

PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

Interim report

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

July 2018
CANBERRA

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Foreword

The Joint Select Committee on Constitutional Recognition acknowledges the long history of advocacy for constitutional recognition of Aboriginal and Torres Strait Islander peoples.

As Co-Chairs, we have understood the requirement for this Committee to find common ground and seek a way forward on the options and issues considered and reflected in the work of the Expert Panel, the former Joint Select Committee, the *Uluru Statement from the Heart*, and the Referendum Council.

We support constitutional recognition of Aboriginal and Torres Strait Islander peoples as a part of the broader project of reconciliation and recognition of their unique status in our nation.

We understand the frustration about the length of time taken to advance these issues. However, we also note that the *Uluru Statement from the Heart* represents a major change in the direction of the debate on constitutional recognition with its proposals for a Voice, agreement making, and truth-telling.

The primary task of this Committee is to consider and develop proposals for constitutional recognition, including The Voice. The range of views about what The Voice might look like means that this is not a simple task.

We have listened closely to Aboriginal and Torres Strait Islander peoples. Discussion has highlighted that the majority of day to day challenges facing Aboriginal and Torres Strait Islander peoples do not fall within the ambit of the national Parliament. Many of the solutions to these challenges are at the local and regional level.

These solutions need to be found through close political and fiscal cooperation between Commonwealth, state and territory, and regional bodies. Consequently, to be effective, any voice proposal will need to have local, regional, and national elements.

Throughout our inquiry, we have asked for people's proposals and ideas on what that Voice might look like, and how it might best work with the Commonwealth Parliament, the Australian Government, the states and territories, local authorities, and existing organisations.

We have also considered suggestions for agreement making and truth-telling. We look to further comment on the appropriateness of the term Makarrata and how culturally this process might help us achieve reconciliation.

This interim report indicates our progress to date and outlines what we will be doing next. It sets out key areas of inquiry, asking specific questions on what a Voice could strive for and how it could be designed. It acknowledges that whatever form future proposals may take, a Voice must be legitimate, representative, and agreed between the Parliament and Aboriginal and Torres Strait Islander peoples.

Design questions regarding constitutional and/or legislative change remain before us. The Committee recognises that the Australian public and Aboriginal and Torres Strait Islander peoples may have differing views on the need for a Voice and whether that Voice should be given a constitutional guarantee.

We encourage Aboriginal and Torres Strait Islander peoples and the broader community to make submissions examining the principles and models outlined in Chapters 3 and 4 and addressing the questions we pose in Chapter 7.

We are hopeful that the next round of consultations might help the Committee to refine models which might form the basis for 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.

On behalf of the Committee, we would like to acknowledge and thank everyone who has worked with us to this point, and we look forward to their ongoing guidance and assistance as we continue this important journey.

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

Senator Jonathon Duniam

Senator Malarndirri McCarthy

Senator Rachel Siewert

Senator Amanda Stoker

The Hon. Linda Burney MP

The Hon. Sussan Ley MP

Ms Cathy McGowan AO MP

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:
 - 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.

1. Introduction

- 1.1 On 26 May 2017, delegates to the First Nations National Constitutional Convention produced the *Uluru Statement from the Heart*.
- 1.2 On 30 June 2017, the Referendum Council recommended a referendum be held on a First Nations Voice.
- 1.3 On 26 October 2017, the Government rejected ‘a constitutionally enshrined additional representative assembly for which only Indigenous Australians could vote for or serve in’. However, the Prime Minister went on to say the Government understands and recognises:

... the desire for Aboriginal and Torres Strait Islander Australians to have a greater say in their own affairs... We remain committed to finding effective ways to develop stronger local voices and empowerment of local people.¹

- 1.4 On 5 August 2017, in the keynote address to the Garma Festival, the Leader of the Opposition expressed Labor’s support for the proposals put forward at Uluru:

I cannot be any more clear than this: Labor supports a voice for Aboriginal people in our Constitution, we support a declaration by all parliaments, we support a truth-telling commission. We are not confronted by the notion of treaties with our first Australians. For us the question is not whether we do

¹ Australian Government, ‘Response to Referendum Council’s report on Constitutional Recognition’, *Media Release*, 26 October 2016, <<https://ministers.pmc.gov.au/scullion/2017/response-referendum-councils-report-constitutional-recognition>> viewed 17 July 2018.

these things, the question is not if we should do these things but when and how.²

