culture of Aboriginal and Torres Strait Islander peoples and their contact with other Australians both good and bad. A fuller understanding of our history including the relationship between Black and White Australia will lead to a more reconciled nation. We have made some recommendations about how this might be achieved.

On behalf of the Committee, we would like to acknowledge and thank everyone who has worked with us including those who made submissions and gave

evidence. In particular we would like to thank the Committee Secretariat for their work on the report as well as Kevin Keeffe and Philippa Englund from our offices for their support.

We commend the report to the Parliament.

Senator Patrick Dodson
Co-Chair

Mr Julian Leeser MP
Co-Chair

Membership of the Committee

Co-Chairs

Senator Patrick Dodson

Mr Julian Leeser MP

Members

The Hon. Linda Burney MP

Senator Jonathon Duniam

The Hon. Sussan Ley MP (to 28/08/18)

Senator Malarndirri McCarthy

Ms Cathy McGowan AO MP

Senator Rachel Siewert

The Hon. Dr John McVeigh MP (from 10/09/18)

Senator Amanda Stoker

Mr Llew O'Brien MP

The Hon. Warren Snowdon MP

Resolution of appointment

- 1 A Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples will inquire into and report on matters relating to constitutional change, and in conducting the inquiry, the Committee will:
 - a. consider the recommendations of the Referendum Council (2017), the *Uluru Statement from the Heart* (2017), the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (2015), and the Expert Panel on Constitutional Recognition of Indigenous Australians (2012);
 - b. examine the methods by which Aboriginal and Torres Strait Islander peoples are currently consulted and engaged on policies and legislation which affects them, and consider if, and how, self-determination can be advanced, in a way that leads to greater local decision making, economic advancement and improved social outcomes;
 - c. recommend options for constitutional change and any potential complementary legislative measures which meet the expectations of Aboriginal and Torres Strait Islander peoples and which will secure cross party parliamentary support and the support of the Australian people;
 - d. ensure that any recommended options are consistent with the four criteria of referendum success set out in the Final Report of the Expert Panel on Recognising Aboriginal and Torres Strait Islander peoples in the Constitution:
 - i. contribute to a more unified and reconciled nation;

- ii. be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples;
 - iii. be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums; and
 - iv. be technically and legally sound;
 - v. engage with key stakeholders, including Aboriginal and Torres Strait Islander peoples and organisations; and
 - vi. advise on the possible steps that could be taken to ensure the referendum has the best possible chance of success, including proposals for a constitutional convention or other mechanism for raising awareness in the broader community;
- 2 the Committee present to Parliament an interim report on or before 30 July 2018 and its final report on or before 29 November 2018;
- 3 the Committee consist of eleven members, three Members of the House of Representatives to be nominated by the Government Whip or Whips, two Members of the House of Representatives to be nominated by the Opposition Whip or Whips, one Member of the House of Representatives to be nominated by any minority group or independent Member, two Senators to be nominated by the Leader of the Government in the Senate, two Senators to be nominated by the Leader of the Opposition in the Senate, and one Senator to be nominated by any minority group or independent Senator;
- 4 every nomination of a member of the Committee be notified in writing to the President of the Senate and the Speaker of the House of Representatives;
- 5 the members of the Committee hold office as a joint select committee until presentation of the Committee's final report or until the House of Representatives is dissolved or expires by effluxion of time, whichever is the earlier;
- 6 the Committee elect two of its members to be joint chairs, one being a Senator or Member, who is a member of the Government party and one being a Senator or Member, who is a member of the non-Government parties, provided that the joint chairs may not be members of the same House:

-
- 7 the joint chair, nominated by the Government parties shall chair the first meeting of the Committee, and the joint chair nominated by the non-Government parties shall chair the second meeting of the committee, and subsequent committee meetings shall be chaired by the joint chairs on an alternating basis;
 - 8 a joint chair shall take the chair whenever the other joint chair is not present;
 - 9 each of the joint chairs shall have a deliberative vote only, regardless of who is chairing the meeting;
 - 10 three members of the Committee constitute a quorum of the Committee provided that in a deliberative meeting the quorum shall include one Government member of either House and one non-Government member of either House;
 - 11 the Committee:
 - a. have power to appoint subcommittees consisting of three or more of its members, and to refer to any subcommittee any matter which the Committee is empowered to examine; and
 - b. appoint the chair of each subcommittee who shall have a deliberative vote only;
 - 12 each subcommittee shall have at least one Government member of either House and one non-Government member of either House;
 - 13 at any time when the chair of a subcommittee is not present at a meeting of the subcommittee, the members of the subcommittee present shall elect another member of that subcommittee to act as chair at that meeting;
 - 14 two members of a subcommittee constitute the quorum of that subcommittee, provided that in a deliberative meeting the quorum shall include one Government member of either House and one non-Government member of either House;
 - 15 members of the Committee who are not members of a subcommittee may participate in the proceedings of that subcommittee but shall not vote, move any motion or be counted for the purpose of a quorum;
 - 16 the Committee or any subcommittee have power to:
 - a. call for witnesses to attend and for documents to be produced;

- b. conduct proceedings at any place it sees fit;
 - c. sit in public or in private;
 - d. report from time to time, in order to progress constitutional recognition of Aboriginal and Torres Strait Islander peoples; and
 - e. adjourn from time to time and sit during any adjournment of the House of Representatives and the Senate;
- 17 the Committee or any subcommittee have power to consider and make use of the evidence and records of the former Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples appointed during the 44th Parliament;
- 18 the provisions of this resolution, so far as they are inconsistent with the standing orders, have effect notwithstanding anything contained in the standing orders.¹

¹ House of Representatives, *Votes and Proceedings*, No. 103, 1 March 2018, pp. 1431-1433.

List of recommendations

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.

Recommendation 3

6.105 The Committee recommends that the Australian Government support the process of truth-telling. This could include the involvement of local organisations and communities, libraries, historical societies and Aboriginal and Torres Strait Islander associations. Some national coordination may be required, not to determine outcomes but to provide incentive and vision. These projects should include both Aboriginal and Torres Strait Islander peoples and descendants of local settlers. This could be done either prior to or after the establishment of the local voice bodies.

Recommendation 4

6.106 The Committee also recommends that the Australian Government consider the establishment, in Canberra, of a National Resting Place, for Aboriginal and Torres Strait Islander remains which could be a place of commemoration, healing and reflection.

1. Introduction

- 1.1 On 19 March 2018, the Parliament agreed that a Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples be appointed to inquire into and report on matters relating to constitutional change, including the proposal for the establishment of a First Nations Voice.¹
- 1.2 Throughout this inquiry, the Committee has sought to find common ground and identify a way forward on these issues.
- 1.3 As required by its resolution of appointment, the Committee presented an interim report on 30 July 2018 and this, its final report, was presented on 29 November 2018.

Approach to the inquiry

- 1.4 The resolution of appointment requires the Committee to consider a wide range of matters, including recommendations of the Referendum Council (2017), the *Statement from the Heart* (2017), the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (2015), and the Expert Panel on Constitutional Recognition of Indigenous Australians (2012).
- 1.5 Acknowledging the significant shift in the ongoing discussions about constitutional change and recognition represented by the *Statement from the Heart*, which was announced only 10 months before the Committee was

¹ The Hon. Angus Taylor MP, Minister for Law Enforcement and Cybersecurity, *House of Representatives Hansard*, 1 March 2018, pp. 2528-2530.

appointed, the Committee came to the view that its primary task was to expand on the detail of the proposal for a First Nations Voice.

- 1.6 While The Voice has been the Committee's focus, the Committee has also considered the proposals for truth-telling and agreement making arising from the *Statement from the Heart*, as well as other proposals for constitutional change and recognition.
- 1.7 In the course of evidence and in speaking with the community, the Committee kept in mind the aspirations of the *Statement from the Heart*. The Committee acknowledges that for some the conversation is well advanced, while for others it is just beginning.
- 1.8 The Committee acknowledges that it had limited time and resources compared to the Expert Panel and Referendum Council and was therefore not able to undertake consultations to the same extent or in the same level of detail as those bodies. However, by conducting the majority of its work in the public domain, the views of all can be shared and debated with transparency and respect. The Committee was able to draw on the views of a range of stakeholders, as outlined below and in Appendices A and B, and anticipates that community views will continue to develop as these important issues are discussed across Australia.
- 1.9 As noted in the interim report, the Committee acknowledges there is frustration at the length of time taken to advance these issues.
- 1.10 The Committee also emphasises the importance of cross-party support to achieve constitutional change.
- 1.11 While there are diverse views among members of the Committee, as there are among Aboriginal and Torres Strait Islander peoples and the broader community, the recommendations contained in this report represent an agreed position on the path forward which all members could support.

Conduct of the inquiry

- 1.12 The Committee held its first meeting on 27 March 2018, and thereafter called for written submissions addressing the matters set out in the resolution of appointment.
- 1.13 In April, the Committee received private briefings from Aboriginal and Torres Strait Islander leaders and other stakeholders in order to identify the next steps to build on previous work in relation to constitutional recognition.

The transcripts of some of these briefings were later published with the permission of those present.

- 1.14 In June and July, the Committee conducted public hearings in Kununurra, Halls Creek, Fitzroy Crossing, Broome, Canberra, Dubbo, Sydney, Adelaide, and Perth. The Committee also attended a meeting of the four Northern Territory Land Councils at Barunga.
- 1.15 Following the presentation of the interim report on 30 July 2018, the Committee called for further written submissions addressing the matters set out in the report. In total throughout the inquiry, the Committee received 479 submissions and 47 supplementary submissions. These submissions are listed in Appendix A.
- 1.16 In trying to get a better understanding of the design of a Voice, the interim report produced a series of nine principles and 15 models and 100 questions. Unfortunately the Committee received far fewer submissions responding in detail to questions set out in the interim report than it had anticipated.
- 1.17 In September and October, the Committee conducted additional public hearings in Canberra, Wodonga, Shepparton, Melbourne, Thursday Island, Townsville, Palm Island, Brisbane, and Redfern. A planned hearing in Cherbourg was cancelled due to sorry business (funerals and mourning) in the community. The Committee also met with community organisations in Albury and Wodonga. Public hearings are listed in Appendix B.
- 1.18 The Committee expresses its appreciation to the many individuals and organisations who contributed to the inquiry and those who provided meeting places throughout the course of the inquiry's conduct.

Structure of the final report

- 1.19 The final report of the Committee is intended to reflect the evidence received across the wide range of matters included in the Committee's resolution of appointment. The report sets out the Committee's conclusions and recommendations in relation to these matters.
- 1.20 Readers are reminded that this report should be read in conjunction with the Committee's interim report, which considers in detail the evidence received earlier in the inquiry.

The Voice

- 1.21 Chapter 2 considers the design of a First Nations Voice. Building on the interim report, the chapter presents further evidence on the structure and

functions of The Voice and considers additional examples of existing and proposed structures that might inform the design of The Voice. The chapter concludes with a discussion of evidence on a process to determine the detail of The Voice.

- 1.22 Chapter 3 considers the legal form of a First Nations Voice. The chapter considers arguments for enshrining The Voice in the Australian Constitution, and then discusses a number of issues relating to the finalisation of an appropriate constitutional provision. The chapter concludes with a discussion of suggested approaches to give legal form to The Voice.
- 1.23 Suggested provisions for enshrining The Voice in the Australian Constitution are discussed in Chapter 3.
- 1.24 Chapter 4 presents evidence on other forms of constitutional change and recognition, including changes to section 25 and section 51(xxvi) and an extra-constitutional declaration of recognition.

Other matters raised in the Statement from the Heart

- 1.25 Chapter 5 considers the concepts of ‘Makarrata’ and agreement making.
- 1.26 Chapter 6 considers the issue of truth-telling raised by the *Statement from the Heart* and examines proposals for truth-telling and other forms of commemoration.
- 1.27 Previous recommendations that the Committee was required to consider (as set out in paragraph 1.4) are listed in Appendix C.

A note on language

- 1.28 In accordance with agreed practice, the Committee will generally refer to Aboriginal and Torres Strait Islander peoples, unless specific language is used by stakeholders in their evidence to the Committee.
- 1.29 Consistent with the interim report, the term ‘The Voice’ is used with capital letters when referring to the *Statement from the Heart*, but the terms ‘voice’ or ‘voices’ are used with lower case letters when speaking of alternative local, regional, or national structures or organisations, again unless alternative language is used by stakeholders.
- 1.30 Lastly, the Committee acknowledges concerns among some Aboriginal and Torres Strait Islander peoples around the use of the terms *Makarrata* and

Uluru Statement from the Heart and will choose to refer to the statement as the *Statement from the Heart*.

2. Designing a First Nations Voice

- 2.1 As noted in Chapter 1 of this report, the primary task of this Committee has been to consider in greater detail the proposal made in the *Statement from the Heart* for a First Nations Voice. This chapter gives a short overview of the proposal and summarises the findings made by the Committee in its interim report.
- 2.2 The chapter then considers at greater length evidence received since the interim report in relation to the detailed design of The Voice, particularly the structure, membership, functions, and operation of The Voice.
- 2.3 The chapter then considers existing and proposed advisory structures that might inform the design of The Voice.
- 2.4 The chapter then outlines evidence in relation to a process of co-design that might be used to determine the detail of The Voice.
- 2.5 The Committee notes the many different views regarding the scope and timing of any co-design process. More specific evidence about the broader process of implementing The Voice is considered in Chapter 3.
- 2.6 Readers should note that this chapter should be read in conjunction with the Committee's interim report, particularly Chapters 2, 3, and 4 of that report.

Overview of the proposal

- 2.7 In May 2017, Aboriginal and Torres Strait Islander delegates at the Referendum Council's National Constitutional Convention presented the *Statement from the Heart*. The statement called for the establishment of a First Nations Voice enshrined in the Australian Constitution.¹

¹ *Uluru Statement from the Heart*, 2017.

- 2.8 In June 2017, the Referendum Council recommended that a referendum be held to provide in the Australian Constitution for a representative body that gives Aboriginal and Torres Strait Islander peoples a Voice to the Commonwealth Parliament.²
- 2.9 In making this recommendation, the Referendum Council noted that while proposals in relation to a Voice were not identical in form and substance, they had certain features in common.
- First, that the intention of The Voice is not to exercise a veto or limit the legislative power of the Parliament; rather it is to provide input where such power is exercised in relation to Aboriginal and Torres Strait Islander peoples.³ It was later put to the Committee that delegates at the National Constitutional Convention understood that the primary purpose of The Voice was to ensure that Aboriginal and Torres Strait Islander voices were heard whenever the Commonwealth Parliament exercised its powers to make laws under section 51(xxvi) and section 122 of the Constitution.⁴
 - Second, that The Voice should take its structure from legislation enacted by the Parliament, which would specify how the body is to be given an appropriately representative character and how it can properly and most usefully discharge its advisory functions.⁵ It was also noted that the scope of the advisory function would require definition.⁶
- 2.10 The Referendum Council also noted that it was for the Parliament to consider what further definition is required before the proposal is in a form appropriate to be put to a referendum.⁷
- 2.11 In the course of this inquiry the importance of local and regional bodies (voices) to Aboriginal and Torres Strait Islander peoples has also been made strongly to the Committee. Some of the models considered by the Committee and even some of the constitutional provisions presented to this

² Referendum Council, *Final Report of the Referendum Council*, 2017, p. 2.

³ Referendum Council, *Final Report of the Referendum Council*, 2017, p. 36.

⁴ Technical Advisors: Regional Dialogues and the Uluru First Nations Constitutional Convention, *Submission 206*, p. 7.

⁵ Referendum Council, *Final Report of the Referendum Council*, 2017, p. 36.

⁶ Referendum Council, *Final Report of the Referendum Council*, 2017, p. 36.

⁷ Referendum Council, *Final Report of the Referendum Council*, 2017, p. 2.

Committee demonstrate that The Voice need not be a single national body but may involve local and regional structures.

Summary of findings from the interim report: principles, models and questions

- 2.12 In its interim report, the Committee noted strong support for the concept of a First Nations Voice. However, the Committee also observed that there are disparate views on the most appropriate way to give effect to the proposal.⁸
- 2.13 In particular, the Committee considered a wide range of evidence on the possible structure, membership, functions, and operation of a voice. This evidence is outlined in Chapter 3 of the interim report.
- 2.14 In seeking to understand how The Voice proposal could work, and to give greater definition to the proposal, the Committee identified nine principles that arose in evidence to the Committee, which might underpin the design of The Voice.
- 2.15 The Committee also considered 12 examples of past and current advisory bodies and three additional indicative proposals for a Voice and structures that might inform the design of The Voice. These examples are outlined in Chapter 4 of the interim report.
- 2.16 In its interim report, the Committee suggested that it was essential to address questions of detail in order for the proposal for a Voice to meet the criteria for achieving recognition as set out in the Committee's resolution of appointment. The Committee also suggested that addressing questions of detail would assist in the development of a proposal that was legitimate, effective, and an enduring reform for the benefit of Aboriginal and Torres Strait Islander peoples.⁹
- 2.17 The Committee sought further evidence from stakeholders, outlining a series of approximately 100 questions in relation to the design and implementation of local, regional, and national voices. These questions are outlined in Chapter 7 of the interim report.

⁸ Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Interim Report*, 2018, p. 117.

⁹ Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Interim Report*, 2018, pp. 116-117.

2.18 Very few submissions took the time to respond to the questions raised in the interim report.

Summary of principles taking into account evidence at the interim and final reports

2.19 The table below outlines the principles which the Committee saw as underpinning the design of a voice in the interim report. Additional principles which have emerged since the interim report appear in italics.

Box 2.1 Principles for the design of The Voice

- Most significant is the strong support for local and regional structures.
- The members of The Voice should be chosen by Aboriginal and Torres Strait Islander peoples, rather than appointed by government.
- The design of the local voices should reflect the varying practices of different Aboriginal and Torres Strait Islander communities—a Canberra designed one size fits all model would not be supported.
- There should be equal gender representation.
- The Voice at the local, regional, and national level should:
 - be used by state, territory and local governments as well as the federal government;
 - provide oversight, advice and plans but not necessarily administer programs or money; and
 - provide a forum for people to bring ideas or problems to government and government should be able to use the voices to road test and evaluate policy. This process should work as a dialogue where the appropriateness of policy and its possible need for change should be negotiable.
- Consideration must be given to the interplay of any Voice body with existing Aboriginal and Torres Strait Islander organisations at both local and national level (in areas such as health, education, and law) and how such organisations might work together.
- *Cross-border communities should be treated as being in the same region where appropriate.*
- *Advice should be sought at the earliest available opportunity.*

Further evidence on a First Nations Voice

2.20 This section gives a summary of the evidence in relation to a First Nations Voice that was received following the presentation of the Committee's

interim report in July. While the Committee received further evidence addressing the design of The Voice, this evidence was limited in detail.

- 2.21 As noted above, this chapter should be read in conjunction with the interim report for a full picture of the evidence received throughout the inquiry.
- 2.22 Many stakeholders deferred to Aboriginal and Torres Strait Islander peoples to determine the detailed design of The Voice through an appropriate co-design or consultation process.¹⁰ Evidence in relation to a possible process of co-design is discussed later in this chapter.
- 2.23 This section discusses the evidence in relation to:
- continued support for the concept of a First Nations Voice;
 - its possible structure and membership; and
 - its function and operation.
- 2.24 Evidence on suggested approaches to the establishment and implementation of The Voice is discussed in Chapter 3.

Continued support for the concept

- 2.25 Throughout the inquiry, the Committee observed broad support for the concept of a First Nations Voice, both as a form of recognition and particularly as a mechanism to empower Aboriginal and Torres Strait Islander peoples to have a greater say in the policy and legislation that governs their affairs.
- 2.26 The Torres Strait Regional Authority suggested that local and regional decision making is central to sustainable economic advancement and improved social outcomes, but that many communities feel they have lost the ability to make decisions for themselves. The submission stated:

Not all Indigenous communities and regions have the same aspirations and goals, we recognise that—however the common thread that runs through all our communities is the desire to be part of the decision making process.¹¹

¹⁰ For example, see: Technical Advisers: Regional Dialogues and Uluru First Nations Constitutional Convention, *Submission 209*, p. 7; Ms June Oscar AO, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Proof Committee Hansard*, Canberra, 18 October 2018, p. 3; Indigenous Peoples Organisation, *Submission 338*, p. 7.

¹¹ Torres Strait Regional Authority, *Submission 461*, pp. 2-3.

2.27 In a supplementary submission, the National Congress of Australia's First Peoples (Congress) suggested that Aboriginal and Torres Strait Islander peoples are 'easily sidelined' in political discussions:

... we make up only 3 per cent of the Australian population, and therefore frequently lack the political capital necessary to push for substantial policy reform.¹²

2.28 Councillor Roy Prior, Deputy Mayor of the Palm Island Shire Council said:

It's important that we're sitting around the table and that, in those in-depth discussions, our voice is heard.¹³

2.29 Speaking to the Committee on Palm Island, Dr Lynore Geia said:

This community that I love dearly has never had the opportunity to step out and take risks or to be self-governing. We always had the arm of the government over the top of us. We have always been at the mercy of the purse of the government.¹⁴

2.30 The submission from the Congress suggested that The Voice would:

... ensure that the voices of Aboriginal and Torres Strait Islander peoples across Australia are heard when decisions are being made which will inevitably affect our lives. Perhaps most importantly, it would ensure that the Australian Government does things with us - not to us.¹⁵

2.31 Gilbert + Tobin submitted that The Voice would provide a mechanism for Aboriginal and Torres Strait Islander peoples to influence the decisions affecting their lives:

Aboriginal and Torres Strait Islander Peoples are best able to identify the opportunities that will most benefit their communities and address the challenges they face. As a nation, we have failed, abjectly, in addressing those challenges and creating those opportunities because we have failed to listen to Aboriginal and Torres Strait Islander Peoples. There have been too few good

¹² National Congress of Australia's First Peoples, *Submission 292.1*, pp. 1, 25.

¹³ Councillor Roy Prior, Deputy Mayor, Palm Island Shire Council, *Proof Committee Hansard*, Palm Island, 3 October 2018, p. 7

¹⁴ Dr Lynore Geia, *Proof Committee Hansard*, Palm Island, 3 October 2018, pp. 12-13.

¹⁵ National Congress of Australia's First Peoples, *Submission 292.1*, p. 1.

policy outcomes. The Voice would both enable and compel us, finally, to listen.¹⁶

2.32 Mr Terry O’Shane, Director of the North Queensland Land Council, suggested that The Voice would provide for a structured and recognised process of engagement with parliamentarians and the public service.¹⁷

2.33 Ms Rachel Atkinson, Chair of the Palm Island Community Company discussed how community-controlled social services were succeeding in improving the lives of people on Palm Island.¹⁸ She explained that The Voice would not be ‘another government’ but would instead be an opportunity for recognition and a greater degree of self-determination.¹⁹

2.34 Ms Atkinson emphasised the importance of having a strong local voice to achieving outcomes for the community:

Here on Palm, we’ve stopped children being removed from this island in the last three to four years; but, nationally, we are in a serious crisis of over-representation, and kids are still being removed. So something has been tweaked here; something is going right. It’s locally grown. I think the strength of this community and the voice of this community has prevented that.²⁰

Structure and membership

Relationship between the local, regional and national voices

2.35 The Committee continued to observe strong support for the principle that the structure of a First Nations Voice should include local and regional elements.

2.36 Ms Tui Crumpen, Non-executive Director at the Kaiela Institute said:

¹⁶ Gilbert + Tobin, *Submission 315.1*, p. 2.

¹⁷ Mr Terry O’Shane, Director, North Queensland Land Council, *Proof Committee Hansard*, Townsville, 3 October 2018, pp. 15-16.

¹⁸ Ms Rachel Atkinson, Chair, Palm Island Community Company, *Proof Committee Hansard*, Palm Island, 3 October 2018, p. 17.

¹⁹ Ms Rachel Atkinson, Chair, Palm Island Community Company, *Proof Committee Hansard*, Palm Island, 3 October 2018, pp. 7-8.

²⁰ Ms Rachel Atkinson, Chair, Palm Island Community Company, *Proof Committee Hansard*, Palm Island, 3 October 2018, pp. 7-8.

We need mechanisms for an Indigenous voice within our parliament framework and we need to support communities to design how they will represent their own community voice at a local, state and national level.²¹

2.37 Ms Rachel Atkinson said that The Voice should be 'locally grown'.²²

2.38 Councillor Alf Lacey, Mayor of the Palm Island Aboriginal Shire Council, emphasised the importance of The Voice having a regional framework:

Not all of us have got the ear of the parliament. I think of a regional framework that allows us living in regional Australia, particularly northern Australia, to have some meaningful dialogue and input into the future of our community.²³

2.39 The Australian Indigenous Governance Institute undertook a five year project which:

... demonstrates that top-down approaches in Indigenous policy have not and will not succeed. Furthermore, the evidence demonstrates that when governments engage Indigenous peoples and communities as equal partners, vesting real decision-making powers in Indigenous communities and Indigenous-led organisations, meaningful improvements in the health, wellbeing and general livelihoods of Indigenous peoples and communities are realised.

... Evidence collected from various parts of the world including Canada, the United States of America, New Zealand and Norway demonstrate that when the recognition of Indigenous Peoples' unique rights are matched with structural decision-making power, many communities are able to achieve long-term sustainable development.²⁴

2.40 The Centre for Excellence in Child and Family Welfare argued that local bodies led to greater empowerment and improved outcomes for Aboriginal and Torres Strait Islander peoples:

²¹ Ms Tui Crumpen, Non-executive Director, Kaiela Institute, *Proof Committee Hansard*, Shepparton, 25 September 2018, p. 13.

²² Ms Rachel Atkinson, Chair, Palm Island Community Company, *Proof Committee Hansard*, Palm Island, 3 October 2018, p. 8.

²³ Councillor Alf Lacey, Mayor, Palm Island Aboriginal Shire Council, *Proof Committee Hansard*, Palm Island, 3 October 2018, p. 3.

²⁴ Australian Indigenous Governance Institute, *Submission 407*, p. 4.

... we know that local empowerment and self-governance leads to improved socio-economic outcomes for Aboriginal communities. We know that when children and young people are connected to culture and community, their health, social and educational outcomes improve...

The Centre also supports the consistent theme present in the Interim Report that suggests there should be strong local and regional structures that feed into a national Voice; as a one-size-fits-all, Western approach to governance would not be appropriate.²⁵

2.41 Rhonda Diffey, a resident in the Albury-Wodonga area, observed that:

Aboriginal and Torres Strait Islander peoples are not an homogenous group where one solution will fit all communities therefore issues need to be discussed at a local level, suggested outcomes determined and then fed up to regional and then to Federal committees for consideration. The Voice must be responsive to these community suggested outcomes if it is to be a genuine voice that fully represents the diversity of Indigenous communities.²⁶

2.42 The historian Dr Pat Larkin referred with approval to bodies based on the Murdi Paaki Regional Assembly:

The establishment of organisations based on this model throughout regional and urban Australia would encourage and avail [Aboriginal and Torres Strait Islander] ATSI citizens throughout our nation to actively participate in self determination from the grass roots level upwards and maintain an information flow through the Federal advisory bodies to the Government of the day on progress of improvement of circumstances affecting them and an immediate knowledge of circumstances inhibiting this progress.²⁷

2.43 The National Native Title Council argued that the interplay between the local, regional and national voices is also important:

The proposition that a National Voice should have effective local and regional structures upon which the National Voice is founded is unarguably correct.²⁸

2.44 The Committee heard a range of evidence about how local, regional, and national elements of a First Nations Voice might relate to each other and to government and the parliament.

²⁵ The Centre for Excellence in Child and Family Welfare, *Submission 448*, p. 1.

²⁶ Rhonda Diffey, *Submission 179.1*, p. 1.

²⁷ D P (Pat) Larkin, *Submission 449*, p. 3.

²⁸ National Native Title Council, *Submission 464*, p. 3.

2.45 The Centre for Comparative Constitutional Studies suggested that the role of the national voice could be to act as a ‘channel’ or ‘interface’ for local and regional voices. Speaking to the Committee in Melbourne, Associate Professor Kristen Rundle, Co-Director of the Centre, explained:

We understand that not only do institutions of Indigenous governance presently operate at the local and regional level, but Indigenous persons have their closest connections to those local and regional entities. So what we understand the national body to be, or what it could be, is a channel, an interface, for regional and local voices to raise their concerns about laws and policies that the national parliament and the national executive might be considering.²⁹

2.46 Associate Professor Rundle went on:

If I understand correctly, [the voice] is not a governance institution; it is an institution to enable concerns and issues arising from other governance institutions that have been legitimately constituted by Indigenous persons according to their own wishes on how to do that to bring their concerns to bear on the processes of the Commonwealth parliament.³⁰

2.47 Professor Anne Twomey described how her thinking on The Voice had evolved since she first drafted a constitutional provision to require parliament to consider the views of a single body:

I’ve been thinking a little bit more about the basis for what’s being done and the reasons for Uluru. In doing so—just going back to the basics—it seems to me that there are two elements to this. The first is the recognition side—that is, having a voice and allowing that voice to be heard—and that involves recognition of your existence and some respect for listening to that voice. The second element of it, however—and the two are intimately connected—is the practical element. The practical element of it is that your voice is heard in a way that has an impact upon the laws and policies that are being made by those laws and policies being made in a more informed manner. When I was thinking about that, and I was also thinking in particular about how there seems to be a great attachment at the Indigenous level to local voices rather than having some kind of a top-down arrangement, I started thinking to myself whether or not there’s something to be said for having more than one voice—having a polyphony of voices, if you know what I mean. If the aim is to

²⁹ Associate Professor Kristen Rundle, Co-Director, Centre for Comparative Constitutional Studies, *Proof Committee Hansard*, Melbourne, 26 September 2018, p. 33.

³⁰ Associate Professor Kristen Rundle, Co-Director, Centre for Comparative Constitutional Studies, *Proof Committee Hansard*, Melbourne, 26 September 2018, p. 33.

have a parliament that is informed and the aim is to have respect and recognition of Indigenous people through listening to their voices, then you can have more than one voice.³¹

2.48 Professor Twomey went on:

... it might well be the case that groups from a particular region or a particular area have views that they wish to express to parliament about the impact of those policies on their particular region, their area, and we shouldn't be precluding the ability of those voices to be heard.³²

2.49 Professor Twomey expanded on this concept in a supplementary submission:

There could be a polyphony of voices, sometimes separate and sometimes joining in chorus, forming a more sophisticated layer of understanding that can inform the Parliament and the Executive.

On this basis, representative bodies would exist at the local level, and could, if they wished, affiliate into regional groupings to increase their capacity to give advice or convey experience and wisdom.³³

2.50 Professor Twomey suggested that the advice of local and regional bodies could be collected by a secretariat, presented to the Parliament, and considered by a parliamentary committee.³⁴ This concept is discussed in further detail in the following section (see paragraph 2.100).

2.51 Responding to Professor Twomey's comments, Professor Rosalind Dixon of the Faculty of Law at the University of New South Wales, cautioned that proliferation can weaken the influence of institutions:

I think it's very important to make suggestions about regional [and] local entities to make sure representation is there, but I would be concerned about dilution if there was too much proliferation and no strong central voice to interface with parliament.³⁵

³¹ Professor Anne Twomey, *Proof Committee Hansard*, Canberra, 18 September 2018, p. 3.

³² Professor Anne Twomey, *Proof Committee Hansard*, Canberra, 18 September 2018, p. 8.

³³ Professor Anne Twomey, *Submission 57.1*, p. 3.

³⁴ Professor Anne Twomey, *Submission 57.1*, p. 3; Professor Anne Twomey, *Proof Committee Hansard*, Canberra, 18 September 2018, p. 3.

³⁵ Professor Rosalind Dixon, Faculty of Law, University of New South Wales, *Proof Committee Hansard*, Canberra, 18 September 2018, p. 3.

- 2.52 Professor Dixon also emphasised that while providing information was one of the functions of The Voice, another function was to advocate of behalf of Aboriginal and Torres Strait Islander peoples. Professor Dixon suggested that advocacy was ‘often diluted by confusion of the leadership’.³⁶
- 2.53 Professor Megan Davis, Pro Vice-Chancellor Indigenous at the University of New South Wales, suggested that having ‘a multiplicity of voices’ with the flexibility to engage with different levels of government was important for Aboriginal and Torres Strait Islander peoples. However, Professor Davis also emphasised the importance of a national Voice as discussed at the regional dialogues conducted by the Referendum Council.³⁷
- 2.54 Associate Professor Rundle emphasised that The Voice should provide for the expression of a multiplicity of voices irrespective of whether The Voice is constitutionalised as a single national body or a number of local and regional bodies, suggesting it was not an either/or situation:

I think what is really important to clarify is that we have two constitutional choices: one is to constitutionalise a national entity, and the other is to constitutionalise local or regional entities. ... The national entity on both models is like a funnel for that multiplicity of voices. ... We think it’s really important to see that the function of the voice, irrespective of which model is constitutionalised, is to provide for the expression of a multiplicity of voices, and those voices are those of the local and regional entities.³⁸

Reflecting regional arrangements, people who are no longer on their own country, and language groups

- 2.55 The Committee heard a range of views on how the structure and membership of The Voice might acknowledge and reflect the existing arrangements in Aboriginal and Torres Strait Islander communities.
- 2.56 Speaking with witnesses in Wodonga, the Committee heard that the structure of any regional voices should reflect the fact that, for example, the Albury-Wodonga community spans the state boundary between New South Wales and Victoria. In considering regional structures the fact

³⁶ Professor Rosalind Dixon, Faculty of Law, University of New South Wales, *Proof Committee Hansard*, Canberra, 18 September 2018, p. 8.

³⁷ Professor Megan Davis, Pro Vice-Chancellor Indigenous, University of New South Wales, *Proof Committee Hansard*, Canberra, 18 September 2018, p. 9.

³⁸ Associate Professor Kristen Rundle, Co-Director, Centre for Comparative Constitutional Studies, *Proof Committee Hansard*, Canberra, 18 September 2018, pp. 14-15.

that a cross border regional community exists should be taken into account in determining regional boundaries.

2.57 Ms Jane Young of the North East Catchment Management Authority explained that, while it might be easier for an institutional perspective to incorporate the state boundary, Albury-Wodonga was one regional community.³⁹ It was put to the Committee that a ‘cross-border’ or ‘cross-jurisdictional’ model would be most appropriate for that community.⁴⁰

2.58 Ms Jill Gallagher AO, the Victorian Treaty Advancement Commissioner, told the Committee that ‘unique approaches are needed in each region’:

We know that even in Victoria the challenges and aspirations of our community are often vastly different from one that is 20 kilometres down the road, let alone thousands of miles away.⁴¹

2.59 Ms Gallagher went on:

Western forms of democracy are not a traditional concept and do not align in many ways with our cultural ways of decision-making... We need to be inclusive of our clans and language groups but we also need to recognise our current and modern ways of organising ourselves. We need a way to include members of the Stolen Generation who have lost their connections, as well as people from other parts of the country who have been living in Victoria for many generations. And we need to consider how we bring along people who are living across borders.⁴²

2.60 The National Native Title Council (NNTC) submitted that the structure of The Voice should incorporate traditional owner arrangements.

2.61 However, the NNTC also acknowledged the fact that many Aboriginal and Torres Strait Islander peoples reside in areas outside of their traditional land,

³⁹ Ms Jane Young, Executive Manager, Leadership and Strategy, North East Catchment Management Authority, *Proof Committee Hansard*, Wodonga, 24 September 2018, p. 8.

⁴⁰ Mr Brendon Kennedy, Cultural Activities Officer, Burrinja Cultural and Environmental Discovery Centre, Gateway Health, *Proof Committee Hansard*, Wodonga, 24 September 2018, p. 5; Mrs Nicola Melville, Chairperson, Albury Wodonga Health Service, *Proof Committee Hansard*, Wodonga, 24 September 2018, p. 15.

⁴¹ Ms Jill Gallagher AO, Victorian Treaty Advancement Commissioner, Victorian Treaty Advancement Commission, *Proof Committee Hansard*, Melbourne, 26 September 2018, p. 25.

⁴² Ms Jill Gallagher AO, Victorian Treaty Advancement Commissioner, Victorian Treaty Advancement Commission, *Proof Committee Hansard*, Melbourne, 26 September 2018, p. 25.

and particularly in urban areas. Mr Jamie Lowe, Chairperson of the NNTC, told the Committee that ‘around 15 per cent’ of Aboriginal people in Victoria are living on their traditional country.⁴³

- 2.62 Dr Matthew Storey, Acting Chief Executive Officer of the NNTC, explained that this situation gave rise to a ‘duality’:

The issue, the fundamental attribute, of Indigenous identity is a connection to country and the traditional law that’s associated with that... The other aspect is a modern reality that the biggest population centres for the Indigenous community in Australia are Western Sydney, Melbourne and Brisbane.⁴⁴

- 2.63 Dr Storey argued that The Voice should attempt to ‘bring these two themes together’ in order to have legitimacy and to be effective:

... the voice has to appreciate the fact that, for instance, the majority of Eastern Maar people reside in Melbourne but that doesn’t alter the fact that they’re Eastern Maar. ... any ultimate structure has to be able to blend both those themes together; otherwise it just won’t be effective. Certainly though if the national voice can’t give appropriate recognition of traditional law then it loses its legitimacy, and that is an undesirable outcome.⁴⁵

- 2.64 Similarly, Ms Rhonda Diffey, who spoke to the Committee in Wodonga, stated that The Voice must consider the views of people displaced from their ancestral country.⁴⁶

- 2.65 Responding to a question from the Committee, Mr Robert (Les) Malezer, Chairperson of the Foundation for Aboriginal and Islander Research Action, suggested that The Voice should take account of the fact that some Aboriginal and Torres Strait Islander peoples identify in language groups and want to continue to use their language and laws into the future:

It’s really up for Aboriginal and Torres Strait Islander people to work out the complexities: how to deal with people who are language speakers who hold law, how to deal with people of stolen generations who can’t identify their

⁴³ Mr Jamie Lowe, Chairperson, National Native Title Council, *Proof Committee Hansard*, Melbourne, 26 September 2018, p. 40.

⁴⁴ Dr Matthew Storey, Acting Chief Executive Officer, National Native Title Council, *Proof Committee Hansard*, Melbourne, 26 September 2018, p. 39.

⁴⁵ Dr Matthew Storey, Acting Chief Executive Officer, National Native Title Council, *Proof Committee Hansard*, Melbourne, 26 September 2018, p. 39.

⁴⁶ Ms Rhonda Diffey, *Proof Committee Hansard*, Wodonga, 24 September 2018, p. 30.

point of heritage and so on. These are complications to be worked out in the process.⁴⁷

2.66 Professor Megan Davis suggested the structure of The Voice should reflect differences in governance and cultural authority:

... this can't be a cookie-cutter kind of structure; many of the regions have different ways in which they organise their governance and, in particular, ways in which cultural authority exists in particular regions.⁴⁸

2.67 Professor Davis acknowledged it would be important to consider how The Voice would work with existing institutions and the various way in which local, state and territory, and federal governments already interact with Aboriginal and Torres Strait Islander communities.⁴⁹ However, Professor Davis also stressed that none of the regional dialogues conducted by the Referendum Council determined that an existing institution fulfilled the role of a voice in the community.⁵⁰

2.68 As noted above, the Centre for Comparative Constitutional Studies suggested that 'existing and emerging channels of consultation should be respected and not, unless sought by the relevant groups, collapsed into the channels provided by the voice'. The Centre noted that this was consistent with successful models in other jurisdictions.⁵¹

Choosing Aboriginal and Torres Strait Islander people to serve on The Voice

2.69 The Committee received a range of suggestions to ensure that the composition of The Voice would be representative of Aboriginal and Torres Strait Islander peoples across the country.

⁴⁷ Mr Robert (Les) Malezer, Chairperson, Foundation for Aboriginal and Islander Research Action, *Proof Committee Hansard*, Brisbane, 4 October 2018, p. 27.

⁴⁸ Professor Megan Davis, Pro Vice-Chancellor Indigenous, University of New South Wales, *Proof Committee Hansard*, Canberra, 18 September 2018, p. 9.

⁴⁹ Professor Megan Davis, Pro Vice-Chancellor Indigenous, University of New South Wales, *Proof Committee Hansard*, Canberra, 18 September 2018, p. 9.

⁵⁰ Professor Megan Davis, Pro Vice-Chancellor Indigenous, University of New South Wales, *Proof Committee Hansard*, Canberra, 18 September 2018, p. 9.

⁵¹ Centre for Comparative Constitutional Studies, *Submission 289.1*, pp. 4-5.

- 2.70 Professor Dixon emphasised that legitimacy in local and regional communities would be critical to The Voice, and suggested that any selection process should be mindful of those communities.⁵²
- 2.71 Congress also emphasised the importance of representing remote and rural communities, and also giving individual communities the autonomy to decide how they were represented. The submission suggested:
- A regional electoral model has the benefit of allowing for greater scope with regards to recognising traditional cultural practices such as group discussions and oral acclamation.⁵³
- 2.72 However, Congress also cautioned that active participation would depend on The Voice, through its advice, having a real and tangible impact on the wellbeing of Aboriginal and Torres Strait Islander peoples:
- This positive impact will allow the voice to affirm its representative status via consultations and evaluations, and establish its long-term sustainability.⁵⁴
- 2.73 Mr Harry Hobbs, a PhD candidate in the Law Faculty at UNSW, submitted that ‘the voice must accurately reflect Aboriginal and Torres Strait Islander peoples’ voices in all their diversity’.⁵⁵ Mr Hobbs suggested mechanisms should exist to encourage all people to contribute, ‘including women, young people, Stolen Generations, and Torres Strait Islanders’, noting that each community should determine its preferred arrangement.⁵⁶
- 2.74 Associate Professor Rundle suggested that the representative character of The Voice would depend on its role, and particularly on the nexus between the national voice and regional and local voices:
- [The voice] may need to have a minimally representative character, precisely because it receives the advice and views of representative entities that are already established or ones that might be established...⁵⁷

⁵² Professor Rosalind Dixon, Faculty of Law, University of New South Wales, *Proof Committee Hansard*, Canberra, 18 September 2018, pp. 6-7.

⁵³ National Congress of Australia’s First Peoples, *Submission 292.1*, p. 17.

⁵⁴ National Congress of Australia’s First Peoples, *Submission 292.1*, pp. 19-20.

⁵⁵ Mr Harry Hobbs, *Submission 189.1*, p. 3.

⁵⁶ Mr Harry Hobbs, *Submission 189.1*, p. 3.

⁵⁷ Associate Professor Kristen Rundle, Co-Director, Centre for Comparative Constitutional Studies, *Proof Committee Hansard*, Melbourne, 26 September 2018, pp. 33-34.

- 2.75 Professor Bertus de Villiers, Adjunct Professor from Curtin Law School, submitted that The Voice was not intended to be representative in the same way as a legislature, and that its representation and accountability should be commensurate with the advisory function of The Voice.⁵⁸
- 2.76 The Prime Minister’s Indigenous Advisory Council submitted that four categories of membership were ‘critical’ to include in The Voice: elected general representatives; representatives nominated by Traditional Owners; representatives chosen for their knowledge and expertise across broad policy areas; and young and emerging leaders.⁵⁹
- 2.77 Congress recommended that members of The Voice should be chosen through a process of democratic election. Congress stated that elections would ensure that The Voice was representative and would also help to maintain ‘popular investment’ in The Voice. Congress proposed two options for electing members:
- direct elections based on state and territory boundaries; or
 - region-based elections, where representatives chosen by the individual communities in a given region are called together to elect members for that region.⁶⁰
- 2.78 Speaking to the Committee in Townsville, Mr Richie Ah Mat, Chairperson of the Cape York Land Council, suggested a process of election for two representatives from each state and territory, rather than ‘a cast of thousands’.⁶¹
- 2.79 Congress recommended that elections occur at a different time to elections for parliamentarians:
- This will allow for greater continuity in the advice provided by the voice; the opportunity to provide incoming governments with recommendations relating to proposed policies (and in particular, those contained in their electoral platforms); and the prevention of electoral fatigue and confusion within communities.⁶²

⁵⁸ Professor Bertus de Villiers, *Submission 6.2*, p. 2.

⁵⁹ Prime Minister’s Indigenous Advisory Council, *Submission 419*, pp. 7-8.

⁶⁰ National Congress of Australia’s First Peoples, *Submission 292.1*, pp. 15-17.

⁶¹ Mr Richie Ah Mat, Chairperson, Cape York Land Council, *Proof Committee Hansard*, Townsville, 3 October 2018, p. 2.

⁶² National Congress of Australia’s First Peoples, *Submission 292.1*, p. 16.

- 2.80 In contrast, Professor de Villiers reiterated his suggestion that terms and elections for members of The Voice should coincide with those for the Parliament, as this would enhance participation in elections.⁶³
- 2.81 The Indigenous Peoples Organisation recommended that participation in elections should be open to all Aboriginal and Torres Strait Islander peoples, noting that:
- ... many members of our communities had been forcibly removed due to government policies that resulted in the Stolen Generation and loss of connection from their communities. That previous exclusion should not be further exacerbated by challenges to those who register their right to vote.⁶⁴
- 2.82 Congress, the Indigenous Peoples Organisation, and the Prime Minister's Indigenous Advisory Council supported the principle that membership of The Voice should include equal number of men and women.⁶⁵ Congress explained that it has a similar policy within its own organisation, which had succeeded in ensuring equal representation and also in promoting engagement by female members, both within the organisation and in the electoral process.⁶⁶

Function and operation

Addressing the 'third chamber' argument

- 2.83 Consistent with the report of the Referendum Council (see paragraph 2.9), the Committee heard that The Voice would not exercise a veto over the Parliament and that it would instead serve to advise the Parliament.
- 2.84 For example, Mr Ah Mat told the Committee:
- ... the voice will give advice to the government of the day. Everybody said it—they shouldn't have the right. Well, we don't have the right of veto. We can discuss it. At the end of the day, I believe that the voice is the main stump for all of us.

⁶³ Professor Bertus de Villiers, *Submission 6.2*, p. 2.

⁶⁴ Indigenous Peoples Organisation, *Submission 338.1*, p. 8:

⁶⁵ National Congress of Australia's First Peoples, *Submission 292.1*, p. 18; Indigenous Peoples Organisation, *Submission 338.1*, p. 8; Prime Minister's Indigenous Advisory Council, *Submission 419*, p. 4.

⁶⁶ National Congress of Australia's First Peoples, *Submission 292.1*, p. 18.

I'm giving you advice now. You are asking me for advice. It's the same thing.⁶⁷

2.85 Similarly, Professor Alexander Reilly, Director of the Public Law and Policy Research Unit, explained:

... the voice is advisory and, therefore, anything that comes through the voice is not binding on the parliament or the executive.⁶⁸

2.86 Associate Professor Rundle rejected the characterisation of The Voice as being a third chamber of the Parliament:

[The Voice] would not be a third chamber of parliament because it would be established outside of parliament and it does not involve a transfer of power. ... It would not be a third chamber because it would have no real power of veto with respect to political deliberations at either the parliamentary or the executive level. It would be advisory only. Its advice is non-binding.⁶⁹

2.87 Professor Twomey also submitted that the proposal for a voice to the Parliament was 'clearly' not a third House of the Parliament:

I am not aware of any serious suggestion that the Uluru proposal [for a Voice] is one for the establishment of an Indigenous House of Parliament that can initiate, pass and veto legislation.⁷⁰

2.88 Professor Twomey suggested that if there was concern that The Voice would impose an obligation on the Parliament to consider its advice, then the proposal could be re-conceptualised so that it did not involve the imposition of such an obligation. Professor Twomey went on:

Reliance could be placed on the good sense of Members of Parliament to give consideration to useful advice when appropriate.⁷¹

2.89 Mrs Lorraine Finlay emphasised that The Voice should be designed to be consistent with, and complementary to, the existing governmental structures in Australia.⁷²

⁶⁷ Mr Richie Ah Mat, Chairperson, Cape York Land Council, *Proof Committee Hansard*, Townsville, 3 October 2018, p. 2.

⁶⁸ Professor Alexander Reilly, Public Law and Policy Research Unit, The University of Adelaide, *Proof Committee Hansard*, Canberra, 18 September 2018, p. 11.

⁶⁹ Associate Professor Kristen Rundle, Co-Director, Centre for Comparative Constitutional Studies, *Proof Committee Hansard*, Melbourne, 26 September 2018, p. 34.

⁷⁰ Professor Anne Twomey, *Submission 57.1*, p. 2.

⁷¹ Professor Anne Twomey, *Submission 57.1*, p. 3.

- 2.90 Mrs Finlay cautioned that The Voice should not marginalise Aboriginal and Torres Strait Islander peoples from the primary political process in Australia or supplant their voice in the Parliament.⁷³
- 2.91 Associate Professor Rundle suggested that one of the most promising aspects of the proposal for a Voice was that it ‘seeks to work clearly, transparently and institutionally with the channels of parliamentary democracy’:
- It seeks, in many ways, to be a model political participant from the point of view of how many Australians would like their democracy to function.⁷⁴
- 2.92 Sydney Students for an Indigenous Voice proposed the establishment of a parliamentary committee to oversee the function of The Voice, in order to maintain its effectiveness, but not to exercise any power over The Voice.⁷⁵

Providing advice to both Parliament and the Executive

- 2.93 The Committee is aware of a range of views on how The Voice could perform the function of providing advice.
- 2.94 A number of witnesses emphasised the importance of The Voice providing advice not only to the Parliament, but also to the Executive Government, consistent with the principle that advice should be available as early as possible in the process of developing policy or legislation. For example, Professor Adrienne Stone, Co-Director of the Centre for Comparative Constitutional Studies, explained:
- It’s really important for good public policy formation that the First Nations voice is one that is heard by the executive during policy formation as well as by the parliament during lawmaking.⁷⁶
- 2.95 Similarly, Professor Alexander Reilly of the Public Law and Policy Research Unit at the University of Adelaide explained:

⁷² Mrs Lorraine Finlay, *Proof Committee Hansard*, Canberra, 18 September 2018, p. 12.

⁷³ Mrs Lorraine Finlay, *Proof Committee Hansard*, Canberra, 18 September 2018, p. 17.

⁷⁴ Associate Professor Kristen Rundle, Co-Director, Centre for Comparative Constitutional Studies, *Proof Committee Hansard*, Melbourne, 26 September 2018, p. 35.

⁷⁵ Sydney Students for an Indigenous Voice, *Submission 444*, pp. 12-13.

⁷⁶ Professor Adrienne Stone, Co-Director, Centre for Comparative Constitutional Studies, *Proof Committee Hansard*, Canberra, 18 September 2018, p. 16.

It's a voice to the parliament and all its processes, so a voice that would feed into the existing committee structures. It's also a voice that needs to be to the executive government, because the executive generates new laws and changes existing law.⁷⁷

2.96 In a supplementary submission, the Centre for Comparative Constitutional Studies stated:

Effective consultation requires an advisory function at the policy-making stage. This should extend to including advice from the Voice in Cabinet submissions for proposed new laws. ... The connection between the advisory function of the Voice with respect to bills before the Parliament and its advisory function with respect to policy-making must be emphasised. Each requires the other. Only if both of these channels of advice are secured could understandings reached at the policy-making stage be properly reflected in the legislative drafting stage.⁷⁸

2.97 Mr Ah Mat suggested that The Voice should provide advice to the cabinet so that cabinet debate is informed about whether or not policies are suitable for Aboriginal and Torres Strait Islander peoples:

I think that's where it's got to be. Because cabinet really is the power base in Canberra for either government, whoever is the government of the day. If there's a piece of legislation that affects Aboriginal and Torres Strait Islander people, I think that's when the discussions happen between the voice and cabinet.⁷⁹

2.98 The Law Council of Australia suggested that The Voice could have access to the Executive 'in the normal way that a Commonwealth statutory authority and many community representative bodies have access to government'.⁸⁰

2.99 Witnesses discussed various mechanisms for The Voice to provide advice to the Australian Parliament.

2.100 As noted in the previous section, when referring to a model where local and regional bodies might affiliate into regional groups to provide advice to the

⁷⁷ Professor Alexander Reilly, Public Law and Policy Research Unit, The University of Adelaide, *Proof Committee Hansard*, Canberra, 18 September 2018, p. 11.

