



## **Call for submissions Indigenous Law Centre, UNSW**

Join the **Push for Uluru**, by making a submission to the Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples (2018).

Submissions are due on **11 June 2018**, but if you need more time, the Committee has asked that you contact them.

Their contact details are:

Joint Select Committee on Constitutional Recognition  
Relating to Aboriginal and Torres Strait Islander Peoples  
PO Box 6021  
Parliament House  
Canberra ACT 2600

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[jscrc@aph.gov.au](mailto:jscrc@aph.gov.au)

### **USE YOUR OWN VOICE!**

Tell the Committee, in your own words, why you, as an Australian, or your organisation, support a constitutionally enshrined Voice to the Parliament, as called for in the Uluru Statement from the Heart. Tell them why you will vote 'Yes' at a referendum!

It's important that you use your own voice, as the Committee will be less interested in receiving pro forma submissions with the same language. They want to hear from YOU!

You might want to consider in your submission telling the Committee:

- \* Why you think the Voice to Parliament is good for the Australian nation;
- \* Why it is good for reconciliation;
- \* Why it will help close the gap in Aboriginal and Torres Strait Islander disadvantage;
- \* Why you think Australians from a broad cross section will vote Yes at a referendum.

If you want a bit more guidance on what you might write, we have some suggestions below.



### **What should you emphasise in your submission?**

We know from the public debates and political statements leading up to the establishment of the Committee that there are certain matters that the Committee will be interested in hearing your views on. These include:

#### **High chance of winning:**

- A reform to change the Constitution to insert a Voice to Parliament has a high chance of winning at a referendum.
- The key to a successful referendum is broad public support. This means the public must have an opportunity to have a robust national discussion. It is important that options for reform are not taken off the table by politicians through backroom deals.
- This reform deserves to be brought forward to a referendum of the Australian people.

#### **The importance of First Nations consensus:**

- Constitutional reform in this area cannot be pursued without the agreement of First Nations. It will have no chance of winning and no legitimacy without this consensus.
- The three reforms in the Uluru Statement from the Heart – Voice, Treaty and Truth – represent the unified position of First Nations as to what meaningful recognition is.

#### **Unprecedented process:**

- The process that led to the call for a Voice to Parliament in the Uluru Statement from the Heart was an expression of First Nations self-determination.
- The process that led to the Uluru Statement has unprecedented legitimacy. That process involved the first-ever comprehensive constitutional consultations in Australian history to be designed, led and attended solely by Aboriginal and Torres Strait Islander peoples.
- The Uluru Statement emerged from a robust ‘bottom-up’ deliberative process. Through the course of 12 Regional Dialogues and the Uluru Convention, Aboriginal and Torres Strait Islander people themselves decided on the final reform proposals. This is in contrast, for instance, to the 2012 Expert Panel Report, in which the final recommendations were decided upon by appointed experts.



### **Informed by Guiding Principles:**

- The Uluru Constitutional Convention endorsed 10 Guiding Principles for constitutional reform. These were drawn from the records of meetings for the 12 Dialogues and were underpinned by international instruments (eg, the *United Nations Declaration on the Rights of Indigenous Peoples*) as well as historical declarations and calls for reform by First Nations.
- The three reforms called for in the Uluru Statement were based on and given legitimacy by these 10 Guiding Principles.

### **Understanding the three reforms in the Uluru Statement:**

- The Uluru Convention was the culmination of the 12 Regional Dialogues and a truncated dialogue in the ACT. The national convention at Uluru endorsed the Dialogues' decision-making and their ranking of three reforms as priorities:
  1. **Voice:** Voice to Parliament
  2. **Treaty:** Makarrata Commission to oversee treaty-making
  3. **Truth:** Makarrata Commission to oversee truth-telling
- The clear preference from all 12 Dialogues was for a constitutionally enshrined Voice to Parliament, and this is reflected in the prioritisation of the Voice to Parliament in the Uluru Statement.
- It is important to understand that the Dialogues and the Uluru Statement represented a shift from the thinking behind the proposals in the 2012 Expert Panel Report, whose central recommendation was for a constitutional prohibition on racial discrimination.

### **Understanding the Voice to Parliament:**

- The Dialogues were all very clear that the Voice needed to be enshrined in the Constitution. If the Voice was not protected in the Constitution but only in legislation, it could be repealed by Parliament like they did with ATSIC. The Parliament could destroy the Voice with a stroke of a pen.