- 1.5 On 27 May 2017, Senator Rachel Siewert, the Australian Greens spokesperson on Aboriginal and Torres Strait Islander issues, released a statement supporting the *Uluru Statement from the Heart* saying:

The Australian Greens strongly support the *Uluru Statement from the Heart* by our First Peoples. I urge all sides of politics to do the same.³

- 1.6 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.⁴

Role of the Committee

- 1.7 In conducting its inquiry, the Committee is required by its resolution of appointment to:
- 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);
 - examine the methods by which Aboriginal and Torres Strait Islander peoples are currently consulted and engaged on policies and legislation that 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; and
 - recommend options for constitutional change and any potential complementary legislative measures that meet the expectations of Aboriginal and Torres Strait Islander peoples and that will secure cross-party parliamentary support and the support of the Australian people.

² The Hon. Bill Shorten MP, Leader of the Opposition, *Address to Garma Festival 2017*, Crikey, 5 August 2017, <<https://blogs.crikey.com.au/northern/2017/08/05/bill-shorten-address-garma-festival-2017/>> viewed 17 July 2018.

³ Senator Rachel Siewert, Australian Greens Spokesperson on Aboriginal and Torres Strait Islander Issues, 'Australian Greens Respond to the Uluru Statement from the Heart', *Media Release*, 27 May 2017.

⁴ The Hon. Angus Taylor MP, Minister for Law Enforcement and Cybersecurity, *House of Representatives Hansard*, 1 March 2018, pp. 2528-2530.

- 1.8 The resolution of appointment requires the Committee to ensure that any recommended options are consistent with the four criteria of referendum success set out in the Final Report of the Expert Panel. That is, any recommended options should:
- contribute to a more unified and reconciled nation;
 - be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples;
 - be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums; and
 - be technically and legally sound.
- 1.9 The resolution of appointment also requires the Committee to:
- engage with key stakeholders, including Aboriginal and Torres Strait Islander peoples and organisations; and
 - 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.
- 1.10 The resolution of appointment requires the Committee to present to the Parliament an interim report on or before 30 July 2018 and a final report on or before 29 November 2018.

Conduct of the inquiry

- 1.11 The Committee held its first meeting on 27 March 2018.
- 1.12 The Committee called for written submissions addressing the matters set out in the resolution of appointment. As at 23 July 2018 the Committee had authorised 381 submissions and 9 supplementary submissions. These submissions are listed in Appendix A.
- 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 heard from a range of witnesses at public hearings Kununurra, Halls Creek, Fitzroy Crossing, Broome, Canberra, Dubbo, Sydney, Adelaide, and Perth. These witnesses are listed in Appendix B.

- 1.15 The Committee also attended a meeting of the four Northern Territory Land Councils at Barunga.
- 1.16 The Committee expresses its appreciation to all of the individuals and organisations who have contributed to the inquiry to date.

Structure of the interim report

- 1.17 The interim report of the Committee outlines the context of the work of the Committee, provides a brief summary of evidence received to date, and informs stakeholders of the Committee's intended process for further consultation prior to the presentation of the final report.
- 1.18 Chapter 2 outlines the rationale for a First Nations Voice. It describes how The Voice could empower Aboriginal and Torres Strait Islander peoples to shape policy and legislation able to improve socio-economic outcomes.
- 1.19 Chapter 3 scopes design issues surrounding the structure and membership of The Voice, its possible functions and operation, and mechanisms for its establishment and implementation.
- 1.20 Chapter 4 considers past and existing representative or scrutiny bodies which could inform the design of The Voice before outlining a sample of proposals received to date.
- 1.21 Chapter 5 provides a brief overview of recent initiatives aimed at progressing the constitutional recognition of Aboriginal and Torres Strait Islander peoples and the major recommendations arising from these.
- 1.22 Chapter 6 considers evidence received to date relating to agreement making and truth-telling.
- 1.23 Chapter 7 outlines the Committee's views on existing proposals and evidence received to date. The chapter also outlines the Committee's intended process for further consultation and engagement on the issues considered in this interim report.
- 1.24 Previous recommendations that the Committee is required to consider (as set out in paragraph 1.7) are listed in Appendix C.

A note on language

- 1.25 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.

- 1.26 The term 'The Voice' is used with capital letters when referring to the *Uluru 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.