⁷⁸ Centre for Comparative Constitutional Studies, *Submission 289.1*, p. 12.

⁷⁹ Mr Richie Ah Mat, Chairperson, Cape York Land Council, *Proof Committee Hansard*, Townsville, 3 October 2018, p. 5.

⁸⁰ Law Council of Australia, *Submission 288.1*, p. 10.

Parliament, Professor Twomey suggested that a secretariat could collect, order, and record advice and present it to the Parliament in the form of a database, which could be published online and formally tabled in the Parliament.⁸¹ Professor Twomey went on to suggest:

To ensure that what was said was heard, there could be a parliamentary committee that would be responsible for reviewing that advice, in a similar way to the manner in which the Joint Standing Committee on Treaties reviews all treaties that Australia proposes to ratify. It could alert Parliament to the issues raised in that advice, as is done by the Senate Standing Committee on Regulations and Ordinances.⁸²

- 2.101 Associate Professor Matthew Stubbs of the University of Adelaide proposed that any parliamentarians should be empowered—and obliged in some cases—to refer issues or proposals to The Voice for consideration, although it should be a matter for The Voice whether or not it acts on any such referral. He also suggested that any advice or report prepared by The Voice should be made available to the public immediately.⁸³
- 2.102 The Australian Human Rights Commission suggested that members of The Voice could be invited as ‘non-parliamentary representatives of Aboriginal and Torres Strait Islander communities’ to participate in Senate estimates proceedings.⁸⁴ The Commission stated that there is currently a lack of government accountability for the outcomes of services to Aboriginal and Torres Strait Islander peoples.⁸⁵
- 2.103 Similarly, Mr O’Shane argued that The Voice should have the authority to question decisions, similar to a Senate estimates committee, to provide for accountability.⁸⁶
- 2.104 Citing a need for The Voice to have evidence on which to base its advice, Sydney Students for an Indigenous Voice submitted that The Voice should be able to conduct inquiries into the delivery of services, as well as

⁸¹ Professor Anne Twomey, *Submission 57.1*, p. 3.

⁸² Professor Anne Twomey, *Submission 57.1*, p. 3.

⁸³ Associate Professor Matthew Stubbs, *Submission 281.1*, p. 2.

⁸⁴ Australian Human Rights Commission, *Submission 394*, p. 13.

⁸⁵ Australian Human Rights Commission, *Submission 394*, p. 13. See also: Professor Tom Calma AO, *Proof Committee Hansard*, Canberra, 18 October 2018, p. 5.

⁸⁶ Mr Terry O’Shane, Director, North Queensland Land Council, *Proof Committee Hansard*, Townsville, 3 October 2018, pp. 15-16.

legislation relating to the delivery of services, and to publicly report its findings. Furthermore they suggested:

The [Voice] should also provide for a method for more regular reporting on the status of Closing the Gap targets, or any successor targets. As with all matters, the [Voice] will provide this advice in a non-binding manner.⁸⁷

2.105 The Centre for Comparative Constitutional Studies suggested other procedural devices that might make The Voice's advisory function more effective, including addressing the Parliament and the use of 'trigger mechanisms' to ensure The Voice is notified of relevant bills.⁸⁸

2.106 The Centre also suggested that The Voice's advisory function might extend into the 'post-legislative stage' and that The Voice could have a role in 'monitoring the administration of laws likely to have a specific or disproportionate impact on [I]ndigenous Australians relative to other Australians':

The need for this 'secondary function' arises from the link between policy-making and administration. For example, monitoring of the administration of laws affecting [I]ndigenous Australians may prove crucial to the identification of issues that could benefit from further investigation at the policy-making stage for proposed new laws. Monitoring could also expose the need for reform of administrative arrangements that might require only non-legislative change.⁸⁹

Scope and timing of advice

2.107 The Committee heard further evidence on the scope of the matters The Voice should consider and the most appropriate timing for the provision of advice within the parliamentary or political process.

2.108 Professor Dixon proposed a model where the Parliament 'shall engage' The Voice when relying on section 51(xxvi) and section 122 of the Australian Constitution to enact legislation, and 'may engage' The Voice in respect of laws made under other provisions.⁹⁰

⁸⁷ Sydney Students for an Indigenous Voice, *Submission 444*, p. 12.

⁸⁸ Centre for Comparative Constitutional Studies, *Submission 289.1*, pp. 11-12.

⁸⁹ Centre for Comparative Constitutional Studies, *Submission 289.1*, p. 13.

⁹⁰ Professor Rosalind Dixon, *Submission 316.1*, p. 2; Professor Rosalind Dixon, Faculty of Law, University of New South Wales, *Proof Committee Hansard*, Canberra, 18 September 2018, p. 2.

2.109 However, Associate Professor Stubbs cautioned against limiting the scope of The Voice in this manner, suggesting that The Voice should be able to speak to any exercise of Executive and legislative power:

I fear that by putting in those two specific section references, and by referring simply to legislative power, we are narrowing significantly the ability of the voice to represent Aboriginal and Torres Strait Islander people's perspectives in a holistic way.⁹¹

2.110 Individuals who designed and led the Referendum Council's regional dialogue process (referred to in this chapter as Anderson et al) proposed a model where the primary function of The Voice is restricted to 'matters relating to Aboriginal and Torres Strait Islander peoples':

This will, as was intended by the Regional Dialogues, capture laws that are introduced under the races power (section 51(xxvi)) and the territories power (section 122), as well as laws that might appear to be of general application but that particularly affect Aboriginal and Torres Strait Islander peoples.⁹²

2.111 Anderson et al explained why the scope of The Voice should not be further restricted to laws introduced under section 51(xxvi) and section 122:

First, such a limited function would not reflect the true gamut of legislation that particularly affects Aboriginal and Torres Strait Islander peoples. ... Second, limiting the function in this way would prove constitutionally difficult in that the question of whether a law is 'with respect to' a head of power is not determined definitively at the time of its passage, but, rather, when the High Court has been asked to decide. Third, it is not intended that the Voice will have a power of veto, or the power to delay legislative or executive decision-making. As such, the breadth of the Voice's function to present its views does not interfere with the legislative or executive function.⁹³

⁹¹ Associate Professor Matthew Stubbs, Public Law and Policy Research Unit, The University of Adelaide, *Proof Committee Hansard*, Canberra, 18 September 2018, p. 15.

⁹² Ms Pat Anderson AO, Professor Megan Davis, Mr Noel Pearson, Associate Professor Sean Brennan, Dr Dylan Lino, Ms Gemma McKinnon, and Associate Professor Gabrielle Appleby, *Submission 479*, p. 8.

⁹³ Ms Pat Anderson AO, Professor Megan Davis, Mr Noel Pearson, Associate Professor Sean Brennan, Dr Dylan Lino, Ms Gemma McKinnon, and Associate Professor Gabrielle Appleby, *Submission 479*, p. 9.

2.112 Anderson et al suggested that The Voice would determine for itself which issues to prioritise.⁹⁴

2.113 When asked what policy The Voice should provide advice on, Mr Ah Mat told the Committee:

I think the voice should provide advice on policy areas like health for our people, education for our people, economics for our people and welfare for our people. ... There are going to be so many policy issues that the voice body can assist with on the right way forward for parliament.⁹⁵

2.114 Associate Professor Stubbs suggested that it should be for The Voice itself to determine whether or not it wishes to provide advice on a particular matter:

I don't think that [the voice] should have to wait for the parliament to say, 'On this issue we are willing to hear from you.' My conception of the voice—and it may only be my conception—is that it should be empowering to Aboriginal and Torres Strait Islander people to speak about any topic they think relevant.⁹⁶

2.115 Associate Professor Rundle from the Centre for Comparative Constitutional Studies agreed, stating that The Voice should not require the invitation of the Parliament in order to provide advice.⁹⁷ In a supplementary submission, the Centre also suggested that advice should be provided on the initiative of The Voice—that is, the giving of advice should not be mandatory.⁹⁸

2.116 Sydney Students for an Indigenous Voice urged that any referral and reporting process between the Parliament and The Voice must be fully transparent:

⁹⁴ Ms Pat Anderson AO, Professor Megan Davis, Mr Noel Pearson, Associate Professor Sean Brennan, Dr Dylan Lino, Ms Gemma McKinnon, and Associate Professor Gabrielle Appleby, *Submission 479*, p. 9.

⁹⁵ Mr Richie Ah Mat, Chairperson, Cape York Land Council, *Proof Committee Hansard*, Townsville, 3 October 2018, p. 5.

⁹⁶ Associate Professor Matthew Stubbs, Public Law and Policy Research Unit, The University of Adelaide, *Proof Committee Hansard*, Canberra, 18 September 2018, p. 15. See also: Mr Harry Hobbs, *Submission 189.1*, p. 4; Ms Pat Anderson AO, Professor Megan Davis, Mr Noel Pearson, Associate Professor Sean Brennan, Dr Dylan Lino, Ms Gemma McKinnon, and Associate Professor Gabrielle Appleby, *Submission 479*, p. 7.

⁹⁷ Associate Professor Kristen Rundle, Centre for Comparative Constitutional Studies, *Proof Committee Hansard*, Canberra, 18 September 2018, p. 17.

⁹⁸ Centre for Comparative Constitutional Studies, *Submission 289.1*, p. 11.

Transparency between Federal Parliament's referrals and the [Voice]'s reporting would mitigate the risk of tokenism by virtue of its public nature.⁹⁹

2.117 As noted above, the Committee observed general support for the principle that advice should be available as early as possible in the process of developing policy or legislation.

2.118 Sydney Students for an Indigenous Voice suggested that inclusion in the legislative process 'from the beginning' would be important to building trust, as well as empowering Aboriginal and Torres Strait Islander peoples.¹⁰⁰

2.119 However, noting that the details would depend on the structure of The Voice, Professor Twomey stressed that there would be a difference between the formal provision of advice and what might occur in practice:

One of the points about this is that it is a voice to the parliament; therefore, you need to have a formal way of receiving that voice in parliament... But that was not intended to preclude what would, presumably, happen in practice, which is that, being aware that this sort of advice would appear and would be required to be considered during parliamentary debate, the obvious and sensible thing to do would be for ministers, parliamentary departments and the like who are forming the policy that eventually becomes the legislation to engage in consultation before that point.¹⁰¹

2.120 Similarly, Professor Dixon suggested that while the legislative stage might be the 'final formal stage of interaction', advice might be sought informally at an earlier stage:

Clearly, the earlier the advice is received, the more likely it is to be effective... I think that the legislative definition of the workings of a voice should try to work that out, and ideally encourage the giving of advice as early as possible, including confidentially, and only having the legislative stage as being the final formal stage of interaction. The most likely model that would work would be one in where there is at least a two-part if not three-part process of informal and confidential advice, followed by more formal and more publically available advice.¹⁰²

⁹⁹ Sydney Students for an Indigenous Voice, *Submission 444*, p. 12.

¹⁰⁰ Sydney Students for an Indigenous Voice, *Submission 444*, p. 10.

¹⁰¹ Professor Anne Twomey, *Proof Committee Hansard*, Canberra, 18 September 2018, pp. 5-6.

¹⁰² Professor Rosalind Dixon, Faculty of Law, University of New South Wales, *Proof Committee Hansard*, Canberra, 18 September 2018, p. 6.

2.121 Along the same lines, Sydney Students for an Indigenous Voice submitted:

... it would be best practice for the executive, and indeed the shadow cabinet, to refer any intended legislation to the [voice], whenever it stands to disproportionately affect Aboriginal and Torres Strait Islander people, and to engage with members of the [voice] on the formation of regulation developed under ministerial discretion.¹⁰³

2.122 However, Mr Hobbs suggested that existing notification and comment provisions could be adapted to empower The Voice to provide advice in executive processes as well as the Parliament:

For example, a provision modelled on s 17 of the *Legislation Act 2003* (Cth) could require rule-makers to consult with the national body before making legislative instruments. Similarly, a convention could develop whereby the public service and relevant Ministers notify the body when developing legislation or policy that relates to Aboriginal and Torres Strait Islander affairs, inviting it to discuss and provide comment on proposals.¹⁰⁴

2.123 The Law Institute of Victoria recommended there be a ‘substantive obligation’ on the Parliament and/or the Executive to consider the advice of The Voice when enacting legislation under sections 51(xxvi) and 122 of the Constitution. The Institute proposed constitutional and legislative options to give effect to this recommendation.¹⁰⁵

2.124 The Centre for Comparative Constitutional Studies suggested that consideration could be given to a timeframe for the provision of advice.¹⁰⁶

2.125 Sydney Students for an Indigenous Voice proposed that The Voice should be given two calendar weeks to provide advice on legislation in exposure-draft form. The students suggested that for urgent matters The Voice should be given 72 hours to provide advice, and in cases where this is unacceptable, advice should be provided directly to the Governor-General for consideration.¹⁰⁷

¹⁰³ Sydney Students for an Indigenous Voice, *Submission 444*, p. 10.

¹⁰⁴ Mr Harry Hobbs, *Submission 189.1*, pp. 4-5.

¹⁰⁵ Law Council of Australia, *Submission 288.1*, pp. 13-15.

¹⁰⁶ Centre for Comparative Constitutional Studies, *Submission 289.1*, pp. 11-12.

¹⁰⁷ Sydney Students for an Indigenous Voice, *Submission 444*, pp. 10-11.

2.126 However, Professor de Villiers suggested that the time allowed for advice should not be statutorily prescribed because it may be too rigid and give rise to litigation. Professor de Villiers went on:

The Voice will fail or succeed based on the political culture of those involved, not due to legal prescriptions and litigation.¹⁰⁸

Providing advice on local, state, and territory matters

2.127 A number of witnesses agreed that many issues of concern to Aboriginal and Torres Strait Islander peoples arise at the state, territory, and local level.¹⁰⁹ For example, Professor George Williams AO explained:

Local policing is a good example of where the states operate pretty much autonomously, and that is an example of where I know a lot of Indigenous communities have a strong interest. There are a number of other areas dealing with service delivery, but we just don't have the federal leadership at the moment, which does emphasise that, unless we're going to disappoint some communities, we will need to build in a means of advising state governments.¹¹⁰

2.128 Similarly, Mr Harry Hobbs submitted:

In Australia, the division of constitutional responsibilities means that all levels of government may develop legislation and policy that affects Indigenous communities. Consequently, a First Nations Voice could be empowered to participate in legislative and policy development at federal, state and territory, and local levels.¹¹¹

2.129 However, the Committee received limited evidence on the specific mechanism by which The Voice might provide advice on these matters.

2.130 Mr Hobbs suggested that the 'Chair' of The Voice could serve as a full member of the Ministerial Council on Aboriginal and Torres Strait Islander

¹⁰⁸ Professor Bertus de Villiers, *Submission 6.2*, p. 1.

¹⁰⁹ Centre for Comparative Constitutional Studies, *Submission 289.1*, p. 11; Indigenous Peoples Organisation, *Submission 338.1*, p. 5; Professor Rosalind Dixon, Faculty of Law, University of New South Wales, *Proof Committee Hansard*, Canberra, 18 September 2018, pp. 6-7; Mrs Lorraine Finlay, *Proof Committee Hansard*, Canberra, 18 September 2018, p. 12; The Hon. Robert Tickner AO, *Proof Committee Hansard*, Redfern, 5 October 2018, p. 56.

¹¹⁰ Professor George Williams AO, *Proof Committee Hansard*, Canberra, 18 September 2018, p. 10.

¹¹¹ Mr Harry Hobbs, *Submission 189.1*, p. 4.

Affairs or sit on (or have observer status at) the Council of Australian Governments.¹¹²

- 2.131 Professor Williams and Professor Dixon suggested that constitutional change may be required to support or mandate an interface or interaction between The Voice and the states.¹¹³
- 2.132 Sydney Students for an Indigenous Voice agreed that there was currently a ‘tension’ regarding how The Voice could address ‘community-based issues’. However, the students suggested that the federal Parliament should ensure there is sufficient flexibility within The Voice to address these issues.¹¹⁴
- 2.133 Associate Professor Stubbs submitted that The Voice should be specifically enabled to provide advice to state and territory parliaments and executive governments, and local governments, as well as the Commonwealth:
- ... it is important to ensure that there can be no argument limiting the advisory body to address only ‘federal’ issues.¹¹⁵
- 2.134 However, Associate Professor Stubbs also recommended that ‘no mechanisms for formally instituting a role for the advisory body within state or territory parliaments should be prescribed by the Commonwealth, it being a matter for each state or territory government to determine whether and how it wishes to interact with Aboriginal and Torres Strait Islander peoples’.¹¹⁶
- 2.135 Mrs Finlay submitted that, while a mechanism to encourage The Voice and the states and territories to work together was important, this shouldn’t be ‘imposed’ by the Commonwealth in a way that ‘affects the federal balance that currently exists in the Australian Constitution’.¹¹⁷
- 2.136 The Centre for Comparative Constitutional Studies suggested that the Commonwealth should seek advice from The Voice on questions relevant to

¹¹² Mr Harry Hobbs, *Submission 189.1*, p. 4.

¹¹³ Professor George Williams AO, *Proof Committee Hansard*, Canberra, 18 September 2018, p. 4; Professor Rosalind Dixon, Faculty of Law, University of New South Wales, *Proof Committee Hansard*, Canberra, 18 September 2018, p. 4.

¹¹⁴ Sydney Students for an Indigenous Voice, *Submission 444*, p. 9.

¹¹⁵ Associate Professor Matthew Stubbs, *Submission 281.1*, p. 2.

¹¹⁶ Associate Professor Matthew Stubbs, *Submission 281.1*, p. 2.

¹¹⁷ Mrs Lorraine Finlay, *Proof Committee Hansard*, Canberra, 18 September 2018, p. 12.

Aboriginal and Torres Strait Islander peoples being managed through intergovernmental arrangements.¹¹⁸

2.137 Speaking to the Committee in Canberra, Associate Professor Rundle commented on the limitations of legislative competence at the federal level:

... those factors in the Australian federal arrangement should not discount the importance of what does take place at the Commonwealth level and also the kind of participatory experience and capacity building that will follow from the voice is readily transferable to other levels of government if, indeed, those channels are not already in place.¹¹⁹

2.138 The Centre for Comparative Constitutional Studies expanded on this point in a supplementary submission:

... we envisage the role given to the national Voice would see it operate in a way that draws, as appropriate, on the views of First Nations peoples in local and regional groups. The procedures developed by the Voice for this purpose could extend the advantages of consultation to States, Territories and local government as well. In this way, the Voice offers an opportunity for empowering [I]ndigenous Australians in their relationships with government at all levels, federal, state, regional and local.¹²⁰

2.139 Professor Davis suggested that a mechanism to enable ‘leverage’ between different levels of government was important:

What you heard was that some dialogues expressed views that sometimes state governments are good, sometimes territory governments are good, but, when they’re not, that’s when you go to the Commonwealth, to put pressure on, such as the extraordinary work and advocacy that’s done currently with respect to criminal justice and incarceration at a Commonwealth level. So having some sort of flexibility in design that would enable that leverage between the two structures, I think, is really important.¹²¹

2.140 Similarly, Mr Hobbs submitted:

¹¹⁸ Centre for Comparative Constitutional Studies, *Submission 289.1*, p. 11.

¹¹⁹ Associate Professor Kristen Rundle, Centre for Comparative Constitutional Studies, *Proof Committee Hansard*, Canberra, 18 September 2018, p. 17.

¹²⁰ Centre for Comparative Constitutional Studies, *Submission 289.1*, p. 8.

¹²¹ Professor Megan Davis, Pro Vice-Chancellor Indigenous, University of New South Wales, *Proof Committee Hansard*, Canberra, 18 September 2018, p. 9.

Empowering the [voice] to engage with all levels of government can enhance its efficacy and strengthen its legitimacy. If a Commonwealth government is indifferent or hostile to the institution, representatives could leverage their relationship with receptive state, territory, and local governments to continue to advocate for Indigenous interests. An Indigenous representative body will always be vulnerable to the forces of majoritarianism but engaging with multiple governments can help the organisation manage its central tension.¹²²

- 2.141 The Committee also heard from Congress that The Voice could serve as a ‘co-ordinating body’, which could advise state, territory, and local governments on ways to co-ordinate policy implementation:

For instance, the voice could provide guidance to policies which it has designed that require implementation at the state, territory and/or local government-level. Unified action, across state and territory borders, is important for maintaining the equality of outcomes for Aboriginal and Torres Strait Islander peoples, and ensuring that national standards relating to issues such as cultural safety and community engagement are met.¹²³

Examples of advisory structures

- 2.142 In its interim report the Committee considered 12 examples of past and current advisory bodies and structures and three indicative proposals that might inform the design of The Voice. These examples are outlined in Chapter 4 of the interim report.
- 2.143 The Committee continued to receive evidence about advisory and governance structures relating to Aboriginal and Torres Strait Islander peoples, which may serve to inform the design of The Voice.
- 2.144 The Committee also notes that it also continued to receive evidence about past advisory bodies—particularly the Aboriginal and Torres Strait Islander Commission but also the National Aboriginal Conference.¹²⁴ Further

¹²² Mr Harry Hobbs, *Submission 189.1*, p. 4.

¹²³ National Congress of Australia’s First Peoples, *Submission 292.1*, pp. 23-24.

¹²⁴ For example: Ms Mary Graham, *Proof Committee Hansard*, Brisbane, 4 October 2018, pp. 17-18; Mr Robert (Les) Malezer, Foundation for Aboriginal and Islander Research Action, *Proof Committee Hansard*, Brisbane, 4 October 2018, pp. 21-22; Dr Jackie Huggins, Co-Chair, National Congress of Australia’s First Peoples, *Proof Committee Hansard*, Brisbane, 4 October 2018, p. 28; The Hon. Robert Tickner AO, *Proof Committee Hansard*, Redfern, 5 October 2018, pp. 52, 55-57. Mr Harry Hobbs, *Submission 189.1*, p. 2; Prime Minister’s Indigenous Advisory Council, *Submission 419*, pp. 6-7.

evidence in relation to these bodies is discussed in the Committee's interim report and is not reproduced here. The Committee notes that these structures have strengths and weaknesses. The Committee is not endorsing any particular structure, but is providing them as examples.

2.145 The table below outlines the bodies and structures which the Committee considered in the interim report. Additional bodies and structures which are discussed in this report appear in italics.

Box 2.2

- National Aboriginal Consultative Committee;
- National Aboriginal Conference;
- Aboriginal and Torres Strait Islander Commission;
- Parliamentary Joint Committee on Human Rights;
- Torres Strait Regional Authority;
- Murdi Paaki Regional Assembly;
- Prime Minister's Indigenous Advisory Council;
- Australian Capital Territory Aboriginal and Torres Strait Islander Elected Body;
- National Aboriginal Community Controlled Health Organisation;
- National Congress of Australia's First Peoples;
- Prescribed Bodies Corporate;
- Aboriginal Land Councils
- Proposals from Uphold & Recognise;
- Proposals from the Cape York Institute;
- Proposal from Mr Eric Sidoti;
- *Victorian Aboriginal Representative Body;*
- *Empowered Communities;*
- *Pama Futures;*
- *Proposal for a Torres Strait Regional Assembly;*
- *Proposal for recognising local Indigenous bodies; and*
- *Proposal made by the Indigenous Peoples Organisation.*

Victorian Aboriginal Representative Body

2.146 The Committee heard evidence about the proposal for a Victorian Aboriginal Representative Body.

2.147 As part of the Victorian treaty process, the Victorian Treaty Advancement Commission (the Commission) is establishing the representative body of Aboriginal people to develop a treaty negotiation framework with the

Victorian Government. The treaty process began in 2016 and the representative body is due to be established in July 2019.¹²⁵ Further information about the treaty advancement process in Victoria is contained in Chapter 5 of the report.

- 2.148 The primary responsibility of the representative body is to work with the state government to develop a treaty negotiation framework—that is, the rules for treaty and the other elements to support treaty negotiations.¹²⁶
- 2.149 The representative body is being designed by Aboriginal Victorians, and its composition, electoral rules, and governance structures would not be prescribed by government.¹²⁷
- 2.150 It is proposed that:
- the representative body will be a company limited by guarantee;
 - the body will initially consist of 28 representatives selected by a combination of state-wide elections and seats reserved for formally recognised Traditional Owner groups, who will vote on all major decisions of the body;
 - representatives will elect an executive of between seven and nine people, including a Chair, who will implement decisions of the body and set its agenda; and
 - the work of the body will be guided by an elders' voice.¹²⁸
- 2.151 The proposed structure includes 11 reserved seats for formally recognised Traditional Owner groups (under the *Native Title Act 1993*, the *Traditional Owner Settlement Act 2010*, or the *Aboriginal Heritage Act 2006*). It is proposed that more reserved seats will be created as further Traditional Owners are recognised over time.¹²⁹
- 2.152 It is proposed that the remaining 17 seats be elected by a non-compulsory state-wide vote, with all Aboriginal and Torres Strait Islander people living

¹²⁵ Mr Andrew Gargett, Director, Strategy, Engagement and Community, Aboriginal Victoria, *Proof Committee Hansard*, Melbourne, 26 September 2018, p. 17.

¹²⁶ Mr Andrew Gargett, Director, Strategy, Engagement and Community, Aboriginal Victoria, *Proof Committee Hansard*, Melbourne, 26 September 2018, p. 15.

¹²⁷ Mr Andrew Gargett, Director, Strategy, Engagement and Community, Aboriginal Victoria, *Proof Committee Hansard*, Melbourne, 26 September 2018, p. 15.

¹²⁸ Victorian Treaty Advancement Commission, *Treaty Statewide Gathering*, 2018, pp. 6-7.

¹²⁹ Victorian Treaty Advancement Commission, *Treaty Statewide Gathering*, 2018, pp. 8-10.

in Victoria and being at least 16 years of age eligible to vote. Six voting regions across the state (based on population) are proposed, as well as the creation of a separate electoral roll and a process for ensuring gender balance among elected representatives.¹³⁰

- 2.153 The Committee heard evidence in Melbourne from Ms Jill Gallagher AO, the Victorian Treaty Advancement Commissioner, who explained that the proposal for the body to be a company limited by guarantee was to ensure its independence:

We are proposing the body should be established as a company limited by guarantee. This ensures the necessary independence from the states. One of the earlier conversations that we had with community was: what legal structure should this body take?

We heard loud and clear: the structure that gives us the most independence from government.¹³¹

- 2.154 Mr Gargett, representing Aboriginal Victoria, suggested establishing the representative body in this way would maximise its independence, flexibility, and accountability to the community, and that this was preferred to alternative structures such as a statutory corporation.¹³²

- 2.155 Mr Gargett explained why a combination of reserved and general seats had been recommended:

The reason that there's a blended model is that there are areas across the state where there is no traditional owner group that's formally recognised, and there are a raft of complexities that sit behind that.¹³³

- 2.156 The Committee heard that the proposed electoral boundaries were based 'as closely as possible' to local government boundaries and sought to achieve a ratio of one representative per 1,700 Aboriginal people.

¹³⁰ Victorian Treaty Advancement Commission, *Treaty Statewide Gathering*, 2018, pp. 10-11.

¹³¹ Victorian Treaty Advancement Commission, *Treaty Statewide Gathering*, 2018, pp. 8-10. See also: Ms Jill Gallagher AO, Victorian Treaty Advancement Commissioner, Victorian Treaty Advancement Commission, *Proof Committee Hansard*, Melbourne, 26 September 2018, p. 25.

¹³² Mr Andrew Gargett, Director, Strategy, Engagement and Community, Aboriginal Victoria, *Proof Committee Hansard*, Melbourne, 26 September 2018, p. 15.

¹³³ Mr Andrew Gargett, Director, Strategy, Engagement and Community, Aboriginal Victoria, *Proof Committee Hansard*, Melbourne, 26 September 2018, p. 18.

- 2.157 Mr Gargett noted that the electoral boundaries were not designed on Traditional Owner boundaries.¹³⁴
- 2.158 Mr Gargett told the Committee that a consistent message in feedback on the representative body was that the body should not take over the role or responsibility of existing organisations, mechanisms, and governance arrangements, noting that:

We are really conscious we don't want to impede gains that have been made by the Victorian Aboriginal community already in this process.¹³⁵

Empowered Communities

- 2.159 The Committee heard evidence about the Empowered Communities initiative which is designed to give Aboriginal and Torres Strait Islander peoples a greater say in decisions that affect them:
- [Empowered Communities] is an opt-in model, where leaders, organisations and communities agree to subscribe to [Empowered Communities] principles and norms. The approach is based on partnership between governments and Indigenous leaders and their communities, and includes jointly agreeing priorities and regional investment.¹³⁶
- 2.160 Empowered Communities 'allows participating regions to develop an organisational governance model for their region which suits the particular circumstances of communities within their region'.¹³⁷ The government initially provided three years' funding for regional backbone organisations to 'support leaders and communities to identify their development priorities and co-design strategies to address them'.¹³⁸ The Department of the Prime Minister and Cabinet also outlined the government's involvement in the initiative.¹³⁹

¹³⁴ Mr Andrew Gargett, Director, Strategy, Engagement and Community, Aboriginal Victoria, *Proof Committee Hansard*, Melbourne, 26 September 2018, p. 18.

¹³⁵ Mr Andrew Gargett, Director, Strategy, Engagement and Community, Aboriginal Victoria, *Proof Committee Hansard*, Melbourne, 26 September 2018, p. 20.

¹³⁶ Department of the Prime Minister and Cabinet, *Submission 382.1*, p. 16.

¹³⁷ Uphold & Recognise and PM Glynn Institute, *Submission 423.1*, p. 1.

¹³⁸ Department of the Prime Minister and Cabinet, *Submission 382.1*, p. 16.

¹³⁹ Department of the Prime Minister and Cabinet, *Submission 382.1*, pp. 16-18.

2.161 The Department submitted that implementation of Empowered Communities is underway in eight regions:

- Cape York, Queensland;
- East Kimberley, Western Australia;
- West Kimberley, Western Australia;
- Central Coast, New South Wales;
- Inner Sydney, New South Wales;
- Goulburn-Murray, Victoria;
- Ngaanyatjarra Pitjantjatjara Yankunytjatjara Lands, Central Australia; and
- Ngarrindjeri, South Australia.¹⁴⁰

2.162 Governance arrangements in each Empowered Communities region are built on existing structures to create ‘local and regional coalitions to drive reform’:

These arrangements will vary according to regional circumstances but share common elements, including:

- a. Indigenous-led opt-in organisations playing a key leadership role.
- b. A leadership group selected or elected and comprised of a mix of organisational, cultural, natural and educated leaders from the region.
- c. An interface, or partnership, mechanism (such as a ‘meeting place’ or ‘negotiation table’) for negotiations between Indigenous and government partners.
- d. A backbone team driving delivery and performing support functions.¹⁴¹

2.163 For example, the Committee heard that the governance structure in the Inner Sydney region consists of two alliances—the Redfern alliance and the La Perouse alliance—which are each made up of organisations that are Aboriginal-controlled, representative of the community and which choose to opt in to the structure.¹⁴²

2.164 Mr Sean Gordon, Chairman of Uphold & Recognise, explained that Empowered Communities provides a ‘power board’ for each of the regions

¹⁴⁰ Department of the Prime Minister and Cabinet, *Submission 382.1*, pp. 16-17.

¹⁴¹ Inner Sydney Empowered Communities, *Submission 463*, p. 1.

¹⁴² Mr Chris Ingrey, Co-Chair, Inner Sydney Empowered Communities, *Proof Committee Hansard*, Redfern, 5 October 2018, p. 9.

to ‘plug into’.¹⁴³ In a submission, Uphold & Recognise and the PM Glynn Institute expanded on this analogy:

Each of the Empowered Communities regions can ‘plug in’ to the Empowered Communities ‘powerboard’, in order to facilitate negotiations with the federal government specific to their region. ... Within a region, the Empowered Communities powerboard incorporates a ‘partnership table’ and a ‘co-design lab’, each of which may be accessed by any participating Empowered Communities region. In order to access either the partnership table or the co-design lab, an Empowered Communities region must first be developing a ‘regional development agenda’, including identifying a ‘first priority’ to kick start the process and demonstrate action and collaboration on the ground.

The partnership table provides a safe environment in which the representatives of the region can meet with representatives of the government to negotiate how to fund and deliver on the development agenda, and/or how a specific program can be funded and delivered along the way. The co-design lab provides a forum for representatives of the region to meet with experts, government representatives and other stakeholders to brainstorm and develop a clear idea of a reform proposal, including a budget for that proposal and an implementation plan and timeframe, consistent with the region’s development agenda. The solution that emerges from the co-design lab is then taken to the partnership table, where the region’s representatives and the government’s representatives work out how to support and implement it.¹⁴⁴

2.165 Mr Gordon emphasised the diversity of Aboriginal and Torres Strait Islander communities and suggested that Empowered Communities had attempted to be ‘Indigenous-led at a place based level’:

I’ve been convening Empowered Communities for five years now and probably one of the greatest lessons is just understanding how unique communities are when it comes to establishing their own governance structures.¹⁴⁵

2.166 Ms Felicia Dean from the Kaiela Institute in Shepparton told the Committee:

I think that one of the things about Empowered Communities is that it gives us the opportunity to sit down with our mob and say, ‘Well, where do we

¹⁴³ Mr Sean Gordon, Chairman, Uphold & Recognise, *Proof Committee Hansard*, Redfern, 5 October 2018, p. 12.

¹⁴⁴ Uphold & Recognise and PM Glynn Institute, *Submission 423.1*, pp. 1-2.

¹⁴⁵ Mr Sean Gordon, Chairman, Uphold & Recognise, *Proof Committee Hansard*, Redfern, 5 October 2018, pp. 11-12.

want to go and how do we get there?’ That’s what it’s about. It’s about us determining our own future and finding ways and setting agendas for how we can work to that.¹⁴⁶

2.167 Dr Damien Freeman suggested that the ‘power board’ model of Empowered Communities provides a basis for considering the possible relationship between local and regional voices and a national voice:

... when you think about the relationship between the national dimension of some sort of Indigenous voice and the local or regional dimensions you have this example. They have come up with a way that at the local or regional level they can each develop their own structure for how their voice should work. But although each one can have a different structure it can, as it were, plug into the power board which then serves as a conduit to engage with government at a higher level.¹⁴⁷

Other proposed structures

Pama Futures

2.168 The Committee heard evidence about the Pama Futures model, which has been developed for the Cape York region. The model is set out in a March 2018 report of the Cape York Partnership and the Cape York Land Council, which was submitted to the Australian and Queensland governments for consideration.¹⁴⁸

2.169 The report explains that over 800 people in the region participated in the process to develop the model, beginning with a three-day summit in August 2017.¹⁴⁹

2.170 Dr Shireen Morris, representing the Cape York Institute, described the model as ‘the next phase’ of Empowered Communities, while the Department of the Prime Minister and Cabinet submitted that the model is

¹⁴⁶ Mr Felicia Dean, Community Engagement, Kaiela Institute, *Proof Committee Hansard*, Shepparton, 25 September 2018, p. 15.

¹⁴⁷ Dr Damien Freeman, PM Glynn Institute, Australian Catholic University, *Proof Committee Hansard*, Redfern, 5 October 2018, pp. 13, 15. See also: Uphold & Recognise and PM Glynn Institute, *Submission 423.1*, pp. 2-4; Inner Sydney Empowered Communities, *Submission 463*, pp. 2-6.

¹⁴⁸ Cape York Partnership and Cape York Land Council, *Pama Futures*, March 2018.

¹⁴⁹ Cape York Partnership and Cape York Land Council, *Pama Futures*, March 2018, p. 36.

‘intended to both broaden and accelerate’ the Empowered Communities process.¹⁵⁰

2.171 The Cape York Institute provided further detail in a submission to the inquiry:

The Cape York Pama Futures model incorporates multiple mechanisms for grassroots empowerment, commits to ensuring that traditional owners have the full say in appropriate matters (such as in relation to decisions over land), and provides mechanisms for efficient interfacing and agreement-making with government.¹⁵¹

2.172 The submission explains that the model includes:

- Place-based plans, developed through inclusive participation, in which the people of a place set out their needs and priorities.
- A new interface/structure—Partnership Tables—to be established for negotiations and agreement-making between governments and the people of a place. The place-based plans form the basis of negotiations and agreement-making at the Partnership Table. Agreement-making sets out how investment is to be used and sets expectations about what will be achieved.
- Funding reforms so budgets are controlled closer to those affected, including:
 - Governments to provide place-based transparency of funding flows;
 - Place-based pooled funding arrangements;
 - Indigenous people acting as decision-makers about funding grants to services (through panels appointed as purchasers, or co-purchasers of services);
 - Increasing Indigenous organisations’ participation in service delivery and reducing the dominance of external NGOs;
- Monitoring and evaluation that facilitates adaptive practice, and accountability.¹⁵²

2.173 Indigenous organisations would have ‘an enabling role, focused on empowering the grassroots’.¹⁵³

¹⁵⁰ Dr Shireen Morris, Senior Policy Adviser and Constitutional Reform Research Fellow, Cape York Institute, *Proof Committee Hansard*, Dubbo, 2 July 2018, p. 4; Department of the Prime Minister and Cabinet, *Submission 382.1*, p. 18.

¹⁵¹ Cape York Institute, *Submission 244.2*, p. 10.

¹⁵² Cape York Institute, *Submission 244.2*, p. 10.

- 2.174 Under the model, a Community Partnership Table would be established in each of the 12 sub-regional communities in Cape York. The partnership table would be a forum for the community and government to come together ‘to share responsibility for decision making, co-purchasing of services and accountability for success’.¹⁵⁴
- 2.175 At the regional level, the Cape York Futures Forum would include representatives of 12 sub-regional communities and would be the ‘primary Indigenous leadership structure for Pama Futures across Cape York’ or, in other words, ‘the First Nations Voice for Cape York’.¹⁵⁵
- 2.176 A ‘virtual authority’ would also be established, supported by a board comprised of people nominated from the region and federal and Queensland government representatives.¹⁵⁶
- 2.177 Mr Robert Ryan, Assistant Secretary, Empowered Communities at the Department of the Prime Minister and Cabinet, told the Committee that the model sought to bring together the ‘three strands’ of ‘empowerment, economic development and reformed land arrangements which actually bring prosperity for Aboriginal people’.¹⁵⁷ Mr Ryan explained:

It’s very much a grassroots model. It’s based on 12 sub-regions, largely based around local government areas, and it has a mix of cultural authority through traditional owners and prescribed body corporates, empowerment, which brings in natural leaders within that community, in particular a lot of the historical people who may not be traditional owners but actually play a key role in those communities, and then the people who are really focused around economic development. It brings those together at a sub-regional level to have discussion with the three levels of government – Commonwealth, state and local – and make decisions around how investment should happen, where the priorities are in that region and then out of that build that up to a regional

¹⁵³ Cape York Institute, *Submission 244.2*, p. 10.

¹⁵⁴ Cape York Institute, *Submission 244.2*, p. 11.

¹⁵⁵ Cape York Institute, *Submission 244.2*, pp. 10-11.

¹⁵⁶ Cape York Institute, *Submission 244.2*, p. 11.

¹⁵⁷ Mr Robert Ryan, Assistant Secretary, Empowered Communities, Department of the Prime Minister and Cabinet, *Proof Committee Hansard*, Canberra, 25 June 2018, pp. 12-13. See also: Department of the Prime Minister and Cabinet, *Submission 382.1*, p. 18.

approach, which they call the Cape York Futures Forum. That would look at the matters which need to be progressed at a regional level.¹⁵⁸

2.178 The Cape York Institute submitted that the model could be established by national legislation, noting that there would be ‘common structural elements and principles’ at a national level, and that each region could choose how they wished to ‘represent and organise themselves’:

This is just the Cape York approach—other regions must devise a different model that better suits them.¹⁵⁹

2.179 The Department of the Prime Minister and Cabinet noted that the government had been working with Cape York leaders throughout the development of the proposal.¹⁶⁰

Proposal for a Torres Strait Regional Assembly

2.180 The Committee heard evidence about attempts to revitalise a 1997 proposal to establish a Torres Strait Regional Assembly. The proposal was made by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs in its 1997 report: *Torres Strait Islanders: A New Deal*.¹⁶¹

2.181 The House Standing Committee proposed that the Regional Assembly be established under complementary Commonwealth and Queensland legislation and be responsible to nominated Commonwealth and Queensland government ministers.¹⁶²

2.182 The Regional Assembly would replace the Torres Strait Regional Authority, the then Island Coordinating Council (a Queensland statutory authority),

¹⁵⁸ Mr Robert Ryan, Assistant Secretary, Empowered Communities, Department of the Prime Minister and Cabinet, *Proof Committee Hansard*, Canberra, 25 June 2018, pp. 12-13.

¹⁵⁹ Cape York Institute, *Submission 244.2*, p. 13.

¹⁶⁰ Department of the Prime Minister and Cabinet, *Submission 382.1*, p. 18.

¹⁶¹ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Torres Strait Islanders: A New Deal*, August 1997.

¹⁶² House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Torres Strait Islanders: A New Deal*, August 1997, pp. 50-52.

and the Torres Shire Council, and would ‘represent and provide services for and on behalf of all residents of the Torres Strait area’.¹⁶³

- 2.183 The House Standing Committee proposed that the Regional Assembly consist of an elected representative from each island council electorate, three elected representatives from Thursday Island and two representatives elected to represent Horn and Prince of Wales Islands.¹⁶⁴
- 2.184 All voters qualified under the *Local Government Act 1993* (Qld)—not limited to Torres Strait Islanders and Aboriginals, and including members of Island Councils—would be eligible to vote for Regional Assembly candidates and be eligible for election as candidates.¹⁶⁵
- 2.185 The House Standing Committee proposed that the Regional Assembly undertake the functions that were, at the time, carried out by Torres Strait Regional Authority, the Island Coordinating Council, and the Torres Shire Council, noting that these functions would need to be adapted for to encompass all people in the region. These functions include:
- formulating policy and implementing programs;
 - advising Commonwealth and Queensland government ministers; and
 - having and discharging the functions of local government where these functions are not administered by Aboriginal and Island Councils.¹⁶⁶
- 2.186 Aside from the Torres Shire Council, other Island Councils would continue to carry out their existing functions. However, the House Standing Committee noted that the Island Councils may decide to contract out various functions to the Regional Assembly or, eventually, to merge with the Assembly.¹⁶⁷
- 2.187 The House Standing Committee proposed that the Regional Assembly be run ‘according to sound parliamentary principles’ and that the Regional

¹⁶³ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Torres Strait Islanders: A New Deal*, August 1997, pp. 50-52.

¹⁶⁴ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Torres Strait Islanders: A New Deal*, August 1997, pp. 52-55.

¹⁶⁵ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Torres Strait Islanders: A New Deal*, August 1997, pp. 52-55.

¹⁶⁶ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Torres Strait Islanders: A New Deal*, August 1997, pp. 55-58.

¹⁶⁷ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Torres Strait Islanders: A New Deal*, August 1997, pp. 55-58.

Assembly consider establishing a ‘cultural council’ of elders to advise the Regional Assembly on issues of cultural and traditional significance to all Torres Strait Islanders.¹⁶⁸

2.188 In a submission to the present inquiry, the Torres Strait Regional Assembly advised the Committee that it was working to design and implement a ‘regional assembly’ model of governance:

The TSRA Board at their Meeting 100 in September 2016 passed a resolution to establish a Regional Governance Committee. The committee is mandated by the TSRA Board to progress the design and implementation of a regional assembly model of governance for the Torres Strait. ... The TSRA Board at Meeting 107, unanimously agreed to establish a Torres Strait Regional Assembly by 2020. Following on from this, the TSRA Board at a recent Special Meeting 108 on 3 August 2018, endorsed the Torres Strait Regional Assembly Transition Plan developed by the Regional Governance Committee’s Secretariat Consultant, Mr Phillip Mills.

The TSRA is now working proactively with its key partners in the Torres Strait and Northern Peninsula Area of Australia to build on the existing governance arrangements so that by 2020 we will have the foundations to move to the next level of our region and our people’s journey.¹⁶⁹

2.189 Speaking to the Committee on Thursday Island, Mr Getano Lui of the Torres Strait Regional Authority explained the history behind the proposal to transition to assembly governance. Mr Lui emphasised:

This is not something new that we’re talking about. We are resurrecting, really, the aspiration of our people that has been lying dormant for that many years.¹⁷⁰

2.190 Mr Lui added that there had been discussions with the federal and state governments about the proposal.¹⁷¹

¹⁶⁸ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Torres Strait Islanders: A New Deal*, August 1997, pp. 63-64.

¹⁶⁹ Torres Strait Regional Authority, *Submission 461*, p. 2.

¹⁷⁰ Mr Getano (Jnr) Lui, Chair, Regional Governance Committee, Torres Strait Regional Authority, *Proof Committee Hansard*, Thursday Island, 2 October 2018, pp. 11-12.

¹⁷¹ Mr Getano (Jnr) Lui, Chair, Regional Governance Committee, Torres Strait Regional Authority, *Proof Committee Hansard*, Thursday Island, 2 October 2018, pp. 11-12.

Proposal for recognising local Indigenous bodies

- 2.191 The Committee is aware of a proposal made by Mr Nyunggai Warren Mundine AO for the establishment of local Aboriginal and Torres Strait Islander representative bodies.
- 2.192 The proposal is set out in Mr Mundine’s essay, *Practical Recognition from the Mobs’ Perspective*, published in May 2017 in advance of the National Constitutional Convention at Uluru.¹⁷²
- 2.193 In the essay, Mr Mundine stated that recognition should ‘not be about recognising a race of people, but about recognising First Nations of our country and the mobs to which each of us still belongs’.¹⁷³
- 2.194 Reflecting on the proposal for a national representative body for Aboriginal and Torres Strait Islander peoples, Mr Mundine suggested:
- The challenge of the proposal is a national body to represent all Indigenous Australians... But the establishment of a national body logically raises questions about how it is configured, what its powers are, who will serve on it, and who elects them.¹⁷⁴
- 2.195 Mr Mundine suggested that the body’s credibility would not come from its inclusion in the Constitution:
- A body that exists in the Constitution, but which is not fulfilling its purpose, or which is mired in disputes, loses credibility. Similarly, a body outside the Constitution that is representative and effective enjoys legitimacy. Credibility comes from being a voice that is considered, measured and represents our will and ambition as Indigenous Australians seeking to improve the welfare of the people we’re responsible for.¹⁷⁵
- 2.196 As an alternative to a national representative body, Mr Mundine proposed explicitly recognising the existing power of the Federal Parliament

¹⁷² Mr Nyunggai Warren Mundine AO, *Practical Recognition from the Mobs’ Perspective: Enabling our mobs to speak for country*, Uphold & Recognise Monograph Series, 2017.

¹⁷³ Mr Nyunggai Warren Mundine AO, *Practical Recognition from the Mobs’ Perspective: Enabling our mobs to speak for country*, Uphold & Recognise Monograph Series, 2017, p. 3.

¹⁷⁴ Mr Nyunggai Warren Mundine AO, *Practical Recognition from the Mobs’ Perspective: Enabling our mobs to speak for country*, Uphold & Recognise Monograph Series, 2017, p. 7.

¹⁷⁵ Mr Nyunggai Warren Mundine AO, *Practical Recognition from the Mobs’ Perspective: Enabling our mobs to speak for country*, Uphold & Recognise Monograph Series, 2017, p. 8.

to legislate for the ‘creation of local representative bodies for Indigenous communities’.¹⁷⁶ Mr Mundine explained:

This new constitutional provision would give no more power to the Federal Parliament than it already possesses. The Parliament would establish a statutory framework to give effect to this new constitutional provision. What this statutory framework would do is recognise:

- Indigenous Australia’s past, through a mechanism for the acknowledgement and preservation of cultures and languages, as well as the legacy of native title’s past to ensure enduring custodianship;
- The need for formal representative structures for Indigenous Australians today and tomorrow; and
- A vehicle for the Federal Government to partner with Indigenous Australians towards empowerment and to realise control and responsibility for the advancement of Indigenous health and welfare.¹⁷⁷

2.197 Mr Mundine suggested that the responsibilities of local bodies can either be defined in the Constitution or in legislation, but functions could include managing native title lands, the preservation of languages and culture, and taking responsibility for the advancement of Indigenous health and welfare.¹⁷⁸

2.198 Mr Mundine also suggested that local bodies might affiliate in representative state and federal bodies:

Logic says that, once local bodies are created, they’ll affiliate in representative State and Federal bodies. But, unlike a constitutionally created national body, any State or Federal body will be accountable to community through its connection to constituent ‘peoples’ or ‘nations’.¹⁷⁹

2.199 Two draft constitutional provisions giving effect to this proposal are discussed in Chapter 3.

¹⁷⁶ Mr Nyunggai Warren Mundine AO, *Practical Recognition from the Mobs’ Perspective: Enabling our mobs to speak for country*, Uphold & Recognise Monograph Series, 2017, p. 10.

¹⁷⁷ Mr Nyunggai Warren Mundine AO, *Practical Recognition from the Mobs’ Perspective: Enabling our mobs to speak for country*, Uphold & Recognise Monograph Series, 2017, p. 11.

¹⁷⁸ Mr Nyunggai Warren Mundine AO, *Practical Recognition from the Mobs’ Perspective: Enabling our mobs to speak for country*, Uphold & Recognise Monograph Series, 2017, pp. 10-11.

¹⁷⁹ Mr Nyunggai Warren Mundine AO, *Practical Recognition from the Mobs’ Perspective: Enabling our mobs to speak for country*, Uphold & Recognise Monograph Series, 2017, p. 10.

2.200 This proposal is discussed and developed in further detail in a submission to the inquiry from Dr Morris.¹⁸⁰ See Chapter 3 for this evidence.

Proposal made by the Indigenous Peoples Organisation

2.201 In a detailed submission to the inquiry, the Indigenous Peoples Organisation outlined a model for an 'Elected Representative Body'.¹⁸¹

2.202 Speaking to the Committee in Redfern, Ms Cathryn Eatock, Co-Chair of the organisation, described the proposal:

The IPO proposal is based on a regional model which is fed by voluntary local governance bodies that feed into a regional assembly. There is no limit on the number of voluntary local governance bodies, though in its operation voting would be limited to one vote per family. It would include local organisations, youth representatives, women and elders.

Each local governance body would elect or choose through traditional decision-making means a male and a female co-chair. The two local co-chairs would then attend a regional assembly where a further two co-chairs, one male and one female, would be elected to chair the regional assembly. These regional chair positions would be paid, full-time positions for the 36 regions based on an improved version of the previous ATSIC regional model. The regional assemblies' co-chairs would then total 72 positions, but these would then be divided into state and national responsibilities with an equal number of 36 women and men working at both state and national levels.

