



public interest
ADVOCACY CENTRE

Submission to Interim Voice Report Public Consultation

19 March 2021

About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal centre based in Sydney.

Established in 1982, PIAC tackles barriers to justice and fairness experienced by people who are vulnerable or facing disadvantage. We ensure basic rights are enjoyed across the community through legal assistance and strategic litigation, public policy development, communication and training.

Our work addresses issues such as:

- Reducing homelessness, through the Homeless Persons' Legal Service
- Access for people with disability to basic services like public transport, financial services, media and digital technologies
- Justice for Aboriginal and Torres Strait Islander people
- Access to affordable energy and water (the Energy and Water Consumers Advocacy Program)
- Fair use of police powers
- Rights of people in detention, including equal access to health care for asylum seekers (the Asylum Seeker Health Rights Project)
- Transitional justice
- Government accountability.

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The Public Interest Advocacy Centre office is located on the land of the Gadigal of the Eora Nation.

Contents

- Recommendations 1**
- A Constitutionally-Enshrined Voice..... 2**
- 1. Introduction 2**
- 2. The Voice to Parliament Must be Constitutionally Enshrined 3**
 - 2.1 Independence..... 3
 - 2.2 Stability..... 3
 - 2.3 Legitimacy 4
 - 2.4 Momentum 4
- 3. Other Issues 5**
 - 3.1 Eligibility to stand as a candidate 5
 - 3.2 Ministerial appointments..... 6

Recommendations

Recommendation 1 – The Voice Must be Constitutionally Enshrined

The Voice to Parliament, as called for in the Uluru Statement from the Heart, must be constitutionally enshrined. To achieve this, the Commonwealth Government must honour its election commitment to hold a referendum on the Voice, with enabling legislation passed in the next term of parliament following a successful vote.

Recommendation 2 – Ensure character tests do not unnecessarily exclude potential candidates

Care must be taken in designing character tests for eligibility to stand as candidates for the Voice to ensure that criteria, including those relating to criminal history and bankruptcy, do not arbitrarily and unnecessarily deny people the opportunity to contribute.

Recommendation 3 – No Ministerial Appointees

The National Voice should not include members appointed by the Commonwealth Minister. This is necessary to preserve the independence and authority of the Voice.

A Constitutionally-Enshrined Voice

1. Introduction

As an organisation that is committed to achieving justice for, and in partnership with, Aboriginal and Torres Strait Islander people, PIAC strongly supports and has formally endorsed the Uluru Statement from the Heart.

That includes supporting all three key elements of the Uluru Statement:

- Voice: a First Nations Voice to Parliament enshrined in the Constitution
- Treaty: a process for agreement making, and
- Truth: truth-telling about our history,

with both Treaty and Truth overseen by a Makarrata Commission.

PIAC has expressed this support through previous submissions to public consultations, including:

- A submission to the Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander People,¹ and
- A supplementary submission to the Commonwealth Parliamentary Inquiry into Constitutional Recognition of Aboriginal and Torres Strait Islander People.²

We have also incorporated our commitment to the Uluru Statement into our work. The Towards Truth Project is a collaborative project, undertaken in partnership with the Indigenous Law Centre at UNSW, to provide practical, foundational support for the truth-telling process called for in the Uluru Statement from the Heart. The work of the project includes mapping laws, policies and practices of Australian governments that have had an impact on Aboriginal and Torres Strait Islander people and developing a publicly-accessible database for use as a resource.

This short submission is based on our previous submissions and informed by our work on the Towards Truth project, as well as PIAC's other work on Aboriginal and Torres Strait Islander Justice issues, including police accountability, improving the child protection system, and raising the age of criminal responsibility.

PIAC does not seek to address all of the issues raised in the Interim Report. This reflects both the scope of our expertise and our recognition, as a non-Indigenous organisation, that on issues such as methods of election, membership numbers and terms, and the number of, and boundaries for, regional voice bodies, the views of Aboriginal and Torres Strait Islander people should have primacy.

¹ PIAC, *Submission to the Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander People*, 11 June 2018, available at: <https://piac.asn.au/wp-content/uploads/2018/06/18.06.11-Indigenous-Constitutional-Recognition-Final.pdf>

² PIAC, *Supplementary Submission to the Commonwealth Parliamentary Inquiry into Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples*, 17 September 2018, available at: <https://piac.asn.au/wp-content/uploads/2018/10/18.09.17-PIAC-Supplementary-Submission-Indigenous-Constitutional-Recognition-Final.pdf>

2. The Voice to Parliament Must be Constitutionally Enshrined

PIAC urges that the Voice to Parliament is enshrined in the Constitution. Establishment via legislation alone is inadequate.