2. Proposal for a First Nations Voice

- 2.1 In 2017, Aboriginal and Torres Strait Islander people came together to express their preferred form of recognition through the *Uluru Statement from the Heart*, which called for the ‘establishment of a First Nations Voice enshrined in the Constitution’ and a Makarrata Commission to supervise agreement making and truth-telling.¹
- 2.2 This chapter discusses evidence received by the Committee in relation to:
- the purpose and background of The Voice;
 - the reasons for its establishment;
 - the problems it could address; and
 - how it might lead to greater self-determination, economic advancement, and improved social outcomes for Aboriginal and Torres Strait Islander peoples.
- 2.3 This chapter also considers some international case studies on structures for First Nations engagement. The Committee received a range of evidence in relation to the *functions* that might be carried out by The Voice; that evidence is discussed in Chapter 3.
- 2.4 While acknowledging calls for a Voice to Parliament, the Committee also notes the increasing number of Aboriginal and Torres Strait Islander people who have been elected to Federal and State Parliament and local councils in recent years. A list of Aboriginal and Torres Strait Islander parliamentarians elected to Australian legislatures is included at Appendix D. The Committee also notes the range of government agencies which are designed to engage with Aboriginal and Torres Strait Islander peoples on policies which affect

¹ *Uluru Statement from the Heart*, 2017, <https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart_0.PDF> viewed 6 July 2018.

them including but not limited to the Aboriginal and Torres Strait Islander Social Justice Commissioner, the Prime Minister's Indigenous Advisory Council, and the forthcoming Indigenous Commissioner of the Productivity Commission.

The purpose and background of The Voice

- 2.5 The *Uluru Statement from the Heart* called for a Voice that will empower Aboriginal and Torres Strait Islander peoples to shape the policy and legislation governing their affairs.
- 2.6 The Technical Advisers to the Regional Dialogues and the Uluru First Nations Constitutional Convention (the Technical Advisers) suggested that The Voice was seen by delegates as 'a continuation of the long struggle for political representation going back over a century and an expression of the right to self-determination'.²
- 2.7 In its recommendation to provide for The Voice in the Constitution, the Referendum Council described The Voice as a 'representative body' that gives Aboriginal and Torres Strait Islander peoples a Voice to the Australian Parliament.³
- 2.8 The Technical Advisers reported that discussions at the dialogues indicated 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.
- 2.9 The Technical Advisers explained that section 51(xxvi) has been relied on to pass laws in relation to cultural heritage and native title, and that section 122 has been relied on to pass laws for the Northern Territory intervention.⁴
- 2.10 In calling for the establishment of a Voice, the *Uluru Statement from the Heart* acknowledged the socio-economic problems experienced by some Aboriginal and Torres Strait Islander communities:

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

² Technical Advisers: Regional Dialogues and the Uluru First Nations Constitutional Convention, *Submission 206*, p. 6.

³ Referendum Council, *Final Report of the Referendum Council*, 2017, p. 2.

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

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.⁵

- 2.11 These problems are linked to governance and administrative structures that disempower Aboriginal and Torres Strait Islander peoples:

These dimensions of our crisis tell plainly the structural nature of our problem. This is the torment of our powerlessness.⁶

Aboriginal and Torres Strait Islander engagement and representation

- 2.12 Formally, Aboriginal and Torres Strait Islander peoples can participate in parliamentary processes in the same manner as other Australians; by approaching a local Member, submitting a petition, contributing to a committee inquiry, or seeking election to the House of Representatives or the Senate.
- 2.13 However, in practical terms, Aboriginal and Torres Strait Islander peoples, who make up 2.8 per cent of the Australian population (approximately 649,000 out of 23.4 million people),⁷ may struggle to have their views represented in the Parliament.⁸
- 2.14 Constitutional law academic Professor Anne Twomey submitted that because Aboriginal and Torres Strait Islander peoples 'amount to a very small proportion of the population, their representation in the Commonwealth Parliament, even if proportionate to their number in the overall population, will never be sufficient to inform and adequately influence the passage of those laws' that affect them.⁹

⁵ *Uluru Statement from the Heart*, 2017, <https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart_0.PDF> viewed 6 July 2018.

⁶ *Uluru Statement from the Heart*, 2017, <https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart_0.PDF> viewed 6 July 2018.

⁷ Australian Bureau of Statistics, *2016 Census QuickStats*, <http://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/036> viewed 7 July 2018.

⁸ Mr Harry Hobbs, *Submission 189*, p. 1.

⁹ Professor Anne Twomey, *Submission 57*, p. [3].