The regional structure will engage with ministers, government agencies and Aboriginal peak organisations and liaise with Aboriginal and Torres Strait Islander local governance bodies. All levels of governance will have youth, women and elders needs addressed as standing agenda items. The governance body would require three administrative arms to support the work of the elected regional chairs. It requires (1) a policy review and development arm to review and provide expert advice on current policies and legislation, to propose best practice policy and to foster the development of more effective approaches (2) a service delivery and infrastructure arm to provide expert advice and capacity to respond directly to government shortfalls in service delivery, housing and infrastructure requirements, with the ability to support local and regional community development initiatives, community wellbeing and capacity building and (3) an ethics and good governance arm to review decision making and operations, to address any conflicts of interest and to

¹⁸⁰ Dr Shireen Morris, *Submission 195*, pp. 25-29.

¹⁸¹ Indigenous Peoples Organisation, *Submission 338.1*.

ensure the highest standard of accountability and good governance. The ethics arm would provide advice to the representative body but also provide guidance, mediation and advice services to the broader Aboriginal and Torres Strait Islander community sector.¹⁸²

2.203 Responding to a question from the Committee, Ms Eatock suggested the model ‘borrows from’ but ‘improves’ the regional model of the former Aboriginal and Torres Strait Islander Commission:

... importantly, it incorporates a local governance body. That’s based on the Murdi Paaki trial but also the New South Wales Two Ways Together Partnership Community Program, which established 40 partnerships between communities, local governments and local working groups. I previously had the opportunity to do a review of that Two Ways Together model and found it to be strongly supported in all the communities.¹⁸³

2.204 The Committee notes that further detail on the proposal, including responses to the questions included in the Committee’s interim report, is included in the Indigenous Peoples Organisation’s submission.¹⁸⁴

A process of co-design

2.205 The Committee heard a range of evidence on a possible process of co-design between Aboriginal and Torres Strait Islander peoples and the Parliament or government to determine the detail of The Voice.

2.206 The Committee notes that, in giving evidence in relation to a process to determine the detail of The Voice, stakeholders expressed different views on the scope and timing of any such process—that is, there were different views on what level of detail should be determined, and whether or not this should occur before any referendum to constitutionalise The Voice.

2.207 The Committee notes the context in which this evidence was received. Nevertheless, the Committee suggests that a discussion of this evidence in general terms may assist in identifying broad principles that might inform any process of co-design to determine the detail of The Voice.

¹⁸² Ms Cathryn Eatock, Co-Chair, Indigenous Peoples Organisation, *Proof Committee Hansard*, Redfern, 5 October 2018, p. 25.

¹⁸³ Ms Cathryn Eatock, Co-Chair, Indigenous Peoples Organisation, *Proof Committee Hansard*, Redfern, 5 October 2018, p. 28.

¹⁸⁴ Indigenous Peoples Organisation, *Submission 338.1*.

2.208 More specific evidence in relation to the process of providing legal form to The Voice is discussed in the following chapter.

Aboriginal and Torres Strait Islander peoples working with Government should determine the detail of a First Nations Voice

2.209 As noted earlier in this chapter, the Committee observed that many stakeholders deferred to Aboriginal and Torres Strait Islander peoples to determine the detailed design of The Voice.

2.210 The Statement from the Heart Working Group, endorsed the Committee's commitment to deep consultation but cautioned that:

... strong evidence of co-design by Aboriginal and Torres Strait Islander people in the models presented will be required for sincere and meaningful engagement.¹⁸⁵

2.211 The New South Wales Aboriginal Land Council called for a process of co-design to be:

... well resourced, well informed, led by Aboriginal people, and have a clear mandate. NSWALC supports the dialogue process of the Referendum Council, and NSWALC is willing to participate and assist in hosting these discussions.¹⁸⁶

2.212 The National Native Title Council suggests that:

Rather than developing the detail of the model for a National Voice and Makarrata Commission through the processes of a Parliamentary Joint Select Committee, consideration should be given to developing the mechanisms for implementation of the above core principles through an appropriately resourced national Indigenous consultative process.¹⁸⁷

2.213 In a submission to the inquiry, the Technical Advisers to the Regional Dialogues and Uluru First Nations Constitutional Convention stated that the dialogues considered that the full detail of The Voice must be designed through a process that is led by Aboriginal and Torres Strait Islander peoples. The submission went on:

¹⁸⁵ Statement from the Heart Working Group, *Submission 302.1*, p. 6.

¹⁸⁶ New South Wales Aboriginal Land Council, *Submission 386.1*, p. 3.

¹⁸⁷ The National Native Title Council, *Submission 464*, p. 5.

... the body must have authority from, be representative of, and have legitimacy in Aboriginal and Torres Strait Islander communities across Australia.¹⁸⁸

2.214 Ms June Oscar AO, the Aboriginal and Torres Strait Islander Social Justice Commissioner, told the Committee that there should be ‘full and equal participation of Indigenous people in any design process’ in relation to The Voice.¹⁸⁹

2.215 The Indigenous Peoples Organisation submitted that it is of ‘fundamental importance’ that Aboriginal and Torres Strait Islander peoples determine the structure and form of The Voice:

Indeed, the freedom and power to shape representative structures is inherent in the phrase ‘self-determination’.¹⁹⁰

2.216 Dr Gabrielle Appleby also suggested that within any design process there was a need to prioritise self-determination of Aboriginal and Torres Strait Islander peoples. Dr Appleby went on:

As such I submit that it’s better to leave the process initially in the hands of First Nations people, who themselves may seek the input and deliberation in the process on the appropriate questions from non-Indigenous Australians and technical experts.¹⁹¹

2.217 Anderson et al emphasised the process should be ‘Indigenous-led’ but also noted the importance of ‘non-Indigenous input’:

The creation of a First Nations Voice effects a change not only to the arrangements governing Aboriginal and Torres Strait Islander peoples but also to the governing arrangements of Australia as a whole. Non-Indigenous people from across Australia must therefore also be able to have a genuine and

¹⁸⁸ Technical Advisers: Regional Dialogues and Uluru First Nations Constitutional Convention, *Submission 209*, p. 7.

¹⁸⁹ Ms June Oscar AO, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Proof Committee Hansard*, Canberra, 18 October 2018, p. 3.

¹⁹⁰ Indigenous Peoples Organisation, *Submission 338*, p. 7.

¹⁹¹ Dr Gabrielle Appleby, *Proof Committee Hansard*, Canberra, 11 September 2018, pp. 3-4.

significant say on how the Voice will operate in relation to the established institutions of Australian government.¹⁹²

2.218 The Committee heard about the relationship between the design of The Voice and its legitimacy and credibility among Aboriginal and Torres Strait Islander peoples.

2.219 Mr Keith Thomas, Chief Executive Officer of the South Australian Native Title Services said:

... I really think a lot of [the design of the Voice] has to come through a consultation process with Aboriginal people so that Aboriginal people have ownership of that process and ownership of the final product. If we don't have that, it's probably not going to work.¹⁹³

2.220 Professor Davis emphasised that the legitimacy of any process for designing and establishing an institution is important for the legitimacy of that institution going forward:

We know that in any public institution the trust and confidence of the people that that institution is intended to serve is really critical for the public law principle of legitimacy.¹⁹⁴

2.221 Anderson et al explained:

The right to self-determination has a constitutive aspect that is engaged at moments when new governing institutions are being created. ... when new governing institutions for Indigenous peoples are being created, they must, if they are to uphold self-determination, come into being through a process that involves the participation and obtains the consent of the Indigenous peoples concerned.¹⁹⁵

¹⁹² Ms Pat Anderson AO, Professor Megan Davis, Mr Noel Pearson, Associate Professor Sean Brennan, Dr Dylan Lino, Ms Gemma McKinnon, and Associate Professor Gabrielle Appleby, *Submission 479*, pp. 11, 15.

¹⁹³ Mr Keith Thomas, Chief Executive Officer, South Australian Native Title Services, *Proof Committee Hansard*, Adelaide, 5 July 2018, p. 9.

¹⁹⁴ Professor Megan Davis, Pro Vice-Chancellor Indigenous, University of New South Wales, *Proof Committee Hansard*, Canberra, 11 September 2018, p. 6.

¹⁹⁵ Ms Pat Anderson AO, Professor Megan Davis, Mr Noel Pearson, Associate Professor Sean Brennan, Dr Dylan Lino, Ms Gemma McKinnon, and Associate Professor Gabrielle Appleby, *Submission 479*, p. 14.

- 2.222 The Indigenous Peoples Organisation emphasised that engagement of the Aboriginal and Torres Strait Islander community in the development of The Voice is essential for it to have legitimacy in representing that community.¹⁹⁶
- 2.223 Referring to the experience of remote Aboriginal and Torres Strait Islander communities, the Hon. Fred Chaney AO and Mr Bill Gray AM described the ‘local sense of being voiceless and being consulted without being heard’:
- Answers unilaterally determined by government or Parliament will not be answers. A voice that Indigenous people do not think of as authentically their voice and is not regarded as legitimate, is without value. What the interim report identifies is that there are many issues to be considered and there will be differing views including among Indigenous people.¹⁹⁷
- 2.224 Quoting from a discussion paper on the design of Indigenous organisations, the Indigenous Peoples Organisation submitted that ‘the challenge is to develop distinctively Indigenous institutions which nonetheless facilitate effective engagement with government’.¹⁹⁸
- 2.225 It was suggested by some that the Parliament or the government should have a role in any process to determine the detail of a First Nations Voice.
- 2.226 Mr Thomas Mayor submitted that the questions posed in the Committee’s interim report relating to the design of a First Nations Voice ‘can only be meaningfully answered in an authentic way’ through ‘deep consultations between the Australian Government and Aboriginal and Torres Strait Islander peoples’.¹⁹⁹
- 2.227 Uphold & Recognise and the PM Glynn Institute submitted that ‘the only legitimate process that will have the confidence of all Australians is a process that is initially in the hands of both the Australian Parliament and First Nations people’.²⁰⁰

¹⁹⁶ Indigenous Peoples Organisation, *Submission 338*, p. 7. See also: Law Council of Australia, *Submission 288.1*, p. 6.

¹⁹⁷ The Hon. Fred Chaney AO and Mr Bill Gray AM, *Submission 405*, pp. 2-4.

¹⁹⁸ Indigenous Peoples Organisation, *Submission 338*, p. 7. See also: David Martin, ‘Rethinking the Design of Indigenous Organisations: The Need for Strategic Engagement’, *Discussion Paper No. 248*, Centre for Aboriginal Economic Policy Research, 2003, 11.

¹⁹⁹ Mr Thomas Mayor, *Submission 247.1*, p. 3. See also: Gilbert + Tobin, *Submission 315.1*, p. 4.

²⁰⁰ Uphold & Recognise and PM Glynn Institute, *Submission 423*, p. 2.

2.228 Speaking in the context of the need to resolve a sufficient level of detail prior to any referendum in relation to The Voice, Professor Williams suggested that any design process should be led by Aboriginal and Torres Strait Islander peoples, but should also ‘educate and build in the broader community’:²⁰¹

How do we design the process that gets us a rigorous, safe, sound model while at the same time educating, building support and maintaining Indigenous leadership of the process? That is the big question for me.²⁰²

2.229 Similarly, Mr Hobbs submitted:

The challenge – and the opportunity – is that no one knows the detail of what a First Nations Voice will look like. ... We do know, however, that a First Nations Voice will only be effective if it is regarded as legitimate by the Aboriginal and Torres Strait Islander community and credible by government and the Australian public at large.²⁰³

2.230 Mr Chaney and Mr Gray recommended that the Parliament work with Aboriginal and Torres Strait Islander peoples to find answers, rather than imposing the answers:

Such consultations will take time and should not be rushed.²⁰⁴

Suggested approaches to co-design

2.231 The Committee is aware of a range of views on how any co-design process should proceed, including what matters should be determined in any co-design process and who should conduct the process.

2.232 The Committee notes that some stakeholders referred to past processes that might inform or provide a model for any future co-design process, including regional dialogues conducted by the Referendum Council. Of particular significance as a best practice standard was the consultation work that led into the establishment of ATSIC. On the Aboriginal side, leaders such as Charles Perkins and Lowitja O’Donoghue led complex and wide-ranging efforts to co-design new institutions, ably supported by non-Aboriginal leaders such as Nugget Coombs and Gerry Hand.

²⁰¹ Professor George Williams AO, *Proof Committee Hansard*, Canberra, 18 September 2018, p. 2.

²⁰² Professor George Williams AO, *Proof Committee Hansard*, Canberra, 18 September 2018, p. 7.

²⁰³ Mr Harry Hobbs, *Submission 189.1*, pp. 6-7.

²⁰⁴ The Hon. Fred Chaney AO and Mr Bill Gray AM, *Submission 405*, p. 3.

2.233 The Committee heard that one of the important design questions to be addressed in any design process would be interface between The Voice and existing local and regional organisations.²⁰⁵ Mr Ken Sumner, Chief Executive Officer of the Moorundi Aboriginal Community Controlled Health Service, said:

A First Nations voice should be designed in collaboration with Indigenous people so that it complements and supports regional and local empowerment.²⁰⁶

2.234 Dr Appleby submitted that some design questions should be addressed exclusively by Aboriginal and Torres Strait Islander peoples, while others could be addressed through a co-design process:

I would submit that questions about representation, the desired function of the voice and what it can achieve within communities, for instance, are things that should be driven by First Nations, as they are uniquely placed to inform these questions. However, there are other questions that affect the operation of the wider constitutional system which could be part of a co-design process. In addition, there are many technical questions that would require an intimate understanding of the Constitution and parliamentary systems, and as such the answers to these questions should be informed by experts.²⁰⁷

2.235 In a submission, Uphold & Recognise and the PM Glynn Institute proposed a two-stage process of consultation:

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

In the second stage, the people within each local/regional community need to be consulted about how the local/regional voice for their community should operate.²⁰⁸

2.236 The submission explained that the first stage of consultation would involve Aboriginal and Torres Strait Islander peoples working with the Parliament

²⁰⁵ Associate Professor Kristen Rundle, Co-Director, Centre for Comparative Constitutional Studies, *Proof Committee Hansard*, Melbourne, 26 September 2018, pp. 33-34.

²⁰⁶ Mr Ken Sumner, Chief Executive Officer, Moorundi Aboriginal Community Controlled Health Service, *Proof Committee Hansard*, Adelaide, 5 July 2018, p. 36.

²⁰⁷ Dr Gabrielle Appleby, *Proof Committee Hansard*, Canberra, 11 September 2018, pp. 3-4.

²⁰⁸ Uphold & Recognise and PM Glynn Institute, *Submission 423*, pp. 2, 20.

to determine whether they prefer a ‘bottom-up’ or ‘top-down’ structure for The Voice, and then identifying and revising a specific model. The second stage would occur after legislation enabling The Voice is passed.²⁰⁹

2.237 While emphasising that the views of Aboriginal and Torres Strait Islander peoples should guide the development of The Voice, Mr Hobbs also proposed a two-stage process of consultation:

... a first stage of meaningful consultation designed and led by Indigenous peoples could be undertaken with Indigenous communities across the country. This stage could focus on developing and articulating key themes and principles underlying a representative body...²¹⁰

2.238 Mr Hobbs suggested that this stage might be ‘loosely’ based on the Referendum Council process or the Victorian treaty process, which are discussed later in this section. Mr Hobbs went on:

The results of these consultations should inform the drafting of a Bill. It is imperative that a second round of detailed consultations is then run to allow Indigenous people and communities to understand the specific proposal. Although a Bill will exist at this stage, Parliament should commit to any modifications desired by Indigenous peoples.²¹¹

2.239 The Public Law and Policy Research Unit submitted that there was a need for Aboriginal and Torres Strait Islander peoples to clarify their expectations of The Voice, after which there should be a further process of consultation between representatives of Aboriginal and Torres Strait Islander communities and the government to consider issues of the function, operation, structure, membership, and implementation of The Voice.²¹²

2.240 It also argued that ‘the starting point of these consultations ought not be a presentation of potential models for the consideration of Aboriginal and Torres Strait Islander peoples’, instead suggesting a continuation of the regional dialogue process:

Having identified the Voice as the core claim, it is incumbent on Aboriginal and Torres Strait Islander peoples to prepare a comprehensive outline for the Voice.

²⁰⁹ Uphold & Recognise and PM Glynn Institute, *Submission 423*, pp. 20-21.

²¹⁰ Mr Harry Hobbs, *Submission 189.1*, pp. 2-3.

²¹¹ Mr Harry Hobbs, *Submission 189.1*, pp. 2-3.

²¹² Public Law and Policy Research Unit, *Submission 408*, pp. 2-3.

As a matter of process, this would give Aboriginal and Torres Strait Islander peoples ownership over the referendum proposal and ensure that it reflects their needs and aspirations. This is a tangible benefit that cannot be achieved through a top-down process.²¹³

2.241 The Cape York Institute submitted that a ‘clear and transparent’ process of consultation would be required to settle the detailed design of The Voice, including its composition, functions, powers, and procedures. The Institute recommended that while the process should take place after a referendum, a framework for the process could be set out in advance.²¹⁴

2.242 A similar but more detailed proposal was received in a submission from Anderson et al:

Before the referendum, the Voice design process should be set out in a draft Bill that is endorsed in a motion by Parliament and released to the public alongside the referendum question. ... it involves the following:

- The process for designing the Voice will be overseen by a Voice Design Council.
- The Voice Design Council should be populated by non-parliamentary members of the Prime Minister’s Expert Panel on the Recognition of Aboriginal and Torres Strait Islander peoples in the Constitution and the Referendum Council. This ensures continuity from the previous processes that have been undertaken and to harness the depth of knowledge that has been gained through these processes. Additional appointments may be made to ensure geographic representation across the States and Territories, as well as equal gender representation and equal Indigenous and non-Indigenous membership.
- The Indigenous members of the Council will constitute an Indigenous Steering Committee, who will take primary responsibility for coordinating the process, guided by the advice of the full Council.
- Twelve Voice Design Dialogues with First Nations delegates from around the country will deliberate on the design of the First Nations Voice.
- Following the Dialogues, a National Convention comprising 10 delegates from each Dialogue will convene to synthesise the work of the Dialogues into principles for drafting a Bill to establish the Voice.

²¹³ Public Law and Policy Research Unit, *Submission 408*, pp. 2-3.

²¹⁴ Cape York Institute, *Submission 244.3*, p. 4. See also: Dr Shireen Morris, Senior Policy Adviser and Constitutional Reform Research Fellow, *Proof Committee Hansard*, Townsville, 3 October 2018, pp. 9-10.

- The Council’s Indigenous Steering Committee will oversee the preparation of a draft Bill establishing the First Nations Voice by the Office of Parliamentary Counsel, in accordance with the Drafting Principles determined at the National Convention.
- The work of the Indigenous Steering Committee and the delegates to the Dialogues and National Convention will be guided by a set of Design Principles drawn from the work undertaken by the Referendum Council ...
- The Council will produce a final report that details the process undertaken and includes a copy of a draft Bill establishing the First Nations Voice. This report will be tabled in the Commonwealth Parliament.
- A Parliamentary Joint Committee will consider the Council’s Report and the draft Bill and, after conducting a full parliamentary inquiry and receiving further input from the wider Australian community, recommend whether the Bill should be passed by Parliament.
- Parliament will have the final say on what form the First Nations Voice takes.²¹⁵

2.243 The submission from Anderson et al set out suggested ‘guiding principles’ derived from the Referendum Council regional dialogue process.²¹⁶

2.244 The Committee heard from Professor Tom Calma AO, former Aboriginal and Torres Strait Islander Social Justice Commissioner, that a challenge in any co-design process would be how Aboriginal and Torres Strait Islander representatives are selected or appointed to participate in the process. Professor Calma suggested that these representatives would need to be ‘acceptable to ordinary Aboriginal and Torres Strait Islander people’.²¹⁷

2.245 Professor Calma suggested that Congress should be consulted in the process of determining who would be involved in any co-design process.²¹⁸

²¹⁵ Ms Pat Anderson AO, Professor Megan Davis, Mr Noel Pearson, Associate Professor Sean Brennan, Dr Dylan Lino, Ms Gemma McKinnon, and Associate Professor Gabrielle Appleby, *Submission 479*, pp. 13-14.

²¹⁶ Ms Pat Anderson AO, Professor Megan Davis, Mr Noel Pearson, Associate Professor Sean Brennan, Dr Dylan Lino, Ms Gemma McKinnon, and Associate Professor Gabrielle Appleby, *Submission 479*, pp. 17-18. See also: Cape York Institute, *Submission 244.3*, p. 4; Law Council of Australia, *Submission 288.1*, p. 7.

²¹⁷ Professor Tom Calma AO, *Proof Committee Hansard*, Canberra, 18 October 2018, p. 3.

²¹⁸ Professor Tom Calma AO, *Proof Committee Hansard*, Canberra, 18 October 2018, p. 3.

- 2.246 Uphold & Recognise and the PM Glynn Institute suggested that its proposed two-stage consultation process would be initially overseen by ‘an independent person’ and then by an ‘accreditation commission’ established by legislation.²¹⁹
- 2.247 Professor Davis argued that a new entity was required for any co-design process in relation to The Voice:
- What that would look like would be the subject of discussions and debate, but it would need to be one that is independent, is transparent and is at arm’s length from the bulk of the processes that exist in Australia today with respect to Indigenous affairs. I say that because of the kinds of feedback and the tenor of the feedback that we got in the dialogues with respect to existing institutions.²²⁰
- 2.248 As outlined above, Anderson et al recommended that a ‘Voice Design Council’ be established with non-parliamentary members of the Expert Panel and the Referendum Council.²²¹
- 2.249 However, the Indigenous Peoples Organisation suggested that any consultation process should be overseen by people distinct from those who ‘managed and significantly contributed to the Referendum consultation process’, to ensure a ‘perception of broader community ownership’ not tied to previous processes.²²²
- 2.250 The Indigenous Peoples Organisation recommended the establishment of a Makarrata Commission, with one of its functions being to ‘undertake the complex negotiations required with Indigenous Peoples to develop the terms and formation of a national representative body’.²²³

²¹⁹ Uphold and Recognise and PM Glynn Institute, *Submission 423*, p. 20.

²²⁰ Professor Megan Davis, Pro Vice-Chancellor Indigenous, University of New South Wales, *Proof Committee Hansard*, Canberra, 11 September 2018, p. 6. See also: Ms Patricia Anderson AO, *Proof Committee Hansard*, Canberra, 11 September 2018, p. 2.

²²¹ Ms Pat Anderson AO, Professor Megan Davis, Mr Noel Pearson, Associate Professor Sean Brennan, Dr Dylan Lino, Ms Gemma McKinnon, and Associate Professor Gabrielle Appleby, *Submission 479*, pp. 13-14.

²²² Indigenous Peoples Organisation, *Submission 338.1*, p. 24.

²²³ Indigenous Peoples Organisation, *Submission 338*, p. 9; Indigenous Peoples Organisation, *Submission 338.1*, p. 24.

2.251 The Indigenous Peoples Organisation also recommended a discussion paper based on evidence to this inquiry be developed for consultation.²²⁴

2.252 The Committee also received suggestions for ensuring that any process of consultation would be culturally appropriate. For example, Aunty Pam Griffin, an Aboriginal Elder from Wodonga, explained that consultations often fail to understand or abide by Indigenous ways or customs:

It is important to meet the communities where they are at, fitting with their agendas and timeframe where possible and allowing enough time in consultation to ensure that a common understanding is achieved through straight talking, plain English and in some circumstances using an interpreter. There has been too much effort spent on outcomes that are not effective.²²⁵

2.253 Similarly, the Indigenous Peoples Organisation submitted:

Undertaking culturally appropriate consultation processes requires striving to seek consensus or full agreement, or as close as possible to full agreement ... Sufficient discussion time and efforts made to consider and incorporate concerns raised in some way generally support stronger endorsements than a mere simple majority.²²⁶

2.254 Dr Lynore Geia, speaking to the Committee on Palm Island, suggested that Aboriginal and Torres Strait Islander communities would need to be informed so that they could decide how to participate in any process:

People need to be given the time to reflect and think and have ownership of the process as well. That first process, before we even get to talk about community awareness, might take three or four months of constant talking so that people can become familiar with it and think about and talk about it in their own families and say: 'Yes, that's a good thing. Let's get involved.'²²⁷

Evidence on previous consultation processes

2.255 As noted above, several stakeholders referred to previous processes of institutional design and consultation with Aboriginal and Torres Strait

²²⁴ Indigenous Peoples Organisation, *Submission 338.1*, p. 21.

²²⁵ Aunty Pam Griffin, *Submission 60*, p. 1. See also: Mr Brian Blake, *Proof Committee Hansard*, Wodonga, 24 September 2018, p. 33.

²²⁶ Indigenous Peoples Organisation, *Submission 338.1*, p. 24.

²²⁷ Dr Lynore Geia, *Proof Committee Hansard*, Palm Island, 3 October 2018, p. 16.

Islander peoples that might inform any future process of co-design in relation to The Voice.

Referendum Council's regional dialogue process

2.256 The Committee heard that the Referendum Council's regional dialogue process was a model that could inform the co-design of a First Nations Voice.²²⁸ Details of the process are set out in the Final Report of the Referendum Council.²²⁹ The report explains:

The aim of the First Nations Regional Dialogues was to enter into a dialogue with Aboriginal and Torres Strait Islander peoples about what constitutional recognition involves from their perspectives. The format was designed to give participants a chance to examine the main options for recognition that had been put forward, to understand them in detail, to discuss the pros and cons of each proposal and to explore their potential significance for the relationship between Aboriginal and Torres Strait Islander peoples and other Australians. Through this process, delegates were invited to identify an approach to recognition that seemed most likely to be meaningful.²³⁰

2.257 Following a trial dialogue in Melbourne in November 2016 to test the methodology, a total of 12 dialogues (and one additional information day) were held around Australia from December 2016 to May 2017. Each dialogue spanned over two and a half days.²³¹

2.258 The dialogues were delivered in partnership with local Aboriginal and Torres Strait Islander organisations. Up to 100 delegates were invited to each. Two convenors were selected from the local region to facilitate discussions according to an agenda prepared by the Referendum Council's Indigenous Steering Committee, and five local working group leaders,

²²⁸ For example: Mr Thomas Mayor, *Submission 247.1*, p. 3; Gilbert + Tobin, *Submission 315.1*, p. 4; Prime Minister's Indigenous Advisory Council, *Submission 419*, p. 14; Ms Patricia Anderson AO, *Proof Committee Hansard*, Canberra, 11 September 2018, p. 2; Dr Gabrielle Appleby, *Proof Committee Hansard*, Canberra, 11 September 2018, p. 3; Ms Pat Anderson AO, Professor Megan Davis, Mr Noel Pearson, Associate Professor Sean Brennan, Dr Dylan Lino, Ms Gemma McKinnon, and Associate Professor Gabrielle Appleby, *Submission 479*, pp. 12-18.

²²⁹ Referendum Council, *Final Report of the Referendum Council*, pp. 109-113.

²³⁰ Referendum Council, *Final Report of the Referendum Council*, pp. 110-111.

²³¹ Referendum Council, *Final Report of the Referendum Council*, pp. 110-113.

supported by legal and technical advisors, facilitated working group discussions at each dialogue.²³²

2.259 Speaking to the Committee in Canberra, Ms Patricia Anderson AO, Co-Chair of the Referendum Council, outlined some of the practical considerations that informed the process, including:

- accounting for factors that would impact upon the participation of the community, such as ceremony, wet season, cyclone season, and sporting events;
- holding dialogues on weekends rather than during the week, so that people could attend without losing income;
- ensuring that the dialogues involved a sample of people with cultural authority to represent communities;
- working with trusted local individuals, supported by experts, rather than professional facilitators; and
- facilitating participating in language where required.²³³

2.260 Ms Anderson explained that the participation of some individuals and organisations was restricted:

We tried to ensure that peak national organisations that have ongoing access to parliament, parliamentarians and other entities with skin in the game were restricted in dialogues to ensure those who do not normally have a voice in communities could participate fully.²³⁴

2.261 Ms Anderson also noted that the extent of the process was limited by the Referendum Council's budget.²³⁵

2.262 Ms Anderson urged the Committee to consider the importance of 'dialogue and deliberation' in any co-design process in relation to The Voice.²³⁶ More specifically, Ms Anderson shared her views on the benefits of adopting the regional dialogue process:

²³² Referendum Council, *Final Report of the Referendum Council*, pp. 111-112.

²³³ Ms Patricia Anderson AO, *Proof Committee Hansard*, Canberra, 11 September 2018, pp. 2-3.

²³⁴ Ms Patricia Anderson AO, *Proof Committee Hansard*, Canberra, 11 September 2018, pp. 2-3.

²³⁵ Ms Patricia Anderson AO, *Proof Committee Hansard*, Canberra, 11 September 2018, p. 2. See also: Professor Megan Davis, Pro Vice-Chancellor Indigenous, University of New South Wales, *Proof Committee Hansard*, Canberra, 11 September 2018, p. 9.

²³⁶ Ms Patricia Anderson AO, *Proof Committee Hansard*, Canberra, 11 September 2018, p. 2.

... it is Aboriginal designed and led; it is a proven method to engender consensus among the large number of First Nations, because dialogue productively incorporates tension and disagreement; it allows voices not normally engaged in Indigenous affairs; and it is based on the characteristics of (a) impartiality, (b) access to relevant information, (c) open and constructive dialogue, and (d) mutually agreed and owned outcomes—eventually.²³⁷

2.263 Dr Appleby emphasised that the regional dialogues represent ‘best practice’ in relation to any co-design process in relation to The Voice, and should be used as a ‘starting point’ for any consultation with Aboriginal and Torres Strait Islander peoples:

One of the most remarkable features of the dialogues and the convention was the achievement of such a high degree of consensus on complex political issues. This was attributable to the high level of trust and confidence that people had in the process that was conducted over the preceding 12 months. It was an Indigenous-designed and an Indigenous-led model of community deliberation that offered genuine participation and informed participation, and that resulted in strong ownership of the outcome.²³⁸

2.264 Similarly, the Prime Minister’s Indigenous Advisory Council submitted that the dialogue process was ‘leading practice in Aboriginal and Torres Strait Islander consultation and consensus making’.²³⁹

2.265 Mr Thomas Mayor wrote that the dialogue process was ‘informative and educational’ and ‘maximised the opportunity for considered and intelligent positions to be determined’.²⁴⁰

2.266 Dr Appleby noted that, as the objective of co-design of The Voice would be different to that of the Referendum Council’s process, there would need to be differences between the two processes. However, Dr Appleby also emphasised that ‘a lot could be learnt’ from the regional dialogues:

... particularly about First Nations participation in designing and running the process, in relation to the need for civics education to accompany the process

²³⁷ Ms Patricia Anderson AO, *Proof Committee Hansard*, Canberra, 11 September 2018, p. 2.

²³⁸ Dr Gabrielle Appleby, *Proof Committee Hansard*, Canberra, 11 September 2018, p. 3.

²³⁹ Prime Minister’s Indigenous Advisory Council, *Submission 419*, p. 14.

²⁴⁰ Mr Thomas Mayor, *Submission 247.1*, p. 3.

and the need for sufficient time to allow breakout groups to ensure delegates are informed and all voices are heard within the process.²⁴¹

2.267 The Committee notes observations about a lack of awareness among some Aboriginal and Torres Strait Islander communities about the Referendum Council's regional dialogue process, and also some concerns about the nature of the process, including how delegates were selected and how the dialogues were conducted. For example, the Indigenous Peoples Organisations submitted:

Consultation processes should also be open to those interested in attending, limits on participation during the referendum consultations was a criticism among some community members who feared a pre-determined outcome.²⁴²

2.268 The Wiradjuri Buyaa Council opposed the *Statement from the Heart* on the basis of the 'exclusive and select consultation process which restricted and disallowed an appropriate Wiradjuri Nation response in accordance with Wiradjuri Law and custom'.²⁴³

2.269 Mr Nathan Moran, Chief Executive Officer of the Metropolitan Local Aboriginal Land Council, told the Committee:

At that regional dialogue at Rooty Hill, we did state some up-front concerns about the process for selecting people to attend the dialogues. ... There was a bit of contention about people going along. Were they representing community? Were they representing themselves? Were they elected representatives? Were they cultural representatives, or other?²⁴⁴

2.270 Ms Yvonne Weldon, Chairperson of the Land Council, and Ms Ann Weldon also expressed concerns about selection process and about the conduct of the Sydney dialogue.²⁴⁵

²⁴¹ Dr Gabrielle Appleby, *Proof Committee Hansard*, Canberra, 11 September 2018, pp. 3-4.

²⁴² Indigenous Peoples Organisation, *Submission 338.1*, p. 24.

²⁴³ Wiradjuri Buyaa Council, *Submission 468*, p. 1.

²⁴⁴ Mr Nathan Moran, Chief Executive Officer, Metropolitan Local Aboriginal Land Council, *Proof Committee Hansard*, Redfern, 5 October 2018, p. 3.

²⁴⁵ Ms Yvonne Weldon, Chairperson, Metropolitan Local Aboriginal Land Council, *Proof Committee Hansard*, Redfern, 5 October 2018, pp. 5-6; Ms Ann Weldon, *Proof Committee Hansard*, Redfern, 5 October 2018, pp. 7-8.

Process leading to the establishment of the National Congress of Australia's First Peoples

- 2.271 The Committee heard evidence about the consultation process that led to the establishment of the National Congress of Australia's First Peoples.
- 2.272 This consultation process and its outcomes are described in a 2009 report, *Our future in our hands*, which was prepared by an independent Steering Committee chaired by the then Aboriginal and Torres Strait Islander Social Justice Commissioner, Professor Tom Calma AO.²⁴⁶
- 2.273 As outlined in the report, the Australian Government requested the establishment of the Steering Committee in December 2008 to develop a preferred model for a National Representative Body for Aboriginal and Torres Strait Islander peoples by July 2009.²⁴⁷
- 2.274 The 2009 report explains that the consultation process involved several stages, each involving a range of activities.
- 2.275 Initial consultations were undertaken by the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) from July to December 2008, and included:
- approximately 80 regional and local consultation meetings across every state and the Northern Territory;
 - meetings with peak organisations; and
 - a written submission process that attracted 106 public submissions.²⁴⁸
- 2.276 Further consultations were led by the Steering Committee from December 2008 to July 2009, and included:
- a second written submission process;
 - a national online survey open to Aboriginal and Torres Strait Islander people;
 - focus group meetings conducted by the Steering Committee;
 - discussions with Indigenous and non-Indigenous peak groups and organisations;
 - obtaining information from state and territory governments;

²⁴⁶ Australian Human Rights Commission, *Our future in our hands*, 2009.

²⁴⁷ Australian Human Rights Commission, *Our future in our hands*, 2009, p. 1.

²⁴⁸ Australian Human Rights Commission, *Our future in our hands*, 2009, pp. 41-42.

- a toolkit to help communities run their own meetings to discuss the representative body; and
- a national competition to name the representative body.²⁴⁹

2.277 The consultations involved the preparation of two community guides to inform discussion. Around 50,000 copies of each guide were distributed.²⁵⁰ Information from earlier consultations was made publicly available and framed the discussion at later consultations.²⁵¹

2.278 The consultations also included a national workshop:

In March 2009, the Steering Committee convened a national workshop of 100 Aboriginal and Torres Strait Islander people in Adelaide to identify the key elements of a new national representative body. 50 men and 50 women were selected based on merit following a public nomination process, with delegates selected to ensure a gender balance, as well as representation of urban, regional and remote locations.²⁵²

2.279 Speaking to the Committee in Canberra, Professor Calma suggested that this process was a ‘potential way forward’ for developing the design of a First Nations Voice.²⁵³ Professor Calma explained that the selection process for the national workshop was led by an ‘eminent group of Aboriginal and Torres Strait Islander people’ who selected participants ‘based on a whole range of demographics, from age to gender to remoteness and urban representation and so forth.’²⁵⁴

2.280 Professor Calma told the Committee that the workshop was an effective process of co-design:

That group got together to consider how the national congress would be formed. It was a very unbiased process. I think it was enhanced by having electronic voting, secret voting, on any issues that were considered where they were being challenged. At the end of the day we got a process where co-design worked very effectively and was done in a way that was very unbiased and very futuristic in foresight, and the way forward. I think

²⁴⁹ Australian Human Rights Commission, *Our future in our hands*, 2009, pp. 15, 41-42.

²⁵⁰ Australian Human Rights Commission, *Our future in our hands*, 2009, pp. 41-42.

²⁵¹ Australian Human Rights Commission, *Our future in our hands*, 2009, p. 15.

²⁵² Australian Human Rights Commission, *Our future in our hands*, 2009, pp. 41-42.

²⁵³ Professor Tom Calma AO, *Proof Committee Hansard*, Canberra, 11 September 2018, pp. 5-6.

²⁵⁴ Professor Tom Calma AO, *Proof Committee Hansard*, Canberra, 11 September 2018, pp. 5-6.

that really does bode well for a model moving forward in being able to develop what a voice may look like.²⁵⁵

2.281 Responding to Professor Calma's comments on the process, Professor Davis stated:

... it was dominated by many people involved in peak organisations, universities and bureaucratic structures. To that end, I think you can distinguish the dialogue process which engaged local communities to identify those people.²⁵⁶

2.282 Congress submitted that many of the concerns expressed by Aboriginal and Torres Strait Islander peoples during these consultations are still 'highly relevant' today, and should be incorporated into the design of The Voice.²⁵⁷

Victorian treaty process

2.283 The Committee also heard evidence about the consultation involved in the Victorian Government's ongoing process towards a treaty in that state, which includes the design and establishment of an Aboriginal Representative Body.

2.284 Evidence in relation to the proposed structure for the representative body is discussed earlier in this chapter (see paragraph 2.146).

2.285 Mr Gargett gave the Committee an overview of the process:

In July 2016, the government established an Aboriginal Treaty Working Group to lead consultation with the Aboriginal community. The working group is comprised of members nominated by key Aboriginal organisations, such as the Victorian Aboriginal Heritage Council and the Federation of Victorian Traditional Owner Corporations. Members were also appointed by the minister for their personal experience and expertise following an expression of interest process.

In November 2016 and in March 2017, the Aboriginal Treaty Working Group led two phases of community consultation on the design of the Aboriginal Representative Body. Consultations occurred through open, statewide forums; regional and metropolitan community consultations; online submissions; and

²⁵⁵ Professor Tom Calma AO, *Proof Committee Hansard*, Canberra, 11 September 2018, pp. 5-6.

²⁵⁶ Professor Megan Davis, Pro Vice-Chancellor Indigenous, University of New South Wales, *Proof Committee Hansard*, Canberra, 11 September 2018, p. 6.

²⁵⁷ National Congress of Australia's First Peoples, *Submission 292.1*, p. 25.

community led treaty circles. Following this, in November and December 2017, an Aboriginal Community Assembly was held over six days. It was a representative group of Aboriginal Victorians selected independently from government following an open expression of interest process. This group made recommendations on outstanding elements on the design of the Aboriginal Representative Body.

Over 7,000 Aboriginal Victorians were engaged through those phases of consultation. In December 2017, the Victorian Treaty Advancement Commissioner, Jill Gallagher AO, was appointed to lead the process independently from government. This year, the commissioner has led a further series of treaty roadshows with Aboriginal communities across Victoria. These roadshows have engaged more than a thousand Aboriginal Victorians across 30 communities, providing the regional and local engagement which is vital for a legitimate treaty process.²⁵⁸

- 2.286 Mr Gargett explained that, while the Aboriginal Treaty Working Group operated as an advisory body to government, the establishment of the Office of the Victorian Treaty Advancement Commissioner provided for greater independence for Aboriginal Victorians, ensuring that the process had legitimacy.²⁵⁹
- 2.287 Mr Gargett emphasised that the process was designed to be open and inclusive, ensuring that all Aboriginal Victorians can participate, even when they are unable to attend in meetings.²⁶⁰
- 2.288 Mr Gargett went into further detail about the community assembly. He explained that an independent panel was convened to select participants following an open expression of interest process:

We had three esteemed Aboriginal leaders within the community, who are separate from government, and they reviewed all the applications... It was a broad sample in terms of age split, so youth, middle-aged and elder cohorts. Gender balance was fifty-fifty split broadly speaking. Then across each region of Victoria that group came together in two lots of three days, which was deliberately done to enable them to discuss the key issues and then go back to

²⁵⁸ Mr Andrew Gargett, Director, Strategy, Engagement and Community, Aboriginal Victoria, *Proof Committee Hansard*, Melbourne, 26 September 2018, p. 14.

²⁵⁹ Mr Andrew Gargett, Director, Strategy, Engagement and Community, Aboriginal Victoria, *Proof Committee Hansard*, Melbourne, 26 September 2018, pp. 14, 17.

²⁶⁰ Mr Andrew Gargett, Director, Strategy, Engagement and Community, Aboriginal Victoria, *Proof Committee Hansard*, Melbourne, 26 September 2018, pp. 16-17.

their community to seek feedback and information, discuss with them and then come back and finalise the discussions. Obviously, the issues they're talking about such as: how do you determine who votes, are there electoral regions—it's really complex and challenging stuff.²⁶¹

2.289 Ms Gallagher explained how she approached the consultation process:

My particular consultative model was to go out on country and talk to people about what are the possibilities now that we have a government that is prepared to explore treaties with us... for me it was important to go out on country to talk to people and get their views but not go out with a clean slate. We've already had two years of developing design principles, and they're the principles the community came up with.

...

Then, through my additional engagement through the treaty roadshows, we heard other concerns. ... So we came back and incorporated that into our model. It's about continued conversations, with communications being very clear, and bringing that back and seeing how we can test those models and invest in those models. To me, that's the key.²⁶²

2.290 Ms Gallagher also explained how she had sought to capture the views of Aboriginal elders in the consultation process, including through a state-wide elders' forum. Ms Gallagher explained that this would be important to the authority of the representative body once it is established.²⁶³

2.291 Mr Gargett told the Committee that the Aboriginal Representative Body was required to be established by July 2019—three years from the establishment of the Aboriginal Treaty Working Group.²⁶⁴ Mr Gargett commented on this timeframe:

It's important that when it comes to really foundational issues such as representation and ability to have a voice we bring the community with us. There are really ingrained challenges that have developed over 200 years that

²⁶¹ Mr Andrew Gargett, Director, Strategy, Engagement and Community, Aboriginal Victoria, *Proof Committee Hansard*, Melbourne, 26 September 2018, pp. 16-17.

²⁶² Ms Jill Gallagher AO, Victorian Treaty Advancement Commissioner, Victorian Treaty Advancement Commission, *Proof Committee Hansard*, Melbourne, 26 September 2018, p. 26.

²⁶³ Ms Jill Gallagher AO, Victorian Treaty Advancement Commissioner, Victorian Treaty Advancement Commission, *Proof Committee Hansard*, Melbourne, 26 September 2018, p. 30.

²⁶⁴ Mr Andrew Gargett, Director, Strategy, Engagement and Community, Aboriginal Victoria, *Proof Committee Hansard*, Melbourne, 26 September 2018, p. 17.

mean quick resolution isn't necessarily the right way to go. Having said that, we had nothing in 2016 and we've now got a legislated process with the anticipation of a representative body within that period of time, so I think things can be achieved.²⁶⁵

2.292 Ms Gallagher acknowledged that it hadn't been a quick process:

We know it's not just us sitting down and designing a body; it's that continued engagement—the road trips, the treaty roadshows that we've just completed—and a lot more still has to happen.²⁶⁶

2.293 Ms Gallagher went on:

What I'm hearing from the community, as we travel throughout the state, is, 'Why is it taking so long?' But then, in other corners, we hear it's too quick. It's a tricky thing to balance the aspirations out there; it really is.²⁶⁷

Committee comment

2.294 As noted at the beginning of this chapter, the Committee came to the view that its primary task was to expand on the detail of the proposal for a First Nations Voice.

2.295 Throughout this inquiry, the Committee has sought to elicit evidence to better understand the nature of the proposal and to elucidate principles and models that might inform the design of The Voice.

2.296 The Committee notes that it received far fewer submissions responding in detail to the questions set out in the interim report than it had anticipated. Given the poor response it is difficult to provide detail for the structure and operation of The Voice or voices without a process of co-design.

2.297 Nevertheless, in the evidence received following the presentation of the interim report the Committee continued to observe strong support for the concept of a First Nations Voice.

²⁶⁵ Mr Andrew Gargett, Director, Strategy, Engagement and Community, Aboriginal Victoria, *Proof Committee Hansard*, Melbourne, 26 September 2018, p. 22.

²⁶⁶ Ms Jill Gallagher AO, Victorian Treaty Advancement Commissioner, Victorian Treaty Advancement Commission, *Proof Committee Hansard*, Melbourne, 26 September 2018, pp. 25-26.

²⁶⁷ Ms Jill Gallagher AO, Victorian Treaty Advancement Commissioner, Victorian Treaty Advancement Commission, *Proof Committee Hansard*, Melbourne, 26 September 2018, p. 26.

- 2.298 However, the Committee also continued to observe a lack of consensus on how to give effect to this proposal in practical terms.
- 2.299 There remain significant questions about the form and function of The Voice and, as outlined in both the interim and final reports, the Committee has received evidence that reflects a wide range of views on how best to resolve these questions.
- 2.300 The Committee reiterates the principles it identified in the interim report, which could underpin the design of a First Nations Voice (see paragraph 2.19).
- 2.301 The Committee has also considered 21 examples of past, current, or proposed advisory or representative structures, which could inform the design of The Voice (see paragraph 2.145).
- 2.302 Above all, the Committee's consultations have highlighted a demand for local and regional voices, as well as for a national voice.
- 2.303 The Voice should reflect the experiences of Aboriginal and Torres Strait Islander peoples in their communities, and, through its relationship with the Parliament and the Executive, it must ultimately have as its objective positive change for these communities. Whatever the structure of The Voice, it is absolutely critical it has legitimacy and credibility at the local level.
- 2.304 Ultimately, however, it is not the role of the Committee to finalise the detail of The Voice. As the Committee stated in its interim report, it believes that the detail of The Voice should be determined by Aboriginal and Torres Strait Islander peoples, the Australian Government, and the Parliament. It is worth restating the Committee's observations on co-design from the interim report:

The Committee recognises the potential of various Voice proposals to provide meaningful recognition of Aboriginal and Torres Strait Islander peoples.

The Committee considers that it is essential to address questions of detail if the proposal for a Voice is to meet the criteria for achieving recognition as set out above and in the Committee's resolution of appointment.

Furthermore, in considering these questions, the Committee is keen to ensure that the various Voice proposals, should they be established, are both legitimate and effective.

The Committee feels strongly that, to meet these objectives, the design of The Voice, as well as any amendments that might be put to a referendum, should

be informed by the two parties that it seeks to bring together—Aboriginal and Torres Strait Islander peoples and the Parliament.

The Committee acknowledges that much of the work to be done should be led by Aboriginal and Torres Strait Islander peoples. The Committee also acknowledges that in any co-design process, the government should take an active role in participating in any Aboriginal and Torres Strait Islander-led consultations so that the outcomes of the consultations are co-owned by the government and Aboriginal and Torres Strait Islander peoples and so that government can have a richer appreciation for the authentic perspective offered by Aboriginal and Torres Strait Islander peoples.

While some of the previous processes referred to in this interim report have deeply engaged Aboriginal and Torres Strait Islander peoples, there has not yet been coordinated discussion between government and Aboriginal and Torres Strait Islander peoples on the detailed design of a voice on a local, regional, and national basis with the participation of all parties.

The Committee also considers that, through this inquiry, it can play a constructive role in the process of developing the proposal for a Voice.

At this stage of the Committee's deliberations, clear support for the concept of a Voice has not yet extended to any accepted view on what The Voice, or series of voice proposals, should look like; nor is there clarity on how such bodies should interact with each other or with the Parliament and the Executive.

- 2.305 Nothing that the Committee has subsequently heard has altered the views expressed in the interim report.
- 2.306 The Committee agrees that Aboriginal and Torres Strait Islander peoples should determine the model of a First Nations Voice that best suits their needs and aspirations—they should determine how the voices of their local and regional communities are to be represented. It is important this must be a community-driven process.
- 2.307 However, as noted above, the success of The Voice depends on its relationship with the Parliament and the Executive. More fundamentally, the existence of The Voice depends on its acceptance among the broader Australian community. Shared understanding and ownership of a First Nations Voice is critical.
- 2.308 For these reasons, the Committee is of the view that the Parliament should have an active role in determining the detail of a First Nations Voice. This

process is an opportunity to build on constructive dialogues conducted to date. Aboriginal and Torres Strait Islander peoples wish to be heard, and the government and the Parliament must ensure that they are able to listen to these voices.

- 2.309 Having government as a partner in co-design provides co ownership of the results of that process, reduces the surprise element and also ensures that the ideas emanating from the co-design are achievable, practical and able to be implemented.
- 2.310 As such, the Committee considers that the most appropriate process for determining the detail of The Voice is a process of co-design involving Aboriginal and Torres Strait Islander peoples, supported by representatives of the Australian Government.
- 2.311 The Committee is of the view that a properly conducted process of co-design will ensure that The Voice can be:
- 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.
- 2.312 The precise method of how that process of co-design will work is a matter for government to determine. The Committee recognises the scale of the consultations undertaken by the Referendum Council's First Nations regional dialogues as indicated in evidence throughout the inquiry. The Committee also notes the evidence from some Aboriginal and Torres Strait Islander peoples of disquiet with aspects of that consultation process. Given that feedback, while respecting the Referendum Council's process, any co-design process would need to address these issues.
- 2.313 The Committee hopes that recording and presenting the evidence it has received openly, transparently, and with respect will assist in any co-design process in relation to a First Nations Voice.

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.**

3. Providing a legal form for a First Nations Voice

- 3.1 The Committee appreciates that an appropriately designed First Nations Voice will empower Aboriginal and Torres Strait Islander peoples to shape the policies and laws affecting them. It has the potential to transform:
- the relationship between Aboriginal and Torres Strait Islander peoples and the Australian Government; and
 - the poor socio-economic outcomes experienced by some Aboriginal and Torres Strait Islander communities.
- 3.2 This chapter considers the legal form in which a First Nations Voice might be placed.
- 3.3 This chapter considers stakeholder views regarding how these principles may be achieved. It begins by considering the case for enshrining a First Nations Voice in the Australian Constitution, before considering the issues surrounding the finalisation of an appropriate constitutional provision, including:
- drafting principles;
 - design questions yet to be resolved; and
 - the prospect of conducting a convention to finalise a provision.
- 3.4 The chapter then concludes by discussing two suggested approaches to implementing a First Nations Voice, including:

- commencing with a referendum to constitutionalise a First Nations Voice; or
 - commencing with the legislative enactment of a First Nations Voice.
- 3.5 Nothing in this chapter affects the need for co-design which was promised in the interim report and outlined in the previous chapter.

Why constitutionalise a First Nations Voice

3.6 The Committee identified broad stakeholder support for the enshrinement of a First Nations Voice to Parliament in the Australian Constitution, notwithstanding stakeholders' differing views on how and when it should be implemented.

3.7 As noted in Chapter 2, much of the evidence received by the Committee sought to illustrate how the constitutional enshrinement of a First Nations Voice would benefit Aboriginal and Torres Strait Islander peoples by providing a permanent avenue for input into the policy and legislation governing their affairs.

3.8 Many stakeholders supported the constitutional enshrinement of a First Nations Voice on the basis that the Referendum Council asserted that this form of constitutional recognition is the 'only option for a referendum proposal that accords with the wishes of Aboriginal and Torres Strait Islander peoples'.¹ For example, Ms Ada Oliver-Dearman submitted:

We must not proceed with a recognition referendum that Indigenous people do not agree with. They have made clear what they want in the Uluru Statement. A recognition referendum must constitutionally guarantee the voices of the First Nations. This is the line in the sand. It must be respected.²

3.9 The Centre for Comparative Constitutional Studies warned that failing to constitutionalise a First Nations Voice may damage trust between Aboriginal and Torres Strait Islander peoples and the institutions of Australian Government:

A purely legislative response would fail to capitalise on the unique and unprecedented consensus captured by the Uluru Statement... The significance of this moment in Australian history suggests that constitutional change should be prioritised. The political will for constitutional change may fluctuate

¹ Referendum Council, *Final Report of the Referendum Council*, 2017, p. 2.