This was the strong and unambiguous call of the Uluru Statement from the Heart:

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. [Emphasis in original]

2.1 Independence

We emphasise the rationale for that call, as articulated through the deliberative process which culminated in the Uluru Statement. That process considered the fundamental importance of a body that was truly independent of Government, and therefore one whose responsibility was to advocate for First Nations peoples.

The problems created by the lack of independence from government of previous Aboriginal and Torres Strait Islander organisations is recognised in the Interim Report itself:³

A recurring issue with which all historical bodies have had to confront, is the extent of their independence from government to represent Aboriginal and Torres Strait Islander peoples in the first instance. The 2008 report of the Aboriginal and Torres Strait Islander Social Justice Commissioner found that most previous bodies have to varying degrees, and for various reasons, tended to prioritise the objectives of the Australian Government of the day first, and those of Aboriginal and Torres Strait Islander peoples second.

Constitutional enshrinement would put the Voice in a much better position than previous bodies to fulfil its primary obligations, because it would be clear that its responsibility was not to the 'Government of the day'. A Constitutional mandate makes clear that the obligations of the Voice are above politics.

2.2 Stability

The history of previous bodies provides another compelling reason for enshrinement – the Voice would not be able to be abolished through the passage of simple legislation.

Once again, this background is outlined in the Interim Report itself. It details the often-brief history of a large number of historical Aboriginal and Torres Strait Islander organisations (including the Federal Council for the Advancement of Aborigines & Torres Strait Islanders, National Aboriginal

³ Indigenous Voice Co-Design Process, *Interim Report to the Australian Government*, October 2020, page 118.

Consultative Committee, National Aboriginal Conference, Aboriginal and Torres Strait Islander Commission, and National Indigenous Council).⁴

Constitutional enshrinement would help to protect the Voice from being easily abolished, making it more likely for the Voice to fearlessly represent the views of First Nations peoples to Parliaments.

For similar reasons, PIAC is strongly opposed to a ‘legislation first, referendum later’ approach to establishing the Voice.

Creating the Voice via legislation first, without the authority provided by enshrinement in the Constitution, will necessarily limit the independence and credibility of the Voice in its formative years. This will weaken the ability of this body to advocate on behalf of First Nations peoples.

Passing legislation first, with the ‘promise’ of a referendum at some later date, also carries with it significant risks. This includes the possibility of government walking away from this promise, disappointing Aboriginal and Torres Strait Islander people and their legitimate aspirations for structural recognition in our Constitution.

This approach also risks any operational challenges faced by the Voice in its formative years being used as a basis for its abolition – rather than recognising the need for flexibility and allowing for innovation, to ensure the Voice delivers on its mandate.

2.3 Legitimacy

A referendum will ensure the Voice carries the authority and legitimacy of a Constitutional mandate, given directly by the Australian people. The education campaign in the lead up to a referendum will ensure all Australian voters are involved in the establishment of the Voice.

It is hard to imagine that a legislated Voice would be seen as anything other than a political creation and the product of political compromise. This would significantly undermine its legitimacy and the weight that may be given to its advice.

2.4 Momentum

‘Legislation first, referendum later’ also undercuts momentum for a successful referendum to be held. Public opinion demonstrates substantial support for a constitutionally-enshrined Voice,⁵ with the *2020 Australian Reconciliation Barometer* indicating that 81% of the general community believe a Voice should be protected within the constitution.⁶

The time has come to accept the generous invitation with which the Uluru Statement concludes:

⁴ Ibid, page 119.

⁵ Francis Markham and Will Sanders, ‘Support for a constitutionally enshrined First Nations Voice to Parliament: Evidence from opinion research since 2017’ (Working Paper No 138/2020, Centre for Aboriginal Economic Policy Research (CAEPR), Research School of Social Sciences, College of Arts & Social Sciences, Australian National University, November 2020).

⁶ Reconciliation Australia, *2020 Australian Reconciliation Barometer* (Report, 30 November 2020), 14.

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.

Irrespective of the specific model for the Voice which is ultimately adopted, the Voice itself must be enshrined in the Constitution. The Commonwealth Government must honour its election commitment to hold a referendum to achieve this end.

Once a successful referendum has been held, and the Voice is enshrined in the Constitution, enabling legislation must then be passed in the next term of Parliament.

Recommendation 1 – The Voice Must be Constitutionally Enshrined

The Voice to Parliament, as called for in the Uluru Statement from the Heart, must be constitutionally enshrined. To achieve this, the Commonwealth Government must honour its election commitment to hold a referendum on the Voice, with enabling legislation passed in the next term of parliament following a successful vote.