- The Dialogues were clear that the Voice to Parliament needed to be representative of First Nations, not individuals. First Nations must be able to decide who represents them through their own processes. This is a further expression of their right to self-determination.
- The Dialogues were clear that the role of the Voice was to have a meaningful and genuine dialogue with Parliament to provide First Nations with an input into laws and policies that affected them.
- The Dialogues were clear that the Voice needed to be designed so that it was able to consult with and be accountable to First Nations people.

### **Why the Voice will help close the gap**

- The Voice to Parliament represents a structural reform that will help close the gap.

### **Designing the Voice to Parliament**

- While the exact design of the Voice to Parliament is left to legislation, the design of the Voice **MUST** be led by First Nations. This is an ongoing expression of self-determination.
- The Voice to Parliament should be designed through a ‘bottom-up’ process, just like the Uluru Statement was. This should be through series of Regional Dialogues to seek First Nations input into and feedback on draft legislative proposals.

### **Voice then Makarrata Commission**

- The Uluru Statement from the Heart carefully sequenced the reform proposals so that the aspiration of the Makarrata Commission was sequenced after the Voice to Parliament is established.
- The Dialogues and Uluru appreciated that treaties are complex legal agreements: they require long, careful and complex negotiation and execution.
- At the current time, many Aboriginal and Torres Strait Islander communities have insufficient resources to engage in this complex and long process of agreement-making. Further, many communities have been torn apart by the native title system, and

there needs to be a process to help communities heal from this before a new agreement-making process is embarked on.

- If treaties are rushed into, there is a risk that ‘anything’ will be included, and there is a risk that these treaties embed and reinforce the power imbalance between Aboriginal and Torres Strait Islander peoples and the state.

### Why the ‘race’ reforms of the Expert Panel were not included

- The Uluru Statement intentionally did not prioritise the race reforms that had formed part of the Expert Panel Report, and in particular:
  - The removal of section 25
  - The deletion of the races power (section 51(26)) and the insertion of a new Commonwealth power to make laws about Aboriginal and Torres Strait Islander peoples (section 51A)
  - The insertion of a prohibition on racial discrimination (section 116A)
- **Removal of section 25:** The Dialogues agreed this section of the Constitution was a dead letter and its removal was not a priority.
- **The deletion of the races power (section 51(26)) and the insertion of a new Commonwealth power to make laws about Aboriginal and Torres Strait Islander peoples:**
  - The Dialogues were acutely aware that section 51(26) was the triumph of the 1967 referendum.
  - The Dialogues were aware that there was a body of case law about its interpretation, and that a new head of power (section 51A) brought uncertainty about its future interpretation.
  - The Dialogues were aware that the *Kartinyeri Case* opened the possibility that section 51(26) could be used to pass adversely discriminatory laws, but also that discrimination can be beneficial as well as detrimental. Many good laws have been passed under section 51(26).
  - The Dialogues were aware that simply deleting the word ‘race’ from section 51(26) was unlikely to make any substantive difference to the status quo: the insertion of “Aboriginal and Torres Strait Islander” instead of “race”



didn't alter the head of power or the possibility that the Parliament could still discriminate in favour and against Aboriginal and Torres Strait Islander people. There was no guarantee an amended section 51(26) or a new section 51A would prevent the Parliament passing adversely discriminatory laws. The Dialogues were innovative in arguing that the Voice to Parliament can monitor the passage of laws under sections 51(26) and 122.

- **The insertion of a prohibition on racial discrimination:**
  - While there was support in the Dialogues for a constitutional prohibition on racial discrimination, this was not as high a priority as a Voice to Parliament or treaty-making. The reform priorities of First Nations – Voice, Treaty and Truth – were definitively captured by the Uluru Statement.
  - The Dialogues concluded that racially discriminatory laws could be prevented through a Voice to Parliament, rather than a constitutional prohibition to be enforced through the courts. The Voice to Parliament and the push for Makarrata were viewed as active reforms that would address the feelings of voicelessness and powerlessness in Aboriginal and Torres Strait Islander communities.
  - The Dialogues were also aware that the proposed section 116A would still have to be interpreted by the judges, and that there was a large amount of uncertainty about the scope of protection it would afford.