² Ms Ada Oliver-Dearman, *Submission 298*, p. 1.

over time, and a failure to deliver on the promise of the Uluru Statement may lead to a further erosion of trust between Indigenous and non-[I]ndigenous Australians, and between [I]ndigenous Australians and the institutions of Australian Government. The constitutional moment created at Uluru must be seized upon.³

- 3.10 Professor Anne Twomey noted the potential of a constitutional First Nations Voice to provide meaningful symbolic recognition of Aboriginal and Torres Strait Islander peoples:

The inclusion in the Constitution of a mechanism by which Indigenous voices are heard therefore amounts to a form of recognition and respect that is accorded not just on a personal level, but at the very heart of Australia's nationhood, in its Constitution. Most importantly, it is not just words on a page declaring respect for Indigenous Australians which may over time ring hollow or false. It is a form of living respect that is activated each time an Indigenous voice is heard by the Parliament.⁴

- 3.11 Mr Terry O'Shane, Director of the North Queensland Land Council, felt that a successful referendum to enshrine a First Nations Voice would contribute to a more unified nation by reforging the relationship between Indigenous and non-Indigenous Australians:

I think if the referendum is that we're going for a voice then I think we go out and do the campaigning ... [Aboriginal and Torres Strait Islander peoples and other Australians] are divided and we'll never ever come together unless something fundamentally changes in terms of our relationship. It'll only change if we get out and work on it. That is a decision that the people of Australia have to make... That's why we've got to go there [and have a referendum].⁵

- 3.12 Gilbert + Tobin felt that constitutionalising a First Nations Voice would support Australia, as a nation, to reconcile with the facts of its history by providing long overdue, formal recognition of the status of Aboriginal and Torres Strait Islander peoples as the first Australians:

When the Australian Constitution was drafted, Indigenous Australians had no role in its formation and no place in the Constitution except by way of

³ Centre for Comparative Constitutional Studies, *Submission 289.1*, p. 6.

⁴ Professor Anne Twomey, *Submission 57.1*, p. 1.

⁵ Mr Terry O'Shane, Director, North Queensland Land Council, *Proof Committee Hansard*, Townsville, 3 October 2018, p. 14.

exclusion. Constitutionally enshrining The Voice would address this manifest wrong and provide proper and respectful recognition of the place of Aboriginal and Torres Strait Islander Peoples in our nation.⁶

- 3.13 Individuals who designed and led the Referendum Council’s regional dialogue process (referred to in this chapter as Anderson et al) asserted that ‘enshrining The Voice would usher in a new era of stability and continuity in Aboriginal and Torres Strait Islander affairs’:

Over more than four decades, Australian governments have repeatedly seen the justice and common sense of providing a voice to Aboriginal and Torres Strait Islander people in the policy process, through bodies established on an administrative or even legislative footing. But there has been no enduring commitment to institutional security. To date, there has been no protection against unilateral abolition of First Nations representative structures or against the instability, disempowerment and lack of certainty that follows...

During the dialogues people repeatedly emphasised they wanted to escape this instability and uncertainty and achieve enduring structural change by constitutionally entrenching the Voice.⁷

- 3.14 The National Congress of Australia’s First Peoples (Congress) pointed out that Aboriginal and Torres Strait Islander peoples comprise less than three per cent of the total population and are ‘all too easily sidelined in political discussion’. It asserted that a Voice to Parliament would ‘ensure that the voices of Aboriginal and Torres Strait Islander peoples across Australia are heard when decisions are being made which will inevitably affect [their] lives’ and ‘go a long way towards the challenges we face’:

Enshrining an advisory body to Parliament, responsible for reviewing legislation, providing advice to the Executive and the Australian Government, and proposing policy reforms would allow Aboriginal and Torres Strait Islander peoples to overcome this disadvantage.⁸

- 3.15 UNICEF Australia emphasised the potential of a constitutionally enshrined First Nations Voice to improve socio-economic conditions experienced by Aboriginal and Torres Strait Islander communities:

⁶ Gilbert + Tobin, *Submission 315.1*, p. 1.

⁷ Ms Patricia Anderson AO, Professor Megan Davis, Mr Noel Pearson, Associate Professor Sean Brennan, Associate Professor Gabrielle Appleby, Dr Dylan Lino, Ms Gemma McKinnon, *Submission 479*, pp. 4-5.

⁸ National Congress of Australia’s First Peoples, *Submission 292.1*, p. 24.

... a Voice to Parliament for Aboriginal and Torres Strait Islander Peoples has the potential to provide expert and culturally sensitive advice to policy makers so that the best interests of Aboriginal and Torres Strait Islander children can be better understood and more effectively protected by our federal legislators and policy-makers, and provide a mechanism for meaningful dialogue and consultation with Aboriginal communities...⁹

- 3.16 Evidence also highlighted practical legal and technical reasons for seeking to enshrine a First Nations Voice in the Australian Constitution by way of a successful referendum.
- 3.17 Stakeholders argued that a First Nations Voice, supported by a double majority of Australians during a referendum and enshrined in the Australian Constitution, would be less vulnerable than a Voice founded solely in Commonwealth statute.
- 3.18 The Prime Minister's Indigenous Advisory Council and the Indigenous Peoples Organisation both asserted that constitutionally enshrining a First Nations Voice would politically and legally mandate its permanence, where legislation has been demonstrated to be inadequate. They argued that providing for the permanence of a Voice is important given the abolition of past statutory representative bodies such as the Aboriginal and Torres Strait Islander Commission (ATSIC) and the underfunding of Congress.¹⁰
- 3.19 The Centre for Comparative Constitutional Studies argued that constitutionalising The Voice 'ensures that Indigenous participation and consultation will be protected into the future':
- A purely legislative mechanism, without any constitutional status, would leave the Voice to Parliament vulnerable to changes in political will.¹¹
- 3.20 Reconciliation South Australia supported this argument. It asserted that Australia's 'long history of ignoring, dismantling and disempowering Aboriginal and Torres Strait Islander voices' needs to be rectified by 'the highest legal framework available'.¹²

⁹ UNICEF Australia, *Submission 377*, p. 11.

¹⁰ Prime Minister's Indigenous Advisory Council, *Submission 419*, p. 8; Indigenous Peoples Organisation, *Submission 338.1*, p. 22.

¹¹ Centre for Comparative Constitutional Studies, *Submission 289.1*, p. 5.

¹² Reconciliation South Australia Inc., *Submission 475*, p. ii.

- 3.21 The Committee heard that constitutionally enshrining a First Nations Voice would increase its efficacy by granting it a measure of independence from the Australian Government.
- 3.22 Uphold & Recognise contended that a constitutionally enshrined First Nations Voice could be reformed but not abolished by the federal Parliament. It suggested a Voice would be provided with ‘greater security, and therefore strength, to argue a contrary position’ to the government of the day. Uphold & Recognise also noted that constitutionally enshrining a Voice ‘directly addresses the fundamental imbalance between Indigenous people and government’.¹³ Similarly, the Public Law and Policy Research Unit said:
- ... there have been several attempts to create an Aboriginal representative body in legislation. While these bodies have served an important role in the relationship between Aboriginal and Torres Strait Islander peoples and Australian governments, their vulnerability to extinguishment has hampered their capacity to represent Aboriginal and Torres Strait Islander peoples effectively.¹⁴
- 3.23 However, the Committee is aware that there is not universal support for the constitutional enshrinement of a First Nations Voice to Parliament.
- 3.24 Some Aboriginal and Torres Strait Islander individuals expressed discomfort with the idea of being included in a document which they felt had been instrumental in their dispossession. For example, Ms Mary Graham questioned the value of constitutional recognition:
- ... the Constitution reflects the ideas of the sovereignty upon which the dispossession and all that other stuff occurred, so how can you convince Aboriginal people that it’s appropriate to place themselves under this document?¹⁵
- 3.25 Concerns were also raised regarding the principle of specifically acknowledging one group of Australians, as separate to other Australians, within the Constitution.
- 3.26 Mr Morgan Begg, Research Fellow at the Institute of Public Affairs, stressed that Australia is a ‘liberal democracy’ and that as such, every adult may

¹³ Uphold & Recognise, *Submission 423.1*, p. 4; see also: Gilbert + Tobin, *Submission 315.1*, p. 2.

¹⁴ Public Law and Policy Research Unit, *Submission 408*, p. 2.

¹⁵ Ms Mary Graham, *Proof Committee Hansard*, Brisbane, 4 October 2018, pp. 15-16.

equally influence civil society by voting to elect representatives to state and federal parliaments and to local government. He argued that constitutionalising a First Nations Voice is contrary to the liberal democratic principle of ‘equal representation’:

Amending the Constitution to establish a body giving a Voice to Parliament for one group is divisive and undemocratic. The Australian Constitution is the founding document of the Australian nation, and every Australian should be treated equally under it...

The creation of a body to exclusively represent one group formally elevates members of that group above others.¹⁶

3.27 Mr Simon Breheny, Director of Policy at the Institute of Public Affairs, took this idea further, suggesting that even a statutory First Nations Voice would conflict with the liberal democratic principle of equal representation.¹⁷

3.28 A counter argument was presented by Professor Alexander Reilly of the Public Law and Policy Research Unit. He contended that constitutionalising a First Nations Voice is entirely appropriate as the Australian Constitution already specifically empowers Parliament to make laws in relation to Aboriginal and Torres Strait Islander peoples as a group distinct from other Australians:

Any power must come with accountability. For general powers—the powers of the parliament to make laws with respect to other people—that accountability is entrenched in the Constitution through the electoral process mandated by the constitution. There is no such accountability in relation to the power to make laws with respect to Aboriginal and Torres Strait Islander people. They don’t get, anywhere in the Constitution, the chance to respond to powers used in relation to them. The Voice adds that accountability... the Voice is important and it’s not sufficient [to] just put it into legislation.¹⁸

3.29 However, Mr Begg and Mr Breheny suggested that the Institute of Public Affairs would prefer to repeal section 25 and section 51(xxvi) of the

¹⁶ Mr Morgan Begg, Research Fellow, Institute of Public Affairs, *Proof Committee Hansard*, Melbourne, 26 September 2018, p. 1.

¹⁷ Mr Simon Breheny, Director of Policy, Institute of Public Affairs, *Proof Committee Hansard*, Melbourne, 26 September 2018, p. 3.

¹⁸ Professor Alexander Reilly, Public Law and Policy Research Unit, The University of Adelaide, *Proof Committee Hansard*, Canberra, 18 September 2018, p. 16.

Australian Constitution to remove all notion of distinguishing between Australians based on the concept of ‘race’:

The institute’s position on both of those provisions is that it would prefer to see both provisions repealed in full...

On the basis that we don’t think it’s appropriate that the government passes laws for a particular race.¹⁹

A constitutional provision to enshrine a First Nations Voice

- 3.30 Support for the constitutional enshrinement of a First Nations Voice generated stakeholder discussion throughout the inquiry about an appropriate constitutional provision. Stakeholders discussed general principles for a provision, suggested draft words and reflected on the merits of different options for constitutional provisions to enshrine The Voice.
- 3.31 The Committee received 18 different draft constitutional provisions. These provisions can be divided into three groups: (i) provisions dealing with local and regional voices, (ii) provisions dealing with a national voice only, and (iii) provisions dealing with a hybrid of matters.

Constitutional provisions dealing with local voices

- 3.32 The first local option is a provision for enshrining local voices and then ‘letting them affiliate of their own accord, so that their voices are heard effectively at the national level’:²⁰

70A. Aboriginal and Torres Strait Islander bodies

There shall be local Aboriginal and Torres Strait Islander bodies, with such composition, roles, powers and functions as shall be determined by the Parliament, including the function of collectively advising the Parliament on proposed laws relating to Aboriginal and Torres Strait Islander affairs.²¹

- 3.33 The second local option suggests repealing section 51(xxvi) of the Constitution and replacing it with a new section 51A, noting that this proposal differs to the new section 51A contemplated by the 2012 Expert

¹⁹ Mr Morgan Begg, Research Fellow and Mr Simon Breheny, Director of Policy, Institute of Public Affairs, *Proof Committee Hansard*, Melbourne, 26 September 2018, p. 3.

²⁰ Uphold & Recognise, *Submission 172: Attachment 2*, pp. 8-9.

²¹ Uphold & Recognise, *Submission 172: Attachment 2*, p. 14.

Panel. The model is detailed and specifies the functions of the local bodies to be established:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

- 1 Aboriginal and Torres Strait Islander heritage, cultures and languages and the relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters; and
- 2 the establishment, composition, roles, powers and procedures of local Aboriginal and Torres Strait Islander bodies which shall be established to manage and utilize native title lands and waters and other lands and sites, preserve local cultures and languages and advance the welfare of the local Aboriginal or Torres Strait Islander peoples.²²

3.34 The third local option suggests a more modest constitutional provision which provides local representative bodies with a broad ‘plenary power’ for influencing Aboriginal and Torres Strait Islander affairs, but which leaves Parliament to determine their exact functions:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

Aboriginal and Torres Strait Islander affairs, and the Parliament shall establish bodies for each of the Aboriginal and Torres Strait Islander peoples, the composition, roles, powers and procedures of which bodies shall be determined by the Parliament.²³

3.35 Two similar alternative options based on the third local option above were also suggested to clarify the scope of advice to be provided by the representative bodies and empower Parliament to establish the mechanism by which advice will be provided:²⁴

There shall be local First Nations bodies, with such composition, roles, powers and functions as may be determined by Parliament, and which shall include the functions of managing and utilising native title lands and waters and other lands and sites, preserving local First Nations languages, advancing the welfare of the local Aboriginal or Torres Strait Islander peoples, and advising

²² Mr Nyunggai Warren Mundine AO, *Practical Recognition from the Mobs’ Perspective: Enabling our Mobs to Speak for Country*, Uphold & Recognise Monograph Series, 2017, p. 12.

²³ Mr Nyunggai Warren Mundine AO, *Practical Recognition from the Mobs’ Perspective: Enabling our Mobs to Speak for Country*, Uphold & Recognise Monograph Series, 2017, p. 12.

²⁴ Dr Shireen Morris, *Submission 195*, p. 28.

Parliament and the Executive on proposed laws and other issues relating to these matters, under procedures to be determined by Parliament.²⁵

3.36 This other option tightens the language of the above option:

There shall be local bodies for each of the Aboriginal and Torres Strait Islander peoples, the composition, roles and powers of which bodies shall be determined by the Parliament, and which shall include procedures for Aboriginal and Torres Strait Islander peoples to provide advice to Parliament and the Executive on proposed laws and other matters relating to Aboriginal and Torres Strait Islander affairs.²⁶

3.37 The sixth local option provides for multiple local voices:

- 1 There shall be a national Aboriginal and Torres Strait Islander Voice to Parliament, and various regional, state and local Voices, with such powers as the Parliament deems necessary and appropriate to inform its use sections ss 51(xxvi) and 122, or the exercise of any other provisions of this Constitution.
- 2 The Parliament shall engage with the Voice and Voices when relying on sections ss 51(xxvi) and 122 of the Constitution, and may engage either the Voice or Voices in respect of any other provision of this Constitution, or laws made thereunder;
- 3 Until the Parliament otherwise provides, the Voice and Voices shall:
 - a. Be comprised of Aboriginal and Torres Strait Islander representatives chosen according to procedures agreed between the Commonwealth and Aboriginal and Torres Strait Islander peoples, based on principles of democracy, regional and local empowerment, gender equality and respect for traditional authority; and
 - b. Have power to engage with any other Commonwealth state, territory or local government body or entity it deems appropriate.²⁷

Constitutional provisions dealing with national voices

3.38 The first national option aims to enshrine a national Aboriginal and Torres Strait Islander representative body, informed by local entities and entitled to provide advice to the Parliament, which, in certain limited circumstances, the Parliament would be compelled to consider before passing law. This

²⁵ Dr Shireen Morris, *Submission 195*, p. 28.

²⁶ Dr Shireen Morris, *Submission 195*, p. 28.

²⁷ Professor Rosalind Dixon, *Submission 316.1*, p. 2.

provision seeks to clarify the constitutional obligation imposed on the Australian Parliament to consult the new First Nations Voice.²⁸ The proposal is to enshrine a national First Nations Voice to be inserted into a new section 60A within the Australian Constitution:

60A(1) There shall be an Advisory Council, which shall have the function of providing advice to the Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander affairs.

(2) The Parliament shall, subject to this Constitution, have power to make laws with respect to the composition, roles, powers and procedures of the Advisory Council.

(3) The Speaker of the House of Representatives and President of the Senate shall cause a copy of the Advisory Council's advice to be tabled in each House of Parliament as soon as practicable after receiving it.

(4) The House of Representatives and the Senate shall give consideration to the tabled advice of the Advisory Council in debating proposed laws with respect to Aboriginal and Torres Strait Islander affairs.²⁹

3.39 The second national option builds on the first national option and removes descriptions of how the advice should be tabled and considered and may help quell fears that The Voice would function as a 'third chamber of Parliament':³⁰

First Nations voice (omitting advice tabling function in Constitution) 60A
There shall be an Aboriginal and Torres Strait Islander body, external to Parliament, to be called the [insert appropriate name, perhaps drawn from an Aboriginal or Torres Strait Islander language], which shall have the function of providing advice to the Parliament and the Executive Government on Aboriginal and Torres Strait Islander affairs, under procedures, rules and processes to be determined by Parliament. The Parliament shall, subject to this Constitution, have power to make laws with respect to the composition, roles, powers and procedures of the [body].³¹

²⁸ Uphold & Recognise, *Submission 172: Attachment 2*, pp. 8-9.

²⁹ Professor Anne Twomey, *Submission 57.1*, p. 2.

³⁰ Cape York Institute, *Submission 244*, p. 24.

³¹ Cape York Institute, *Submission 244*, p. 24.

- 3.40 The third national option also builds on the first national option but does not stipulate the name of the First Nations Voice to be established or how it should provide advice:

First Nations voice (with no advice tabling function in the Constitution) There shall be a First Nations body, external to Parliament, established by Parliament, to advise Parliament and the Executive on proposed laws and other matters relating to Aboriginal and Torres Strait Islander affairs, under procedures to be determined by Parliament, and with such powers, processes and functions as shall be determined by Parliament.³²

- 3.41 The fourth national option, to be inserted in Chapter 1 of the Constitution provides:

There shall be a First Peoples Council established by Parliament and with such powers as may be determined by Parliament from time to time. Parliament shall consult with and seek advice from the First Peoples Council on legislation relating to Aboriginal and Torres Strait Islander peoples.³³

- 3.42 A revised version of the fourth national option was suggested to empower Aboriginal and Torres Strait Islander peoples to advise Parliament in a manner which is clearly non-justiciable and which upholds Parliamentary supremacy:

There shall be a First Peoples Council established by Parliament to advise Parliament and the Executive on proposed laws and other matters relating to Aboriginal and Torres Strait Islander peoples, under procedures to be determined by Parliament, and with such powers, processes and functions as may be determined by Parliament.³⁴

- 3.43 A sixth national option recommended the insertion of a new section 127 into the Australian Constitution in place of 'racist provisions deleted by the 1967 referendum' modelled on the language of the Interstate Commission:

There shall be an Aboriginal and Torres Strait Islander Voice [or Voices] to Parliament, with such powers as the Parliament deems necessary and

³² Cape York Institute, *Submission 244*, p. 25.

³³ Provisions was proposed during the 2015 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples' inquiry. See Allens Linklaters, *Submission 97*, p. 17.

³⁴ Dr Shireen Morris, *Submission 195*, p. 25.

appropriate to inform its use sections ss 51(xxvi) and 122, or any other provisions of this Constitution.³⁵

3.44 A seventh national option provides for a more detailed version of option six:

(1) There shall be an Aboriginal and Torres Strait Islander Voice to Parliament, with such powers as the Parliament deems necessary and appropriate to inform its use sections ss 51(xxvi) and 122, or the exercise of any other provisions of this Constitution.

(2) The Parliament shall engage the Voice when relying on sections ss 51(xxvi) and 122 of the Constitution, and may engage it in respect of any other provision of this Constitution, or laws made thereunder;

(3) Until the Parliament otherwise provides, the Voice shall:

(a) Be comprised of Aboriginal and Torres Strait Islander representatives chosen according to procedures agreed between the Commonwealth and Aboriginal and Torres Strait Islander peoples, based on principles of democracy, regional and local empowerment, gender equality and respect for traditional authority; and

(b) Have power to engage with any other Commonwealth state, territory or local government body or entity it deems appropriate.

(c) Create appropriate regional, state and local councils to advise it on the exercise of its powers and functions, including its engagement with state and local entities, and empower such councils directly to engage with those entities in appropriate cases.³⁶

3.45 The eighth national option recommends creating a new Chapter 9 of the Australian Constitution using the following draft provision:

Chapter 9 First Nations

Section 129 The First Nations Voice

- 1 There shall be a First Nations Voice.
- 2 The First Nations Voice shall present its views to Parliament and the Executive on matters relating to Aboriginal and Torres Strait Islander peoples.

³⁵ Professor Rosalind Dixon, *Submission 316.1*, p. 1.

³⁶ Professor Rosalind Dixon, *Submission 316.1*, p. 2.

- 3 The Parliament shall, subject to this Constitution, have power to make laws with respect to the composition, functions, powers and procedures of the First Nations Voice.³⁷

3.46 A ninth national option was suggested by Senator Patrick Dodson and the Hon. Warren Snowdon MP in the course of questioning witnesses before the Committee:

- 1 There shall be a First Nations Voice to Parliament;
- 2 The Voice shall not be a third chamber of the Parliament;
- 3 The Voice shall be advisory only and its advice will not be justiciable; and
- 4 Its powers and functions shall be determined by the Parliament of Australia.

Hybrid constitutional provisions

3.47 A hybrid option incorporating the power to make treaties was also suggested:

Section [XX] Aboriginal and Torres Strait Island People

The Commonwealth of Australia recognises that the lands now known as Australia were occupied by Aboriginal and Torres Strait Islander peoples according to their own laws and traditions.

The Commonwealth of Australia recognises that no formal agreement has been entered with Aboriginal and Torres Strait Islander peoples for the occupation of their lands.

The Commonwealth of Australia commits to a relationship with Aboriginal and Torres Strait Islander peoples based on the recognition of their rights as Aboriginal and Torres Strait Islander peoples.

(1) As such, the Commonwealth of Australia:

(i) Shall, in consultation with the relevant State and/or Territory, enter a treaty or treaties with Aboriginal and Torres Strait Islander peoples to affirm those rights already recognised and those rights that may be further attained;

(ii) Shall, provide for a First Nations Voice to be heard by both houses of parliament;

³⁷ Ms Patricia Anderson AO, Professor Megan Davis, Mr Noel Pearson, Associate Professor Sean Brennan, Associate Professor Gabrielle Appleby, Dr Dylan Lino, Ms Gemma McKinnon, *Submission 479*, p. 6.

(iii) May, in consultation with those affected peoples, make laws for Aboriginal and Torres Strait Islander peoples.³⁸

3.48 There was also a proposal for constitutional provisions dealing with defining the first people, makarrata, voice, agreement making and communication in a new Chapter 1A:

First People shall mean the Aboriginal and Torres Strait Islander Nations, clans, language groups, communities, families and individuals as existed before European and South-east Asian contact and since.³⁹

...

1A. Voice

In all considerations of the Constitution, it is desirable to pay heed to the:

- i. History; and
- ii. Culture; and
- iii. Knowledge of Country; and
- iv. Truth-telling; and
- v. Lives;

of the First People.⁴⁰

...

1B. Agreement Making

In all considerations of the Constitution, it is desirable to pay heed to the governance arrangements of the First People.⁴¹

...

1C. Communication

English shall be the official written and spoken language of Australia.

³⁸ Mr Edward Synot, *Submission 303.1*, p. i.

³⁹ Ms Catherine Sullivan, *Submission 404*, p. ii.

⁴⁰ Ms Catherine Sullivan, *Submission 404*, pp. ii-iii.

⁴¹ Ms Catherine Sullivan, *Submission 404*, p. iii.

Notwithstanding this, in all considerations of the Constitution, it is desirable to pay heed to the:

- i. Languages; and
- ii. Songs and Songlines; and
- iii. Dancing; and
- iv. Message sticks; and
- v. Artwork including historic rock art; and
- vi. Secret and sacred places;

of the First People.⁴²

3.49 The final hybrid proposal was to suggest reserved senate seats for Aboriginal and Torres Strait Islander peoples by amending section 9 of the Constitution to add:

... the method shall ensure there is representation for indigenous Australians and shall be uniform for all the States.⁴³

Themes in the drafting

3.50 The Committee observed a number of similarities between the draft constitutional provisions submitted by stakeholders throughout the inquiry. These similarities in approach indicated that a constitutional provision might attempt to:

- describe the broad features of a First Nations Voice but defer responsibility for defining its structure and functions to the Australian Parliament;⁴⁴

⁴² Ms Catherine Sullivan, *Submission 404*, p. iii.

⁴³ Mr David Latimer, *Submission 458*, p. 1.

⁴⁴ Professor Rosalind Dixon, *Submission 316.1*, p. 2; Indigenous Peoples Organisation, *Submission 338.1*, p. 22; Associate Professor Kristen Rundle, Co-Director, Centre for Comparative Constitutional Studies, Melbourne Law School, University of Melbourne, *Proof Committee Hansard*, Melbourne, 26 September 2018, pp. 32-34; Professor Anne Twomey, *Submission 57.1*, p. 2; Centre for Comparative Constitutional Studies, *Submission 289.1*, pp. 12-13; Professor Adrienne Stone, Co-Director, Centre for Comparative Constitutional Studies, The University of Melbourne, *Proof Committee Hansard*, Canberra, 18 September 2018, p. 16; Uphold & Recognise and the PM Glynn Institute, *Submission 423*, pp. 10, 16.

- unequivocally uphold the sovereignty of the Australian Parliament by providing for a Voice which is external to Parliament and which has functions which do not constitute a veto over Parliament;⁴⁵ and
- provide for a First Nations Voice in a manner which renders its structure and functions non-justiciable, so as to avoid legal uncertainty.⁴⁶

3.51 Congress asserted that a provision which provides for the fundamental characteristics of a First Nations Voice without being overly prescriptive would imbue the representative body with both stability and flexibility:

The constitutional provision for the voice should contain elements which ensure that its representative nature; independence; and functions relating to providing advice and developing policy are maintained. However, the constitutional provision should not be a substitute for legislation, and precise details relating to the provision of resources, operation and makeup of the voice should be left to the Australian Parliament to decide. There should merely be enough to ensure that future governments cannot, out of political expediency, seek to undermine the voice or sideline it.⁴⁷

3.52 Associate Professor Kristen Rundle, Co-Director of the Centre for Comparative Constitutional Studies suggested that drafting a constitutional provision which clearly provides for a First Nations Voice operating externally to Parliament and which does not involve a transfer of power, would allay fears that a Voice may constitute a ‘third chamber’.⁴⁸

3.53 Uphold & Recognise and the PM Glynn Institute at the Australian Catholic University argued that any constitutional provision for a First Nations Voice should be ‘drafted so as to avoid enabling challenge in the courts on constitutional grounds’.⁴⁹ Dr Morris argued that a provision which achieves

⁴⁵ Associate Professor Kristen Rundle, Co-Director, Centre for Comparative Constitutional Studies, Melbourne Law School, University of Melbourne, *Proof Committee Hansard, Melbourne*, 26 September 2018, p. 34; Professor Anne Twomey, *Submission 57.1*, p. 2.

⁴⁶ Cape York Institute, *Submission 244.3*, p. 2; Professor Anne Twomey, *Submission 57.1*, p. 2; Associate Professor Kristen Rundle, Co-Director, Centre for Comparative Constitutional Studies, Melbourne Law School, University of Melbourne, *Proof Committee Hansard, Melbourne*, 26 September 2018, p. 32.

⁴⁷ National Congress of Australia’s First Peoples, *Submission 292.1*, p. 26.

⁴⁸ Associate Professor Kristen Rundle, Co-Director, Centre for Comparative Constitutional Studies, Melbourne Law School, University of Melbourne, *Proof Committee Hansard, Melbourne*, 26 September 2018, p. 34.

⁴⁹ Uphold & Recognise and the PM Glynn Institute, *Submission 423*, p. 5.

this would avoid ‘the downsides and legal uncertainty created by justiciab[ility]’:

This avoids any risk of laws being struck down, which is often cited as a concern for parliamentarians anxious to retain their power in this constitutional relationship.⁵⁰

Broad design issues to be resolved

- 3.54 However, the Committee also noted that stakeholders’ draft constitutional provisions varied greatly depending on their conceptualisation of the structure and operation of the First Nations Voice to be enshrined.
- 3.55 On this basis some stakeholders, such as Professor Anne Twomey, recommended that overarching design questions be resolved before a provision to enshrine a First Nations Voice in the Australian Constitution is finalised.⁵¹
- 3.56 Design questions surrounding The Voice are considered in more detail in the previous chapter.
- 3.57 Professor Twomey was among many stakeholders who identified a range of basic design questions which needed resolution before further progress could be made. In a supplementary submission, Professor Twomey listed the following questions:
- Is there to be a single body that provides an Indigenous ‘voice’ to the Parliament and the Executive?
 - Is there to be a hierarchy of Indigenous bodies, with a peak body that provides a single set of advice to the Parliament and the Executive?
 - Is there to be a network of local bodies that may separately or collectively provide advice to Parliament and the Executive, through some kind of organising body, such as a Secretariat?
 - Is there to be some kind of obligation on Parliament to consider advice when it is provided or should there be an internal mechanism, such as a parliamentary committee, that alerts Parliament to the advice?
 - What mechanism should be provided for Parliament to be informed of that advice (i.e. how does the voice speak ‘to’ the Parliament and how is it to be publicly known and recorded what advice has been given)?

⁵⁰ Dr Shireen Morris, *Submission 195*, p. 23.

⁵¹ Professor Anne Twomey, *Submission 57.1*, pp. 4-5.

- What powers does the Parliament need for the purposes of facilitating the operation of such a system (eg the power to create local or regional bodies or a single central body and the power to determine the composition, powers, functions and procedures of such bodies)?
- What balance should there be between obligation and flexibility?⁵²

3.58 Professor George Williams AO made a similar point. He stressed that any constitutional provision to enshrine a First Nations Voice will differ depending on whether it's providing for a national structure, a local structure, or an institute with elements of both:

If it is going to be a single body advising Parliament, referring to body in the constitutional change would be fine, but if you anticipate in fact there'll be the capacity for a regional or local body to advise Parliament, and there are many of those, then you have to draft the Constitution accordingly and not make it a singular body that's actually referred to.⁵³

3.59 Professor Williams cautioned that finalising a draft provision before agreeing on the fundamental structure and functions of the First Nations Voice may result in the enshrinement of a constitutional provision ill-suited to the model of Voice to be implemented:

My point is a simple one. It's just that we need to work this out beforehand so that we do get the drafting right. I think it would be a problem if we have these conversations after the drafting because we may end up with the wrong form of words.⁵⁴

3.60 The question of how best to provide for the longevity of a First Nations Voice also remains to be resolved before a constitutional provision for its enactment can be finalised.

3.61 Dr Bryan Keon-Cohen AM QC submitted that the constitutional provision should include words which prohibit the abolition of the First Nations Voice:

The power of a duly elected government to change legislation, or reduce/abolish funding to The Voice entity, cannot be removed, but the terms of the constitutional amendment could restrain this power by including words

⁵² Professor Anne Twomey, *Submission 57.1*, pp. 4-5.

⁵³ Professor George Williams AO, *Proof Committee Hansard*, Canberra, 18 September 2018, p. 6.

⁵⁴ Professor George Williams AO, *Proof Committee Hansard*, Canberra, 18 September 2018, p. 6.

to the effect of 'must' be a Voice, or 'can be removed only by 2/3 vote of both houses, duly assembled' or words to this effect.⁵⁵

3.62 Moreover, it was submitted that the model of First Nations Voice to be implemented will inform whether it is desirable, or even possible, to enshrine it in the Australian Constitution.

3.63 Professor Dixon noted that while it would be suitable to constitutionalise a national First Nations Voice to Parliament, it may not be appropriate to constitutionalise a Voice comprised exclusively of local and regional entities:

We're a federal system, and the Commonwealth Constitution largely governs the entrenchment of institutions that operate at the Commonwealth level.

... just because we support, all your committee supports, for the creation of regional and local bodies, it doesn't necessarily mean that that should be constitutionally entrenched.⁵⁶

3.64 Moreover, she noted that the Australian Government may not even have the constitutional authority to establish local and regional voices through Commonwealth statute:

... there would be some constitutional doubt about the capacity of the Commonwealth Parliament to create an entirely local voice, although I think the race power would be sufficient. The further it gets from the Commonwealth level under existing constitutional authority, the more questions you'd have to ask about whether the race and the incidental power is sufficient although my argument would be that it would be.⁵⁷

3.65 Professor Williams made a similar point. He observed that some stakeholders have expressed support for a First Nations Voice which could advise both the federal, state and territory parliaments. He suggested that the Australian Government may not have the constitutional authority to legislate for a Voice which can advise the state or territory parliaments:

... I think the area where you would need constitutional change is if you want to support the interface with state parliaments. They have certain immunities and protections that would meant that, if you wanted an extra role there,

⁵⁵ Dr Bryan Keon-Cohen AM QC, *Submission 161.1*, p. 2.

⁵⁶ Professor Rosalind Dixon, Professor of Law, Faculty of Law, University of New South Wales, *Proof Committee Hansard*, Canberra, 18 September 2018, p. 3.

⁵⁷ Professor Rosalind Dixon, Professor of Law, Faculty of Law, University of New South Wales, *Proof Committee Hansard*, Canberra, 18 September 2018, p. 3.

unless you've got the consent and engagement of the states, you would need a clear constitutional mandate for that to occur.⁵⁸

- 3.66 Professor Dixon suggested that the Australian Government could encourage the states to enact the local elements of a First Nations Voice either through legislation or through constitutional change.⁵⁹
- 3.67 A range of views were also expressed regarding the optimal placement of a provision to enshrine a First Nations Voice within the Australian Constitution.

Conventions to finalise a constitutional provision

- 3.68 The Committee heard evidence that, following the resolution of broad design questions in relation to a First Nations Voice, a constitutional convention may be required to build consensus around a form of words to enshrine a Voice in the Australian Constitution.
- 3.69 Constitutional conventions enable focussed debate and discussion on constitutional issues.⁶⁰ In a 2008 Public Law Review article considering constitutional reform mechanisms, Professor Anne Twomey suggested that conventions are considered an appropriate constitutional reform mechanism for two reasons:

The first is its 'symbolic significance'. [A constitutional convention] brings to mind the founding of the Commonwealth of Australia and the drafting of the Constitution. It is therefore an appropriate mechanism for undertaking fundamental revisions of that document or reforming the federal system that it created. Secondly, where the proposed reform is complex or involves a number of options, plebiscites are not an appropriate means of testing the public will. If the public is ultimately to vote on the final form of proposed

⁵⁸ Professor George Williams AO, *Proof Committee Hansard*, Canberra, 18 September 2018, p. 4.

⁵⁹ Professor Rosalind Dixon, Professor of Law, Faculty of Law, University of New South Wales, *Proof Committee Hansard*, Canberra, 18 September 2018, p. 4.

⁶⁰ Parliament of Australia, Australian Parliamentary Library, 'Post Federation Constitutional Conventions and Commissions Purpose, Composition, Process and Outcomes', *Research Note*, Number 5, 28 August 1995, <https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/UCR20/upload_binary/UCR20.pdf;fileType=application%2Fpdf#search=%22library/prspub/UCR20%22> retrieved 17 October 2018.

amendments at a referendum, then a constitutional convention may be an appropriate model to use.⁶¹

3.70 Moreover, Professor Twomey noted that constitutional conventions comprised of *elected* delegates may result in constitutional reform proposals viewed more favourably by the Australian public than reform proposals originating from other mechanisms such as constitutional commissions with government appointed members:

Constitutional commissions or other expert bodies may also be the subject of suspicion because they are invariably appointed by governments. An elected constitutional convention, on the other hand, gives the people a positive role in initiating constitutional reform. On this basis, they [the people] might be more likely to approve, or at least give serious consideration to, the products of its deliberation.⁶²

3.71 Professor Twomey suggested that former Prime Minister Sir Robert Menzies held a similar view:

Robert Menzies argued in 1944 that fundamental changes to the Constitution would never be passed if they proceeded from any party and that some changes would only have a hope if they proceeded from a popularly elected convention 'which has had abundant time and opportunity to consider problems that have to be faced and to form reasonable conclusions in respect of them'.⁶³

3.72 However, Professor Twomey noted the view that elected delegates may feel obliged to stand by the platform on which they were elected, which may increase the difficulties of achieving compromise or consensus at a constitutional convention. She also noted that it has been argued that elected constitutional conventions are a waste of money as they 'duplicate the task of a Parliament that has already been democratically elected and already has the staff, the facilities and the experience to do the job'.⁶⁴

⁶¹ Professor Anne Twomey, 'Constitutional conventions, commissions and other constitutional reform mechanisms', *Public Law Review*, Volume 19, No. 4 December 2008, pp. 309-310.

⁶² Professor Anne Twomey, 'Constitutional conventions, commissions and other constitutional reform mechanisms', *Public Law Review*, Volume 19, No. 4 December 2008, p. 309.

⁶³ Professor Anne Twomey, 'Constitutional conventions, commissions and other constitutional reform mechanisms', *Public Law Review*, Volume 19, No. 4 December 2008, pp. 309-310.

⁶⁴ Professor Anne Twomey, 'Constitutional conventions, commissions and other constitutional reform mechanisms', *Public Law Review*, Volume 19, No. 4 December 2008, p. 310.

3.73 In an Australian Parliamentary Library paper referring to the Australian Constitutional Convention from 1973-1985 (whose delegates were members of the Commonwealth and state parliaments with local government and territory representatives), Professor Saunders suggested that the strength of the convention was its potential to develop consensus on proposals for constitutional change across all political groups with representation in Australian Parliaments:

... the [Australian Constitutional Convention] provided a forum for Members of Parliament from all parts of the country to meet and deliberate on constitutional matters, engendering a greater degree of understanding and tolerance of each other's perspectives than generally had existed in the past.⁶⁵

3.74 Professor Williams said he favoured a constitutional convention as a means of finalising a draft provision to constitutionalise a First Nations Voice because of the historical success of similar processes in engaging the broader community with constitutional issues:

It's tended to be the most successful means of moving from this type of stage to actually having a model to put to the people. I think the key will be finding a process that combines that Indigenous leadership with the broader community buy-in.⁶⁶

3.75 Professor Megan Davis agreed with Professor Williams regarding the 'important role that a national convention might play in... enabling non-Indigenous Australians to walk through a deliberative decision-making constitutional process that enables them to better understand the exigency of a Voice to Parliament'.⁶⁷

3.76 Evidence demonstrated support for the inclusion of constitutional lawyers, Aboriginal and Torres Strait Islander peoples⁶⁸ and Parliamentarians in any

⁶⁵ Professor Cheryl Saunders in McRae, H., & Mullins, A. (1998). *Australian Constitutional Convention 1973-1985: a guide to the archives*. Melbourne: Centre for Comparative Constitutional Studies, The University of Melbourne; Professor Cheryl Saunders, Consultation, Politics and Public Administration Group, 15 August 2000, <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0001/01RP03#by> retrieved 18 October 2018.

⁶⁶ Professor George Williams AO, *Proof Committee Hansard*, Canberra, 18 September, p. 3.

⁶⁷ Professor Megan Davis, Pro Vice-Chancellor Indigenous, University of New South Wales, *Proof Committee Hansard*, Canberra 18 September 2018, p. 5.

⁶⁸ Centre for Comparative Constitutional Studies, *Submission 289.1*, p. 10.

process to finalise the wording of a provision to constitutionalise a First Nations Voice.⁶⁹

- 3.77 The Indigenous Peoples Organisation submitted that a Makarrata Commission should be established and that its responsibilities should include developing the wording of a constitutional provision through community consultation.⁷⁰

A process to implement a First Nations Voice

- 3.78 The Committee identified two fundamentally different approaches to implementing a First Nations Voice based on stakeholders feedback, namely:
- commencing with a referendum to constitutionally enshrine the broad principles of a Voice, before a process to finalise the details of its structure and functions, and its enactment via Commonwealth legislation; or
 - enacting The Voice in Commonwealth legislation, followed by its eventual constitutional enshrinement by referendum.
- 3.79 These differing views were put to the Committee by Aboriginal and Torres Strait Islander leaders with a long history of committed advocacy on the issue of constitutional recognition.
- 3.80 Other stakeholders referred to in this section of the report have not necessarily made submissions in relation to the entirety of these approaches to implementation.
- 3.81 The remainder of this chapter considers evidence relating to the possible benefits and challenges presented by these different approaches to implementing a First Nations Voice.

Commencing with a referendum

- 3.82 The Committee has heard from some stakeholders advocating for referendum to constitutionally enshrine a First Nations Voice to be conducted as soon as practicable.⁷¹

⁶⁹ Dr Shireen Morris, Senior Policy Adviser and Constitutional Reform Research Fellow, Cape York Institute, *Proof Committee Hansard*, Townsville, 3 October 2018, p. 9.

⁷⁰ Indigenous Peoples Organisation, *Submission 338.1*, p. 22.

⁷¹ For example: Cape York Institute, *Submission 244.3*, p. 4; Ms Patricia Anderson AO, Professor Megan Davis, Mr Noel Pearson, Associate Professor Sean Brennan, Associate Professor Gabrielle

3.83 Anderson et al urged the Committee to recommend that a referendum be pursued as a matter of immediate priority:

The Regional Dialogues, national constitutional convention and the *Uluru Statement From the Heart* provide sufficient authority and necessary detail to pursue constitutional reform now.⁷²

3.84 Anderson et al recommended that a referendum be conducted before an Aboriginal and Torres Strait Islander led co-design process to determine the details of the First Nations Voice, stating:

Consistently with the practice of constitutional deferral, the detail of the Voice should be determined after the referendum. The detail should be left to an Indigenous-led consultation process that is then subject to parliamentary oversight.⁷³

3.85 Mr Bill Gray, former Chairman of ATSIC, also advocated for a referendum prior to a co-design process to finalise the structure and functions of a First Nations Voice. He felt that co-design must not be rushed if it is to be viewed as authentic and legitimate by Aboriginal and Torres Strait Islander peoples.⁷⁴

3.86 Anderson et al suggested that, knowledge of the co-design process to be conducted should the referendum be successful, is sufficient to secure the public support needed to constitutionally enshrine a First Nations Voice:

What can and should be determined prior to the referendum is the process by which the design of the Voice will be worked out... Setting out the Voice design process in detail before the referendum will provide sufficient certainty

Appleby, Dr Dylan Lino, Ms Gemma McKinnon, *Submission 479*, pp. 2, 6; Mr Bill Gray AM, *Proof Committee Hansard*, Canberra, 11 September 2018, p. 7.

⁷² Ms Patricia Anderson AO, Professor Megan Davis, Mr Noel Pearson, Associate Professor Sean Brennan, Associate Professor Gabrielle Appleby, Dr Dylan Lino, Ms Gemma McKinnon, *Submission 479*, pp. 2, 6.

⁷³ Ms Patricia Anderson AO, Professor Megan Davis, Mr Noel Pearson, Associate Professor Sean Brennan, Associate Professor Gabrielle Appleby, Dr Dylan Lino, Ms Gemma McKinnon, *Submission 479*, p. 11.

⁷⁴ Mr Bill Gray AM, *Proof Committee Hansard*, Canberra, 11 September 2018, p. 7.

and confidence to First Nations, the Parliament, the Executive, the States and the Australian people to approve the constitutional amendment.⁷⁵

- 3.87 They recommended that a draft bill outlining the co-design process be endorsed by a motion of Parliament and released to the public alongside the referendum question:

The Bill provides all parties – First Nations, the Parliament, the Executive, the States and the Australian people – sufficient certainty on the process by which the First Nations Voice will be designed after the referendum.⁷⁶

- 3.88 Anderson et al envisioned that the First Nations Voice will be enacted in Commonwealth legislation following a successful referendum and a subsequent co-design process to determine the detail of the representative body:

... the detail of the Voice will not be included in the Constitution but be determined by Parliament. This will ensure flexibility of the Voice to adapt to changing needs of First Nations.⁷⁷

- 3.89 Constitutional law experts who engaged with the Committee’s inquiry also broadly agreed that the detail of a First Nations Voice’s structure and functions should be provided for in Commonwealth legislation.⁷⁸

Benefits of commencing with a referendum

- 3.90 The Cape York Institute suggested that commencing the implementation of a First Nations Voice with a referendum would increase the likelihood of a successful referendum by limiting public debate to the principle of empowering Aboriginal and Torres Strait Islander voices to advise Parliament, as opposed to the details of a First Nations Voice to be established:

⁷⁵ Ms Patricia Anderson AO, Professor Megan Davis, Mr Noel Pearson, Associate Professor Sean Brennan, Associate Professor Gabrielle Appleby, Dr Dylan Lino, Ms Gemma McKinnon, *Submission 479*, p. 13.

⁷⁶ Ms Patricia Anderson AO, Professor Megan Davis, Mr Noel Pearson, Associate Professor Sean Brennan, Associate Professor Gabrielle Appleby, Dr Dylan Lino, Ms Gemma McKinnon, *Submission 479*, pp. 13, 15.

⁷⁷ Ms Patricia Anderson AO, Professor Megan Davis, Mr Noel Pearson, Associate Professor Sean Brennan, Associate Professor Gabrielle Appleby, Dr Dylan Lino, Ms Gemma McKinnon, *Submission 479*, p. 9.

⁷⁸ Dr Gabrielle Appleby, *Proof Committee Hansard*, Canberra, 11 September 2018, p. 12.

The referendum can in this way be won on the readily digestible principle that Indigenous peoples should have a fair say in political decisions made about them, their rights and their affairs, without getting bogged down in highly complex institutional design detail which is properly a matter for legislation, not the Constitution.⁷⁹

3.91 Submitters in favour of this approach referred to past referendums to illustrate the value of asking voters to consider a question of principle rather than complex institutional or legislative design.

3.92 Dr Richard Davis argued that the 1999 referendum on the question of Australia becoming a republic failed, in part, because voters focussed on the model of governance advanced, not the principle of the question:

In that referendum, voters were asked to vote on the Queen and Governor General being replaced by a President appointed by a two-thirds majority of the members of the Commonwealth Parliament. The preference for how a President would be established allowed public commentary to focus on this mechanism at the expense of the more general consideration about whether Australians wished to establish a republic in the first place.⁸⁰

3.93 Anderson et al asserted that there is historical precedent for constitutionally enshrining an institution, but deferring responsibility for its full design and enactment to the Australian Parliament should the referendum be successful:

Consistent with the practice of constitutional deferral, it is both usual and desirable that the detail of constitutional institutions is not precisely determined at the point of constitutional change. Rather, the broad parameters of the institutions are enshrined in the Constitution, with the detail determined later in legislation...

Examples of constitutional deferral include the High Court of Australia, established by section 71 of the Constitution, but the detail of which was not

⁷⁹ Cape York Institute, *Submission 244.3*, p. 4. See also: Professor Megan Davis, Pro Vice-Chancellor Indigenous, University of New South Wales, *Proof Committee Hansard*, Canberra, 18 September 2018, p. 5.

⁸⁰ Dr Richard Davis, *Submission 465*, p. 1.

determined by Parliament until two years after Federation through the Judiciary Act 1903 (Cth).⁸¹

- 3.94 Moreover, they argued that pursuing a referendum with a detailed model of the First Nations Voice to be established (should the referendum be successful) could mislead the Australian public:

We believe that presenting to the Australian public an ‘exposure draft’ setting out a model of what the Voice might look like, should the referendum be successful, has the capacity to mislead the public. The referendum pertains only to the constitutional words and not the legislative detail. That legislative detail will likely change and evolve. The referendum debate should be informed by what is being constitutionally entrenched: the broad parameters of the body and empowering Parliament to determine the detail of the composition, functions, powers and procedure of it.⁸²

- 3.95 Some witnesses cited recent opinion polls as a reason for proceeding to a referendum. Dr Morris observed that the majority of the Australian public appear to support the constitutional recognition of Aboriginal and Torres Strait Islander peoples, suggesting that a successful referendum is possible:

The OmniPoll done late last year showed that 61 per cent of Australians would vote yes to a referendum if it was held at that time... There was also a Newspann poll earlier this year that showed a similar level of support.

... I think that the concept of a Voice, the simple concept that the First Nations should have a say in laws and policies made about Indigenous affairs, is a concept that can win popular support and that, if there was the requisite political leadership, I do think that a referendum could succeed.⁸³

Challenges of commencing with a referendum

- 3.96 However, others questioned whether this support would manifest in a successful referendum if the Australian public was asked to enshrine a First

⁸¹ Ms Patricia Anderson AO, Professor Megan Davis, Mr Noel Pearson, Associate Professor Sean Brennan, Associate Professor Gabrielle Appleby, Dr Dylan Lino, Ms Gemma McKinnon, *Submission 479*, p. 11.

⁸² Ms Patricia Anderson AO, Professor Megan Davis, Mr Noel Pearson, Associate Professor Sean Brennan, Associate Professor Gabrielle Appleby, Dr Dylan Lino, Ms Gemma McKinnon, *Submission 479*, p. 12.

⁸³ Dr Shireen Morris, Senior Policy Adviser and Constitutional Reform Research Fellow, Cape York Institute, *Proof Committee Hansard*, Townsville, 3 October 2018, p. 10.

Nations Voice without access to detailed information about its structure or operation.⁸⁴

3.97 Mr Mick Gooda, former Aboriginal and Torres Strait Islander Social Justice Commissioner felt that there is currently insufficient clarity around a Voice proposal to prosecute a successful referendum campaign:

... if Australians don't understand what they are voting for in a referendum they will vote no. For me, there are too many unknowns right now.

... If we went to a referendum now, as some people are advocating, on a simple question of whether there should be a voice to parliament for Aboriginal Torres Strait Islander people, without any detail about how it's going to be formed and constructed, it's a guarantee of failure. We're committed to a voice, but we think there's a process we've got to go through.⁸⁵

3.98 Mr Gooda also suggested that pursuing a referendum without detail about the structure and operation of a First Nations Voice would enable misinformation to propagate:

... I could just imagine the mischief some people would get up to with [a lack of information about The Voice]: 'It's going to usurp the power of Parliament.' We've already had that. 'It's going to usurp the power of the High Court.' My understanding is that the referendum question has absolutely got to be clear on what we're asking...⁸⁶

3.99 Professor Williams, who co-authored a book considering the context of successful referenda in Australia,⁸⁷ suggested that none of the preconditions for a prevailing referendum on a First Nations Voice are sufficiently evident to proceed. He suggested that to be successful, a referendum on a Voice requires:

- bipartisan support;
- popular ownership of the proposal by voters;
- education; and

⁸⁴ Dr Jackie Huggins, Co-Chair, National Congress of Australia's First Peoples, *Proof Committee Hansard*, Brisbane, 4 October 2018, p. 28; Father Frank Brennan SJ AO, *Submission 453*, p. 9.