3. Other Issues

3.1 Eligibility to stand as a candidate

PIAC has concerns around the proposal, articulated on page 41 of the Interim Report, for candidates for selection as members of the National Voice to meet ‘objective eligibility requirements’ and/or to be vetted against a ‘broader character test’.

In addition to Indigeneity and residence in the Torres Strait Islands or the State or Territory for which they are standing, the Report then raises:⁷

Conduct issues, which could include bankruptcy, certain criminal convictions, and currently serving sentences of imprisonment.

While PIAC supports the stated intention of this approach – ‘managing risk, maintaining integrity and supporting confidence in the National Voice’⁸ – care must be taken to ensure any eligibility requirements are not so strict and rigidly applied as to render ineligible some people who could otherwise make significant contributions to the Voice.

This is particularly relevant given the ongoing over-representation of Aboriginal and Torres Strait Islander people in terms of engagement with the criminal justice system, including disproportionate rates of incarceration.⁹ This over-representation is even worse amongst First

⁷ Indigenous Voice Co-Design Process, *Interim Report to the Australian Government*, October 2020, page 41.

⁸ Ibid.

⁹ ‘Although Aboriginal and Torres Strait Islander adults make up around 2% of the national population, they constitute 27% of the national prison population’: Australian Law Reform Commission, *Pathways to Justice Report*, January 2018, executive summary. Available at: <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/executive-summary-15/disproportionate-incarceration-rate/>

Nations children,¹⁰ with detention in juvenile justice often entrenching individuals in the criminal justice system well into adulthood.¹¹

Indeed, the over-incarceration of Aboriginal and Torres Strait Islander people, and especially young people, is one of the key matters raised in the Uluru Statement itself:

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.

Similar concerns apply with respect to the strict application of other objective criteria, such as bankruptcy, where once again Aboriginal and Torres Strait Islander people may be disproportionately affected.¹²

None of this is to dismiss the importance of ensuring people who serve as members of the Voice are able to perform their duties with integrity. But it is essential to ensure that any 'fit and proper' character tests are carefully defined and applied in a way that takes into account individual circumstances, to avoid unfairly excluding categories of people who may otherwise be able to make a significant contribution to the work of the Voice.

Recommendation 2 – Ensure character tests do not unnecessarily exclude potential candidates

Care must be taken in designing character tests for eligibility to stand as candidates for the Voice to ensure that criteria, including those relating to criminal history and bankruptcy, do not arbitrarily and unnecessarily deny people the opportunity to contribute.

3.2 Ministerial appointments

PIAC also has concerns around the option for the National Voice to include up to two people appointed by the Commonwealth Minister, in addition to members who are selected by First Nations people themselves.

While we acknowledge that this option is presented to provide flexibility 'to fill skill gaps and resolve issues of demographic balance, for example providing additional representation for remote areas if needed',¹³ we are more persuaded by the view that such appointments would not

¹⁰ With Aboriginal and Torres Strait Islander young people aged 10-14 in 2011 being 23 times as likely as non-Indigenous young people aged 10-14 to be under community-based supervision and 25 times as likely to be in detention (excluding Western Australia and the Northern Territory): Australian Institute of Health and Welfare, 'Young people aged 10-14 in the youth justice system 2011-12', 2013, vi.

¹¹ 'The younger children were at their first sentence, the more likely they were to reoffend generally, reoffend violently, continue offending into the adult criminal jurisdiction, and be sentenced to an adult sentence of imprisonment before their 22nd birthday. After accounting for the effect of other factors, each additional year in age at entry into the criminal courts was associated with an 18% decline in the likelihood of reoffending': Sentencing Advisory Council Victoria, 'Reoffending by Children and Young People in Victoria, 2016, pxiii.

¹² With a May 2019 report showing almost half (48.8%) of Indigenous survey respondents classified as experiencing severe or high levels of financial stress: Centre for Social Impact et al, 'Money stories: Financial resilience among Aboriginal and Torres Strait Islander Australians', May 2019, p 16, available at: https://www.csi.edu.au/media/NAB_IFR_FINAL_May_2019_web.pdf

¹³ Indigenous Voice Co-Design Process, *Interim Report to the Australian Government*, October 2020, page 39.

be in line with the principle of self-determination, and that ‘there [i]s a real risk that appointees could be perceived as lacking credibility, and community or cultural authority.’¹⁴

Where skills gaps and/or geographic imbalances arise, we support these being addressed by the Voice itself, rather than through Ministerial appointment which would compromise on the Voice’s independence and therefore on its authority to speak for First Nations people.

Recommendation 3 – No Ministerial Appointees

The National Voice should not include members appointed by the Commonwealth Minister. This is necessary to preserve the independence and authority of the Voice.

¹⁴ Ibid.