⁸⁵ Mr Mick Gooda, *Proof Committee Hansard*, Canberra, 18 October 2018, pp. 2-3.

⁸⁶ Mr Mick Gooda, *Proof Committee Hansard*, Canberra, 18 October 2018, p. 8

⁸⁷ Professor George Williams AO and David Hume, *People Power: The History and Future of the Referendum in Australia*, UNSW Press, 2010.

- a modern referendum process.⁸⁸
- 3.100 The Business Council of Australia and Father Frank Brennan SJ AO also noted the importance of broad political collaboration to initiate a referendum on a First Nations Voice and engender the popular support required for a successful ‘yes’ campaign.⁸⁹
- 3.101 Father Brennan felt that the constitutional enshrinement of a First Nations Voice in the immediate future does not have the broad political support needed to succeed, and suggested that it is therefore, ‘not only sensible but also imperative to first legislate and road test any Voice’.⁹⁰
- 3.102 Dr Jackie Huggins, Co-Chair of Congress also believed that a successful referendum to constitutionally enshrine a Voice is not currently possible. She cautioned against proceeding prematurely and characterised the consequences of a failed referendum as ‘disastrous’:
- Yet again Aboriginal and Torres Strait Islander people would feel very let down, because what does that say to us? That we are worthless, that we are not valued, that we’re not seen in this society as people having even equal rights? I’ve heard that many times from our people. So, unfortunately, I think a failed referendum would be another blow to Indigenous Australians.⁹¹
- 3.103 Congress also contemplated the political difficulties in maintaining a statutory First Nations Voice to Parliament in the face of a failed referendum.⁹²
- 3.104 In a submission, Uphold & Recognise and the PM Glynn Institute responded to evidence given at an earlier public hearing by Ms Patricia Anderson AO, who suggested that a referendum in relation to The Voice ‘only needs to contain the broad contours or parameters of the voice’ and that ‘the detail of the voice elicited from a co-design process can be deferred until after a referendum’.⁹³ Drawing on the experience of the 1999 republic referendum,

⁸⁸ Professor George Williams AO, *Submission 13*, p. i.

⁸⁹ Business Council of Australia, *Submission 355.1*, pp. 3-4; Father Frank Brennan SJ AO, *Submission 453*, p. 9.

⁹⁰ Father Frank Brennan SJ AO, *Submission 453*, p. 9.

⁹¹ Dr Jackie Huggins, Co-Chair, National Congress of Australia’s First Peoples, *Proof Committee Hansard*, Brisbane, 4 October 2018, p. 29.

⁹² National Congress of Australia’s First Peoples, *Submission 292.1*, p. 25.

⁹³ Ms Patricia Anderson AO, *Proof Committee Hansard*, Canberra, 11 September 2018, p. 2.

Uphold & Recognise and the PM Glynn Institute submitted that a referendum would be likely to fail if there is insufficient detail about the proposed change:

If insufficient information is provided by the YES case, the NO case during the public campaign will argue vigorously that the voters should not give more power to politicians to decide how the new arrangements will work. In short, the decision not to resolve the detail before the referendum would be a gift to the NO case campaign, which would in all likelihood prevail and result in a majority of electors voting against the proposed change that would be presented as a "blank cheque for the politicians".⁹⁴

3.105 Dr Damien Freeman expanded on this argument at a public hearing in Redfern:

... the reality is that even some people of goodwill will actively oppose this if there's no detail there. They will say that this will give rise to uncertainty. They will say that this is unnecessary. They will say that we're giving either the politicians or the High Court new powers. And the only way to address that is to resolve the details first. I think it's very important to understand that there are people of goodwill who would nevertheless oppose this if the detail were not apparent before they were asked to vote.⁹⁵

3.106 The submission went on to argue that the detail of the proposal should be determined by both the Australian Parliament and Aboriginal and Torres Strait Islander peoples.

Commencing with legislation

3.107 The serious consequences of a failed referendum led many stakeholders to advocate for a more cautious approach to the implementation of a First Nations Voice to Parliament.

3.108 Congress recommended establishing the First Nations Voice through Commonwealth legislation:

National Congress believes that the voice should be initially created via legislation...

Consultation to co-design the voice should precede the enactment of legislation to ensure that community support and faith in its capacity to

⁹⁴ Uphold & Recognise and PM Glynn Institute, *Submission 423*, pp. 1-2.

⁹⁵ Dr Damien Freeman, PM Glynn Institute, *Proof Committee Hansard*, Redfern, 5 October 2018, p. 26.

represent the aspirations of Aboriginal and Torres Strait Islander peoples is maximised.⁹⁶

3.109 Congress advocated for conducting a referendum to constitutionally enshrine a First Nations Voice as soon as practical following the body's establishment through Commonwealth legislation:

... a referendum to constitutionally enshrine the voice should be sought soon after its creation via legislation, to ensure that it will not be abolished or de-funded as many Aboriginal and Torres Strait Islander organisations have been in the past.⁹⁷

3.110 Support for enacting a First Nations Voice in legislation prior to a referendum to enshrine it in the Australian Constitution was also expressed by other Aboriginal and Torres Strait Islander representative organisations. Two examples include the New South Wales Aboriginal Land Council ('the largest Aboriginal member-based organisation in Australia')⁹⁸ and the Indigenous Peoples Organisation (which represents more than 250 Aboriginal and Torres Strait Islander peak organisations, community organisations and individual members across Australia).⁹⁹

3.111 Whilst the National Aboriginal Community Controlled Health Organisation (NACCHO) did not advocate for a legislatively enacted First Nations Voice as an initial step, it did support an Aboriginal and Torres Strait Islander led co-design process to finalise the details of a First Nations Voice ahead of a referendum seeking its constitutional enshrinement:

NACCHO agrees that there are still significant details to be worked out on how the advisory body would be elected and its terms of reference. We note that the Uluru Statement proposed that these details be left to the Parliament, however NACCHO believes that these details should be worked out with and supported by Aboriginal and Torres Strait Islander delegates, with the process to be funded by Government. NACCHO believes that these details need to be agreed prior to a referendum.¹⁰⁰

⁹⁶ National Congress of Australia's First Peoples, *Submission 292.1*, p. 25.

⁹⁷ National Congress of Australia's First Peoples, *Submission 292.1*, p. 25.

⁹⁸ New South Wales Aboriginal Land Council, *Submission 386*, pp. 1-2; New South Wales Aboriginal Land Council, *Submission 386.1*, p. 2.

⁹⁹ Indigenous Peoples Organisation, *Submission 338.1*, p. 12; Indigenous Peoples Organisation, *Submission 338.2*, p. ii.

¹⁰⁰ National Aboriginal Community Controlled Health Organisation, *Submission 373*, p. 6.

3.112 Ms Cathryn Eatock, Co-Chair, Indigenous Peoples Organisation, told the Committee:

We believe that a governance body should be established through legislation before the issues around a constitutional referendum are addressed, and that that also requires a period of bedding down. We've seen fear campaigns before, with Mabo, where some interest groups suggested that people's backyards would be stolen. We've seen that fear can be promoted. It's actually the government's responsibility to educate the Australian population and to bring them with us so it's a joint journey of healing for the Australian community.¹⁰¹

3.113 While noting their preference for a constitutionally enshrined body, the New South Wales Aboriginal Land Council argued the practical benefit of legislation first:

The Referendum Council's Final Report noted the preference for a constitutionally enshrined Voice, rather than a legislative body, to provide reassurance and recognition that this new norm of participation and consultation would be different to the practices of the past. A Voice to Parliament established through legislation may provide a practical interim first step. However, a constitutional Voice to Parliament must be pursued to provide people with certainty in moving forward.¹⁰²

Benefits and challenges arising from commencing with legislation

3.114 The Committee acknowledges the range of views presented in favour of commencing with legislation to implement a First Nations Voice to Parliament.

3.115 The Committee heard that proceeding with the legislative enactment of a First Nations Voice in the first instance may facilitate the general public's understanding of, and trust in, the legitimacy of the proposal; both factors being critical to a successful referendum.

3.116 Professor Williams suggested legislating for a First Nations Voice in the first instance would provide an opportunity to 'illustrate the workability of this model, pending a referendum'.¹⁰³

¹⁰¹ Ms Cathryn Eatock, Co-Chair, Indigenous Peoples Organisation, *Proof Committee Hansard*, Redfern, 5 October 2018, p. 27.

¹⁰² New South Wales Aboriginal Land Council, *Submission 386*, p. 2.

¹⁰³ Professor George Williams AO, *Submission 13*, p. ii.

3.117 Mrs Lorraine Finlay pointed out that this approach could also increase public support for the constitutional enshrinement of a First Nations Voice by providing an opportunity for the Australian public to see it operating successfully prior to a referendum:

I think a statutory starting point provides an important stepping stone to building that [nationwide] support. The past examples of attempts to give Indigenous Australians a voice have shown there are significant challenges in making sure that these structures work effectively and actually deliver the outcomes that we want them to deliver. Given those past challenges, I think it's important to ensure that the model actually works before we go down the road of constitutional entrenchment, and I think that's an important way of building support amongst the Australian people for the work that the voice is intended to do.¹⁰⁴

3.118 Professor Tom Calma AO, former Aboriginal and Torres Strait Islander Social Justice Commissioner made a similar point. He felt that this approach would assist the general public to understand that a First Nations Voice is not 'threatening' or a 'third chamber of Parliament'.¹⁰⁵ He suggested that a public education campaign could also build awareness and support for a First Nations Voice:

...nobody knows what the Voice might look like and how it might operate. Once that's determined or recommended, if there's broad support for it, then we should go into another round of campaigns. Going by the experience that we've had in the last few years, I think we will get that support across the nation.¹⁰⁶

3.119 The Indigenous Peoples Organisation similarly highlighted the opportunity for public education whilst a First Nations Voice is established in legislation in the lead up to a referendum:

After a period of its effective operation and bedding down the changes to the Constitution should be put to referendum. This should be undertaken in conjunction with a broad educational campaign to counter possible fear campaigns mounted by wealthy individuals and vested interests/stakeholders

¹⁰⁴ Mrs Lorraine Finlay, *Proof Committee Hansard*, Canberra, 18 September 2018, p. 12.

¹⁰⁵ Professor Tom Calma AO, *Proof Committee Hansard*, Canberra, 18 October 2018, p. 5.

¹⁰⁶ Professor Tom Calma AO, *Proof Committee Hansard*, Canberra, 18 October 2018, p. 7.

that seek to actively influence the national discourse around Indigenous affairs.¹⁰⁷

3.120 Professor Calma suggested that proceeding with the legislative enactment of a First Nations Voice would provide opportunity to refine its operation and maximise its efficacy prior to a referendum:

...[We] have to ensure that the Voice is not just going to be another parliamentary committee that is referenced as and when people have a discretionary issue.¹⁰⁸

3.121 The Indigenous Peoples Organisation suggested that establishing a Voice via legislation would enable its operation to be refined before its constitutional enshrinement is put to a referendum.¹⁰⁹

3.122 However, Gilbert + Tobin felt that exposure to an operational Voice would actually undermine popular and government support for its long-term enshrinement in the Constitution and make a referendum less likely to be held:

If the voice is to be a successful medium through which Indigenous Australians can effect positive changes to their lives and futures then, necessarily, its work must be critical and contestable. This will inevitably give rise to criticism of the voice inside and outside of government. If the voice finds expression only through legislation, unsupported by the underpinning of a constitutional mandate, then those at the receiving end of its critical work may well be unlikely to ever support constitutional enshrinement... If the voice is not to be a voice of challenge and discomfort to those in power then it will not be doing its job. It is these very activities which may well make it unpopular and attract entrenched opposition to any constitutionally enshrined voice.¹¹⁰

3.123 Gilbert + Tobin warned that newly established institutions take time to mature and a First Nations Voice is likely to be unfairly criticised while it is finding its feet:

¹⁰⁷ Indigenous Peoples Organisation, *Submission 338.1*, p. 12.

¹⁰⁸ Professor Tom Calma AO, *Proof Committee Hansard*, Canberra, 18 October 2018, p. 5.

¹⁰⁹ Indigenous Peoples Organisation, *Submission 338.1*, p. 12.

¹¹⁰ Gilbert + Tobin, *Submission 315.1*, pp. 2-3. Also see: Professor Adrienne Stone, Co-Director, Centre for Comparative Constitutional Studies, The University of Melbourne, *Proof Committee Hansard*, Canberra, 18 September 2018, p. 13; Cape York Institute, *Submission 244.3*, p. 3.

In its early years of operation the voice may be harshly judged to work inexpertly or inefficiently... It takes time for any new mechanism to establish itself, let alone a new mechanism operating in Indigenous affairs where politics and criticism are rife. The risk here is that those opposed to constitutional enshrinement will use such criticisms of a statutory voice to entrench opposition to ultimate constitutional reform.¹¹¹

3.124 Dr Morris argued that even if the newly established First Nations Voice is highly effective, legislating for it in the first instance risks dissipating momentum for a referendum to seek its constitutional enshrinement:

... the existence of a legislated voice is likely to dissipate momentum and urgency and the perceived need for a constitutional voice. I expect people will say, 'They already have a voice. There's already a vote in existence, so why do we need to change the Constitution?'¹¹²

3.125 The Centre for Comparative Constitutional Studies submitted that historically, 'it is rare for an institution to be constitutionalised after it has been established by legislation':

... once legislation has been passed there may be little political incentive to pursue constitutional change, and the momentum of the Uluru Statement may have passed.¹¹³

3.126 What's more, the Centre suggested that, even if the First Nations Voice is established and then a referendum is conducted to seek its constitutional enshrinement, the referendum is less likely to be successful:

... once a legislated body is operating, the task of achieving the kind of consensus will be complicated by the inevitable political contestation that attends the action of all governmental bodies, even the most successful and high functioning. It will be very difficult to separate the argument for a Voice from political contestation about particular positions taken by the Voice.¹¹⁴

3.127 Stakeholders, including Gilbert + Tobin, observed that 'people may vote against the inclusion of a Voice in the Constitution as they do not agree with

¹¹¹ Gilbert + Tobin, *Submission 315.1*, p. 3.

¹¹² Dr Shireen Morris, Senior Policy Adviser and Constitutional Reform Research Fellow, Cape York Institute, *Proof Committee Hansard*, Townsville, 3 October 2018, p. 8.

¹¹³ Centre for Comparative Constitutional Studies, *Submission 289.1*, p. 6.

¹¹⁴ Centre for Comparative Constitutional Studies, *Submission 289.1*, p. 6.

aspects of The Voice as designed’ rather than the principle of a First Nations Voice to advise Parliament.¹¹⁵

3.128 Similarly, the Cape York Institute asserted that ‘if the Voice is legislated and operational before it is constitutionalised, individuals sitting on the Voice, their decisions, along with any particular structural design issues arising (as will always arise in a new institution), will become the target of the “no” campaign’:

For example, if Indigenous leader X is sitting on the Voice, ‘no’ campaigners would likely target her decisions, behaviour and character, to try to demonstrate why the Voice should not be constitutionalised. This would place the Voice and its members under unfair pressure, setting it up for failure.¹¹⁶

3.129 The Committee notes that there was some suggestion that conducting a referendum to enshrine an already established First Nations Voice has the potential to mislead the Australian public. Dr Morris said:

We think it would be misleading to legislate first and have a referendum later, because the public would likely get the mistaken impression that they’re constitutionalising this specific model – whereas, in reality, all the constitutional amendment would do is set out the high-level imprimatur for voice. And the nature of that voice, through legislation, might change and evolve over time as necessary. I think the more honest approach is to say, ‘Here is a high-level enabling provision, a high-level constitutional promise that we are always going to give Indigenous people a voice in, in their affairs, with the honest acknowledgment that parliament will probably change and evolve the nature of that voice over time.’¹¹⁷

Committee comment

3.130 The Committee echoes observations made in the interim report:

The Committee notes that The Voice is intended to empower Aboriginal and Torres Strait Islander peoples to have a greater say in the policy and legislation which governs their affairs and, in so doing, improve their autonomy and prosperity.

¹¹⁵ Gilbert + Tobin, *Submission 315.1*, p. 4. See also: National Native Title Council, *Submission 464*, p. 6; Dr Gabrielle Appleby, *Proof Committee Hansard*, Canberra, 11 September 2018, p. 11.

¹¹⁶ Cape York Institute, *Submission 244.3*, p. 3.

¹¹⁷ Dr Shireen Morris, Senior Policy Adviser and Constitutional Reform Research Fellow, Cape York Institute, *Proof Committee Hansard*, Townsville, 3 October 2018, p. 8; Dr Gabrielle Appleby, *Proof Committee Hansard*, Canberra, 11 September 2018, p. 11.

An entity or entities such as The Voice would give effect to the long held desire for recognition of the unique status and rights of Aboriginal and Torres Strait Islander peoples, as well as their need for engagement and direct participation in the issues and decision-making that affect their rights as citizens and their daily lives.

The Committee recognises that such calls for greater self-determination, partnership, and participation have been long-standing and are not recent calls. Aboriginal and Torres Strait Islander peoples are demanding to be self-determining, to have a primary role in decision making processes, and not merely be the subjects of any decisions made by others.

- 3.131 The Committee acknowledges the broad stakeholder support for a First Nations Voice enshrined in the Australian Constitution. It recognises that there are many important symbolic and practical reasons to provide for an Aboriginal and Torres Strait Islander representative body in the nation's founding document.
- 3.132 On the one hand, leaders such as Mr Noel Pearson, Ms Pat Anderson AO and Professor Megan Davis have argued strongly for the position of constitutional change as the initial step. On the other hand, leaders such as Mr Mick Gooda, Professor Tom Calma AO and Ms June Oscar AO argued that a constitutional change would only be successful if it was accompanied by clearly articulated legislation, defining and road-testing the implementation of The Voice, after a co-design process. Both viewpoints were seen by the Committee as sincerely held with constructive intent, but fundamentally different.
- 3.133 A constitutionally enshrined First Nations Voice would empower Aboriginal and Torres Strait Islander peoples to shape the policy and legislation governing their affairs across the longer term. It would provide a First Nations Voice with the independence and permanence to provide frank advice.
- 3.134 The Committee notes that presently, the Commonwealth does not lack the constitutional power to establish or remove a First Nations Voice. It also notes that the constitutional enshrinement of a Voice may not change the Commonwealth's capacity in relation to Aboriginal and Torres Strait Islander peoples.
- 3.135 However, the Committee notes the strength of concerns that neither constitutional provision nor Commonwealth statute to enact a First Nations

Voice can be finalised until a co-design process is conducted to finalise the representative body's structure, functions and operation.

- 3.136 It is very important to state clearly that a process of co-design neither precludes nor mandates either the legislative or constitutional option. The process of co-design also provides time for constitutional and legislative options to be further refined and for further and necessary public support to build for the constitutional option.
- 3.137 Indeed, these details from the process of co-design are needed to clarify whether it is even appropriate to enshrine a First Nations Voice in the Australian Constitution or whether the Australian Government has the power to enact it in Commonwealth statute without constitutional change.
- 3.138 The Committee notes, as described in this chapter, the current lack of consensus (including amongst constitutional lawyers) on the form of any constitutional amendment.
- 3.139 The Committee notes there was a diversity of views and in fact some uncertainty surrounding whether the purpose of any constitutional amendment is to:
- recognise Aboriginal and Torres Strait Islander peoples;
 - mention The Voice and defining some of its structures and functions;
 - ensure that The Voice cannot be abolished; or
 - give effect to the broader aspirations of the *Statement from the Heart*.
- 3.140 The Committee suggests that the co-design process recommended in the previous chapter will provide guidance on questions relating to the legal form that The Voice might take.
- 3.141 The Committee also acknowledges the need to consider expert views and to form a consensus on a series of options for constitutional provisions which could be put to the Parliament. One way of dealing with the issues might be a constitutional convention, noting the advantages and disadvantages of such a process. While conventions have been useful in the past to build consensus around options; they also risk solidifying opposition.
- 3.142 The Committee notes the lack of consensus regarding whether putting a referendum question immediately potentially risks dooming the referendum to failure and the fact that such a failure would have consequences for the future of a legislative Voice as a fall back option.
- 3.143 The Committee has received 18 models of potential constitutional amendments. The fact that there are so many different provisions proposing

to constitutionalise The Voice and that a new provision was suggested in a late submission received by the Committee on 3 November 2018, nearly two months after submissions had closed, indicates that neither the principle nor the specific wording of provisions to be included in the Constitution are settled. More work needs to be undertaken to build consensus on the principles, purpose and the text of any constitutional amendments.

3.144 For the reasons set out above, the Committee is unable to recommend either approach (referendum or legislation) at this time. Instead, the Committee is of the view that a process of co-design, according to the recommendation in the previous chapter, should be undertaken and concluded before this question is considered and resolved.

3.145 Following the co-design, the Committee tasks the Australian Government with balancing the urgency for a Voice against the likelihood of referendum success, and determining whether to proceed with the implementation of a First Nations Voice via legislation, executive action, or a referendum.

3.146 In making this recommendation, the Committee acknowledges that the recommendation is not every member's preferred option but rather represents a compromise position given the need for broad political support both as a part of the Committee's terms of reference and for the success of any referendum. Within the Committee some members' first preference views ranged from:

- supporting the co-design of a Voice before considering the question of either legislative enactment or constitutional amendment;
- supporting the co-design of a Voice and its enactment in Commonwealth legislation before considering whether to conduct a referendum to seek its constitutional enshrinement; and
- supporting the co-design of a Voice with the guarantee of a referendum to seek its constitutional enshrinement.

3.147 The recommendation at the conclusion of this chapter represents a position that all members could support.

3.148 The Committee stresses that this recommendation is not made to delay the implementation of a First Nations Voice. Rather, it is made in acknowledgment of the need for a Voice and the serious consequences of a failed referendum.

3.149 It is the Committee's view that following co-design, a decision should be made about the next steps to be taken for the implementation of that design.

- 3.150 Moreover, the Committee makes this recommendation in acknowledgment of the importance of broad political support to successful constitutional reform.
- 3.151 The Committee notes that proposals around section 25 and section 51(xxvi) of the Australian Constitution discussed in detail in Chapter 4 might also be reconsidered after the process of co-design as part of a package of reforms including the establishment of a First Nations Voice.

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.**

4. Other proposals for constitutional change

- 4.1 Beyond including a provision for a First Nations Voice in the Australian Constitution, this chapter considers three other forms of constitutional recognition raised by stakeholders throughout the inquiry, namely:
- the repeal of section 25 of the Australian Constitution;
 - the repeal, amendment, or replacement of section 51(xxvi) of the Australian Constitution; and
 - an extra-constitutional declaration of recognition, which has been proposed as an alternative to a statement of recognition within the Australian Constitution.

Repeal of section 25

- 4.2 As explained in the Committee's interim report, section 25 and section 51(xxvi) of the Australian Constitution both contain references to outdated notions of race.
- 4.3 Section 25 contemplates a state disqualifying all members of a particular race from voting in a state election. It provides that those persons disqualified

from voting due to their race shall not be counted when determining the number of representatives of that state in the Parliament.¹

- 4.4 The Expert Panel on the Constitutional Recognition of Indigenous Australians (2012) and the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (2015) both recommended repealing section 25.²
- 4.5 However, the Referendum Council’s final report made no recommendations in relation to section 25. It noted that section 25 was understood by delegates at the regional dialogues to be a ‘dead letter’ addressed to past historical circumstances and its removal would therefore confer ‘no substantive benefit’ on Aboriginal and Torres Strait Islander peoples.³
- 4.6 While stakeholders acknowledged that section 25 is unlikely to be used today – noting that its use would contravene the *Racial Discrimination Act 1975* (Cth) – many still expressed support for its repeal.
- 4.7 In a joint submission to the inquiry, the current and former Aboriginal and Torres Strait Islander Social Justice Commissioners asserted that various consultation processes have demonstrated that ‘there is near unanimous agreement to remove the racism of section 25’.⁴
- 4.8 Allens Linklaters explained the history of calls for the repeal of section 25:
- Recommendations for the repeal of section 25 date back as far as the 1959 Parliamentary Joint Committee on Constitutional Review. Its removal was also recommended in the Constitutional Conventions 1973-85, and again in the Final Report of the Constitutional Commission 1988.⁵
- 4.9 Councillor Alf Lacey, Mayor of the Palm Island Aboriginal Shire Council, characterised the repeal of section 25 as ‘low hanging fruit’ and suggested

¹ Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Interim Report*, July 2018, p. 93.

² Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Interim Report*, July 2018, p. 94.

³ Referendum Council, *Final Report of the Referendum Council*, June 2017, p. 12.

⁴ Australian Human Rights Commission, *Submission 394*, p. 9.

⁵ Allens Linklaters, *Submission 452*, p. 2.

that this simpler form of recognition could help build support for the more complicated constitutional enshrinement of a First Nations Voice.⁶

4.10 Father Frank Brennan SJ AO also felt that the repeal of section 25 is important and achievable, 'it is an outdated blot on our Constitution.'⁷

4.11 Allens Linklaters submitted that 'section 25 of the Constitution no longer accords with community values of contemporary Australia' and that any referendum to enshrine a First Nations Voice in the Australian Constitution should also seek the repeal of section 25.⁸

4.12 In a joint submission, Associate Professors Matthew Stubbs and Peter Burdon of the University of Adelaide Law School, suggest section 25 should be repealed because it contemplates the disenfranchisement of voters based on an outdated notion of race:

...while s 25 remains in the Constitution, the whole document is tainted by the fact that it envisages the possibility of racial disenfranchisement. Moreover, Aboriginal and Torres Strait Islander peoples were the chief victims of such discrimination. It is therefore appropriate to remove s 25 from the Constitution.⁹

4.13 Others characterised the repeal of section 25 as symbolic recognition that would not meaningfully improve the lives of Aboriginal and Torres Strait Islander peoples.

4.14 Ms Teela May Reid, a 'proud Wiradjuri and Wailwan woman' and a lawyer, asserted that 'symbolic recognition has been rejected by First Nations and will be rejected by the Australian people':

Symbolic recognition includes constitutional recognition in the form of... removing s 25 of the Australian constitution...

Unless constitutional recognition provides real change on the ground in local communities, it will be rejected by First Nations. There is no point pursuing reform if it provides no practical change to the status quo.¹⁰

⁶ Councillor Alf Lacey, Mayor, Palm Island Aboriginal Shire Council, *Proof Committee Hansard*, Palm Island, 3 October 2018, p. 15.

⁷ Father Frank Brennan SJ AO, *Submission 453*, pp. 7-8.

⁸ Allens Linklaters, *Submission 452*, p. 2.

⁹ Associate Professors Matthew Stubbs and Peter Burdon, *Submission 281*, p. iii.

¹⁰ Ms Teela May Reid, *Submission 92*, p. 6.

4.15 Similarly, the New South Wales Aboriginal Land Council supported the reform of section 25 and section 51 (xxvi) of the Australian Constitution:

We believe that further consideration of repealing and replacing section 25 and 51 (xxvi) of the Constitution is needed, particularly if a referendum is proposed.¹¹

Consideration of section 51(xxvi)

4.16 Section 51(xxvi) of the Australian Constitution—sometimes referred to as the ‘races power’—provides the head of power for the Commonwealth to make laws for people of particular racial groups. It was amended at a referendum held in 1967 to repeal the qualification ‘other than the aboriginal race in any state’. This had the effect of enabling the Commonwealth to make laws relating to Aboriginal and Torres Strait Islander peoples. Since the 1967 referendum, the federal Parliament has enacted laws pursuant to section 51(xxvi) in areas including cultural heritage and native title.¹²

4.17 The Expert Panel and the previous Joint Select Committee both recommended replacing section 51(xxvi) with new provisions designed to:

- replace the constitutional authority currently provided by section 51(xxvi) which enables the Commonwealth to legislate with respect to Aboriginal and Torres Strait Islander peoples; and
- prohibit Commonwealth legislation or Executive action which adversely discriminates on the basis of race.¹³

4.18 However, the Referendum Council’s final report made no recommendations in relation to section 51(xxvi).¹⁴ The report explained:

Amending or deleting the race power was ranked low in many Dialogues and rejected in other Dialogues. Delegates understood there was no iron clad guarantee that Parliament could be prevented from passing discriminatory laws that single out Aboriginal and Torres Strait Islander peoples for adverse treatment.

¹¹ New South Wales Aboriginal Land Council, *Submission 386.1*, p. iv.

¹² For example, see: *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)*; *Native Title Act 1993 (Cth)*.

¹³ Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Interim Report*, July 2018, p. 95.

¹⁴ Referendum Council, *Final Report of the Referendum Council*, June 2017, p. 12.

Many participants at the dialogues felt it was too risky to amend section 51 (xxvi) because it could not be assured that the judicial interpretation of words such as ‘benefit’ or ‘advancement’ would accord with the desires and aspirations of the affected peoples.

Delegates were concerned that section 51 (xxvi) had empowered significant legislation in cultural heritage protection, land rights and native title that may be placed at risk. Similar concerns were raised by the Joint Select Committee in relation to the implications of altering or deleting section 51 (xxvi) upon the Native Title Act.

There was no significant appetite for removing the word ‘race’. Dialogues understood that although the concept of ‘race’ was a social construction, removing the word ‘race’ and inserting ‘Aboriginal and Torres Strait Islander Peoples’ does not alter the adverse discriminatory potential of the race power. Therefore, removing the word ‘race’ was not regarded as an improvement on the status quo of the people affected.¹⁵

- 4.19 Yet throughout the inquiry, the Committee did hear ongoing support for the repeal, amendment or replacement of section 51(xxvi) amongst Aboriginal and Torres Strait Islander peoples and the broader community.

Repealing section 51(xxvi)

- 4.20 In a joint submission to the inquiry, the current and former Aboriginal and Torres Strait Islander Social Justice Commissioners submitted that the ‘starting proposition’ for constitutional change should include repealing section 51(xxvi).¹⁶
- 4.21 The Commissioners asserted that constitutional change should be a priority and would complement the actions identified in the *Statement from the Heart*:

The pursuance of constitutional reform should not be a substitute for responding to the Uluru Statement.

Nor should responding to the Uluru Statement be a substitute for pursuing constitutional reform.¹⁷

¹⁵ Referendum Council, *Final Report of the Referendum Council*, June 2017, pp. 12-13.

¹⁶ Australian Human Rights Commission, *Submission 394*, pp. 10-11.

¹⁷ Australian Human Rights Commission, *Submission 394*, p. 7.

4.22 The Commissioners suggested that section 51 (xxvi) has been, and continues to be, used to negatively discriminate against Aboriginal and Torres Strait Islander peoples. For example, through:

- The confirmation of extinguishment of native title between 1975 and 1992 (with commitments made in 1993 to remedy this through the implementation of other measures of restitution which were subsequently not met).
- The removal of heritage protection laws for a group of Aboriginal people due to their unwillingness to consent to a development.
- The winding back of rights to negotiate on native title about some land tenures, following the High Court's decision in *Wik* that Aboriginal interests in land may continue to co-exist with other tenures.
- The acquisition of Aboriginal property without consent and the removal of the protection of racial discrimination laws from all Aboriginal people in the Northern Territory (and some parts of Queensland) through the Northern Territory Emergency Response legislation.¹⁸

4.23 The Commissioners asserted that 'these examples make clear that the Australian Constitution enables and permits racial discrimination to occur in the twenty-first century' and that enabling provisions, such as section 51(xxvi), need to be removed:

These examples, unfortunately, indicate that the potential for the Constitution to be used in this way is not merely theoretical, but something that has been actively utilised by successive Parliaments.

We are unable to identify another country that provides the constitutional power to discriminate in this way.

Our reputation as a country that respects the rule of law and human rights is reduced by the continuation of racially discriminatory power in our Constitution. There remains a pressing need for the removal of such provisions from our Constitution.¹⁹

¹⁸ Australian Human Rights Commission, *Submission 394*, pp. 5-6; Mr Mick Gooda, *Proof Committee Hansard*, Canberra, 18 October 2018, p. 2.

¹⁹ Australian Human Rights Commission, *Submission 394*, pp. 5-6.

- 4.24 Mr Mick Gooda, who served as Aboriginal and Torres Strait Islander Social Justice Commissioner from 2010 to 2016, suggested the repeal of section 51(xxvi) would be of benefit to all Australians.²⁰
- 4.25 However, Mr Gooda did acknowledge that section 51(xxvi) may need to be replaced by a new provision providing constitutional authority for the passage of Commonwealth statute for the benefit of Aboriginal and Torres Strait Islander peoples:
- I'm sure there are a lot of people in this country smarter than me who can make suggestions about how we [rework section 51(xxvi) to provide for positive legislation], but I think the fundamental issue is: the start of the process, as recommended by the Expert Panel, is around the referendum on removing the race power.²¹
- 4.26 Mr Gooda suggested that a referendum to repeal section 51(xxvi) should be conducted while a co-design process to finalise the detail of The Voice is underway. Mr Gooda went on:
- I think the quicker we move to that—it's almost a precursor: let's fix up the race power; we need bipartisan support for that. I think you can get bipartisan support for removing the race power in Parliament.²²
- 4.27 The Institute for Public Affairs also argued in favour of repealing section 51(xxvi), suggesting that other provisions could be relied upon to provide constitutional authority for federal native title legislation.²³

Amendment of section 51(xxvi)

- 4.28 A second option for reforming section 51(xxvi) of the Australian Constitution was proposed by Associate Professors Stubbs and Burdon.
- 4.29 Associate Professors Stubbs and Burdon submitted that section 51(xxvi) should be repealed, arguing that a power to make laws on the basis of race 'has no basis in contemporary Australian society'.²⁴ However, they also went on to suggest it was appropriate that the Commonwealth Parliament

²⁰ Mr Mick Gooda, *Proof Committee Hansard*, Canberra, 18 October 2018, p. 3.

²¹ Mr Mick Gooda, *Proof Committee Hansard*, Canberra, 18 October 2018, p. 3.

²² Professor Tom Calma AO, *Proof Committee Hansard*, Canberra, 18 October 2018, p. 6.

²³ Mr Simon Breheny, Director of Policy, Institute for Public Affairs, *Proof Committee Hansard*, Melbourne, 26 September 2018, p. 4.

²⁴ Associate Professors Matthew Stubbs and Peter Burdon, *Submission 281*, p. iv.

continue to have a power to make laws ‘directed to the protection and advancement’ of Aboriginal and Torres Strait Islander peoples.²⁵

- 4.30 They therefore suggested that section 51(xxvi) could be amended by substituting its reference to the outdated notion of ‘race’ with the more acceptable premise of ‘peoples’:

The first option would be a minimalist change – amend s 51(xxvi) to read ‘Aboriginal and Torres Strait Islander peoples’. This has the advantage of simplicity, and would effectively preserve the status quo in terms of the Commonwealth Parliament’s legislative power in respect of Aboriginal and Torres Strait Islander Australians.²⁶

- 4.31 Associate Professors Stubbs and Burdon suggested that this ‘minimalist change’ to section 51(xxvi) would be more likely to be acceptable to the public than replacing section 51(xxvi) with a power ‘conditioned by a constitutional guarantee against adverse discrimination’.²⁷ This option is discussed in the next section.

- 4.32 This proposal was reiterated in a submission from Associate Professors Stubbs and Burdon along with other members of the Public Law and Policy Research Unit at the University of Adelaide:

The basis for the differential rights of Aboriginal and Torres Strait Islander peoples is in a culturally unique connection to country based on traditional laws and customs. Aboriginal and Torres Strait Islander communities have maintained separate identities from a time prior to the introduction of a foreign legal system. These bases for difference are not sourced in a difference of ‘race’.²⁸

- 4.33 They went on to suggest that updating this language in the Australian Constitution would complement the establishment of a First Nations Voice.²⁹ Associate Professors Stubbs and Burdon explained:

²⁵ Associate Professors Matthew Stubbs and Peter Burdon, *Submission 281*, p. iv.

²⁶ Associate Professors Matthew Stubbs and Peter Burdon, *Submission 281*, p. iv.

²⁷ Associate Professors Matthew Stubbs and Peter Burdon, *Submission 281*, p. iv.

²⁸ Public Law and Policy Research Unit at The University of Adelaide, *Submission 408*, p. 3. Note: this group comprises Associate Professor Matthew Stubbs, Associate Professor Peter Burdon, Dr Anna Olijnyk and Professor Alexander Reilly.

²⁹ Public Law and Policy Research Unit at The University of Adelaide, *Submission 408*, p. 3.

Ultimately, the Uluru Statement from the Heart directs attention to the First Nations Voice to the Parliament, focussing on the empowerment of Aboriginal and Torres Strait Islander people to speak for themselves, rather than asking the courts to enforce a protective guarantee. This solution is arguably both more democratic and more empowering for Aboriginal and Torres Strait Islander Australians – but it must be noted that this places a heavy moral (though not legal) burden on the Commonwealth Parliament to ensure it listens to and respects the First Nations Voice to the Parliament.³⁰

Replacement of section 51(xxvi)

- 4.34 The Committee also heard from stakeholders advocating for section 51(xxvi) to be replaced by a new constitutional provision or provisions.
- 4.35 Reconciliation Tasmania asserted that the recommendations of the Expert Panel (2012) remain valid, are consistent with the *Statement from the Heart*, and should be pursued. It noted that the Expert Panel’s recommendations included:
- the repeal of section 51(xxvi);
 - the insertion of a new section 51A to provide constitutional authority for the Commonwealth Parliament to enact legislation for peace, order and good governance with respect to Aboriginal and Torres Strait Islander peoples, and which recognises their status as the first Australians;
 - the insertion of a new section 116A prohibiting discrimination on the grounds of race, colour, ethnicity or nationality without precluding legislation aimed at overcoming disadvantage; and
 - the insertion of a new section 127A recognising both English and Aboriginal and Torres Strait Islander languages.³¹
- 4.36 Reconciliation Tasmania argued that the Expert Panel’s recommendations are capable of being supported at a referendum.³²
- 4.37 Professor George Williams AO of the University of New South Wales Faculty of Law also supported the replacement of section 51(xxvi) with a provision providing the Commonwealth with the authority to pass legislation for the benefit of Aboriginal and Torres Strait Islander peoples:

³⁰ Associate Professors Matthew Stubbs and Peter Burdon, *Submission 281*, pp. iv-v.

³¹ Reconciliation Tasmania, *Submission 467*, p. ii; Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, 2015, p. xviii.

³² Reconciliation Tasmania, *Submission 467*, p. ii.

This section [51(xxvi)] should be replaced with a general power to make laws in respect of Aboriginal and Torres Strait Islander peoples, subject either to a general guarantee against racial discrimination or a more specific requirement that the power not be used to make laws that discriminate adversely against Indigenous peoples.³³

4.38 Allens Linklaters submitted that ‘the race power could be repealed and replaced by a power to make laws in respect of Aboriginal and Torres Strait Islander peoples’.³⁴

4.39 The Indigenous Peoples Organisation recommended repealing section 51(xxvi) and inserting:

... a new power over ‘Aboriginal and Torres Strait Islander peoples’ and an overarching freedom from racial discrimination’.³⁵

4.40 While the Indigenous Peoples Organisation suggested that a guarantee against racial discrimination was a ‘standard feature’ of other Constitutions, it explained:

There is a possibility that a freedom from racial discrimination might be interpreted by the High Court to strike down laws and programs that provide special benefits or recognition to Aboriginal people and Torres Strait Islanders. It might be held that these discriminate against non-Indigenous people. This could affect programs which, for example, provide accelerated entry into university in order to redress the long-term shortage of Indigenous doctors and lawyers.³⁶

4.41 As such, the Indigenous Peoples Organisation recommended that any such guarantee should be made ‘subject to a clause stating that it does not affect laws and programs aimed at redressing disadvantage’:

The freedom would not only protect Indigenous Australians, it would protect everyone in Australia from any law that discriminates against them on the basis of their race.³⁷

³³ Professor George Williams AO, *Submission 13*, p. ii.

³⁴ Allens Linklaters, *Submission 452*, p. 2.

³⁵ Indigenous Peoples Organisation, *Submission 338.1*, p. 29.

³⁶ Indigenous Peoples Organisation, *Submission 338.1*, p. 30.

³⁷ Indigenous Peoples Organisation, *Submission 338.1*, p. 30.

4.42 The Indigenous Peoples Organisation also suggested provisions that would ‘provide specific recognition of language rights or a combination of symbolic and practical measures that might relate to Indigenous culture’:

Such proposed amendments would recognise Indigenous peoples in a positive way in the Australian Constitution for the first time.³⁸

4.43 However, the Cape York Institute noted that the proposal to insert an anti-discrimination provision in the Australian Constitution has historically lacked broad political support:

- A racial non-discrimination clause was rejected by many politicians after the Expert Panel recommended it in 2012, for exactly the same reason: concerns about empowering the High Court and creating legal uncertainty, to the detriment of parliamentary supremacy.
- Three variations of a racial non-discrimination clause were again recommended by the Joint Select Committee in 2015. The approach was then repudiated by the Committee’s Chairman, Liberal MP, Ken Wyatt, who told the public such a clause would not succeed because it was already being opposed in his own party.
- Australia has never succeeded in implementing any new constitutional rights clause. Previous attempts have failed.
- Australia has not even succeeded in implementing a legislated federal bill of rights, let alone a new constitutionally entrenched rights clause.³⁹

4.44 The Cape York Institute also pointed out that the *Statement from the Heart* does not call for an anti-discrimination provision:

Through the *Uluru Statement from the Heart*, Indigenous people have told Australia what kind of constitutional reform they want. They have asked for a constitutionally guaranteed voice. This is a sensible and pragmatic request. If Indigenous people pushed a racial non-discrimination clause yet again, it would again be rejected by politicians, and they would end up with constitutional minimalism (mere symbolism, without any kind of constitutional guarantee) – which they do not endorse and which failed in 1999...⁴⁰

³⁸ Indigenous Peoples Organisation, *Submission 338.1*, p. 29.

³⁹ Cape York Institute, *Submission 244.1*, p. ii.

⁴⁰ Cape York Institute, *Submission 244.1*, p. ii.

Extra-constitutional declaration of recognition

- 4.45 As noted in the Committee’s interim report, the Referendum Council also recommended an extra-constitutional declaration of recognition to be passed by all Australian Parliaments on the same day:

The Council further recommends:

That an extra-constitutional Declaration of Recognition be enacted by legislation passed by all Australian Parliaments, ideally on the same day, to articulate a symbolic statement of recognition to unify Australians.⁴¹

- 4.46 The Referendum Council stated that, along with the establishment of a Makarrata Commission and a process to facilitate truth telling, an extra constitutional declaration was a matter of ‘great importance’ to Aboriginal and Torres Strait Islander peoples.⁴²

- 4.47 According to the Council, delegates at the regional dialogues felt that the declaration should be an ‘expression of national unity and reconciliation’ and include ‘inspiring and unifying words articulating Australia’s shared history, heritage and aspirations’:

The Declaration should bring together the three parts of our Australian story: our ancient First Peoples’ heritage and culture, our British institutions, and our multicultural unity.⁴³

- 4.48 Evidence received by the Committee also highlighted community support for an extra-constitutional declaration of recognition.

- 4.49 Mr Keith Thomas, Chief Executive Officer of the South Australian Native Titles Services, expressed support for the proposal on the basis that it aligns with the oral story telling traditions of Aboriginal and Torres Strait Islander peoples:

We believe this resonates with the oral traditions of First Nations to tell the true story of these lands and waters and also unify First Nations, colonisers and migrants to jointly build better futures.⁴⁴

⁴¹ Referendum Council, *Final Report of the Referendum Council*, June 2017, p. 2.

⁴² Referendum Council, *Final Report of the Referendum Council*, June 2017, p. 37.

⁴³ Referendum Council, *Final Report of the Referendum Council*, June 2017, p. 2.

⁴⁴ Mr Keith Thomas, Chief Executive Officer, South Australian Native Titles Services, *Proof Committee Hansard*, Adelaide, 5 July 2018, p. 9.

4.50 Mr Paul Wright, National Director of the Australians for Native Title and Recognition (ANTaR), felt that a declaration issued concurrently by all Australian parliaments would be a ‘great start’ to the recognition of Aboriginal and Torres Strait Islander peoples.⁴⁵ In a submission to the inquiry, ANTaR asserted that a declaration would be a ‘powerful demonstration of our collective desire and commitment to the ongoing process of reconciliation in Australia’:

This would put us on a more sure footing as we tackle the priority issues of closing the gap in health inequality, life-expectancy disparities, shameful world-leading incarceration rates and the work required to avoid creating a new stolen generation through state-managed child removal.⁴⁶

4.51 Professor Anna Yeatman, Institute for Culture and Society, Western Sydney University, asserted that an extra-constitutional declaration of recognition is more than mere symbolism. She felt that it could transform Australians’ understanding of their nation and history:

The full significance of this recommendation is missed if it seems to be ‘merely’ symbolic. It is actually a claim for the re-constitution of the Australian people as a political entity... [It] is a claim for a postcolonial reconstruction of the Australian people, one that includes the ancient first nations of Australia, settlers of British heritage, and Australians of ‘immigrant’, multicultural heritage.⁴⁷

4.52 Professor Gregory Craven, Vice-Chancellor and President of the Australian Catholic University, also supported the prospect of an extra-constitutional declaration of recognition. He suggested that the declaration could be made to help garner public awareness and support for the constitutional enshrinement of a First Nations Voice.⁴⁸

⁴⁵ Mr Paul Wright, National Director, Australians for Native Title and Recognition, *Proof Committee Hansard*, Redfern, 5 October 2018, p. 47.

⁴⁶ Australians for Native Title and Reconciliation, *Submission 136*, p. 7.

⁴⁷ Professor Anna Yeatman, *Submission 188*, p. 3.

⁴⁸ Professor Gregory Craven, Vice-Chancellor and President, Australian Catholic University, *Proof Committee Hansard*, Sydney, 4 July 2018, p. 9.

Uphold & Recognise proposal for a declaration of recognition

4.53 Uphold & Recognise submitted a comprehensive proposal for an extra-constitutional declaration of recognition. The proposal is set out in, *A Fuller Declaration of Australia's Nationhood*.⁴⁹

4.54 In that document, Uphold & Recognise argued that, 'together with other substantive reforms for constitutional recognition of Australia's Indigenous peoples, the adoption of a declaration of recognition will complete the process of recognition by creating a symbolic moment that unifies all Australians'.⁵⁰

4.55 Uphold & Recognise contended that both Aboriginal and Torres Strait Islander peoples and the broader Australian public should be involved in drafting a declaration. It suggested that a public competition, similar to the process used to select the Australian flag, could be held to seek a draft declaration from the public:

There are historical examples of similar processes working well. In 1901, a competition was held inviting suggestions for a national flag for the new Australian nation. Over 32,000 entries were received, and five entries were sufficiently similar to be declared joint winners. A similar process could be adopted, encouraging everyone to have their say about the declaration of recognition. Such a competition could result in a shortlist of five versions of a declaration from which the final text could be chosen or refined.

... It would be appropriate to engage an accomplished poet to assist in refining the best entries in the national competition.⁵¹

4.56 Uphold & Recognise suggested that eight themes common to past attempts to draft an Australian declaration of recognition could inform any new draft. The themes comprise:

- 1 Recognition of the traditional owners of the land that comprises modern Australia;
- 2 Acknowledgment of their ongoing connection to their traditional lands and waters;

⁴⁹ Uphold & Recognise, *Submission 17: Attachment 4*, p. 7.

⁵⁰ Uphold & Recognise, *Submission 172: Attachment 4*, p. 7.

⁵¹ Uphold & Recognise, *Submission 172: Attachment 4*, p. 8.

- 3 Affirmation of the heritage, culture and languages of Australia's Indigenous peoples;
- 4 Reverence for the oldest continuing civilisation in the world;
- 5 Reflection about the past mistreatment of Indigenous peoples;
- 6 Recitation of the values shared by Australian citizens;
- 7 Recognition of the institutions central to Australian government; and
- 8 Recognition of the contribution of waves of immigration to a multicultural society.⁵²

4.57 Uphold & Recognise felt that the adoption of an extra-constitutional declaration of recognition should occur after any other constitutional reform to recognise Aboriginal and Torres Strait Islander peoples.⁵³ It felt that the declaration should be adopted by the Australian Parliament, but also could involve state and territory parliaments and proposed two options for making the declaration:

- Amendment of the Australia Acts to insert a new section 18 reciting the declaration;
- A Declaration of Recognition Act authorising the Governor-General to proclaim the declaration in response to a petition to Parliament calling for the declaration.⁵⁴

A Declaration of Recognition Act

4.58 Uphold & Recognise suggested that a declaration of recognition could be circulated and eventually tabled in the Commonwealth Parliament as a petition. Parliament could then respond to the petition by passing a Declaration of Recognition Act authorising the Governor-General to issue a Proclamation Adopting the Declaration of Recognition:

Aboriginal people have a proud history of petitioning Parliament, most famously through the Bark Petitions from the Yirrkala people, who petitioned Parliament in 1963 to recognise their land rights...

Once the drafting process has settled the text of the declaration of recognition, it could be reproduced in Recognition Books which would be circulated around Australia. In this way, Australian citizens could sign the books to

⁵² Uphold & Recognise, *Submission 172: Attachment 4*, pp. 7-8.

⁵³ Uphold & Recognise, *Submission 172: Attachment 4*, p. 9.

⁵⁴ Uphold & Recognise, *Submission 172: Attachment 4*, pp. 9-10.

signify their support for the declaration, and to petition the Australian Parliament to adopt it. Once a sufficient number of people have signed the Recognition Books, they would then be tabled in Parliament as a petition calling for the adoption of a declaration of recognition.

The Parliament could then respond to this petition by passing a Declaration of Recognition Act, which would authorise the Governor-General to issue a Proclamation Adopting the Declaration of Recognition.⁵⁵

Committee comment

- 4.59 The Committee believes there would be broad political support for recognition of Aboriginal and Torres Strait Islander peoples comprising:
- the repeal of section 25; and
 - the rewording of section 51(xxvi) to remove the reference to ‘race’ and insert a reference to ‘Aboriginal and Torres Strait Islander peoples’.
- 4.60 While the Committee has observed some support for these changes among Aboriginal and Torres Strait Islander peoples, the findings of the Referendum Council indicate these changes do not have widespread support in the absence of other, more substantive changes.
- 4.61 Similarly, while the Committee believes there would be some support for an extra-constitutional declaration of recognition, this is unlikely to be supported by Aboriginal and Torres Strait Islander peoples in the absence of some form of constitutional recognition.

⁵⁵ Uphold & Recognise, *Submission 172: Attachment 4*, p. 11.

5. Other issues raised by the Statement from the Heart

Introduction

- 5.1 This chapter considers other issues raised by the *Statement from the Heart* including Makarrata, agreement making, and truth-telling.
- 5.2 The Committee acknowledges that there is no single defined and agreed way forward. As consideration of The Voice took the bulk of the Committee's time, the Committee did not have a chance to deeply consider issues raised by Makarrata and agreement making. On Makarrata it did not have much of an opportunity to test submissions in oral evidence. However, the Committee heard and tested a number of submissions on agreement making and truth-telling.
- 5.3 While there are also differences of opinion amongst Committee members about how to proceed, it is hoped that overall, observations made by those who have participated in the inquiry will perform an educative role in Indigenous and non-Indigenous communities.
- 5.4 In this chapter, the Committee notes particularly the variations in views on terminology. In general, there was widespread acceptance that truth-telling is an essential component of healing and reconciliation. The Committee acknowledges the diversity and strength of feeling among stakeholders about many issues, including: the use of 'Makarrata', which references a Yolngu tradition; the presence of formal or informal institutions; and the legalities and political considerations around the use of 'treaty' or 'agreement making'. As elsewhere in the report, the Committee has sought to present evidence fairly, and in a way which encourages productive

consideration of the range of disparate views, even amongst Committee members.

The concept of 'Makarrata'

- 5.5 This section provides an overview of the proposal for a Makarrata Commission to oversee agreement making and truth-telling. The concept of 'Makarrata' is explored, before a consideration of the suggestions for the possible role and structure of a Makarrata Commission or similar body. The Committee did not hear much evidence on Makarrata. To the extent that it did hear evidence on the idea of Makarrata, the Yolngu word was not well known among Aboriginal and Torres Strait Islander peoples. It also means different things to different people.
- 5.6 The *Statement from the Heart* sought a 'Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history'.¹ The statement described Makarrata as the 'culmination of our agenda: *the coming together after a struggle*'.²
- 5.7 The Referendum Council says Makarrata 'is another word for Treaty or agreement-making'³ while the Prime Minister's Indigenous Advisory Council calls it 'both truth telling and agreement making'.⁴
- 5.8 Makarrata is a Yolngu word from north-eastern Arnhem Land and is used to describe an agreement-making process that encompasses a 'coming to terms with the past as the foundation for a different future'. It enables:
- ... people to acknowledge the dispute between them, to talk it over and resolve it, and to move forward together.⁵
- 5.9 Uphold & Recognise provided the Committee with four policy documents⁶ intended to expand on a range of options regarding the 'big ideas' proposed

¹ *Uluru Statement from the Heart*, 2017.

² *Uluru Statement from the Heart*, 2017.

³ Referendum Council, *Final Report of the Referendum Council*, 2017, p. 21.

⁴ Prime Minister's Indigenous Advisory Council, *Submission 419*, p. 11.

⁵ Uphold & Recognise, *Submission 172: Attachment 1*, 2018, p. 13.

⁶ The four documents are: *Hearing Indigenous Voices, Makarrata, Journey from the Heart* and *A Fuller Declaration of Australia's Nationhood*.

in the *Statement from the Heart*. The document considering Makarrata suggested five aspects of the concept:

- recording the history of Indigenous peoples;
- preserving the culture of Indigenous peoples;
- empowering Indigenous peoples to take responsibility for their communities;
- creating commercial opportunities for Indigenous people; and
- concluding agreements between governments and Indigenous peoples that address the four criteria above.⁷

5.10 However, as it noted in its interim report, the Committee found that some people were concerned regarding the use of the term ‘Makaratta’.⁸ The Committee requested evidence on the cultural context of Makarrata and its potential practical application in the broader Australian democratic context.⁹

5.11 The Prime Minister’s Indigenous Advisory Council provided evidence from a Yolngu leader explaining the cultural context of Makarrata:

Before you can have a makarrata, you have to organise yourself: make sure you have enough men/team and clan group – before the makarrata can start.

For the makarrata, the leaders of the two clans make an agreement: the makarrata ceremony is where men get speared in the leg, which symbolises that there is no more bad feeling between the two clan groups and no further intention to break the law – provided it is done in the right time, way and with the right outside clan groups as witnesses.

Look at this present time in Australia: we are in a situation—you could say that we are in a makarrata—where two systems, two cultures are trying to recognise each other. Sometimes the two systems don’t quite come to that makarrata ground to reach agreement, which makes it very hard.

Maybe it is time to come together and find pathways to resolution.

⁷ Uphold & Recognise, *Submission 172: Attachment 3*, 2018, p. 6.

⁸ For example, see: Mr Les Coe, *Proof Committee Hansard*, Dubbo, 2 July 2018, p. 30; Ms Yvonne Weldon, Chairperson, Metropolitan Local Aboriginal Land Council, *Proof Committee Hansard*, Redfern, 5 October 2018, p. 7.

⁹ Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, *Interim Report*, July 2018, p. 102.

Makarrata is very significant in Yolngu law and culture—sometimes it is the only pathway to peace.¹⁰

5.12 Further detail was provided by Wathanainy Wunungmurra:

It is important to understand the process. There are a few things Yolngu have to do before Makarrata happens.

Some people are responsible as organisers: these people get their authority from the leaders of the two different clans that want to make peace. Before the peacemaking can happen, the organisers from each clan meet: the leader of each clan will send a messenger who will take a message-stick from their clan and return with the reply (these are runners, who may travel great distances). The clan leaders also send messages to consult with other related clans to become part of the peacemaking and to bear witness that the peacemaking ceremony has been conducted properly, at the right time and in the right way.

Once that has been done, the leaders will choose a location where the Makarrata will happen and in which season the Makarrata will occur.

The organisers then sit everyone in their clan down, so that everyone knows what is happening. If everyone agrees—‘yo, manymak (yes, good), we’ll make this happen so that there will be no more bad feeling between these two clan group’—then the messengers will go out again.

The warriors will start preparing. They will have to make special types of woomera, spears, armbands and headbands. They will have to gather clay (for body painting) and make special dirri-dirri (loin-cloths).

At the right time, the two groups will travel to the designated place—wearing the white clay (gapan), armbands and headbands showing they intend to participate in Makarrata. For the Makarrata, the two groups will approach each other in a close formation, as they get close the formations will open up and reveal the aggrieved parties (representing the victim as well as the person who has broken the law). The main participants will then do a totemic dance (for example—for Yirritja clans maybe crocodile; for Dhuwa clans, maybe a shark). Spears will be thrown at the dancers: these may be dodged. The Makarrata concludes with a spear being thrust through the leg of the lawbreakers.

¹⁰ Prime Minister’s Indigenous Advisory Council, *Submission 419*, p. 10. (Translated by Wathanainy Wunungmurra.)

By taking the spear in the leg and having the blood flow down into the land—in front of witnesses—you make the peace.

Yolngu people, when they have a Makarrata, it is under the law. It is a contract between the two warring groups to say: this fighting is finished; it is over: it is done. No Yolngu can break that law. If someone tries to keep fighting after the Makarrata, the law will punish him or her severely (likely by death). After the Makarrata, trading, working together and ceremony can begin again.

To have a proper Makarrata requires a lot of courage: the leaders have to be brave, the messengers have to be brave, the witnesses have to be brave, the warriors have to be brave. They all have to make a decision that puts what is good for their people and their country above their own lives.¹¹

- 5.13 The Prime Minister’s Indigenous Advisory Council therefore interprets Makarrata as ‘both truth telling and agreement making’ and conceives of it as ‘a concept that underpins the way we enter into dialogue and agreement in this country’.¹²
- 5.14 However, the National Congress of Australia’s First Peoples (Congress) noted that the use of the term may not be fitting for a commission that was designed to be ‘inclusive and cover all Aboriginal and Torres Strait Islander nations’:

... we have received feedback from traditional owners, who have told us that it is not culturally appropriate to use this word for a national Commission.¹³

Makarrata Commission

- 5.15 One of the issues raised in the *Statement from the Heart* was the idea of a Makarrata Commission. Although as the report notes in the previous section the idea of Makarrata remains elusive, the Committee did receive submissions on the role and function of a potential Makarrata Commission. Given the tight reporting timeframe and the Committee’s focus on The Voice, the Committee did not have sufficient time to test the propositions raised below in oral evidence.
- 5.16 The *Statement from the Heart* proposed that the Makarrata Commission supervise a process of agreement making and truth-telling. This supervisory

¹¹ Prime Minister’s Indigenous Advisory Council, *Submission 419*, pp. 10-11.

¹² Prime Minister’s Indigenous Advisory Council, *Submission 419*, p. 11.

¹³ National Congress of Australia’s First Peoples, *Submission 292*, p. 3, fn. 1.

role of the Commission was endorsed by many submitters.¹⁴ For example, Congress, reiterated the supervisory role and identified two ways it could be accomplished:

First, the Commission would address intergenerational trauma, which remains an enormous barrier to Aboriginal and Torres Strait Islander Peoples. Secondly, the Commission would facilitate a greater connection to culture for Aboriginal and Torres Strait Islander Peoples.¹⁵

- 5.17 The Prime Minister's Indigenous Advisory Council also emphasised both the supervisory and facilitation role of the Commission:

The Council reflects on the significance of Makarrata as the foundation of reform, and supports the call to establish a Makarrata Commission to supervise a process of agreement making between Government and First nations. The Commission will facilitate the ongoing process of truth telling and agreement making.¹⁶

- 5.18 An educational role was highlighted by a number of submitters. The Indigenous Peoples Organisation saw the Commission as providing a 'process of consultation, education, healing and meaningful reconciliation.'¹⁷ Congress elaborated on the role of enhancing the knowledge of all Australians regarding the history of Aboriginal and Torres Strait Islander peoples.¹⁸

- 5.19 The agreement making role was enlarged on by submitters. Mr Thomas Wilkie-Black, an ANU student, submitted that this aspect of the Commission's role could extend to ongoing responsibility for dispute resolution:

The Commission's role under this model would be ensuring the parties negotiate in good faith and acting as a neutral arbiter assisting them in working through political disagreements.¹⁹

¹⁴ Mr Barry Richard Miller and Mrs Paula Ann Miller, *Submission 426*; Mr Thomas Wilkie-Black, *Submission 450*, p. 6.

¹⁵ National Congress of Australia's First Peoples, *Submission 292*, p. 9.

¹⁶ Prime Minister's Indigenous Advisory Council, *Submission 419*, p. 12.

¹⁷ Indigenous Peoples Organisation, *Submission 338.2*, p. i.

¹⁸ National Congress of Australia's First Peoples, *Submission 292*, p. 9. See also: Indigenous Peoples Organisation, *Submission 338.2*.

¹⁹ Mr Thomas Wilkie-Black, *Submission 450*, p. 38.

5.20 The National Congress of Australia's First Peoples suggest five tasks for the Commission's operations:

- investigating the histories of various Aboriginal and Torres Strait Islander nations using primary and secondary sources;
- holding Tribunals and following up with local communities after the Tribunal process;
- recording findings in official reports for each nation;
- setting up Keeping Places for each nation; and
- engaging in widespread and culturally appropriate marketing to spread awareness about its processes among Aboriginal and Torres Strait Islander Peoples.²⁰

5.21 With regard to the agreement making process, Mr John Burke put forward a list of possible activities. However he emphasised that this is 'not for the purpose of fine definition of the Commission's activities, but rather to anticipate the capacities that it may need.'²¹ His list included:

- clarifying the concept of treaties and agreements;
- proposing a structure and process for implementing treaties and agreements: to a point of proposing a model;
- parallel examination of truth-telling processes and building capacity to support: to a point of planning wide-spread implementation; and possibly
- supporting the implementation of The Voice.²²

Agreement making

5.22 As outlined in the Committee's interim report, Aboriginal and Torres Strait Islander peoples have long advocated for agreement making and this support carried through to the regional dialogues conducted by the Referendum Council in 2017.²³

²⁰ National Congress of Australia's First Peoples, *Submission 292*, p. 16.

²¹ Mr John Burke, *Submission 447*, p. v.

²² Mr John Burke, *Submission 447*, p. v.

²³ Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Interim Report*, July 2018, pp. 101-103.

- 5.23 Throughout the inquiry, the Committee received much evidence highlighting the range of agreement making already occurring across Australian states and territories.
- 5.24 Throughout the inquiry, the Committee has observed that agreement making is occurring at the local and regional level.
- 5.25 For example, in Chapter 3 of the interim report, the Committee considered the role of Prescribed Bodies Corporate in managing and protecting native title rights and interests. The Committee also heard evidence about the Murdi Paaki Regional Assembly, which engages with government agencies and industry on behalf of communities in western New South Wales.
- 5.26 Similarly, in Chapter 2 of this report, the Committee discussed evidence on the Empowered Communities model, which seeks to establish partnerships between government and Aboriginal and Torres Strait Islander communities.
- 5.27 The existence of these arrangements indicates that agreement making extends beyond the state-level treaty and settlement processes described in this chapter, and can encompass a wide range of arrangements across various local and regional communities.
- 5.28 This chapter outlines some prominent examples of state and regional agreement making processes which have recently concluded or are underway.

State and regional agreement making

- 5.29 Many stakeholders referred to agreement making processes occurring at the state or regional level to illustrate both the complexities and opportunities arising from negotiating and reaching agreements in Australia.²⁴
- 5.30 Apmer Aharreng-arenykenh Aknganenty Aboriginal Corporation said agreement making is already occurring in Australia and internationally. It suggested that agreement making can be ‘healing’:

The negotiation of treaties/agreements that provide for full and final settlement between Australian governments and Aboriginal peoples (along language lines), in a way that is similar to the comprehensive ‘modern treaty’

²⁴ For example, see: Mr Harry Hobbs, *Submission 189*, p. 4; Reconciliation Victoria, *Submission 339*, p. 5; Victorian Aboriginal Child Care Agency, *Submission 346*, p. 2; Aboriginal Peak Organisations Northern Territory, *Submission 356*, pp. 2-3; Central Land Council & Northern Land Council, *Submission 357*, p. 9; Reconciliation Western Australia, *Submission 389*, p. 7.

agreements that have been negotiated in British Columbia, Canada offer the prospect of healing a festering sore.

While Indigenous Land Use Agreements (ILUAs) have been touted by some as being treaties, the only one which was comprehensive and delivered full and final settlement was the Noongar Agreement. Otherwise, they have primarily been used for the settlement of land issues. Perhaps the key point being made by those who have been promoting ILUAs as treaties is that the process of negotiation of agreements between native title holders and governments has been happening for some time already.²⁵

- 5.31 The most significant concluded agreement is the South West Native Title Settlement which was concluded by the previous West Australian Government.

South West Native Title Settlement

- 5.32 The South West Native Title Settlement (also known as the Noongar Settlement or the Noongar Native Title Settlement) was often raised by stakeholders as an example of agreement making in Australia.²⁶
- 5.33 The settlement is the most comprehensive native title agreement reached in Australia to date. It covers approximately 200,000 square meters of Western Australia, involves around 30,000 Noongar people and is valued at approximately \$1.3 billion.²⁷
- 5.34 The settlement was negotiated between the Government of Western Australia and the South West Aboriginal Land and Sea Council (SWALSC), which was acting on behalf of six groups of Noongar native title claimants.²⁸

²⁵ Apmr Aharreng-arenykenh Aknganenty Aboriginal Corporation, *Submission 378*, p. 7.

²⁶ Dr Bryan Keon-Cohen AM, QC, *Submission 161*, p. 6; Uphold & Recognise, *Submission 172: Attachment 3*, p. 8; Victorian Aboriginal Child Care Agency, *Submission 310*, p. 2; Reconciliation WA, *Submission 389*, p. 7; Mr Mick Gooda, *Proof Committee Hansard*, Canberra, 18 October 2018, p. 10.

²⁷ Government of Western Australia, *South West Native Title Settlement*, <<https://www.dpc.wa.gov.au/swnts/South-West-Native-Title-Settlement/Pages/default.aspx>> retrieved 6 November 2018; My Harry Hobbs, 'The Noongar Settlement: Two Lessons for Treaty Making in Australia', *Australian Public Law*, <<https://auspublaw.org/2018/10/the-noongar-settlement-two-lessons-for-treaty-making-in-australia/>> retrieved 6 November 2018.

²⁸ Government of Western Australia, *South West Native Title Settlement*, <<https://www.dpc.wa.gov.au/swnts/South-West-Native-Title-Settlement/Pages/default.aspx>> retrieved 6 November 2018.

5.35 Ms Beck, Regional Development Manager of SWALSC suggested that the Noongar people decided to work together to negotiate the settlement to ensure it delivered meaningful outcomes:

The south-west settlement came about because if you look at the Noongar people's country, we have a few pinpricks for native title. We have massive amounts of farms, we have towns, we have state forests, national forests and tiny little tenements. For us to win native title on these tiny little tenements would really only give us something close to nothing.²⁹

5.36 Ms Beck said that in the lead up to negotiations with the Western Australian Government, the SWALSC consulted the Noongar communities to identify their priorities for a settlement agreement:

...there were hundreds and hundreds of meetings with our mob, saying 'Do you want to negotiate?' The amazing thing was that no-one ever talked about money. Everyone talked about a house, saying 'Give us a home.' Everyone talked about jobs for their kids, getting the kids out of the toxic city and taking them back home. They talked about getting us back our country, because our mob feel we're not free to walk on our country. There's a lot of fear there about getting fined, which has happened, and then if the fine is not paid you're put in prison when you go on country. That went on for two years...³⁰

5.37 Following consultation with Noongar communities, the SWALSC undertook negotiations with the Government of Western Australia, which lasted approximately five years.³¹ An agreement was eventually struck encompassing rights, obligations and opportunities relating to resources, land, governance, finance, and cultural heritage, including:

- recognition by the Western Australian Parliament that the Noongar people are the owners and occupiers of South West Western Australia;
- the establishment of the Noongar Boodja Trust which will receive \$50 million annually for 12 years from the Government of Western Australia;

²⁹ Ms Gail Beck, Regional Development Manager, South West Aboriginal Land and Sea Council, *Proof Committee Hansard*, Perth, 6 July 2018, p. 49.

³⁰ Ms Gail Beck, Regional Development Manager, South West Aboriginal Land and Sea Council, *Proof Committee Hansard*, Perth, 6 July 2018, p. 49.

³¹ Ms Gail Beck, Regional Development Manager, South West Aboriginal Land and Sea Council, *Proof Committee Hansard*, Perth, 6 July 2018, p. 49.

- the creation and funding of six Noongar Regional Corporations to represent the rights and interests of the six Noongar native title groups involved in the settlement;
- land access licences enabling lawful access to unallocated Crown land and unmanaged reserve land for customary activities;
- a framework for the Department of Planning, Lands and Heritage and the Noongar Regional Corporations to work in partnership to improve the recording, protection and preservation of Aboriginal sites within the settlement area;
- economic and community development frameworks to improve Noongar community outcomes;
- funding for the establishment of a Noongar Cultural Centre; and
- approximately \$47 million in funding over 10 years to the Noongar Land Fund.³²

5.38 In return for this settlement package, the Noongar people have agreed to renounce all current and future claims relating to 'historical and contemporary dispossession'.³³ They have surrendered all native title rights to the agreement area, and consented to the validation of any past invalid acts over those areas.³⁴

5.39 Legally, the South West Native Title Settlement takes the form of six Indigenous Land Use Agreements covering each of the native title claims of the six Noongar groups involved. Although these Indigenous Land Use Agreements were approved by the Noongar people overall during a series of meetings in 2015, they have faced some opposition from a proportion of the Noongar people and four agreements were initially prevented from being registered with the Native Title Register.³⁵

³² Government of Western Australia, *The South West Native Title Settlement: About the Settlement: Factsheet*, <<https://www.dpc.wa.gov.au/swnts/Documents/Fact%20sheet%20-%20About%20the%20South%20West%20Native%20Title%20Settlement-%20September%202017.pdf>> retrieved 6 November 2018.

³³ Mr Harry Hobbs, 'The Noongar Settlement: Two Lessons for Treaty Making in Australia', *Australian Public Law*, <<https://auspublaw.org/2018/10/the-noongar-settlement-two-lessons-for-treaty-making-in-australia/>> retrieved 6 November 2018.

³⁴ Dr Bryan Keon-Cohen AM, QC, *Submission 161*, p. 6.

³⁵ Mr Harry Hobbs, 'The Noongar Settlement: Two Lessons for Treaty Making in Australia', *Australian Public Law*, <<https://auspublaw.org/2018/10/the-noongar-settlement-two-lessons-for-treaty-making-in-australia/>> retrieved 6 November 2018.

- 5.40 However, the Australian Government amended the *Native Title Act 1993* (Cth) to enable the Indigenous Land Use Agreements to be registered and the settlement to proceed. On 17 October 2018, the Native Title Registrar registered the Indigenous Land Use Agreements and settlement will commence 60 business days after this date.³⁶
- 5.41 Ms Beck suggested that despite the opposition, the majority of Noongar people did support the settlement:
- Even though we've had people take us to court and we've had the naysayers, the majority of Noongars wanted this deal.³⁷
- 5.42 Although the settlement was not negotiated as part of a specific treaty process, Mr Mick Gooda, former Aboriginal and Torres Strait Islander Social Justice Commissioner, asserted that it is an example of agreement making:

Something happened yesterday that's pretty important to note, which is that the Noongar Agreement was registered in the Native Title Tribunal. It's one of the biggest agreements we've got. When people ask about agreement making in any other country that would be called a treaty. When people ask me about treaty, I say, 'We've already got treaties,'... All of the elements you'd think of when you think about a treaty are in there. They'd given up the right to claim Native Title in that area. They came to the conclusion that 98 per cent had been extinguished anyway. They got land and money back from the government. The government passed a piece of legislation that recognised them as the traditional owners of that country. It was state legislation; it wasn't under the Native Title Act. There are the elements you would look at for a treaty, and the sun is still rising over in the west, so I think we've already got treaties in this country.³⁸

State and territory treaty processes

- 5.43 In recent years three state and territory jurisdictions—Victoria, the Northern Territory and South Australia—have commenced treaty processes. The treaty processes have not had bipartisan support in any jurisdiction and were abandoned in South Australia with the change of Government in 2018.

³⁶ Mr Harry Hobbs, 'The Noongar Settlement: Two Lessons for Treaty Making in Australia', *Australian Public Law*, <<https://auspublaw.org/2018/10/the-noongar-settlement-two-lessons-for-treaty-making-in-australia/>> retrieved 6 November 2018.

³⁷ Ms Gail Beck, Regional Development Manager, South West Aboriginal Land and Sea Council, *Proof Committee Hansard*, Perth, 6 July 2018, p. 50.

³⁸ Mr Mick Gooda, *Proof Committee Hansard*, Canberra, 18 October 2018, p. 10.

Victoria

- 5.44 The Victorian Government has been working towards an agreement with Victorian Aboriginal communities since 2016 when it formed an Aboriginal Treaty Working Group comprised of Traditional Owners, Aboriginal community controlled organisations, and young people from across the state.
- 5.45 Mr Andrew Gargett, Director of Strategy, Engagement and Community at Aboriginal Victoria, said that the Victorian Government established the Working Group in response to ‘continued calls by Aboriginal communities for treaty’ and evidence which suggested self-determination affects more positive outcomes in Aboriginal communities:

International evidence points to the fact that when Indigenous people have control over their lives, have an ability to have a say and have power to make decisions then better outcomes follow. The Victorian government has a policy of self-determination, and we are grappling with and taking tangible steps to ensure that Aboriginal people and communities have a greater say over their lives.³⁹

- 5.46 The Working Group was tasked with developing options for an Aboriginal Representative Body and advising the community and state government on the next steps towards a treaty making process.⁴⁰ According to Mr Gargett, the Working Group led community consultation on the design of the Aboriginal Representative Body:

In November 2016 and in March 2017, the Aboriginal Treaty Working Group led two phases of community consultation on the design of the Aboriginal Representative Body. Consultations occurred through open, statewide forums; regional and metropolitan community consultations; online submissions; and community led treaty circles. Following this, in November and December 2017, an Aboriginal Community Assembly was held over six days. It was a representative group of Aboriginal Victorians selected independently from government following an open expression of interest process. This group made recommendations on outstanding elements on the design of the Aboriginal Representative Body.

³⁹ Mr Andrew Gargett, Director of Strategy, Engagement and Community, Aboriginal Victoria, *Proof Committee Hansard*, Melbourne, 26 September 2018, pp. 14-15, 19.

⁴⁰ Victorian Government, *Aboriginal Treaty Working Group*, <<https://www.vic.gov.au/aboriginalvictoria/treaty/treaty-bodies/aboriginal-treaty-working-group.html>> retrieved 6 November 2018.

Over 7,000 Aboriginal Victorians were engaged through those phases of consultation.⁴¹

- 5.47 In March 2018, the Working Group published a final report recommending key design principles and functions for the new Aboriginal Representative Body. For example, it recommended that the body should represent all Aboriginal people in Victoria and that it should embody principles including unity, inclusivity, practicality, independence, transparency and accountability.⁴²
- 5.48 Once established the Aboriginal Representative Body will work with the Victorian Government to develop a framework to guide treaty negotiations.⁴³ Mr Gargett suggested that the framework will ‘outline fundamental matters such as who can negotiate, what can be negotiated for and how negotiations can be carried out’.⁴⁴
- 5.49 The Aboriginal Representative Body will also have a role in establishing a ‘treaty authority’ to act as an independent umpire and enforce the treaty negotiation framework. As well as the establishment of a self-determination fund, to support Aboriginal communities to ensure treaty negotiations are fair.⁴⁵
- 5.50 Further information about the consultation and design process, and about the proposed structure of the Aboriginal Representative Body, is discussed in Chapter 2.
- 5.51 In January 2018, a Victorian Treaty Advancement Commission and a Treaty Commissioner were appointed to collaborate with the Working Group to conduct further consultation with Aboriginal communities across the state.

⁴¹ Mr Andrew Gargett, Director of Strategy, Engagement and Community, Aboriginal Victoria, *Proof Committee Hansard*, Melbourne, 26 September 2018, pp. 14-15.

⁴² Victorian Government, *Final Report on the Design of The Aboriginal Representative Body*, <<https://www.vic.gov.au/aboriginalvictoria/treaty/final-report-on-the-design-of-the-aboriginal-representative-body/executive-summary-and-recommendations.html>> retrieved 6 November 2018.

⁴³ Victorian Government, *What the Commission Will Do*, <<https://www.vic.gov.au/aboriginalvictoria/treaty/jill-gallagher-ao-appointed-as-victorian-treaty-advancement-commissioner.html>> retrieved 6 November 2018.

⁴⁴ Mr Andrew Gargett, Director of Strategy, Engagement and Community, Aboriginal Victoria, *Proof Committee Hansard*, Melbourne, 26 September 2018, p. 15.

⁴⁵ Ms Jill Gallagher AO, Victorian Treaty Advancement Commissioner, Victorian Treaty Advancement Commission, *Proof Committee Hansard*, Melbourne, 26 September 2018, p. 24.

Mr Gargett noted the role of the Commissioner in engaging Victorian Aboriginal communities:

In December 2017, the Victorian Treaty Advancement Commissioner, Jill Gallagher AO, was appointed to lead the process independently from government. This year, the commissioner has led a further series of treaty roadshows with Aboriginal communities across Victoria. These roadshows have engaged more than a thousand Aboriginal Victorians across 30 communities, providing the regional and local engagement which is vital for a legitimate treaty process... The establishment of the office of the commissioner has provided for greater independence for Aboriginal Victorians on the path to treaty and the establishment of the representative body.⁴⁶

5.52 Mr Gargett suggested that appointment of a Victorian Treaty Commissioner ensured the independence and therefore legitimacy of consultation conducted as part of the treaty advancement process:

... At the beginning of the process, the treaty working group operated as an advisory body to government, and government provided the secretariat support for it and the assistance in running the consultations for that first two-year or 18-month phase... Then, at a period where we believed that the process had gained enough momentum, I suppose, it was deemed that creating that further step of independence, which was the Treaty Advancement Commissioner, was an adequate next step to ensure it did have that legitimacy and it wasn't seen as being a government-led process.⁴⁷

5.53 In July 2018, the Victorian Parliament passed the *Advancing the Treaty Process with Aboriginal Victorians Bill 2018* without the support of the opposition party. This bill has four key objectives:

- 1 To advance the treaty process between Aboriginal Victorians and the state.
- 2 To establish that the Aboriginal Representative Body will be the sole representative of Aboriginal Victorians, as recognised by the state, for the purpose of establishing the framework necessary to support future treaty negotiations.
- 3 To enshrine principles of the treaty process.

⁴⁶ Mr Andrew Gargett, Director of Strategy, Engagement and Community, Aboriginal Victoria, *Proof Committee Hansard*, Melbourne, 26 September 2018, pp. 14-15.

⁴⁷ Mr Andrew Gargett, Director of Strategy, Engagement and Community, Aboriginal Victoria, *Proof Committee Hansard*, Melbourne, 26 September 2018, p. 17.

- 4 To require that the Aboriginal Representative Body and the state work together to establish elements necessary to support future treaty negotiations.⁴⁸

5.54 Mr Gargett explained that the ‘legislation enshrines self-determination as a guiding principle for treaty and, consistent with that principle, the legislation requires the future Aboriginal Representative Body and the government to work in partnership to establish the elements to support treaty negotiations’:

The legislation also enables the Aboriginal representative body, once established, to be formally recognised as the state’s equal partner in the next stage of the treaty process. It enshrines guiding principles for the treaty process, including self-determination and empowerment, that all participants in the treaty process must abide by, and it requires the representative body and government to report annually on progress to treaty.⁴⁹

5.55 Mr Gargett also outlined clarified the limits of the *Advancing the Treaty Process with Aboriginal Victorians Bill 2018*:

The legislation does not do a range of things. It does not establish the representative body; that’s the role of the treaty advancement commissioner to do in partnership with the community. It doesn’t establish the new negotiation framework; that’s for negotiation between the representative body and the government. It doesn’t establish the parties to the treaty. It doesn’t specify the parameters, oversight or accountability of the self-determination fund. It doesn’t exclude any Aboriginal Victorians from the treaty process or pre-empt the issues, which groups, including clans or other groups, are competent to negotiate.⁵⁰

5.56 Mr Gargett noted that approximately \$37.5 million has been invested in ‘treaty and self-determination since the 2017-18 budget’.⁵¹ This included

⁴⁸ Parliament of Victoria, *Advancing the Treaty Process with Aboriginal Victorians Bill 2018*, <<https://www.parliament.vic.gov.au/publications/research-papers/download/36-research-papers/13861-advancing-the-treaty-process-with-aboriginal-victorians-bill-2018>> retrieved 6 November 2018.

⁴⁹ Mr Andrew Gargett, Director of Strategy, Engagement and Community, Aboriginal Victoria, *Proof Committee Hansard*, Melbourne, 26 September 2018, p. 15.

⁵⁰ Mr Andrew Gargett, Director of Strategy, Engagement and Community, Aboriginal Victoria, *Proof Committee Hansard*, Melbourne, 26 September 2018, p. 15.

⁵¹ Mr Andrew Gargett, Director of Strategy, Engagement and Community, Aboriginal Victoria, *Proof Committee Hansard*, Melbourne, 26 September 2018, p. 21.

provision for an ongoing education campaign aimed at raising awareness and understanding of the treaty advancement process amongst the broader Victorian population:

The government has also sought to engage the broader community through the Deadly Questions campaign. Deadly Questions is a unique initiative that was launched in June this year. The campaign provides a platform for anyone to ask questions about Aboriginal cultures and have them answered by a diverse range of Aboriginal Victorians. It's an online platform. Deadly Questions gives Aboriginal Victorians a platform to tell their stories and allow their voices to be amplified and provides non-Aboriginal Victorians a place to acquire a deeper understanding of Aboriginal cultures. The website puts Aboriginal voices and Aboriginal people at the heart of the campaign, and the website doesn't shy away from any tough questions, which is critical to establishing a true and honest dialogue between Aboriginal and non-Aboriginal Victorians. Since the campaign launched, we've had almost 3,000 questions asked, with very positive engagement. The second phase of Deadly Questions launched on 23 September, and the campaign shifted to a more explicit focus on treaty and treaties and providing information on what treaties could mean for both Aboriginal and non-Aboriginal Victorians.⁵²

5.57 Ms Jill Gallagher AO, Victorian Treaty Advancement Commissioner, informed the Committee that general public support for the treaty advancement process is strong:

Throughout the treaty roadshows I've had the opportunity to speak to non-Aboriginal people in those communities, and it's just been inspirational. I have not come across one non-Aboriginal person who has been negative in any way, shape or form.⁵³

5.58 The Victorian Government is now working towards the establishment of the Aboriginal Representative Body in early to mid-2019.⁵⁴ However, Mr Gargett informed the Committee that it is not seeking to conclude treaty negotiations

⁵² Mr Andrew Gargett, Director of Strategy, Engagement and Community, Aboriginal Victoria, *Proof Committee Hansard*, Melbourne, 26 September 2018, pp. 14-15.

⁵³ Ms Jill Gallagher AO, Victorian Treaty Advancement Commissioner, Victorian Treaty Advancement Commission, *Proof Committee Hansard*, Melbourne, 26 September 2018, p. 27.

⁵⁴ Victorian Treaty Advancement Commission, *Treaty Statewide Gathering*, p. 5, <http://victreatyadvancement.org.au/sites/default/files/inline-files/Treaty%20Statewide%20Gathering%20-%20Information%20Booklet_1.PDF> retrieved 6 November 2018; Mr Andrew Gargett, Director of Strategy, Engagement and Community, Aboriginal Victoria, *Proof Committee Hansard*, Melbourne, 26 September 2018, p. 16.

within a set timeframe as this approach is not consistent with the principle of self-determination which is guiding the process:

... in effectively a self-determination environment it wouldn't be appropriate for the government to say, 'We need to have a decision, to effectively have a negotiation, by then.' ...in similar modern-day treaty making in British Columbia the process has taken 10 or so years. It is not a quick process, but we're taking a staged approach.⁵⁵

5.59 Ms Gallagher noted that there are aspirations amongst the Victorian Aboriginal communities for clan based treaties as opposed to a single, state-wide agreement:

Clan based treaties. There have to be multiple treaties. We were never one people right across Victoria let alone right across the country. There has to be a cultural footprint on the landscape within Victoria... There are 50,000 of us. The cultural footprint across the landscape, by those aspirations – culture being taught in schools as a compulsory subject, as an aspiration, land as an aspiration and culturalness for our own communities.

Through the stolen generation, through all the forced removals and relocations of our people with the missions, a lot of people have been disconnected from their traditional lands. So reclaiming culture and learning language again is really aspirational. And that, I believe, is doable. We have to be practical and also look at what's within the state government remit.⁵⁶

5.60 However, the long-term future of the treaty advancement process remains uncertain given the lack of bipartisan support for its progression.

5.61 Ms Gallagher noted that the treaty advancement process could be jeopardised by a change of state government in the future:

We know that the opposition in the state of Victoria don't support treaty. They've made that public. We do have an act of parliament – first in the country – which enshrines the treaty process in legislation. It's going to be difficult if we do get a change of government. It would be difficult for them to repeal legislation – they can, all government, we know, but it just makes it that little bit harder. But in that act it commits government to continue to talk to the representative body. It commits government to negotiate and set up the treaty authority and that self-determination fund I spoke about earlier.

⁵⁵ Mr Andrew Gargett, Director of Strategy, Engagement and Community, Aboriginal Victoria, *Proof Committee Hansard*, Melbourne, 26 September 2018, p. 21.

⁵⁶ Ms Jill Gallagher AO, Victorian Treaty Advancement Commissioner, Victorian Treaty Advancement Commission, *Proof Committee Hansard*, Melbourne, 26 September 2018, p. 27.

So, yes, but it just makes it harder. I don't know. I've seen governments grow, all parties grow, and evolve. A more recent expression of that was through marriage equality. I have confidence that all Australians support treaties for Aboriginal people in this country, and I have confidence that political parties will evolve to that level. That's all I can do, have that faith and hope it does happen.⁵⁷

Northern Territory

- 5.62 The Northern Territory Government began an agreement making process this year. On 7 June 2018, the Northern Territory Government and the four Northern Territory Land Councils came together at the Barunga Festival to sign a Memorandum of Understanding (MoU) outlining a future treaty or treaties agreement between the two parties.⁵⁸
- 5.63 The MoU represented the first significant step in advancing treaty in the Northern Territory since the call for a national treaty was made in the Barunga Statement by the Northern and Central Land Councils in 1988.⁵⁹
- 5.64 Under the terms of the MoU, the Northern Territory Government will appoint an independent Treaty Commissioner who will lead consultations with Aboriginal people and organisations across the territory, and develop a framework for treaty negotiations. The Commissioner will also take responsibility for engaging territorians in the treaty making process.⁶⁰
- 5.65 The Northern Territory noted that both territory-wide and region-based treaties may be pursued:

An umbrella Treaty would be a general agreement between the Northern Territory Government and Aboriginal people in the Territory concerning certain matters.

⁵⁷ Ms Jill Gallagher AO, Victorian Treaty Advancement Commissioner, Victorian Treaty Advancement Commission, *Proof Committee Hansard*, Melbourne, 26 September 2018, p. 27.

⁵⁸ Shahni Wellington, Australian Broadcasting Corporation, *Indigenous Treaty a Step Closer after NT Government makes historic pledge*, <<https://www.abc.net.au/news/2018-06-08/indigenous-treaty-a-step-closer-after-nt-government-pledge/9848856>> retrieved 6 November 2018.

⁵⁹ Barunga Festival, The Barunga Statement, <<https://www.barungafestival.com.au/1988-statement/>> retrieved 6 November 2018; Central Land Council & Northern Land Council, *Submission 357*, p. 3.

⁶⁰ Northern Territory Government, *Treaty in the Northern Territory*, <<https://dcm.nt.gov.au/supporting-government/office-of-aboriginal-affairs/treaty/treaty-in-the-nt>> retrieved 6 November 2018.

Then under the umbrella Treaty, Aboriginal groups can negotiate separate agreements for additional or distinctive rights depending on their situation.⁶¹

5.66 It acknowledged that discussions with Aboriginal communities will inform the content of any agreement but suggested that a treaty or treaties may include:

- Acknowledgement of the First Nations people of the Northern Territory, including the deep connection to land and the significant contributions Aboriginal people have made to our society, culture, and prosperity.
- Truth telling process around the history of the Northern Territory, teaching about the displacement, the trauma, and the massacres.
- Rules around how Aboriginal groups and the Northern Territory Government should work together. This may include a formal group that provides a voice to government.
- Protection and support for Aboriginal language and culture.
- Land and sea matters which will vary based on location.
- Potential reparations for past injustices and for the dispossession of Aboriginal people from their resources and land.
- Mechanisms for accountability so that all parties to a Treaty live up to the commitments they make.⁶²

5.67 In a joint submission to the inquiry, the Central and Northern Land Councils noted that they intend to work with the Northern Territory Government, other Indigenous organisations and a yet to be appointed Treaty Commissioner to develop a state-wide consultation process to support agreement making.⁶³

South Australia

5.68 The previous South Australian Government commenced a treaty process which was abandoned upon the change of government in March 2018.

⁶¹ Northern Territory Government, *Treaty or Treaties?*, <<https://dcm.nt.gov.au/supporting-government/office-of-aboriginal-affairs/treaty/treaty-or-treaties-factsheet>> retrieved 6 November 2018.

⁶² Northern Territory Government, *Treaty in the Northern Territory*, <<https://dcm.nt.gov.au/supporting-government/office-of-aboriginal-affairs/treaty/treaty-in-the-nt>> retrieved 6 November 2018.

⁶³ Central Land Council & Northern land Council, *Submission 357*, p. 12.

- 5.69 In December 2016, the Hon Kyam Maher MLC, then Minister for Aboriginal Affairs, announced that the South Australian Government would commence treaty discussions with Aboriginal and Torres Strait Islander peoples residing in the state.⁶⁴
- 5.70 In February 2017, Dr Roger Thomas was appointed as the independent Treaty Commissioner. In July 2017, following an extensive consultation process, the Treaty Commissioner released the report *Talking Treaty: Summary of Engagements and Next Steps*. The report recommended the continuation of consultation with Aboriginal and Torres Strait Islander peoples about the possibility of a treaty, and provided the key elements of a treaty negotiation framework to inform those consultations.⁶⁵
- 5.71 In 2017-18, treaty negotiations occurred with the Adnyamathanha and Ngarrindjeri Nations.⁶⁶
- 5.72 In February 2018, the *Buthera Agreement* was signed by the South Australian Government and Narungga Elders. The official signing of the *Buthera Agreement* laid the foundations for treaty and included capacity-building support for the Narungga Nation Aboriginal Corporation to drive development, economic enterprise and collaborative engagement with government agencies on Guuranda (the Yorke Peninsula).⁶⁷
- 5.73 Following the 2018 state election, a change in state government resulted in a new policy direction which meant that further treaty negotiations were not pursued. However, according to the Department of Premier and Cabinet, the *Buthera Agreement* also includes 'social service strategies covering youth justice, housing, domestic violence, health, child protection and education and cultural studies, which are issues the government will continue to tackle in partnership with the Narungga Nation'.⁶⁸

⁶⁴ Caroline Winter, Australian Broadcasting Corporation, *Treaty: South Australian Government enters historic discussions with Aboriginal nations*, <<https://www.abc.net.au/news/2016-12-14/south-australia-enters-historic-treaty-discussions/8120162>> retrieved 7 November 2018.

⁶⁵ Office of the Treaty Commissioner, *Talking Treaty: Summary of Engagements and Next Steps*, July 2017, p. 2.

⁶⁶ Government of South Australia, *Treaty Negotiations*, <<https://www.dpc.sa.gov.au/about/treaty-negotiations>> retrieved 6 November 2018.

⁶⁷ Government of South Australia, *Treaty Negotiations*, <<https://www.dpc.sa.gov.au/about/treaty-negotiations>> retrieved 6 November 2018.

⁶⁸ Government of South Australia, *Treaty Negotiations*, <<https://www.dpc.sa.gov.au/about/treaty-negotiations>> retrieved 6 November 2018.

- 5.74 Given this change in policy direction in Aboriginal affairs, Dr Thomas ceased the role of Treaty Commissioner in July 2018. However, he was quickly appointed as South Australia's Commissioner for Aboriginal Engagement and tasked with advising the South Australian Government, as well as promoting Aboriginal inclusion more broadly through the non-Aboriginal community.⁶⁹
- 5.75 The South Australian Government has not made further comments on agreement making since its announcement to discontinue the process begun by the previous government prior to the state election.

Committee comment

The concept of 'Makarrata'

- 5.76 The Committee notes that there are a range of views regarding the process and meaning of Makarrata.
- 5.77 The Committee recognises that the concept can be perceived as too culturally specific to be used more broadly across Aboriginal and Torres Strait Island nations generally. More definition of the term and greater understanding among both Aboriginal and Torres Strait Islander peoples and other Australians of how it might apply might help before the policy is taken any further.

Agreement making

- 5.78 The Committee recognises the long history of Aboriginal and Torres Strait Islander advocacy for agreement making at the national, state and regional level.
- 5.79 The Committee observes that agreement making is already taking place around Australia at both the state and regional level and through processes such as native title settlements.
- 5.80 The Committee is of the view that, once established, local and regional voices might continue to pursue agreements as they have done in areas like Murdi Paaki.

⁶⁹ Government of South Australia, *Commissioner for Aboriginal Engagement*, <<https://www.dpc.sa.gov.au/about/commissioner-for-aboriginal-engagement>> retrieved 6 November 2018.

6. Truth-telling

Introduction

- 6.1 The *Statement from the Heart* calls for truth-telling about the history of Aboriginal and Torres Strait Islander peoples.¹ Truth-telling is crucial to the ongoing process of healing and reconciliation in Australia.
- 6.2 The history, tradition and culture of Aboriginal and Torres Strait Islander peoples and their experiences of injustices following colonisation has been largely unknown. However, there is a growing momentum among Australians to develop a fuller understanding and awareness of our history.
- 6.3 Truth-telling was raised by the First Nations Regional Dialogues as being ‘important for the relationship between First Nations and the country’² and throughout the course of the Committee’s inquiry, there has been strong support among stakeholders for the concept of truth-telling.
- 6.4 The Regional Dialogues also emphasised that ‘the true history of colonisation must be told’:

¹ *Uluru Statement from the Heart*, 2017.

² Referendum Council, *Final Report of the Referendum Council*, June 2017, p. 25.

... the genocides, the massacres, the wars and the ongoing injustices and discrimination. This truth also needed to include the stories of how First Nations Peoples have contributed to protecting and building this country.³

- 6.5 Truth-telling is an opportunity for Aboriginal and Torres Strait Islander peoples to record evidence about past actions and share their culture, heritage and history with the broader community.
- 6.6 It is also an opportunity to record the history and evidence of the impacts of colonisation and settlement for local communities, and issues such as massacres, dispossession and stolen wages were raised. The Committee also heard about the reconciling effects of commemorations of massacres at Myall Creek, Coniston and Waterloo Bay.
- 6.7 This chapter presents an overview of suggested approaches to truth-telling and shared histories including examples and evidence from local communities.

The importance of truth-telling

- 6.8 Truth-telling is not just about acknowledging the atrocities of the past, but is also an opportunity for Aboriginal and Torres Strait Islander peoples to share their culture and language with their communities.
- 6.9 Touching on this, Dr Jacqueline Durrant stated that there is evidence of the ‘history of atrocities against Aboriginal people’ but there is also ‘history...out there for the wonderful and amazing culture that Aboriginal peoples have. It’s important that we look at both’.⁴
- 6.10 Mr Mark Redmond, Chief Executive of Reconciliation Tasmania stated that ‘there’s real drive for acknowledgement, for all sides of the story in Tasmania to be told and heard and celebrated’.⁵
- 6.11 Mr Redmond went further to say:

There’s a lot of history which has not been told, and I think we believe as Reconciliation Tasmania that a lot of unity and healing can be done through getting these stories out around what really happened in Tasmania. As you know, there was quite a significant impact on the local Aboriginal people and

³ Referendum Council, *Final Report of the Referendum Council*, June 2017, p. 32.

⁴ Dr Jacqueline Durrant, *Proof Committee Hansard*, Wodonga, 24 September 2018, p. 27.

⁵ Mr Mark Redmond, Chief Executive, Reconciliation Tasmania, *Proof Committee Hansard*, Brisbane, 4 October 2018, p. 3.

on the settlers and the convicts who were here too. There are a whole range of victims around that. But I think that truth-telling can come out and be told in a mature way and a sensible way—to our young people, particularly, who are now being educated in schools around better truth than our older generations—that is only going to add to a unity of our country. Our history has to be told in a fuller way than has been done in the past, and I think that view is held by our members and by Aboriginal organisations across the state in a very strong way.⁶

6.12 But many stakeholders agreed that truth-telling is a means for Australians to acknowledge the historically negative impact on Aboriginal and Torres Strait Islander peoples of contact between them and other Australians.

6.13 Kingsford Legal Centre and Community Legal Centres NSW stated:

A truth telling process has the potential to provide a form of restorative justice, educate the Australian community and provide a path forward for reconciliation.⁷

6.14 Similarly, the National Health Leadership Forum stated:

Truth-telling and acknowledgement of the past injustices will establish a sound basis for further progress towards health and healing for Aboriginal and Torres Strait Islander peoples. The need for truth-telling for the nation to understand and address past and ongoing trauma is crucial.⁸

6.15 According to Mr Thomas Wilkie-Black, an ANU student:

The Regional Dialogues suggest First Nations feel they have been unable to secure such a platform and the state has failed to sufficiently acknowledge frontier violence. By giving survivors of frontier violence the opportunity to share and have their experiences officially acknowledged for the first time, truth-telling can promote their healing.⁹

6.16 Mr Wilkie-Black also suggested that truth-telling could contribute to healing for individuals who didn't feel they had the opportunity to share their stories through previous processes including Royal Commissions or national inquiries:

⁶ Mr Mark Redmond, Chief Executive, Reconciliation Tasmania, *Proof Committee Hansard*, Brisbane, 4 October 2018, p. 2.

⁷ Kingsford Legal Centre and Community Legal Centres NSW, *Submission 336*, p. 9.

⁸ National Health Leadership Forum, *Submission 101*, p. 1.

⁹ Mr Thomas Wilkie-Black, *Submission 450*, p. 18.

There's also scope to involve witnesses who have testified in prior inquiries, because the government's response may have been inadequate.¹⁰

Ongoing impact of past actions

6.17 Historically, there has been little acknowledgment throughout Australia of the negative effects of colonisation for Aboriginal and Torres Strait Islander peoples and how that has accumulated across generations.

6.18 Intergenerational trauma was raised by many stakeholders as a serious problem among Aboriginal and Torres Strait Islander peoples. The National Congress of Australia's First Peoples (Congress) stated:

Aboriginal and Torres Strait Islander Peoples have experienced trauma for over 200 years as a result of colonisation, dispossession, destruction of culture, stolen wages, the Stolen Generations and paternalistic policies which have denied our autonomy and self-determination.¹¹

6.19 According to Dr Lyndall Ryan, 'Australians today seem to know very little of the history of the violent encounter between colonists and Aboriginal people.'¹²

6.20 The Committee heard many examples of how past actions of settlers continue to impact Aboriginal and Torres Strait Islander peoples and communities today.

6.21 Many submitters acknowledged the damaging and ongoing impact colonisation and settlement has had on Aboriginal and Torres Strait Islander peoples.¹³ For example, Gilbert + Tobin stated that:

Throughout the almost 200 years after Australia's settlement, largely as a result of both government action and inaction, Indigenous people:

- lived in poverty;
- were denied their Indigenous identities – their languages and their cultures;

¹⁰ Mr Thomas Wilkie-Black, *Submission 450*, p. 18.

¹¹ National Congress of Australia's First Peoples, *Submission 292*, p. 10.

¹² Dr Lyndall Ryan, *Proof Committee Hansard*, Redfern, 5 October 2018, p. 39.

¹³ For example, Dr James Thyer, *Submission 55*, p. 1; Associate Professor Gabrielle Appleby and Professor Megan Davis, *Submission 480: Attachment 1*.

- died of disease and malnutrition;
- were hunted, massacred and murdered – in Tasmania, almost wiped out;
- were incarcerated; and
- were denied most of the day to day accessories of citizenship – the right to make choices about who they married, where they lived and to enjoy the freedoms of other Australian citizens including the freedom to vote.¹⁴

6.22 Ms Annette Gainsford, a Lecturer at the Centre for Law and Justice at Charles Sturt University, identified that the effects of colonisation have ‘been felt and have affected Aboriginal people in different ways’. She said that ‘part of that is their loss of culture, their loss of language, their loss of land, their loss of identity’.¹⁵

6.23 Similarly, Kingsford Legal Centre and Community Legal Centres NSW attributed ‘generations of trauma’ to:

... colonisation, dispossession, genocide, the Stolen Generations, Stolen Wages, over incarceration, removal of children to out of home care, prevalent discrimination and other human rights violations experienced by Aboriginal and Torres Strait Islander people.¹⁶

6.24 Ms Judith Ahmat, a Gunditjmara woman from north-east Victoria, spoke to the Committee of her family’s experiences during massacres at Lake Condah and the ‘historical unresolved grief that occurred’ within her family:

I did some research, over a nine-year period, with my family group down in the south-west of Victoria... The unresolved grief was from the losses that resulted from government policies and administration. Also, the oppression and the lack of trust experienced by Gunditjmara people is a result of the government policies which created profound and recurring experience of loss.¹⁷

6.25 Ms Emily Carter, Chief Executive Officer of the Marninwarntikura Fitzroy Women’s Resource Centre, told the Committee about health effects that intergenerational trauma has had on children and families in the Fitzroy community:

¹⁴ Gilbert + Tobin, *Submission 315*, p. 3.

¹⁵ Ms Annette Gainsford, Lecturer, Centre for Law and Justice, Charles Sturt University, *Proof Committee Hansard*, Wodonga, 24 September 2018, p. 25.

¹⁶ Kingsford Legal Centre and Community Legal Centres NSW, *Submission 336*, p. 9.

¹⁷ Ms Judith Ahmat, *Proof Committee Hansard*, Wodonga, 24 September 2018, p. 29.

Communities have been suffering intergenerational trauma for a very long time, and we see that in our children, where families from years ago have been exposed to alcohol. Children have been born with brain based disabilities from alcohol, and the continued early life trauma becomes intergenerational.¹⁸

6.26 Mr Wilkie-Black also stated:

In addition to those who have suffered abuse firsthand, many communities and individuals are still affected by historical violence. Colonisation, subsequent policies like the Stolen Generations and the resulting loss of culture, language and lands crippled many communities and traumatised a large proportion of the population. This trauma can be transmitted between generations whereby those with direct experiences of violence exhibit behavioural or other issues, which in turn traumatise subsequent generations.¹⁹

Current truth-telling practices in local communities

6.27 The Committee heard many examples of how truth-telling is already taking place within local and regional communities and how truth-telling can take many forms. This section of the report details examples.

6.28 Ms Rhonda Diffey told the Committee of her experiences working with local elders on community projects:

In our north-east area around Wangaratta in particular there have been quite a number of various projects over recent years that have celebrated, recognised and articulated aspects of Aboriginal heritage. They have been created either by or in conjunction with local elders and they have given the community an insight into their heritage.

...

I've also had the privilege in my professional cultural heritage career of working collaboratively with local elders, elder Eddie Kneebone, elder Freddy Dowling, elder Sandy Atkinson and elder Kevin Atkinson, as well as the local Dirrawarra community, on various projects in our local area. During these projects they have shared a vast amount of traditional knowledge about country, which fits with aspects of other information that has been sourced

¹⁸ Ms Emily Carter, Chief Executive Officer, Marninwarntikura Fitzroy Women's Resource Centre, *Proof Committee Hansard*, Fitzroy Crossing, 13 June 2018, pp. 9-10.

¹⁹ Mr Thomas Wilkie-Black, *Submission 450*, p. 19.

through various historical narratives... these are both stories of first contact, the negatives, but also there were stories in our area of cooperation.²⁰

- 6.29 Mr Kevin Cameron, an elder and associate member of the Wiradjuri Council of Elders in New South Wales, told the Committee he has written stories about the 'true history of the Aboriginal people in Albury-Wodonga' in an effort to preserve their history.²¹
- 6.30 Ms Frances Smullen, Correspondence Secretary at Shepparton Region Reconciliation Group, told the Committee of a 'reconciliation column' the Group prepares fortnightly for the local paper that sometimes touches on truth-telling in the area. It is sometimes written in partnership with Reconciliation Australia or Reconciliation Victoria; at other times it is 'written by somebody locally', and has covered a range of issues and success stories from within the community.²²
- 6.31 Mr Peter Harriott and Mrs Kaye Thomson from the Greater Shepparton City Council outlined several strategies the Council has previously and continues to undertake to promote truth-telling in Shepparton. Mr Harriott stated:

We also did an oral history document about 10 years ago. When I say 'we', the Fairley Foundation partly sponsored that, and council. That was a conversation with a whole range of elders and Aboriginal people. It recorded their stories about living on the flats and those sorts of things. So there are a number of ways that we try to understand the past.

We're starting to use the word 'massacre' and those sorts of words and building those into our documents. We haven't done that before.²³

- 6.32 Mrs Thomson added:

We've also just been involved in an Aboriginal mural project, so we've got four murals here in Shepparton now, two of male elders and two of female elders. We have a statue of William Cooper in our major garden now. We also have a lovely mural of Daniel Cooper, who was his son. That's our RSL memorial. It's just taken a big step within our RSL to recognise the Aboriginal

²⁰ Ms Rhonda Diffey, *Proof Committee Hansard*, Wodonga, 24 September 2018, p. 31.

²¹ Mr Kevin Cameron, *Proof Committee Hansard*, Wodonga, 24 September 2018, pp. 34-35.

²² Ms Frances Smullen, Correspondence Secretary, Shepparton Region Reconciliation Group, *Proof Committee Hansard*, Shepparton, 25 September 2018, pp. 8, 10.

²³ Mr Peter Harriott, Chief Executive Officer, Greater Shepparton City Council, *Proof Committee Hansard*, Shepparton, 25 September 2018, p. 24.

returned servicemen and the atrocities that occurred for them in not being recognised after they came back—if they did come back, as Daniel didn't.

Those stories, that truth-telling, are now coming out into the community. The *Shepparton News* reported on the Daniel Cooper story. Little bit by little bit, that truth is coming out, and I think, little bit by little bit, more people care—not just superficially care but really care.²⁴

6.33 Mr Redmond spoke of some examples of truth-telling currently taking place in Tasmania:

... we're working on a way to acknowledge Australia Day from the Aboriginal perspective, such as what happens in Barangaroo in Sydney now... We are working with state governments and Aboriginal communities around the state on how 2020—and also Australia Day next year—can be celebrated, because it remains a big issue for communities. There is an olive branch, hopefully, from both sides to acknowledge 26 January, without changing the date, as a significant date of impact on the Aboriginal community here.²⁵

6.34 Mr Redmond acknowledged that the 'basis of reconciliation' was for all sides of history to be told and provided examples of two projects that have been received 'positively' that assisted in a process of reconciliation:

We are running a youth program now called Speakout. We are having 40 students presenting to parliament in two weeks time. They have written stories about reconciliation. They are the culture change. They are arguing quite strongly in their speeches and artwork that we need to recognise the trauma that has happened but also the multicultural community we are now... White non-Aboriginal people live here, love this land and belong to this land. It's really important to acknowledge their history and their forefathers' history, because we have become indigenised—we have become part of this land as well and we respect and love it like our Aboriginal brothers and sisters do as well. So I think there is strong support for acknowledging the settler contribution—good and bad—and how there has been that melding of cultures across time, even though it was pretty dramatic down here.

...

²⁴ Mrs Thomson, Director Community, Greater Shepparton City Council, *Proof Committee Hansard*, Shepparton, 25 September 2018, p. 24.

²⁵ Mr Mark Redmond, Chief Executive, Reconciliation Tasmania, *Proof Committee Hansard*, Brisbane, 4 October 2018, p. 3.

Second, we're having a storytelling memorial project, which has been developed through a couple of members... The youth project which we're doing is a way of getting that documented. All the stories that are in that we're going to have published, have on record and have available... We're working with a range of organisations... to get fair organisational and strategic plans in place to acknowledge the importance of storytelling within their organisations and the importance of connection with the Aboriginal community... I believe, from what we've talked about with communities across the state, that there's a real drive for acknowledgement, for all sides of the story in Tasmania to be told and heard and celebrated.²⁶

- 6.35 Ms Meredith Walker, Convenor of Shared History seminars at the Sunshine Coast Reconciliation Group, spoke about truth-telling processes taking place in her community:

I initiated the [Shared History] seminars about truth-telling in Australian history in November 2015. We've had 11 seminars on the Sunshine Coast using recent research with traditional owners and non-Indigenous people speaking at each seminar, with Indigenous speakers in the majority usually. These seminars are very well attended and greatly appreciated by everyone. They're emotionally demanding because often we have someone speaking, for example, about forced removals and then a couple of local people speaking about their families' experiences. They're very rewarding for the audiences...²⁷

- 6.36 In their submission, First Nations Media Australia advised the Committee of the 'failures of mainstream media to accurately portray Australia's history and represent the views of Aboriginal and Torres Strait Islander peoples':

During that time, First Nations media organisations have been established across the country to provide a platform for sharing the voices, stories, languages, cultural knowledge and relevant information for Aboriginal and Torres Strait Islander peoples.

The significance of these historical recordings to the truth-telling process is that the content has been collected by Aboriginal and Torres Strait Islander peoples working in community-controlled organisations. Recordings from this perspective are collected and distributed in a manner that is culturally sensitive and alive to the impact of colonisation within communities. We offer a unique opportunity to contribute first-hand responses to political and social

²⁶ Mr Mark Redmond, Reconciliation Tasmania, *Proof Committee Hansard*, Brisbane, 4 October 2018, p. 4.

²⁷ Ms Meredith Walker, Convenor, Shared History seminars, Sunshine Coast Reconciliation Group, *Proof Committee Hansard*, Brisbane, 4 October 2018, p. 32.

events from a First Nations perspective in truth-telling about our shared history, its impacts on Indigenous history and the contribution First Nations peoples have made to protecting and building Australia.²⁸

Personal experiences of truth-telling

6.37 The Committee heard many examples of the personal experiences people have had with truth-telling and how this has impacted them. In Wodonga, the Committee heard from Ms Ahmat about her personal experiences with truth-telling:

We don't sit around the campfire as much as we should. It's around our kitchen tables now. When I was a child, we used to sit around—we weren't allowed to speak—and listen to the stories from my mum and from my aunts and uncles with regard to when they were little. My mum was seven years old at the time of the Depression. She was removed and put into a home and then she worked as domestic help in a family. Then she served in World War II.

One of my mum's uncles, my Great-Uncle Alan, served in World War I. The family is now trying to put a headstone on his grave because it's unmarked. He served in Egypt, Palestine and Gallipoli, and the recognition is not there.

Those are some of the stories that can be told about some of the things that happened over a period of time. I haven't told all the stories, but those stories are really important because, if we don't start telling the stories and making a noise about it, our grandchildren and their children will not know that Uncle Alan is buried in the Warrnambool cemetery, because he had no children.²⁹

6.38 Also in Wodonga, the Committee heard from Mr Brendan Kennedy, Cultural Activities Officer at the Burraja Cultural and Environmental Discovery Centre cultural hub. Burraja is a community-based organisation that provides programs to support youth in the region. In particular, Burraja 'link[s] them back with culture and to provide someone in the community or a place in the community where they can feel at home and at ease with their situations and their dynamic'.³⁰

²⁸ First Nations Media Australia, *Submission 412*, p. 6.

²⁹ Ms Judith Ahmat, *Proof Committee Hansard*, Wodonga, 24 September 2018, pp. 29-30.

³⁰ Mr Brendan Kennedy, Cultural Activities Officer, Burraja Cultural and Environmental Discovery Centre, *Proof Committee Hansard*, Wodonga, 24 September 2018, p. 1.

6.39 Mr Kennedy discussed the importance of sharing cultural knowledge with youth in the region and stated that ‘holding on to language is a big key of that truth-telling’:

... showing them what part of the country they belong to, and why they’re in someone else’s country, as part of that identity process. From that we can start to get to know the kids and start overcoming some of the issues that might be seen as a barrier to them.³¹

Mapping history

6.40 Dr Lyndall Ryan spoke to the Committee about her involvement in the ongoing development of a digital map of Aboriginal massacre sites that occurred across Australia between 1788 and 1960. To date, the map identifies up to 250 massacre sites. Dr Ryan stated:

... it’s kind of bringing people on board to look for themselves on the map. We’ve seen that modern technology such as digital mapping has been a great tool for reconciliation. The map can be put up on anybody’s computer. They can access it in their own way and in their own time.³²

6.41 Making the map accessible and interactive, and making the process collaborative, has meant that it has generated both local and global interest. Many individuals have provided information about particular sites or information about new sites to ensure the map is ‘as accurate as possible’ and individuals ‘can see that the map is something that they understand, and they want to contribute to it and be part of it’.³³

6.42 Dr Ryan stated that this is an ongoing, cumulative process that ‘starts a discussion and it keeps it going... An ongoing conversation is sort of making people realise there’s a past that many ordinary Australians knew very little about’.³⁴

³¹ Mr Brendan Kennedy, Cultural Activities Officer, Burraja Cultural and Environmental Discovery Centre, *Proof Committee Hansard*, Wodonga, 24 September 2018, p. 1.

³² Dr Lyndall Ryan, *Proof Committee Hansard*, Redfern, 5 October 2018, p. 39.

³³ Dr Lyndall Ryan, *Proof Committee Hansard*, Redfern, 5 October 2018, p. 39.

³⁴ Dr Lyndall Ryan, *Proof Committee Hansard*, Redfern, 5 October 2018, p. 40.

Commemorations and healing

6.43 The Committee heard about the memorial of the Myall Creek massacre (1838, New South Wales) as an example of localised truth-telling and a symbol of reconciliation within the community.

6.44 Professor Lindon Coombs, Co-Chair of Reconciliation New South Wales described the memorial as an icon for truth-telling:

... the national and state-heritage-listed memorial at Myall Creek, which for nearly 20 years has served as an icon for truth-telling in history and a means of encouragement for what can be achieved when Aboriginal and Torres Strait Islander and non-Indigenous people work together towards true reconciliation.³⁵

6.45 Ms Alison Faure-Brac, Executive Director at Reconciliation New South Wales, continued:

This year was the 20th anniversary event... from memory they had 2,000 people at that event this year. They've now put in a funding proposal to build a cultural and education centre there because there are more visitors now than they are currently able to accommodate. That piece of work has generated a lot of momentum.³⁶

6.46 Mr Gooda spoke of how the memorial has led to healing among the community:

... I look at the Myall Creek massacre as the most perfect example of reconciliation. It was the first time that white people got hung for killing Aboriginal people. About 25 years ago, the families of the perpetrators and the victims came together. You can go to the Myall Creek celebration every year. There's no rancour; there's no resentment; there's no blaming. It's actually a celebration of what happened and how everyone survived that. I always dream of something happening nationally like what's happened with the Myall Creek massacre: there's been an understanding of what happened there, and then we move on.³⁷

³⁵ Professor Lindon Coombes, Co-Chair, Reconciliation New South Wales, *Proof Committee Hansard*, Redfern, 5 October 2018, p. 21.

³⁶ Ms Alison Faure-Brac, Executive Director, Reconciliation New South Wales, *Proof Committee Hansard*, Redfern, 5 October 2018, p. 22.

³⁷ Mr Mick Gooda, *Proof Committee Hansard*, Canberra, 18 October 2018, p. 4.

- 6.47 The Committee is also aware of memorials to commemorate the Coniston massacre (1928, Central Australia) and the Waterloo Bay massacre (1849, South Australia).
- 6.48 The Committee notes the healing effect that these memorials have had on victims and perpetrators of the massacres, their descendants, as well as the broader community.³⁸

Suggested approaches to truth-telling

- 6.49 Stakeholders provided a number of suggestions to the Committee about how truth-telling could be implemented. These approaches are outlined further in this chapter.
- 6.50 Mr Redmond from Reconciliation Tasmania distinguished between storytelling and truth-telling, and acknowledged that both are 'important to getting really good reconciliation outcomes.'³⁹
- 6.51 Mr Wilkie-Black made the following recommendation to the Committee:

That First Nations should be consulted as to whether the history of subsequent policies like the Stolen Generations should be included [in truth-telling].⁴⁰

- 6.52 Mr Wilkie-Black agreed with the Regional Dialogues that truth-telling should include genocides, massacres and frontier wars, but recommended that truth-telling also include 'modern injustices':

This could emphasise the ongoing impact of colonisation and account for the failure of previous inquiries and Royal Commissions to sufficiently [respond] to survivors' needs.

While the extent to which it does so will depend on the manner in which testimony is collected, the choice of events truth-telling covers can promote reconciliation by facilitating healing for Indigenous communities and individuals.⁴¹

³⁸ Further information is available from a range of public sources.

³⁹ Mr Mark Redmond, Chief Executive, Reconciliation Tasmania, *Proof Committee Hansard*, Brisbane, 4 October 2018, p. 2.

⁴⁰ Mr Thomas Wilkie-Black, *Submission 450*, p. 15.

⁴¹ Mr Thomas Wilkie-Black, *Submission 450*, p. 15.

- 6.53 In his submission, Mr Wilkie-Black also spoke of the need for truth-telling processes to accommodate those who may require special provisions:

Establishing links with Indigenous health organisations and groups like AHF could help the Makarrata Commission provide specialised support for vulnerable witnesses. The SATRC [South African Truth and Reconciliation Commission] model also underscores the importance of providing avenues through which testimony can be collected confidentially and in private for those who do not wish to testify at public hearings. This could be done by allowing written submissions and taking oral statements in regional offices.⁴²

Local, regional and national processes

- 6.54 A large number of stakeholders agreed that truth-telling is best implemented at local and regional levels.
- 6.55 Dr Durrant stated that if a formal structure were to be implemented then a national body might be necessary. However she asserted that there should also be programs at the local and regional level. This is to 'take account of the diversity of the nations and their own historical experiences' and that Aboriginal and Torres Strait Islander peoples must be engaged in the process of truth-telling.⁴³
- 6.56 In their joint supplementary submission, Associate Professor Gabrielle Appleby and Professor Megan Davis provided further detail about the importance of implementing truth-telling in local communities:

... Truth-telling must thus come from local communities, led by Aboriginal and Torres Strait Islander peoples working with non-Aboriginal people in that community. This work might be undertaken in conjunction with local councils, local history societies, or other local community groups. Indeed, as Penelope Edmonds has explained, locality is key because so many individuals and communities are wary of attempts at reconciliation led by the government, viewing previous attempts as 'state-based and top-down social program[s]' that can be 'repressive and reinforce colonial hegemonies'...⁴⁴

⁴² Mr Thomas Wilkie-Black, *Submission 450*, p. 26.

⁴³ Dr Jacqueline Durrant, *Proof Committee Hansard*, Wodonga, 24 September 2018, pp. 27-28.

⁴⁴ Associate Professor Gabrielle Appleby and Professor Megan Davis, *Submission 480.1*, p. 11.

- 6.57 Mr John van Riet suggested that truth-telling could occur 'by Local Governments inviting its citizens to meet with local Indigenous people in small groups and listen to their stories.'⁴⁵
- 6.58 In his supplementary submission, Mr van Riet referred to his previous involvement in meetings with local Aboriginal and non-Aboriginal people in Victoria to discuss the 1997 report of the Australian Human Rights Commission *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*:

Could not a similar process of truth-telling be encouraged through local councils and churches, inviting aboriginal and non-aboriginal people to meet in small groups and learn of the local history of aboriginal people, including any stories of massacres? Such truth-telling could also display historical exhibits and encourage signage at or near massacre sites.⁴⁶

- 6.59 Reverend Dr Peter Catt, Chair of the Social Responsibilities Committee, Anglican Church South Queensland, spoke to the Committee about the benefit of the church as a non-government organisation running truth-telling processes:

Churches are community based organisations, and the process itself—the desire for the process—bubbled up from the local level. It really started because of personal relationships between members of the parish and of the local Aboriginal community. I think the church and other civil society groups that are community based have a real opportunity to work out how it's going to emerge in their particular place...it's about really finding what the principles of dialogue and emergence are and then encouraging people just to begin that process.⁴⁷

- 6.60 Ms Judith Scarfe told the Committee that for reconciliation to be effective locally, non-Aboriginal people need to be engaged to gain a better understanding of the history of their community:

I think the healing that comes from those stories is a critical element that we have to start working with as well. The shame of the past, the guilt, the scars of the past, and how we live with that currently, are really important. And understanding that locally is important.

⁴⁵ Mr John van Riet, *Submission 14*, p. 1.

⁴⁶ Mr John van Riet, *Submission 14.1*, p. 2.

⁴⁷ Reverend Dr Peter Catt, Chair, Social Responsibilities Committee, Anglican Church South Queensland, *Proof Committee Hansard*, Brisbane, 4 October 2018, p. 7.

There is the challenge: how do we change that locally so that there is an acceptance and an understanding of what our history has been, what stories exist, where I am but also what healing I come to and how I as a white person living in a place come to an understanding of that locally and how I can create a relationship with the Aboriginal community.⁴⁸

- 6.61 When asked about the best approach to get Aboriginal and Torres Strait Islander peoples and the broader community to come to some common understanding about the interconnection of their histories, Mr Anthony Cavanagh, Chief Executive Officer of Ganbina, stated:

I think it is about taking up opportunities to share information and especially the historical stuff. It is creating that vehicle, it is social media or public forums, where people can feel comfortable coming along and just get the conversations and the dialogue going.⁴⁹

- 6.62 Rev. Dr Catt also discussed truth-telling at a national level:

At the national level, we do have, as I said, the National Aboriginal and Torres Strait Islander Anglican Council, and it has been helping the wider church come up with some broader principles. There was a motion sponsored by that council last year at General Synod affirming the Statement from the Heart and the policy, and then, at the ground-up level, it is shaped by the history—because at Buderim there was a particular massacre that everyone knew about, and that was focused on as part of the story.⁵⁰

- 6.63 Mr Bill Buchanan, Board Member of Reconciliation Queensland suggested that truth-telling at the local level can be improved:

... truth-telling can happen at a national level, and it has been happening for some time. The reality is: it has not happened at the local community level or the regional level. Here in this state, we sort of braved it a bit—we went out on a bit of a limb, with an initial what was a crazy idea, I suppose, to do some shared history events. We've driven those events at key areas of conflict within communities. We've been trying to get communities to have this conversation around areas of potential conflict, about how Aboriginal people are misrepresented in the history books, how Aboriginal people are not included in what's happening locally, how we need Aboriginal place names;

⁴⁸ Ms Judith Scarfe, *Proof Committee Hansard*, Wodonga, 24 September 2018, p. 37.

⁴⁹ Mr Anthony Cavanagh, Chief Executive Officer, Ganbina, *Proof Committee Hansard*, Shepparton, 25 September 2018, p. 5.

⁵⁰ Reverend Dr Peter Catt, Chair, Social Responsibilities Committee, Anglican Church South Queensland, *Proof Committee Hansard*, Brisbane, 4 October 2018, p. 8.

you will see a commitment from council to things like future dual-naming policies and things like that. All of this comes about because you work locally. It doesn't come about because of a national priority.⁵¹

Truth-telling in schools

6.64 Some stakeholders suggested that there should be further inclusion in curriculums to improve education of the history and culture of Aboriginal and Torres Strait Islander peoples.⁵²

6.65 In an article 'The Uluru Statement and the Promises of Truth', Dr Appleby and Professor Davis stated:

There remains a level of dissatisfaction, disinterest and denial of Aboriginal and Torres Strait Islander history in Australia, reflected, for instance, in the failure of the Australian educational curriculum to comprehensively and consistently teach this history.⁵³

6.66 Dr Appleby and Professor Davis identified how delegates in regional dialogues proposed truth-telling as leading to 'ongoing change in how Australian history was taught in schools'.⁵⁴

6.67 The Committee acknowledges that for some submitters, learning more accurate history improved their understanding. For example, Mr Martin Pluss told the Committee:

I must admit, from my personal perspective, I thought they [dreamtime stories] were not real when I was a schoolkid in my education. I found that Port Phillip Bay has a depth of 30 metres below sea level. For 60,000 years stories have been told, and there is geological and archaeological evidence now that when the Dreamtime stories of that area of Victoria were told they were talking about a valley that existed there. That's been passed down through Dreamtime stories through the years. For me, that was significant for the basis of truth-telling. As a non-Indigenous person, that enables me to

⁵¹ Mr Bill Buchanan, Board Member, Reconciliation Queensland, *Proof Committee Hansard*, Brisbane, 4 October 2018, p. 36.

⁵² For example, Ms Judith Ahmat, *Proof Committee Hansard*, Wodonga, 24 September 2018, p. 29; Name Withheld, *Submission 430*, p. 3.

⁵³ Associate Professor Gabrielle Appleby and Professor Megan Davis, *Submission 480: Attachment 1*, p. 3.

⁵⁴ Associate Professor Gabrielle Appleby and Professor Megan Davis, *Submission 480: Attachment 1*, p. 9.

understand the legitimacy and the background behind how the voice can be authentic.⁵⁵

A place of significance

6.68 There was support among some stakeholders for a ‘museum’⁵⁶ or ‘memorial plaques’⁵⁷ to acknowledge Aboriginal and Torres Strait Islander peoples.

6.69 Mr David McLachlan stated that a ‘museum’ could ‘reflect the truth’ of the treatment of Aboriginal and Torres Strait Islander peoples, as well as ‘their part in making what this nation...is today’.⁵⁸

6.70 Similarly, Mr van Riet stated that ‘memorial plaques’ should be erected to acknowledge local massacres.⁵⁹

6.71 Current and former Aboriginal and Torres Strait Islander Social Justice Commissioners, Ms June Oscar AO, Mr Mick Gooda and Professor Tom Calma AO also supported a ‘keeping place, a place of significance’.⁶⁰ Mr Gooda supported a national resting place for Aboriginal and Torres Strait Islander peoples who were frontier warriors, stating:

I think we should have our warriors in the national War Memorial. There should be recognition of the frontier conflicts as being real wars... I think one of the reasons we argue for a truth-telling process is that we can’t have full reconciliation in this country until there’s been a recognition of the truth of the settlement of this country. The truth of the settlement of this country has been the cost Aboriginal and Torres Strait Islander people have borne, and we should recognise the frontier conflicts as war. We should recognise our warriors Windradyne, Yagan, Jandamarra in the War Memorial.⁶¹

6.72 Ms Oscar also discussed this idea:

...whilst it is a keeping place for remains of people who haven’t had a burial or when it’s unknown where they come from...it also must be a place of truth-

⁵⁵ Mr Martin Pluss, *Proof Committee Hansard*, Redfern, 5 October 2018, p. 31.

⁵⁶ Mr David McLachlan, *Submission 2*, p. 4.

⁵⁷ Mr John van Riet, *Submission 14*, p. 4.

⁵⁸ Mr David McLachlan, *Submission 2*, p. 4.

⁵⁹ Mr John van Riet, *Submission 14*, p. 1.

⁶⁰ Mr Mick Gooda, *Proof Committee Hansard*, Canberra, 18 October 2018, p. 9.

⁶¹ Mr Mick Gooda, *Proof Committee Hansard*, Canberra, 18 October 2018, p. 4.

telling and a place that acknowledges the living families who have suffered under past policies—the stolen generations. But it's a place of healing as well.⁶²

- 6.73 The Congress also supported a 'Keeping Place', an outcome of the Truth and Justice Commission 'where cultural information, artefacts, knowledge and testimony collected from the Commission would be kept':

Keeping Places would be powerful educational tools about culture for Aboriginal and Torres Strait Islander and non-Indigenous Australians alike. These are similar to memorials created to honour the soldiers after World War I.

For example, Keeping Places could tell interactive traditional stories from the local nation, or include examples of local art with explanations of its significance (where culturally appropriate). Local primary and high schools could go on excursions to Keeping Places to educate students about the history of their land, as well as the culture of its traditional owners.

Further, Keeping Places are a way for Aboriginal and Torres Strait Islander Peoples who have lost connection to their culture due to colonisation to reconnect and learn more about their heritage.⁶³

- 6.74 In June 2013, the Advisory Committee for Indigenous Repatriation⁶⁴ began consultations to seek the views of Aboriginal and Torres Strait Islander peoples and other stakeholders on establishing a National Resting Place for ancestral remains of Aboriginal and Torres Strait Islander peoples with no known community of origin.

- 6.75 The Advisory Committee released a Discussion Paper (which included a survey), and extensive public consultations were held around Australia. In 2014 the Advisory Committee released the *National Resting Place Consultation Report*.⁶⁵ The report made seven recommendations including that 'all ancestral remains provenance only to Australia should be cared for in a

⁶² Ms June Oscar, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Proof Committee Hansard*, Canberra, 18 October 2018, p. 9.

⁶³ National Congress of Australia's First Peoples, *Submission 292*, p. 17.

⁶⁴ Information on the Advisory Committee for Indigenous Repatriation can be found on the Department of Communications and the Arts website: <<https://www.arts.gov.au/what-we-do/cultural-heritage/indigenous-repatriation>>

⁶⁵ *National Resting Place Consultation Report*, Department of Communications and the Arts: <<https://www.arts.gov.au/documents/national-resting-place-consultation-report-2014>> retrieved 15 November 2018.

National Resting Place' (recommendation 1) and that the 'National Resting Place be controlled and run by Aboriginal and Torres Strait Islander peoples' (recommendation 7).⁶⁶

6.76 The Advisory Committee's report noted the view of a number of respondents that holding ancestral remains in museums is seen as culturally inappropriate:

The establishment of a National Resting Place was seen as a powerful statement, moving the current process for care and storage of ancestral remains away from the museum sector, and vesting the future long-term care of these ancestral remains to Aboriginal and Torres Strait Islander peoples.⁶⁷

6.77 In her submission, Ms Diffey said that the 'development of historical narratives in museums and keeping places fits with the notion of sites of harmonious cultural pluralism'.⁶⁸

6.78 Ms Diffey also cautioned the Committee that stories must be developed uniquely to each place and in consultation with 'all local Aboriginal stakeholders'.⁶⁹

6.79 When addressing the Committee in Wodonga, Ms Diffey expanded on this saying that 'the control of decisions relating to the management and protection of Aboriginal cultural heritage influences the development of historical narratives, museums and keeping places':

These are sites where we expect to experience harmonious cultural pluralism. It is imperative that broad discussion and review occurs between all traditional local Aboriginal clans and adequate time is allocated to produce an inclusive, truthful public narrative, because, again, there is a lot of conjecture between the Aboriginal people, the Pangerang particularly, about some of the narratives that are recorded in various museums et cetera to do with their story.⁷⁰

⁶⁶ Advisory Committee for Indigenous Repatriation, *National Resting Place Consultation Report 2014*, p. 1.

⁶⁷ Advisory Committee for Indigenous Repatriation, *National Resting Place Consultation Report 2014*, p. 10.

⁶⁸ Ms Rhonda Diffey, *Submission 179*, p. 3.

⁶⁹ Ms Rhonda Diffey, *Submission 179*, p. 3.

⁷⁰ Ms Rhonda Diffey, *Proof Committee Hansard*, Wodonga, 24 September 2018, p. 32.

- 6.80 Ms Diffey further stated that Aboriginal and Torres Strait Islander peoples should ‘remain the custodians of their heritage’ and that ‘they produce the narratives for us all to share’.⁷¹
- 6.81 However, the Prime Minister’s Indigenous Advisory Council emphasised that any attempts to explain the history of Aboriginal and Torres Strait Islander peoples must be genuine:

Critical to the process of Makarrata is the need to better explain our history, in a way that is accessible, and integrated as a continuous mechanism. It should not be a memorial, or simply a ‘black armband’ or ‘poor blackfellas’ view of history, but rather a genuine space that allows people to hear truth and tell truth, no matter how ugly or unappealing. This history of Aboriginal and Torres Strait Islander peoples has not been properly told. It is important that truth-telling leads to a constructive conclusion for Aboriginal and Torres Strait Islander peoples, and that they are able to seek amends through formal processes of agreement making.⁷²

Oral history as a form of truth-telling

- 6.82 The Committee heard a lot of evidence indicating that oral history is a significant part of truth-telling and that preserving oral history is imperative.
- 6.83 According to the National Library of Australia:

Oral history provides a unique and important opportunity for sharing stories and perspectives, building mutual understanding and fostering social cohesion...This important opportunity for truth-telling and an open dialogue would be an important step towards promoting reconciliation and strengthening Australia’s social fabric.⁷³

- 6.84 Further:

... one of the maxims of oral history is that it is as much about the present as the past and it’s bringing memories into the present from the past, and that’s something that can be done over time. In the same way, we can show multiple stories because people have multiple memories of those things and we also show multiple priorities of them as different events and shine different lights

⁷¹ Ms Rhonda Diffey, *Proof Committee Hansard*, Wodonga, 24 September 2018, p. 32.

⁷² Prime Minister’s Indigenous Advisory Council, *Submission 419*, p. 12.

⁷³ National Library of Australia, *Submission 462*, p. 1.

on different aspects of it. It's a collection that continually retells the truth both by being reinterpreted and re-examined.⁷⁴

6.85 The National Library of Australia revealed to the Committee the 'demonstrated value of well-designed and well-executed oral history projects, particularly in areas of long-term community trauma'.⁷⁵ For the *Bringing Them Home* project, the National Library of Australia coordinated over 300 interviews, and stated some lessons learnt from this project that could inform a process of truth telling through oral history:

- '...the first is the value of having a program that is very well designed and that takes into account the needs of both interviewees and interviewers, particularly in terms of the sorts of cultural safety and the need for counselling services.'⁷⁶
- '...interviewing people in their own environment, in their own space, in a place where people are comfortable and in control of their own being'.⁷⁷
- 'the person who's being interviewed always has the right to determine access conditions for that oral history'.⁷⁸

6.86 Many of the participants of the *Bringing Them Home* project were reinterviewed by the National Library of Australia a decade after their original interview. The Library stated:

... the value of not thinking that what a person has to say in a truth-telling context at a given point is not the only thing they will ever want to say about it. This is really the value that we've seen in going back 10 years after *Bringing*

⁷⁴ Mr Kevin Bradley PSM, National Library of Australia, *Proof Committee Hansard*, Canberra, 16 October 2018, p. 9.

⁷⁵ Dr Marie-Louise Ayres, National Library of Australia, *Proof Committee Hansard*, Canberra, 16 October 2018, p. 7.

⁷⁶ Dr Marie-Louise Ayres, National Library of Australia, *Proof Committee Hansard*, Canberra, 16 October 2018, p. 7.

⁷⁷ Mr Kevin Bradley PSM, National Library of Australia, *Proof Committee Hansard*, Canberra, 16 October 2018, pp. 7-8.

⁷⁸ Dr Marie-Louise Ayres, National Library of Australia, *Proof Committee Hansard*, Canberra, 16 October 2018, p. 9.

them home and reinterviewing, and similarly with our Indigenous leaders oral history project where we go and interview people every seven years.⁷⁹

6.87 Dr Durrant emphasised the importance of having:

Indigenous people engaged in the whole process... there's definitely a place for oral history, certainly from both non-Aboriginal Australians and Aboriginal Australians, but there's definitely a place for archives, because you will find things buried in archives that are out of the living memory or even community memory of both Aboriginal and non-Aboriginal people.⁸⁰

Contested history

6.88 The Committee acknowledges that information about Australia's history can be highly contested, however, there is a desire among Australians for fuller understanding of Australia's past, and contested history should not be a barrier to truth-telling.

6.89 In north-east Victoria for example, the Committee heard that the history of Aboriginal and Torres Strait Islander peoples in the area is disputed and it is very difficult to find historical information in archives.⁸¹ Dr Durrant stated 'there has not been any comprehensive history looking at pre-white settlement Aboriginal Australia, let alone the period of invasion and conflict'.⁸²

6.90 When asked about how to deal with contested events in the process of truth-telling, Dr Durrant replied:

I think it's an acceptable historical practice to include all of the contested information and make it clear that it's contested but leave it up to everybody who's encountering the material to make of it what they will. I don't think that because a historical event is contested it lessens the importance of it.⁸³

⁷⁹ Dr Marie-Louise Ayres, National Library of Australia, *Proof Committee Hansard*, Canberra, 16 October 2018, p. 9.

⁸⁰ Dr Jacqueline Durrant, *Proof Committee Hansard*, Wodonga, 24 September 2018, p. 28.

⁸¹ Dr Jacqueline Durrant, *Proof Committee Hansard*, Wodonga, 24 September 2018, p. 27.

⁸² Dr Jacqueline Durrant, *Proof Committee Hansard*, Wodonga, 24 September 2018, p. 28.

⁸³ Dr Jacqueline Durrant, *Proof Committee Hansard*, Wodonga, 24 September 2018, pp. 28-29.

6.91 Mr Harriott of the Greater Shepparton City Council stated that to deal with contested history, 'find a way around and move on.'⁸⁴

6.92 When discussing the digital map of Aboriginal massacre sites across Australia, Dr Ryan stated that at this stage, no particular sites have been contested. However, the approach to contested sites, should it come up, is:

We've got a very strict methodology, which we set out in the introduction to the map on the website, and we've got a number of [massacre] sites that we simply cannot put up because they haven't met all of the criteria of our methodology... We haven't had any comments from individuals or organisations contesting any of the evidence that we've put forward. Rather, people have been anxious to provide extra evidence or send us off in other directions where we might find it.⁸⁵

6.93 When asked about how contested history should be dealt with should it arise in the development of the map, Dr Ryan replied:

I think the most important thing would be to be very clear about how a massacre site gets on the map, for example. We do have a very clear methodology. If it meets that methodology and you've got very, very good corroborating evidence then I don't think it's going to be a problem. I think it's more where I haven't put a site on the map because I'm not happy that the evidence has met all the criteria, or the evidence just isn't strong enough. I think that's where the issues will arise. I certainly understand your problem, but I think it's not as great a problem as it was say 10 or 15 years ago. I've found in my work, as I've travelled around Australia, that people are wanting to know rather than wanting to contest—and I think there's been a shift; I really do.

It might be that, further down the track, people might say that the story is not as it is on the map—that there's another story—and if there is another story then we will include it. There's some chance that there'll be an Aboriginal story of how an incident happened and there might be a settler story. I think it's our duty to put both of those stories on the map.

We're looking for evidence. An Aboriginal story might confirm the actual site, or it might confirm how many people were killed. The settlers' story might confirm how many settlers were involved in the incident. Often you need evidence from all the people involved—the victims and the perpetrators—as to

⁸⁴ Mr Peter Harriott, Chief Executive Officer, Greater Shepparton City Council, *Proof Committee Hansard*, Shepparton, 25 September 2018, p. 25.

⁸⁵ Dr Lyndall Ryan, *Proof Committee Hansard*, Redfern, 5 October 2018, pp. 40-41.

how it happened. I think that's very rich. It makes the story one that takes account of all sides of the story.⁸⁶

6.94 Regarding disputed oral histories, Dr Marie-Louise Ayres, Director-General of the National Library of Australia stated:

It is not our job to balance those stories. The job is to try to ensure that you get a representative set of interviewees and allow them to tell their story as it is...When you have hundreds of voices, that is when you can actually get that full nuance, so scale is important in a program like this as well.⁸⁷

6.95 Ms Diffey also commented that:

Aboriginal heritage is a living heritage. Historical narrative must acknowledge all changes that have occurred over time, but it must also honour the past. Today relevance is created through heritage interpretation; therefore custodianship responsibilities must honour the truth or give voice to many truths so that active participation, public debate and research can inform future generations.⁸⁸

6.96 Mr Redmond spoke to the Committee about the contested nature of the history of contact between Aboriginal people and settlers in Tasmania. Mr Redmond stated that numerous authors have written extensively and 'authoritatively around factual records of what happened in Tasmania':

I think there's a united, clear and accurate record of our story about the frontier wars in Tasmania and it needs to be told... We believe that there's a huge opportunity for that truth-telling to be done symbolically through monuments in some way—that's another project we're working on—but also through storytelling, which is what we're seeking to do from an Aboriginal perspective but also from a non-Aboriginal perspective, which has a lot of room for peering as well.⁸⁹

6.97 Mr Redmond also commented on sharing the history of settlers as well as Aboriginal and Torres Strait Islander peoples:

⁸⁶ Dr Lyndall Ryan, *Proof Committee Hansard*, Redfern, 5 October 2018, p. 41.

⁸⁷ Dr Marie-Louise Ayres, National Library of Australia, *Proof Committee Hansard*, Canberra, 16 October 2018, p. 8.

⁸⁸ Ms Rhonda Diffey, *Proof Committee Hansard*, Wodonga, 24 September 2018, p. 31.

⁸⁹ Mr Mark Redmond, Chief Executive, Reconciliation Tasmania, *Proof Committee Hansard*, Brisbane, 4 October 2018, p. 3.

Settler history needs to be celebrated because there are some good stories about how they've contributed to the state. Convicts are at another level as well. There have been calls to set up a convict history memorial at Macquarie Point, for example... The whole story of the most recent settlement in Tasmania needs to be celebrated. That's the basis of reconciliation—all sides need to be listened to.⁹⁰

- 6.98 Following his experiences of implementing truth-telling in Tasmania, Mr Redmond provided the following advice to the Committee:

Get local stories recorded now. Oral history—down here and across Australia—is the paramount way of collecting them. Let's collect these stories effectively—that's one. Second, let's talk to different communities across the state, so it's a broad mixture of voices that are heard. Third is to act on it and fund it... Get the grassroots stories into a log which is actually produced into something which is respected and acknowledged by the community as being real works from the community around their stories. Stories that happened around the state need to be resourced.⁹¹

Committee comment

- 6.99 The Committee acknowledges that there is a desire among Australians for a fuller understanding of history, including the history, traditions and culture of Aboriginal and Torres Strait Islander peoples and contact between Aboriginal and Torres Strait Islander peoples and settler communities.
- 6.100 The Committee acknowledges the importance of truth-telling in empowering Aboriginal and Torres Strait Islander peoples and promoting healing. There is a role for truth-telling in enriching Australian culture and also building support for reconciliation.
- 6.101 Some of the history is contested both between different groups of Aboriginal and Torres Strait Islander peoples and between Aboriginal and Torres Strait Islander peoples and the descendants of settlers. Contested history should not be a barrier; instead truth-telling should seek to provide an honest account of history from all perspectives.

⁹⁰ Mr Mark Redmond, Chief Executive, Reconciliation Tasmania, *Proof Committee Hansard*, Brisbane, 4 October 2018, p. 4.

⁹¹ Mr Mark Redmond, Chief Executive, Reconciliation Tasmania, *Proof Committee Hansard*, Brisbane, 4 October 2018, pp. 4-5.

- 6.102 There is some urgency in having these stories told, to avert the risk of the history being lost through the passage of generations.
- 6.103 Once established, local voice bodies may also consider truth-telling as it relates to local communities.
- 6.104 The Committee also supports the proposal to establish a national place of healing in Canberra. The Committee acknowledges views that such issues involve sensitive cultural considerations and should be developed after further consultation with Aboriginal and Torres Strait Islander peoples as necessary.

Recommendation 3

- 6.105 The Committee recommends that the Australian Government support the process of truth-telling. This could include the involvement of local organisations and communities, libraries, historical societies and Aboriginal and Torres Strait Islander associations. Some national coordination may be required, not to determine outcomes but to provide incentive and vision. These projects should include both Aboriginal and Torres Strait Islander peoples and descendants of local settlers. This could be done either prior to or after the establishment of the local voice bodies.**

Recommendation 4

- 6.106 The Committee also recommends that the Australian Government consider the establishment, in Canberra, of a National Resting Place, for Aboriginal and Torres Strait Islander remains which could be a place of commemoration, healing and reflection.**

Senator Patrick Dodson
Co-Chair

Mr Julian Leeser MP
Co-Chair

23 November 2018

Additional comments - Senator Amanda Stoker

I join in the recommendations of the report, with thanks to my parliamentary colleagues for the collegiality with which they have attempted to solve a difficult problem. I note that all involved have worked cooperatively, listening and negotiating in good faith in a commendable reflection of their loyalty to this country and all people who constitute it.

The hearings revealed a deep frustration among the Aboriginal and Torres Strait Islander people consulted. That frustration is justified: for too long this proud and history-rich people has struggled with problems associated with shorter lifespans, over-representation in the criminal justice system, poor school attendance, low levels of higher education attainment and poorer socio-economic outcomes. Social problems associated with drug and alcohol abuse, while a problem in many places, are intensified in several remote communities. Child sexual abuse and rates of sexually transmitted diseases in several remote communities are unacceptable. Submitters often said they were over-consulted yet felt under-heard, with countless reviews, inquiries and reports without meaningful action to follow.

I share their sentiment: our Indigenous people deserve better.

Several individuals and organisations expressed their belief that it was Constitutional recognition that was necessary to overcome these difficulties. To my minds, to acknowledge the unacceptability of the status quo does not necessitate the conclusion that Constitutional recognition is the remedy, especially as a stand alone measure.

Indeed, I am deeply concerned that, for those who expect Constitutional recognition to be a panacea for this diverse bag of practical problems, they are bound for disappointment.

Practical problems require practical solutions. It is for this reason that I see potential in local representative organisations that can advise governments on the adaptation or tailoring of government programs to local needs. In remote communities, or where the dominant culture differs greatly from that contemplated by the design of programs in Canberra or other cities, this can add substantial value. I hope that the co-design process recommended by the JSCCR reveals constructive ways of engaging Indigenous expertise and local knowledge so that government engagement and resources can have their most positive possible impact. A 'Voice' (to use the words of the *Statement from the Heart*) to government of that nature has the potential to improve the efficiency of service delivery and be more effective in helping to 'close the gap', particularly in regional and remote communities.

It is for the same reason – practicality – that I maintain a scepticism of some of the proposals for Constitutional recognition.

The course of submissions revealed that there was an absence of consensus among Indigenous communities about what the various proposals for Constitutional recognition could achieve and indeed what their objectives were. Some believed it would be an important symbol, others saw it as a vehicle for countering discrimination against indigenous people. Some saw it as a part of the healing process for past wrongs, others saw it as a vehicle for treaty. Some saw it as a way to entrench a role for Indigenous people in government decision-making. There were, no doubt, even more objectives than those I have summarised.

No one considered, in their submission, this question: what is the purpose of our Constitution? If the purpose of our Constitution is to make us feel a peace with history, a model to insert a preamble might make sense (though we note their legal effect is substantially more complex than mere symbolism). If the purpose is to say something about our national identity, and the people, events and causes that make it up, then several of the amendment proposals might have value. But if the purpose of our Constitution is to mechanically allocate the powers and functions of a federal government and to define its relationship with the States – and that is its purpose – then all but one of the proposals for amendment is misconceived.

I do not deny that there is a deep emotional attachment to the idea of Constitutional recognition in the hearts of the vast majority of the people who provided evidence to the committee. The difficulty is that the Constitution is not an emotional document; indeed, to insert emotion in a document with a legal purpose and operation is one that invites judicial activism.

One matter that remains of concern, as is often the case with parliamentary inquiries, is that a limited audience is engaged in the process and providing views. In this case, and as would be expected, many individual Indigenous Australians and representative groups of Indigenous Australians have been heavily involved in sharing their views and desires with regard to the myriad of possible outcomes. And yet, Constitutional change is a matter for every Australian, and a large swathe of the Australian people have not had input in the process to date. This is a deficiency that any future process should address.

I support the proposal to amend the Constitution in what will be regarded by some as a minimalist way. The abolition of s25 is appropriate, given that it is not used and, more importantly, that it contemplates the different treatment of Australians by the States on the basis of race for the purposes of voting. What gives this amendment moral force, in my view, is that it drives towards an Australia in which all citizens are treated equally. Indeed, that was the beauty of the 1967 referendum's amendments: it brought Indigenous people toward their rightful place as equal Australians.

I support in principle the amendment of s51(xxvi) so that it provides to the federal government a head of power sufficient to provide support for existing native title legislation, but no more. The idea that we have a "race power" is, to our mind, inconsistent with the notion of the equality of Indigenous people.

It is in this sense that I am in support of Constitutional recognition of Indigenous people. I accept that it is a more limited kind of recognition that some people in our community seek to achieve. While some of the Indigenous people consulted by the JSCCR supported these changes, there were others who regarded this form of recognition as insufficient.

In my view, an approach that puts at its centre the equal treatment of Indigenous people with other Australians will have the best possible prospect of obtaining bipartisan support, and the best possible prospect of being accepted by the Australian people as a whole at a referendum.

I have a range of concerns with many of the other proposals that are well canvassed in the JSCCR final report. Suffice to say that I am guided most prominently by the belief that Indigenous people deserve to be treated in all ways as equal to every other Australian, and by the belief that the Constitution is a legal and mechanical, rather than a poetic or cultural, document.

It would be a mistake, in my view, to entrench any form of identity politics into our Constitution, in the way that many of the proposals for change suggest. Not because the role of Indigenous people in this country isn't important – it is. The

error would lie in the precedent it would set. It is far better for us to focus on the deep equality of Indigenous people, rather than seeking to elevate or separate them from other Australians.

As the role of Constitutional amendments in the context of the rest of the Constitution are tested by individual cases, and the words of the Constitution are considered against a background of changing economic or cultural circumstances, judicial interpretation often leads to consequences unintended at the time of drafting. It means we should be very cautious about each and every word that is inserted, changed or deleted. It provides a good reason to maintain a narrow and legal purpose for the Constitution, and avoid adapting it to symbolic, emotional or cultural purposes.

In my view, we should be open-minded about whether a Voice is best delivered legislatively or Constitutionally. While many submitters seemed to prefer Constitutional entrenchment based on a general perception that it would be more permanent, the flexibility to adapt and improve upon the structure for a Voice as we acquire experience of its operation is a valuable feature of a legislative approach. The co-design process recommended by the JSCCR will allow for a thorough exploration of the practical advantages and disadvantages of each of the models and structures proposed. The Indigenous people who have called in general terms for a Voice must now take the next step, of working with one another and the community more broadly to articulate their objectives for the Voice and formulate a design that will achieve the shared goals of their community.

Finally, our nation should invest in the collection of the history of Indigenous communities, and provide opportunities for written and oral histories to be gathered and shared. I have a reservation about the usage of the term “truth-telling” to describe this process, carrying as it does the suggestion that our history to this point is somehow dishonest. That suggestion is unfair, and unproven. At worst, Australia’s history could be regarded incomplete. Nevertheless, it is important that all with a story to share about Indigenous culture and its positive and negative interactions with non-Indigenous Australians, have an opportunity to do so. I believe that implementation of the JSCCR’s recommendation to commit to local history-gathering, and to provide opportunities to mourn and celebrate what emerges from it, is worthwhile. I expect it will go a long way towards achieving the cultural appreciation that so many Indigenous people regard as fundamental to reconciliation.

Senator Amanda Stoker

26 November 2018

Minority report - The Australian Greens

Introduction

The Uluru Statement from the Heart called for a referendum to provide constitutional recognition for a representative body that gives First Nations peoples a Voice to the Commonwealth Parliament. The Greens wholeheartedly support the establishment of such a constitutionally-enshrined Voice to Parliament. It would be a critically important means of ensuring that First Nation peoples have a voice in decisions that affect them, and a significant say in their future. The Greens reiterate in this Minority Report that we support the *Uluru Statement from the Heart* in full.

Constitutional recognition of a First Nations peoples' Voice to Parliament is a step towards self-determination. Self-determination is a key part of justice and healing for First Nations peoples, in closing the gap and addressing intergenerational trauma.

The Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples (The Committee) heard evidence that a common theme among First Nations' communities is the desire to be part of the decision making process, and their concerns that First Nations peoples are easily sidelined.¹ Paternalistic policy approaches imposed on First Nations peoples by former Governments, like, the Northern Territory Intervention, the cashless welfare card and the Community Development Program have not been done with the consent

¹ Majority Report, p. 12.

of communities. A Voice to Parliament will go some way to addressing the damaging top-down approaches of successive Governments.

The Greens thank Committee members for bringing a spirit of genuine desire for collaboration and consensus to this inquiry process. We also thank those who took the time to make submissions and to provide witness testimony, and we thank the Secretariat staff.

Constitutional Enshrinement

Recommendation 2 of the Final Report states that:

Following process of co-design, the Australian Government consider, in a deliberate and timely manner, legislative, executive and constitutional options to establish the Voice.

It is the Greens' view that the Voice must be enshrined in Australia's constitution, although we recognise that some witnesses expressed their discomfort with the idea of being included in a document that they feel has been instrumental in their dispossession.²

Aboriginal members of the Referendum Council set out the importance of constitutional recognition of the Voice in their submission:

The Uluru Statement from the Heart called for 'a First Nation Voice enshrined in the Constitution'. The call for a Voice was the culmination of a process aimed at eliciting from Aboriginal and Torres Strait Islander peoples what *meaningful* constitutional 'recognition' is to them... Constitutional enshrinement is important for three reasons. It is the only reform that respects the consensus of Aboriginal and Torres Strait Islander peoples as expressed in the Uluru Statement From the Heart. It provides certainty and security for the Voice. It secures enduring popular legitimacy and accords the Voice its proper place in the constitutional system, which will provide it with the necessary legitimacy and status to pursue its role.³

They further stated:

The call for a Voice to Parliament was an unambiguous affirmation of the importance of constitutional enshrinement, and the only proposal put forward

² Majority Report, p. 84.

³ Ms Pat Anderson AO, Professor Megan Davis, Mr Noel Pearson, Associate Professor Sean Brennan, De Dylan Lino, Ms Gemma McKinnon, and Associate Professor Gabrielle Appleby, *Submission 479*, p. 3.

for recognition of Aboriginal and Torres Strait Islander peoples in the Constitution... A constitutionally enshrined First Nations Voice would implement a practical improvement that respects Australia's system of parliamentary democracy and the right of First Nations peoples to self-determination, as expressed in the *United Nations Declaration on the Rights of Indigenous Peoples*.⁴

They also outlined the deeply consultative process that led to a consensus outcome on the issue of constitutional recognition at the Uluru Convention:

Many hundreds of people participated in good faith, working through the pros and cons of different proposals in working groups and plenaries, before arriving at the consensus outcome supported by the Uluru Convention. In particular the dialogue participants considered the potential for legislative, administrative and other forms of change to achieve structural reform, as compared with constitutional change, before emphatically embracing a constitutionally enshrined First Nations Voice.⁵

In their view, constitutional enshrinement of the Voice would prevent any uncertainty, and would provide legitimacy:

To date, there has been no protection against unilateral abolition of First Nations representative structures or against the instability, disempowerment and lack of certainty that follows... During the dialogues people repeatedly emphasised they wanted to escape this instability and uncertainty and achieve enduring structural change by constitutionally entrenching the Voice.... Popular approval at a referendum will seal the legitimacy of the Voice and allow all Australians to participate in this unifying act of constructive reform.⁶

A Priority Referendum

The Greens' acknowledge that witnesses expressed diverse views regarding the process and timing of a referendum. However, on balance we favour the importance of proceeding to a referendum as soon as First Nations peoples are ready (and balancing the need for urgency with the likelihood of any referendum's success).

We agree with the assertion of the National Congress of Australia's First Peoples, that we can proceed to a referendum on a provision which provides for the

⁴ *Ibid*, p. 3.

⁵ *Ibid*, p. 4.

⁶ *Ibid*, pp. 4, 5.

fundamental characteristics of a First Nations Voice, without being overly prescriptive. This would imbue the representative body with both stability and flexibility.⁷

The Greens are very concerned that finalising the design of the Voice before a referendum would effectively entrench the form of the Voice, making it very difficult to change into the future as the role of the Voice evolved.

While it is important to set out a co-design process before any referendum, detail of the Voice should be determined after the referendum, through a First Nations-led consultation process that could then be subject to Parliamentary oversight.

As former Chairman of ATSIC Bill Gray noted in his evidence, a co-design process must not be rushed if it is to be viewed as authentic and legitimate by First Nations peoples.⁸

Furthermore, as suggested by the Cape York Institute, holding a referendum on the *principle of the Voice* would likely increase the chance of success:

The referendum can in this way be won on the readily digestible principle that Indigenous peoples should have a fair say in political decisions made about them, their rights and their affairs, without getting bogged down in highly complex institutional design detail which is properly a matter for legislation, not the Constitution.⁹

Several submitters noted that the establishment of the High Court of Australia followed this model.

No constitutionally-mandated institution exists where the legislation has preceded the creation of the power. All institutions created by a power have been constitutionally mandated. Why would the establishment of the Voice be the one exercise of a power where the institution will be created prior to the power? That's been the way with the High Court of Australia or even the Inter-state Commission.

Legislating a body is not the creation of a Voice. It is not an exercise of a power to give rise to a Voice. A legislative approach would likely be the exercise of the existing race power with all of its jurisprudence and limitations of "race". It would be the establishment of a Voice by the race power with its capacity to discriminate. The capacity to discriminate would be embodied in a Voice created by Parliament. This is not a Voice that is envisioned by First Nations peoples.

⁷ Majority Report, p. 95.

⁸ Majority Report, p. 103.

⁹ Cape York Institute, *Submission 244*.

The temptation to legislate first and test drive the model is obvious. Legislating the Voice before enshrining it in the Constitution is forcing First Nations peoples to audition and prove themselves. This would potentially restrict the Voice and prevent people from doing things with the Voice for fear that it won't be constitutionally enshrined.

Presenting to the Australian public a definite model/legislation setting out with certainty the model of what the Voice might look like would mislead the public. The referendum would only be about the constitutional words and not the legislative detail. That legislative detail will likely change and evolve. This would make the amendment vulnerable to litigation because the people voted on a model. They would be asked to vote on an institution. It sets up legal uncertainty.

There is support for a Voice. Polling indicates a majority of people are ready to support a Voice to parliament. The many ideas of the Voice in the community can be managed in a detailed process after the referendum.

It is the Parliament that hasn't been able to show leadership on this issue. First Nations peoples have been – the Uluru process reached consensus after an extensive consultation process.

Process for designing a Voice

The Greens support calls for the process to design the First Nations Voice to:

- Provide sufficient certainty for all parties prior to the referendum, and to form part of the referendum's public education campaign;
- Respect Aboriginal and Torres Strait Islander peoples' right of self-determination;
- Enable significant and appropriate non-Indigenous input into the end result.

As Aboriginal members of the Referendum Council noted in their submission:

The process for designing the First Nations Voice is just as important as the form that the Voice ultimately takes. To be legitimate and effective, the process cannot be rushed or imposed upon Aboriginal and Torres Strait Islander peoples. Above all, the process must be underpinned by respect for Aboriginal and Torres Strait Islander peoples' right to self-determination... To respect Aboriginal and Torres Strait Islander peoples' right to self-determination, the creation of a First Nations Voice must come about through

an Indigenous-led process that involves extensive participation and deliberation by representatives of First Nations from around the country.¹⁰

Conclusion

The Greens do not agree that the design of the Voice should be finalised prior to a referendum on the concept itself.

We have sought through the years of discussion on constitutional recognition to get multiparty support for constitutional recognition in a form that is supported by First Nations Peoples and capable of being supported by an overwhelming majority of Australians. Through this process we have worked for consensus. However we are unable to achieve consensus at this point because we disagree that the design of the Voice should come first and are disappointed that the Majority report is unable even to agree to support constitutional entrenchment of the Voice despite the clear support by First Nations Peoples for the Voice and constitutional change.

Senator Rachel Siewert

26 November 2018

¹⁰ Ms Pat Anderson et al.

A. List of submissions

- 1 Mr Robert Wade
- 2 Mr David McLachlan
- 3 Mr Fred Leftwich
- 4 Mr Simon Harrington
- 5 Public Affairs Commission of the Anglican Church of Australia
- 6 Adjunct Professor Bertus De Villiers
 - 6.1 Supplementary
 - 6.2 Supplementary
- 7 Mr Henry Burmester AO QC
- 8 Mr Mark Leibler AC
- 9 Mr Maurice Alexander
- 10 Dr Jim Poulter & Uncle Bill Nicholson
 - 10.1 Supplementary
- 11 Michael and Michele Delaney
- 12 Mr Peter Fisher
 - 12.1 Supplementary
- 13 Professor George Williams AO
- 14 Mr John van Riet
 - 14.1 Supplementary
- 15 Ms Malgorzata Schmidt

- 16 Mr Julian Cleary
- 17 Ms Ana Corpuz
- 18 Mr Edward Popham
- 19 Dr Don Sillence
- 20 Ms Dawn Joyce
- 21 FL & SD Davies
- 22 Dr Jean Doherty
- 23 Mr Martin Frohlich
- 24 Mr Cameron Richardson
- 25 Chaia Stein
- 26 Ms Michele Jobbins
- 27 Jillian Napier
- 28 Chrys Black
- 29 Mr Derek Robertson
- 30 Ms Karen Neubauer
- 31 Dr Richard Vickery
- 32 Mr Michael McNally
- 33 Ms Keri James
- 34 Mr Michael Coates
- 35 Catrina Sturmberg
- 36 Dr Colin Shingleton
- 37 Mr John Bentley
- 38 *Name Withheld*
- 39 Dr Rockley Boothroyd
- 40 Carmel Lumley
- 41 Ms Jacqueline Edge
- 42 Mr David Barnett
- 43 Dr Nicholas O'Dwyer
- 44 Bill & Ros Chandler

-
- 45 Mr Rodney Crisp
- 46 Mr Dylan Blair
- 47 Ms Margaret Burbidge
- 48 Mr Frederick Chaney AO
- 49 Lorraine Wilson Ovington
- 50 Mr Michael Mullerworth
- 50.1 Supplementary
- 51 Ms Gillian Coote
- 52 Robin Sevenoaks
- 53 Ms Marie Sellstrom
- 54 Professor Hugh Taylor AC
- 55 Dr James Thyer
- 56 Wilhelmina Newman
- 57 Prof Anne Twomey
- 57.1 Supplementary
- 58 Dr Heather O'Connor
- 59 Ms Pauline Kennedy
- 60 Pam Griffin
- 60.1 Supplementary
- 61 Lauren Gawne
- 62 Jane Pollard
- 63 Miss Jennifer Faulkner
- 64 Dr Andrew Arulsamy
- 65 Royal Society of NSW
- 66 Mr Mark Seymour
- 67 Ms Sarah Holloway
- 68 Natalie Crow
- 69 Mrs Tracy De Geer
- 70 Mrs Jean Anderson

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- 71 Mr Martin McKowen
 - 72 Em Prof Andrew Jakubowicz
 - 73 Mr Alan Rogers
 - 74 Liberty Victoria
 - 75 Mr John Corker
 - 76 Ms Irene Burns
 - 77 Mr Cyle Schneider
 - 78 Mr James Dwyer
 - 79 Walter and Eliza Hall Institute of Medical Research
 - 80 Students of the University of Melbourne Law School
 - 81 Dr Bede Harris
 - 82 Professor Sandy Toussaint
 - 83 Wingecarribee Reconciliation
 - 84 Georgina Woods
 - 85 Mr Paul Winn
 - 86 Tim & Melanie Kallmier
 - 87 Colleen Keating
 - 88 Stuart Hills
 - 89 Danny Fleming
 - 90 Joseph Castley
 - 91 Professor Kim Rubenstein
 - 92 Teela Reid
 - 93 Sybille Frank
 - 94 Mrs Lorraine Finlay
 - 95 Michael Mansell
 - 95.1 Supplementary
 - 96 Rachel Green & Ben Hibbard
 - 97 Jamie Hanson
 - 98 Justin Tutty

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- 99 Trinity College, the University of Melbourne
- 100 World Vision Australia
- 101 National Health Leadership Forum
- 102 Mia Jennings
- 103 Lawson Broad
- 104 Animal Defenders Office Inc
- 104.1 Supplementary
- 105 Dr Fergal Davis
- 106 Ramananda Saraswati & Dorothea Gillen
- 107 Goulburn Broken Catchment Management Authority
- 108 Clear Designing Outcomes
- 109 Dr Brian Sanderson
- 110 Bond University
- 111 Ms Helen McDonald
- 112 Mr Bruce Reyburn
- 113 Anglicare Australia
- 114 Mr Ian Fraser
- 115 City of Marion
- 116 Ms Jane Seeber
- 117 Ms Lisa Overton
- 118 Royal Australian & New Zealand College of Psychiatrists
- 119 Catholic Education Office Ballarat
- 120 Balmain Tigers Australian Football Club
- 121 Maurice Blackburn Lawyers
- 122 Ms Nina Betts
- 123 Byron Environment Centre Inc
- 124 Ms Marie Hayes
- 125 Mr Xiu Ping Lim
- 126 Castan Centre for Human Rights Law, Monash University

- 127 Ms Megan Price
- 128 Ms Tanya Stul
- 129 Ms Pamela Smith
- 130 Mr Andrew Kos
- 131 Uniting Church in Australia Assembly & Uniting Aboriginal and Islander Christian Congress
- 132 Dr Narendrakumar Morris
- 133 *Name Withheld*
- 134 Mr Steve (Robert) Martin
- 135 The Indigenous Settler Relations Collaboration, The University of Melbourne
- 136 ANTaR
- 137 Associate Professor Dominic O'Sullivan
- 138 Mrs Penny Smits
- 139 Ms Maryanne Murray
- 140 Public Interest Law Network
- 141 Dr Michael Breen
- 142 Ms Hannah Sharp
- 143 Mr Julian McMahon
- 144 Mrs Terri-Anne Kingsley
- 145 Mrs Donella Peters
- 146 MS Kay McKenzie
- 147 Australian Republic Movement
- 148 Mr Richard Davies
- 149 Mr Mark D'Astoli
- 150 Prof Lesley Head
- 151 Mr Jeremy Dawkins
- 152 Ms Danya Luo
- 153 Mr David Hall
- 154 Dr Helen Keane

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- 155 Mr Nick Carey
- 156 Glen Jennings
- 157 Ms Jane Needham
- 158 Mr Warren Gould
- 159 General Practice Registrars Australia
- 160 Dr Denise Beale
- 161 Dr Bryan Keon-Cohen AM QC
- 161.1 Supplementary
- 162 Ms Susan Scott
- 163 Dr John Ryan
- 164 Ms Donna Justo
- 165 Mr Robert Garbutt
- 166 Professor Alexander Reilly
- 167 Annie Daley
- 168 Chris Samuel
- 169 Judith Leslie
- 170 Ms Patricia Pollard
- 171 Australian Bar Association
- 172 Uphold & Recognise
- 173 Mr Peter Moylan
- 174 Mr Maurice Jones
- 175 Ms Talina Hurzeler
- 176 cohealth
- 177 Dr Jan Idle et al
- 178 Dr Karis Muller & Coralie Naumann
- 179 Rhonda Diffey
- 179.1 Supplementary
- 180 Dr Moira Scollay AM, Dr Roland Scollay, Clive Scollay, Dan Scollay and Dr Susan LaGanza

-
- 181 J Vincent
 - 182 Mr Peter Mumme
 - 182.1 Supplementary
 - 183 Mr Paul Duldig et al
 - 184 Mr Samuel Munro
 - 185 Mr Ian Dixon
 - 186 Mr Andrew Cole
 - 187 Peter Cook and Jenny Brown
 - 188 Prof Anna Yeatman
 - 189 Mr Harry Hobbs
 - 189.1 Supplementary
 - 190 Mr Daniel Bourke et al
 - 191 Ms Rebecca Harcourt
 - 192 National Justice Project
 - 193 Mr Jason O’Neil
 - 194 Prof Cheryl Saunders
 - 195 Dr Shireen Morris
 - 196 Mr Greg McIntyre SC
 - 196.1 Supplementary
 - 197 Dr Colin James
 - 198 Bass Coast South Gippsland Reconciliation Group
 - 199 Dr Haryana Dhillon
 - 200 Richmond Branch of the Australian Labor Party (Victorian Branch)
 - 201 Ms Kathleen Miller
 - 202 Bronwyn Sindel
 - 203 Marrickville Peace Group
 - 204 Vixen Collective
 - 205 Public Interest Advocacy Centre
 - 205.1 Supplementary

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- 206 Technical Advisers: Regional Dialogues and Uluru First Nations
Constitutional Convention
- 207 Mr Nick Chadwick
- 208 Ms Kate Rees
- 209 Neos Kosmos
- 210 Mr Ross Turnbull et al
- 211 Naturelinks Landscape Management
- 212 Dr Shayne Bellingham
- 213 Ms Michelle Abrahamz
- 214 Collingwood Country Women’s Association
- 215 EcoFeminist Fridays
- 216 Mr Christopher Lynch
- 217 Mr Patrick Quin
- 217.1 Supplementary
- 218 Prof Bronwyn Fredericks
- 219 Professor Kirsty Gover
- 220 Ms Libby Gott et al
- 221 Mr John Stack
- 222 Ms Tiphonie Acreman
- 223 Ms Laura Bulmer
- 224 Ms Samara Hand (*This is an example of 14 form submissions with similar content*)
- 225 Mr Michael Ouzas
- 226 Miss Kate Rose-Crisafulli
- 227 Ms Susan and Mr David Gould
- 228 Tim Keenan
- 229 *Name Withheld*
- 230 Dr Sophie Rudolph
- 231 Mr Neerav Srivastava
- 232 Ms Debra Cushion

- 233 Ms Terri Janke
- 234 Mr Tom Dawkins
- 235 *Name Withheld*
- 236 Ms Fiona Ranga
- 237 Mr Richard Weston
- 238 Natalie Mandel
- 239 Wendy White
- 240 Ms Nerissa Ngadjon
- 241 Mr James Clifford
- 242 Helen Fletcher
- 243 May Miller-Dawkins
- 244 Cape York Institute
- 244.1 Supplementary
 - 244.2 Supplementary
 - 244.3 Supplementary
- 245 Ms Stacey C
- 246 Ms Amanda Sapienza
- 247 Mr Thomas Mayor
- 247.1 Supplementary
- 248 Kendall Lovett
- 249 Chris Sitka
- 250 Catherine Moore
- 251 Ms Barbara Lewis
- 252 Alex Younes
- 253 Mr Steve O'Neill
- 254 Well Thumbed Books
- 255 Anglican Church Southern Queensland
- 256 Lynore Geia
- 257 Humanist Society of Victoria Inc

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- 258 PEN Melbourne
- 259 Laura Hagan
- 260 Ms Sharon Yoxall
- 261 Dr Chris Martin
- 262 Francis Maxwell
- 263 Carmel Grimmett
- 264 University of Newcastle Law School
- 265 Bonnie Parfitt
- 266 Elly Howse
- 267 Professor Marcia Langton AM
- 268 *Name Withheld*
- 269 Genevieve Taylor
- 270 Val Gleeson, Wangaratta Historical Society
- 271 Natalie Crow
- 272 Linda Telai
- 273 Jack Slattery
- 274 Oxfam Australia
- 275 Sue Abbott
- 276 Dr Phillipa Newling
- 277 Dennielle Lee
- 278 Stephen Grimwade
- 279 The Fred Hollows Foundation
- 280 Australian Lawyers Alliance
- 281 Associate Professors Matthew Stubbs and Peter Burdon
- 281.1 Supplementary
- 282 Mark and Sabine Hagan
- 283 Charles Sturt University
- 284 Woden Community Service
- 285 Dr Louise Fitzgerald

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- 286 Rosa Flaherty
- 287 Liz Burton
- 288 Law Council of Australia
- 288.1 Supplementary
- 289 Centre for Comparative Constitutional Studies
- 289.1 Supplementary
 - 289.2 Supplementary
- 290 Yingiya Mark Guyula MLA
- 291 Ms Stephanie Abi-Hanna
- 292 National Congress of Australia's First Peoples
- 292.1 Supplementary
- 293 Tom Gordon
- 294 Yvonne Bradley
- 295 Adjunct Professor Eric Sidoti
- 295.1 Supplementary
- 296 ANTaR Inner West
- 297 Construction Forestry Maritime Mining and Energy Union
- 298 Ada Oliver-Dearman (*This is an example of 553 form submissions with similar content*)
- 299 Ainslie Lamb AM
- 300 Dr Ronald Browne AM
- 301 NSW Reconciliation Council (*This is an example of 13 form submissions with similar content*)
- 302 Statement from the Heart Working Group
- 302.1 Supplementary
- 303 Edward Synot
- 303.1 Supplementary
- 304 Elinor Morris
- 305 Dr Janet Hunt

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- 306 The Hon. Peter Garrett AM
- 307 Susheela Peres da Costa
- 308 Donna Benjamin
- 309 Sophia's Spring
- 310 Victorian Aboriginal Child Care Agency
- 311 Morgan Spruce
- 312 Daniel Benni
- 313 Philip Brown
- 314 Professor Greg Craven AO
- 315 Gilbert + Tobin
- 315.1 Supplementary
- 316 Professor Rosalind Dixon
- 316.1 Supplementary
- 317 Catherine Greenhill
- 318 Ms Megan Edwards
- 319 Barang Regional Alliance Ltd
- 320 Dr Freya Higgins-Desbiolles
- 321 Dr Susan Pyke
- 322 Miss Emma Gallagher
- 323 Mr Samuel Davis
- 324 Mrs Alexandra White
- 325 Mrs Vivienne McCutcheon et al
- 326 Ms Cate Molloy
- 327 Ms Jessica Savage
- 328 Mornington Peninsula Human Rights Group
- 329 Dr Galarrwuy Yunupingu AM
- 330 Mrs Elizabeth Quinn
- 331 Australian Council of Social Service
- 332 Herbert Smith Freehills

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- 333 Croakey
- 334 Human Rights Law Centre
- 335 The Hon Natalie Hutchins MP, Minister for Aboriginal Affairs
- 336 Kingsford Legal Centre and Community Legal Centres NSW
- 337 Anne Kricker
- 338 Indigenous Peoples Organisation
- 338.1 Supplementary
 - 338.2 Supplementary
- 339 Reconciliation Victoria
- 340 The Royal Australasian College of Physicians
- 341 Carmel Grimmett
- 342 John Rhys Jones
- 343 Aboriginal Child, Family and Community Care State Secretariat
- 344 The Law Society of New South Wales Young Lawyers
- 345 Foundation for Aboriginal and Islander Research Action
- 345.1 Supplementary
- 346 Victorian Aboriginal Child Care Agency
- 347 Inner West Council
- 348 Aimee Raymond
- 349 Rosalind Byass
- 350 Georgie Spreadborough
- 351 Chris & Pauline Vigus
- 352 United Voice
- 353 City of Sydney
- 354 Lowitja Institute
- 355 Business Council of Australia
- 355.1 Supplementary
- 356 Aboriginal Peak Organisations of the Northern Territory
- 357 Central Land Council and Northern Land Council

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- 358 Stewart Jensen
- 359 Concerned Australians
- 360 Mr David Bishop
- 360.1 Supplementary
 - 360.2 Supplementary
- 361 Boroondara Reconciliation Network
- 362 Adjunct Professor Judith Dwyer
- 363 Kimberley Land Council and KRED Enterprises
- 364 Alison Elliott
- 365 Yamatji Marlpa Aboriginal Corporation
- 366 Roper Gulf Regional Council
- 367 Reconciliation Australia
- 368 Natalie Wilkin
- 369 The Royal Australian College of General Practitioners
- 370 Sophie Russell
- 371 Christian J Bennett
- 372 Emily Simmons
- 373 National Aboriginal Community Controlled Health Organisation (NACCHO)
- 374 James Ley
- 375 David Harrison
- 376 Lindsay Hackett
- 376.1 Supplementary
- 377 UNICEF Australia
- 378 Apmer Aharreng-arenykenh Agknanenty Aboriginal Corporation
- 379 CASSE Australia
- 380 KALACC
- 380.1 Supplementary
- 381 Ms Suzanne Wargo

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- 382 Department of the Prime Minister and Cabinet
- 382.1 Supplementary
- 383 Shire of Wyndham East Kimberley
- 384 Caritas Australia
- 385 Maroondah Movement for Reconciliation Inc
- 386 NSW Aboriginal Land Council
- 386.1 Supplementary
- 387 *Confidential*
- 388 Mr Graeme Taylor
- 389 Reconciliation WA
- 390 Miss Peta Terry
- 391 Leigh Naunton
- 392 Judith Ahmat
- 393 La Trobe University
- 394 Australian Human Rights Commission
- 395 The Australian National University
- 396 Australian Local Government Association
- 397 Morgan Brigg, Mary Graham and Lyndon Murphy
- 398 Mrs Dianne Ball and Miss Zona Kelly
- 399 C D Marshall
- 400 Mr Martin Pluss
- 401 Dr Karyn Bosomworth (*This is an example of 8 form submissions with similar content*)
- 402 Mr Graeme Parsons
- 403 Keith Dwyer
- 404 Ms Catherine Sullivan
- 404.1 Supplementary
 - 404.2 Supplementary
 - 404.3 Supplementary

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- 405 The Hon. Fred Chaney AO and Mr Bill Gray AM
- 406 Ms Gabrielle Smith
- 407 Australian Indigenous Governance Institute
- 408 Public Law and Policy Research Unit, University of Adelaide
- 409 Ms Jacinta Shailer
- 410 Violet Town & District Reconciliation Group
- 411 National Association for the Visual Arts
- 412 First Nations Media Australia
- 413 Shepparton Region Reconciliation Group
- 413.1 Supplementary
- 414 Australia's Conservation Councils
- 415 Federation of Ethnic Communities' Councils of Australia
- 416 Bradley Alexander Smith
- 417 NSW Council for Civil Liberties
- 418 Emily O'Donnell
- 419 Prime Minister's Indigenous Advisory Council
- 420 SEARCH Foundation
- 421 Diversity Council Australia
- 422 *No submission has been allocated to this number*
- 423 Uphold & Recognise and PM Glynn Institute, Australian Catholic University
- 423.1 Supplementary
- 424 Dr Betty Con Walker
- 425 Dr Jacqueline Durrant
- 425.1 Supplementary
- 426 Mr Barry Miller and Mrs Paula Miller
- 427 Ms Jill Keogh
- 428 Hornsby Area Residents for Reconciliation
- 429 Blue Mountains People for Reconciliation/ANTaR group
- 430 *Name Withheld*

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- 431 Prof Helena Grehan
- 432 Savannah Guides Limited
- 433 Maureen Kingshott and Barbara Guthrie
- 434 Ms Freida Andrews and Mr John Lloyd
- 435 Ms Julie Bailey
- 436 Amy Davidson et al
- 437 City of Bayswater
- 438 *Name Withheld*
- 439 Mr Doug Westland
- 440 Georgia Drake and Lauren Drake
- 441 John Lazarus
- 442 Mrs Rebecca Crawley
- 443 Darian Hiles
- 444 Sydney Students for an Indigenous Voice
- 445 Perinatal Society of Australia and New Zealand
- 446 Georgina San Roque
- 447 Mr John Burke
- 448 The Centre for Excellence in Child and Family Welfare
- 449 D. P (Pat) Larkin
- 450 Thomas Wilkie-Black
- 451 Australian Unity
- 452 Allens
- 453 Fr Frank Brennan SJ AO
- 454 Nathan Lenard
- 455 Cath Marriott
- 456 Kate Auty and Charlie Brydon
- 457 Albury Wodonga Health
- 458 David Latimer
- 459 Professor Lyndall Ryan

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- 460 Torres Shire Council
- 461 Torres Strait Regional Authority
- 462 National Library of Australia
- 463 Inner Sydney Empowered Communities
- 464 National Native Title Council
- 465 Dr Richard Davis
- 466 Ms Hope O'Chin
- 467 Reconciliation Tasmania
- 468 Wiradjuri Buyaa Council
- 469 Ms Liz Heta
- 470 Catholic Justice & Peace Commission of the Archdiocese of Brisbane
- 471 Mr Tony Lane
- 472 Ms Mary Paul
- 473 Mosman Reconciliation
- 474 Womens' Reconciliation Network
- 475 Reconciliation South Australia
- 476 Reconciliation NSW
- 477 Victorian Department of Premier and Cabinet
- 478 Sunshine Coast Reconciliation Group
- 479 Ms Patricia Anderson AO, Professor Megan Davis, Mr Noel Pearson,
Associate Professor Sean Brennan , Associate Professor Gabrielle Appleby,
Dr Dylan Lino, Ms Gemma McKinnon
- 480 Associate Professor Gabrielle Appleby and Professor Megan Davis

B. List of hearings

Tuesday, 17 April 2018¹

Melbourne

National Congress of Australia's First Peoples

Mr Gary Oliver, Chief Executive Officer

Mr Craig Hodges, Media and Communications Manager

Professor Megan Davis, University of New South Wales

New South Wales Aboriginal Land Council

Mr Charles Lynch, Councillor

Mr Stephen Hynd, Executive Director

Prime Minister's Indigenous Advisory Council

Professor Chris Sarra, Co-Chair

Ms Andrea Mason, Co-Chair

¹ This meeting was a private briefing. Sections of the Committee Hansard were subsequently published with the permission of witnesses.

Wednesday, 18 April 2018²

Melbourne

Centre for Comparative Constitutional Studies, University of Melbourne

Professor Adrienne Stone, Director

Department of the Prime Minister and Cabinet

Ms Liz Hefren-Webb, Acting Deputy Secretary

Mr Jamie Fox, First Assistant Secretary, Indigenous Employment and Recognition Division

Mr William Jeffries, Special Adviser, Regional Governance, and Assistant Secretary

Mr Robert Ryan, Assistant Secretary, Empowered Communities Implementation Taskforce

Reconciliation Australia

Ms Karen Mundine, Chief Executive Officer

Mr Andrew Meehan, General Manager, Policy, Research and Government Affairs

Mr Thomas Mayor, Maritime Union of Australia

Mr Tauto Sansbury, Private capacity

Mr Geoffrey Winters, Private capacity

Cape York Institute

Dr Shireen Morris, Senior Policy Adviser and Constitutional Reform Research Fellow

² This meeting was as a private briefing. Sections of the Committee Hansard were subsequently published with the permission of witnesses.

Thursday, 7 June 2018³

Barunga

Central Land Council

Northern Land Council

Tiwi land Council

Anindilyakwa Land Council

Monday, 11 June 2018

Kununurra

Binarri-binyja Yarrowoo Aboriginal Corporation

Ms Christy Hawker, Chief Executive Officer

Wunan Foundation

Mr Ian Trust, Chairperson, and Executive Director

Shire of Wyndham-East Kimberley

Councillor David Menzel, Shire President

Ms Nawoola Selina Newry, Private capacity

Kununurra Region Economic Aboriginal Corporation

Ms Tracy Richards

Mr Nathan Storey

³ This meeting was conducted by the four Northern Territory Land Councils with the Committee participating as invitees. As such, the Committee Hansard is not publicly available.

Monday, 11 June 2018

Halls Creek

Shire of Halls Creek

Councillor Malcolm Edwards, Shire President

Councillor Bonnie Edwards

Ms Michelle Bedford, Private capacity

Ms Siobhan Casson, Private capacity

Ms Josephine Farrer MLA, Member for Kimberley, Western Australian Parliament

*Ms Lewin O'Connell, Electoral Officer, Office of Ms Josephine Farrer MLA,
Western Australian Parliament*

Mardiwah Loop Community

Ms Miranda Gore, Chair

Ms Ellen Williamson, Private capacity

Tuesday, 12 June 2018

Kununurra

Mr James Barron, Private capacity

Miss Sadie Carrington, Private capacity

Ms Bessie Daylight, Private capacity

Ms Beverley Malay, Private capacity

Mr Patrick Mung, Private capacity

Ms Holly Rhodes, Private capacity

Tuesday, 12 June 2018

Broome

Nyamba Buru Yawuru

Mr Peter Yu, Chief Executive Officer

Mrs Debra Pigram, Chairperson

Yawuru Registered Native Title Holders Body Corporate

Mr Thomas Edgar, Chairperson

Kimberley Land Council

Mr Tyrone Garstone, Deputy Chief Executive Officer

Mr Wayne Bergmann, Special Adviser

Ms Dot West, Private capacity

Wednesday, 13 June 2018

Fitzroy Crossing

Mr Nathan Lenard, Private capacity

Kimberley Aboriginal Law and Culture Centre

Mr Neil Carter, Repatriation and Cultural Heritage Officer

Mr Tom Lawford

Dr Lyndon Ormond-Parker, Researcher

Marninwarntikura Fitzroy Women's Resource Centre

Ms Mary Aiken, Chairperson

Ms Emily Carter, Chief Executive Officer

Ms Denise Andrews, Private capacity

Ms Andrew Myers, Private capacity

Mr Mark MacKenzie, Private capacity

Ms Ebony Hill, Private capacity

Monday, 18 June 2018

Canberra

Professor Tom Calma AO, Private capacity

PM Glynn Institute, Australian Catholic University

Dr Damien Freeman

Uphold & Recognise

Mr Sean Gordon, Chairman

Mr Michael Dillon, Private capacity

Mr Bill Gray AM, Private capacity

Monday, 25 June 2018

Canberra

National Aboriginal Community Controlled Health Organisation

Mr John Singer, Chairman

Ms Donnella Mills, Deputy Chair

Ms Patricia Turner, Chief Executive Officer

Dr Dawn Casey, Private capacity

Department of the Prime Minister and Cabinet

Professor Ian Anderson, Deputy Secretary, Indigenous Affairs Group

Mr Jamie Fox, First Assistant Secretary, Indigenous Affairs Group

Mr Robert Ryan, Assistant Secretary, Empowered Communities

Mr William Jeffries, Assistant Secretary, Close the Gap Refresh and Special Adviser Regional Government

Monday, 2 July 2018

Dubbo

Cape York Institute

Dr Shireen Morris, Senior Policy Adviser and Constitutional Reform
Research Fellow

Maranguka Justice Reinvestment Project & Birrang Enterprise Development Company Ltd

Mr Alistair Ferguson, Executive Director

Murdi Paaki Regional Assembly

Mr Des Jones, Chairperson

Mr Les Coe, Private capacity

Tuesday, 3 July 2018

Canberra

Delegates of the Australian National University's First Nations Governance Forum

Professor Mattias Ahren, Professor of Law, Arctic University of Norway

Dr Ken Coates, Canada Research Chair, Johnson-Shoyama Graduate School
of Public Policy, University of Saskatchewan

Mr Brian Crane QC, Partner, Gowling WLG, Canada, LLP

Dr Dalee Sambo Dorough, Associate Professor, University of Alaska

Wednesday, 4 July 2018

Sydney

Mr David Jackson AM QC, Private capacity

Australian Catholic University

Professor Greg Craven AO, Vice- Chancellor and President

Professor Rosalind Dixon, Private capacity

Adjunct Professor Eric Sidoti, Private capacity

New South Wales Aboriginal Land Council

Mr James Christian, Chief Executive Officer

Mr Charles Lynch, Councillor, Northern Region

Dr Bede Harris, Private capacity

Professor Anne Twomey, Private capacity

Australian Bar Association

Mr Phillip Boulten SC, Chair, Indigenous Committee

Ms Susan Phillips, Member, Indigenous Committee

Mr Simeon Beckett, Member Indigenous Committee

Gilbert + Tobin

Mr Danny Gilbert, Managing Partner

Ms Anne Cregan, Partner

Thursday, 5 July 2018

Adelaide

The Hon. Kyam Maher MLC, Shadow Minister for Aboriginal Affairs, South Australian Parliament

Dr Roger Thomas, Private capacity

South Australia Native Title Services

Mr Keith Thomas, Chief Executive Officer

Reconciliation South Australia

Professor Peter Buckskin, Co-Chair

Mr Mark Waters, State Manager

Public Law and Policy Research Unit, University of Adelaide

Professor Alex Reilly, Director

Adelaide Law School, University of Adelaide

Associate Professor Matthew Stubbs

Dr Peter Burdon

Australian Capital Territory Aboriginal and Torres Strait Islander Elected Body

Ms Katrina Fanning, Chairperson

Law Council of Australia

Mr Anthony McAvoy SC, Co-Chair, Indigenous Legal Issues Committee

Mr Nathan MacDonald, Senior Policy Lawyer

Adnyamathanha Traditional Lands Association

Ms Vivianne McKenzie, Vice Chairperson

Ngarrindjeri Regional Authority

Mr Kenneth Sumner, Chief Executive Officer

Mr Steven Sumner, Chief Executive Officer, Moorundi Aboriginal Community Controlled Health Service

Narungga Nations Aboriginal Corporation

Mr Klynton Wanganeen, Chief Executive Officer

Mr Garry Goldsmith, Interim Business Manager

National Congress of Australia's First Peoples

Dr Jackie Huggins, Co-Chair

Mr Rod Little, Co-Chair

The Hon. Amanda Vanstone, Private capacity

Friday, 6 July 2018

Perth

Curtin Law School

Adjunct Professor Bertus de Villiers

*Technical Advisers: Referendum Council regional dialogues and First Nations
Constitutional Convention at Uluru*

Dr Gabrielle Appleby, Private capacity

Professor Sean Brennan, Private capacity

Ms Gemma McKinnon, Private capacity

Dr Dylan Lino, Private capacity

Mr Dean Parkin, Private capacity

The Hon. Robert Ian Viner AO QC, Private capacity

Mr Greg McIntyre SC, Private capacity

Dr Michael Breen, Private capacity

The Hon. Fred Chaney AO, Private capacity

Centre for Comparative Constitutional Studies, University of Melbourne

Professor Adrienne Stone, Director

Professor Cheryl Saunders AO, Member

South West Aboriginal Land and Sea Council

Ms Gail Beck, Regional Development Manager

Mrs Lorraine Finlay, Private capacity

Tuesday, 11 September 2018

Canberra

Ms Pat Anderson AO, Private capacity

Dr Gabrielle Appleby, Private capacity

Professor Tom Calma AO, Private capacity

Professor Megan Davis, University of New South Wales

Mr Bill Gray AM, Private capacity

National Congress of Australia's First Peoples

Dr Jackie Huggins, Co-Chair

Mr Rod Little, Co-Chair

Mr Gary Oliver, Chief Executive Officer

Tuesday, 18 September 2018

Canberra

Professor Megan Davis, University of New South Wales

Professor Rosalind Dixon, Private capacity

Mrs Lorraine Finlay, Private capacity

Professor Anne Twomey, Private capacity

Professor George Williams AO, Private capacity

Centre for Comparative Constitutional Studies, The University of Melbourne

Associate Professor Kristen Rundle, Co-Director

Professor Adrienne Stone, Co-Director

Public Law & Policy Research Unit, the University of Adelaide

Professor Alexander Reilly

Associate Professor Matthew Stubbs

Monday, 24 September 2018

Wodonga

Burraja Cultural and Environmental Discovery Centre

Mr Brendon Kennedy, Cultural Activities Officer

North East Catchment Management Authority

Ms Jane Young, Executive Manager, Leadership and Strategy

Albury Wodonga Health Service

Mrs Nicola Melville, Chairperson

Charles Sturt University

Mr Michael Peachey, Director, Indigenous Student Success, Student Services

Mr Peter Fraser, Director, Government and Community Relations

Ms Annette Gainsford, Lecturer, Centre for Law and Justice

Mr Yanhadarrambal Jade Flynn, Indigenous Resources Officer; and
Representative, Wiradjuri Elders

Ms Leanna Carr-Smith, Representative, Bathurst Wiradjuri and Aboriginal
Community Elders; and Sessional Lecturer

Ms Judith Ahmat, Private capacity

Mr Brian Blake, Private capacity

Mr Kevin Cameron, Private capacity

Ms Rhonda Diffey, Private capacity

Dr Jacqui Durrant, Private capacity

Ms Judith Scarfe, Private capacity

Tuesday, 25 September 2018

Shepparton

Ganbina

Mr Anthony Cavanagh, Chief Executive Officer

Ms Sue Williams, General Manager

Shepparton Region Reconciliation Group

Ms Frances (Fran) Smullen, Correspondence Secretary

Kaiela Institute

Mr Paul Briggs, Executive Director and President

Ms Tui Crumpen, Non-executive Director

Ms Felicia Dean, Community Engagement

Ms Karyn Ferguson, Member, Interim Algabonyah Community Cabinet

Ms Raelene Nixon, Member, Interim Algabonyah Community Cabinet

Greater Shepparton City Council

Mr Peter Harriott, Chief Executive Officer

Mrs Kaye Thomson, Director Community

Ms Melinda Lawley, Private Capacity

Shepparton Interfaith Network

Reverend Chris Parnell, Secretary

Wednesday, 26 September 2018

Melbourne

Institute of Public Affairs

Mr Simon Breheny, Director of Policy

Mr Morgan Begg, Research Fellow

Federation of Ethnic Communities Council of Australia

Mr Mohammad Al-khafaji, Director of Strategy and Engagement

Dr Alia Imtoul, Director of Policy

Aboriginal Victoria

Mr Andrew Gargett, Director, Strategy, Engagement and Community

Mr Jack Register, Manager, Office of the Executive Director

Victorian Treaty Advancement Commission

Ms Jill Gallagher AO, Victorian Treaty Advancement Commissioner

Mr Gary Hansell, Policy Officer

Mr Sam Whitney, Senior Policy Officer

Centre for Comparative Constitutional Studies, The University of Melbourne

Associate Professor Kristen Rundle, Co-Director

National Native Title Council

Mr Jamie Lowe, Chairperson

Dr Matthew Storey, Acting Chief Executive Officer

Tuesday, 2 October 2018

Thursday Island

Torres Shire Council

Councillor Yen Loban, Deputy Mayor

Councillor Gabriel Bani

Ms Dalassa Yorkston, Chief Executive Officer

Torres Strait Regional Authority

Mr Napau Pedro Stephen, Chairperson

Mr Getano (Jnr) Lui, Chair, Regional Governance Committee

Wednesday, 3 October 2018

Townsville

Cape York Land Council

Mr Richie Ah Mat, Chairperson

Mr Allan Creek, Deputy Chairperson

Cape York Institute

Dr Shireen Morris, Senior Policy Adviser and Constitutional Reform
Research Fellow

North Queensland Land Council

Mr Terry O'Shane, Director

Mr Phil Rist, Deputy Chair

Wednesday, 3 October 2018

Palm Island

Palm Island Shire Council

Councillor Alf Lacey, Mayor

Councillor Roy Prior, Deputy Mayor

Palm Island Community Company

Ms Rachel Atkinson, Chair

Ms Dianne Foster, Social Worker

Ms Elizabeth Clay, Private capacity

Dr Lynore Geia, Private capacity

Ms Jennifer Ketchell, Private capacity

Thursday, 4 October 2018

Brisbane

Reconciliation Tasmania

Mr Mark Redmond, Chief Executive

Anglican Church Southern Queensland

Reverend Dr Peter Catt, Chair, Social Responsibilities Committee

Dr Morgan Brigg, Private capacity

Ms Mary Graham, Private capacity

Mr Lyndon Murphy, Private capacity

Mr Edward Synot, PhD Candidate, Griffith Law School

Foundation for Aboriginal and Islander Research Action

Mr Robert (Les) Malezer

National Congress of Australia's First Peoples

Dr Jackie Huggins, Co-Chair

Mr Gary Oliver, Chief Executive Officer

Mr Mark Pearce, Director of Partnerships

Reconciliation Queensland Inc.

Mr Bill (Uncle Bill) Buchanan, Board Member

Mr Peter Jackson, Co-Chair (Non-Indigenous)

Sunshine Coast Reconciliation Group

Ms Meredith Walker, Convener, Shared History seminars

Friday, 5 October 2018

Redfern

Metropolitan Local Aboriginal Land Council

Ms Yvonne Weldon, Chairperson

Mr Nathan Moran, Chief Executive Officer

Ms Ann Weldon, Private capacity

Inner Sydney Empowered Communities

Mr Chris Ingrey, Co-Chair

Dr Sonya Pearce, Regional Director

Uphold & Recognise

Mr Sean Gordon, Chairman

PM Glynn Institute, Australian Catholic University

Dr Michael Casey, Director

Dr Damien Freeman

Reconciliation NSW

Professor Lindon Coombes, Co-Chair

Ms Carol Vale, Board Member

Ms Alison Faure-Brac, Executive Director

Indigenous Peoples Organisation

Ms Cathryn Eatock, Co-Chair

Reverend Raymond Minniecon, New South Wales Elder Committee
Representative

*Mr Martin Pluss, Private Capacity**City of Sydney*

Councillor Jess Scully, Co-Chair, Aboriginal and Torres Strait Islander
Advisory Panel

Mr David Beaumont, Engagement Coordinator, Aboriginal Community
Development

Professor Lyndall Ryan, Private capacity

Australians for Native Title and Recognition

Mr Paul Wright, National Director

Central Coast Aboriginal Men's Group

Mr Craig Towney Foreshew

The Hon. Robert Tickner AO, Private capacity

Tuesday, 16 October 2018

Canberra

Fr Frank Tenison Brennan SJ AO, Private capacity

National Library of Australia

Dr Marie-Louise Ayres, Director-General

Mr Kevin Bradley PSM, Assistant Director-General

Thursday, 18 October 2018

Australian Human Rights Commission

Ms June Oscar AO, Aboriginal and Torres Strait Islander Social Justice
Commissioner

Professor Tom Calma AO, Private capacity

Mr Mick Gooda, Private capacity

C. List of previous recommendations

Expert Panel on Constitutional Recognition of Indigenous Australians, 2012

- 1 That section 25 be repealed.
- 2 That section 51(xxvi) be repealed.
- 3 That a new 'section 51A' be inserted, along the following lines:

Section 51A Recognition of Aboriginal and Torres Strait Islander peoples

Recognising that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

Acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;

Respecting the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;

Acknowledging the need to secure the advancement of Aboriginal and Torres Strait Islander peoples;

the Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples.

The Panel further recommends that the repeal of section 51(xxvi) and the insertion of the new 'section 51A' be proposed together.

- 4 That a new 'section 116A' be inserted, along the following lines:

Section 116A Prohibition of racial discrimination

(1) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.

(2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group.

5 That a new 'section 127A' be inserted, along the following lines:

Section 127A Recognition of languages

(1) The national language of the Commonwealth of Australia is English.

(2) The Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage.

Recommendations on the process for the referendum

- a. In the interests of simplicity, there should be a single referendum question in relation to the package of proposals on constitutional recognition of Aboriginal and Torres Strait Islander peoples set out in the draft Bill (Chapter 11).
- b. Before making a decision to proceed to a referendum, the Government should consult with the Opposition, the Greens and the independent members of Parliament, and with State and Territory governments and oppositions, in relation to the timing of the referendum and the content of the proposals.
- c. The referendum should only proceed when it is likely to be supported by all major political parties, and a majority of State governments.
- d. The referendum should not be held at the same time as a referendum on constitutional recognition of local government.
- e. Before the referendum is held, there should be a properly resourced public education and awareness program. If necessary, legislative change should occur to allow adequate funding of such a program.
- f. The Government should take steps, including through commitment of adequate financial resources, to maintain the momentum for recognition, including the widespread public support established through the *YouMeUnity* website, and to educate Australians about the Constitution and the importance of constitutional recognition of

Aboriginal and Torres Strait Islander peoples. Reconciliation Australia could be involved in this process.

- g. If the Government decides to put to referendum a proposal for constitutional recognition of Aboriginal and Torres Strait Islander peoples other than the proposals recommended by the Panel, it should consult further with Aboriginal and Torres Strait Islander peoples and their representative organisations to ascertain their views in relation to any such alternative proposal.
- h. Immediately after the Panel's report is presented to the Prime Minister, copies should be made available to the leader of the Opposition, the leader of the Greens, and the independent members of Parliament. The report should be released publicly as soon as practicable after it is presented to the Prime Minister.

Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, 2015

- 1 The committee recommends that each House of Parliament set aside a full day of sitting to debate concurrently the recommendations of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, with a view to achieving near-unanimous support for and build momentum towards a referendum to recognise Aboriginal and Torres Strait Islander peoples.
- 2 The committee recommends that the referendum on constitutional recognition be held when it has the highest chance of success.
- 3 The committee recommends that section 25 of the Constitution be repealed.
- 4 The committee recommends the repeal of section 51(xxvi) and the retention of a persons power so that the Commonwealth government may legislate for Aboriginal and Torres Strait Islander peoples as per the 1967 referendum result.
- 5 The committee recommends that the three options, which would retain the persons power, set out as proposed new sections 60A, 80A and 51A & 116A, be considered for referendum.

The first option the committee recommends for consideration is its amended proposed new section 51A, and proposed new section 116A, reported as option 1 in the committee's Progress Report:

51A Recognition of Aboriginal and Torres Strait Islander Peoples

Recognising that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

Acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;

Respecting the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples.

116A Prohibition of racial discrimination

(1) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.

(2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group;

The committee considers that this proposal:

- is legally and technically sound;
- retains a persons power as per the 1967 referendum result;
- contains a special measures provision;
- limits the constitutional capacity of the Commonwealth, states and territories to discriminate;
- offers a protection for all Australians;
- is a broad option;
- had the overwhelming support of Aboriginal and Torres Strait Islander peoples and non-Aboriginal and Torres Strait Islander peoples during the inquiry; and
- accords with the recommendation of the Expert Panel.

The second option was proposed by Mr Henry Burmester AO QC, Professor Megan Davis and Mr Glenn Ferguson after their consultation process:

CHAPTER IIIA

Aboriginal and Torres Strait Islander Peoples

Section 80A

(1) **Recognising** that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

Acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;

Respecting the continuing cultures and heritage of Aboriginal and Torres Strait Islander peoples;

Acknowledging that Aboriginal and Torres Strait Islander languages are the original Australian languages and a part of our national heritage;

the Parliament shall, subject to this Constitution, have power to make laws with respect to Aboriginal and Torres Strait Islander peoples, but so as not to discriminate against them.

(2) This section provides the sole power for the Commonwealth to make special laws for Aboriginal and Torres Strait Islander peoples.

The committee considers that this proposal:

- is legally and technically sound;
- retains a persons power as per the 1967 referendum result;
- is clear in meaning;
- limits the capacity of the Commonwealth only with regard to discrimination, so states and territories are not affected by constitutional change;
- is a narrow option; and
- offers constitutional protection from racial discrimination for Aboriginal and Torres Strait Islander peoples.

The third option which would retain the persons power is the proposal from the Public Law and Policy Research Unit at the University of Adelaide:

60A Recognition of Aboriginal and Torres Strait Islander Peoples

Recognising that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

Acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;

Respecting the continuing cultures and heritage of Aboriginal and Torres Strait Islander peoples;

Acknowledging that Aboriginal and Torres Strait Islander languages are the original Australian languages and a part of our national heritage;

(1) The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples.

(2) A law of the Commonwealth, a State or a Territory must not discriminate adversely against Aboriginal and Torres Strait Islander peoples.

The committee considers that this proposal:

- is legally and technically sound;
- retains a persons power as per the 1967 referendum result;
- is clear in meaning;
- is both a narrow and a broad option;
- limits the 'adverse discrimination' provision to Aboriginal and Torres Strait Islander peoples; and
- limits the capacity of the Commonwealth, states and territories constitutionally to discriminate.
- The committee recommends that the Human Rights (Parliamentary Scrutiny) Act 2011 be amended to include the United Nations Declaration on the Rights of Indigenous Peoples in the list of international instruments which comprise the definition of human rights under the Act.

- 6 The committee recommends that the *Human Rights (Parliamentary Scrutiny) Act 2011* be amended to include the United Nations Declaration on the Rights of Indigenous Peoples in the list of international instruments which comprise the definition of human rights under the Act.

- 7 The committee recommends that the government hold constitutional conventions as a mechanism for building support for a referendum and engaging a broad cross-section of the community while focussing the debate.
- 8 The committee further recommends that conventions made up of Aboriginal and Torres Strait Islander delegates be held, with a certain number of those delegates then selected to participate in national conventions.
- 9 The committee recommends that a referendum be held on the matter of recognising Aboriginal and Torres Strait Islander peoples in the Australian Constitution.
- 10 The committee recommends that a parliamentary process be established to oversight progress towards a successful referendum.

Uluru Statement from the Heart, 2017

We, gathered at the 2017 National Constitutional Convention, coming from all points of the southern sky, make this statement from the heart:

Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under our own laws and customs. This our ancestors did, according to the reckoning of our culture, from the Creation, according to the common law from 'time immemorial', and according to science more than 60,000 years ago.

This sovereignty is a spiritual notion: the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.

How could it be otherwise? That peoples possessed a land for sixty millennia and this sacred link disappears from world history in merely the last two hundred years?

With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia's nationhood.

Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are alienated 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*.

We seek constitutional reforms to empower our people and take *a rightful place* in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.

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

Makarrata is the culmination of our agenda: *the coming together after a struggle*. It captures our aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination.

We seek a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history.

In 1967 we were counted, in 2017 we seek to be heard. We leave base camp and start our trek across this vast country. We invite you to walk with us in a movement of the Australian people for a better future.

Referendum Council, 2017

- 1 That a referendum be held to provide in the Australian Constitution for a representative body that gives Aboriginal and Torres Strait Islander First Nations a Voice to the Commonwealth Parliament. One of the specific functions of such a body, to be set out in legislation outside the Constitution, should include the function of monitoring the use of the heads of power in section 51 (xxvi) and section 122. The body will recognise the status of Aboriginal and Torres Strait Islander peoples as the first peoples of Australia.
- 2 That an extra-constitutional Declaration of Recognition be enacted by legislation passed by all Australian Parliaments, ideally on the same day, to articulate a symbolic statement of recognition to unify Australians.