2.15 In a submission to the Committee, Mr Harry Hobbs of the University of New South Wales' Faculty of Law, illustrated the structural impediments faced by Aboriginal and Torres Strait Islander peoples seeking to engage with parliamentary processes. He noted that 'only eight politicians who identify as Indigenous have served across the life of the federal Parliament', with six of those having been elected since 2010.¹⁰

2.16 Mr Hobbs argued that even when individuals who identify as Indigenous become members of the Parliament, the design of Australia's electoral system inhibits the ability of these members to 'represent Indigenous peoples, let alone encourage parliamentary debate on their distinctive concerns'. He explained:

Aboriginal and Torres Strait Islander people may speak for Indigenous interests, but they ultimately represent their constituents—Indigenous and non-Indigenous alike—as well as their political party's platform. These, potentially countervailing, interests must be considered by Aboriginal and Torres Strait Islander Members.¹¹

2.17 The Technical Advisers reported that delegates at the dialogues echoed this sentiment:

There are Aboriginal people who have been elected to Parliament, but they do not represent us. They represent the Liberal or the Labor Party, not Aboriginal People.¹²

2.18 Speaking to the Committee in Sydney, Professor Twomey compared this situation to that of Australian women in the early 1900s, who had the right to vote but struggled to have their perspectives reflected in Parliament:

... although women had the right to vote, they didn't have a sufficient voice being heard by the parliament to be able to influence issues like, for example, those concerning guardianship of children and other matters. So, once they had the vote, they continued to campaign to have representation in parliament and also to be able to be lawyers, judges, on juries—all these sorts of things—to get that kind of engagement in public life... it still took an awfully long time before they finally achieved many of the types of reforms that they were after... And that was when women made up—as they still do—just over 50 per cent of the population. How much harder is it for Indigenous people,

¹⁰ Mr Harry Hobbs, *Submission 189*, p. 1.

¹¹ Mr Harry Hobbs, *Submission 189*, p. 2.

¹² Technical Advisers to the Regional Dialogues and the Uluru First Nations Constitutional Convention, *Submission 206*, p. 7.

who—although they have the right to vote and the right to be in parliament—still make up such a small proportion of the population, to have their voice heard in order to be able to influence public policy today?¹³

Consequences of barriers to access

2.19 Some submissions to the Committee suggested that the relative exclusion of Aboriginal and Torres Strait Islander perspectives from the Parliament has led to a paternalistic and short-term approach to policies and legislation affecting Aboriginal and Torres Strait Islander peoples. Furthermore, the Committee heard that, where Australian governments do seek Aboriginal and Torres Strait Islander peoples' input into policy and legislation making, this process is often inadequate or ineffective.

2.20 Oxfam Australia claimed that, 'Aboriginal peoples and organisations are consistently disappointed by the lack of good faith and political will demonstrated by successive Australian governments to ensure their active engagement and participation in policy and legislative developments':

There are countless examples of Aboriginal and Torres Strait Islander peoples being excluded from decisions about their future, ranging from the abolition of [the Aboriginal and Torres Strait Islander Commission], to the introduction of the Northern Territory Emergency Response, to the allocation of funding for Aboriginal and Torres Strait Islander programs under the Indigenous Advancement Strategy.¹⁴

2.21 Likewise the Indigenous Peoples Organisation asserted that a history of policy failure reflects policy making that does not 'consider the specific requirements of Aboriginal communities':

... the failure to meet the 'Close the Gap' targets, the issues outlined in the Redfern Statement and cuts of funding to Aboriginal services, combined with an increased funding of mainstream services through the Indigenous Advancement Strategy... These failures highlight the need for Aboriginal specific policies that target and address our needs and incorporate Indigenous policy advice and decision making.¹⁵

2.22 The Australian Bar Association submitted that government consultation with Aboriginal and Torres Strait Islander peoples is 'usually' confined to 'community controlled issue specific organisations':

¹³ Professor Anne Twomey, *Committee Hansard*, Sydney, 4 July 2018, p. 44.

¹⁴ Oxfam, *Submission 274*, p. [3].

¹⁵ Indigenous Peoples Organisation, *Submission 338*, p. 12.

To date, that role has been performed by land councils and native title representative bodies, Aboriginal or Torres Strait Islander health services and Indigenous legal services and their peak bodies, and community councils. There are also consultations with First Nations politicians, academics and community leaders.¹⁶

2.23 The Australian Bar Association argued that these groups ‘are often ill-equipped to respond quickly, comprehensively and effectively to calls for the input of First Nations peoples into policy and legislative development’ and noted that there are sometimes ‘concerns about their representative capacity’.¹⁷

2.24 Speaking to the Committee in Fitzroy Crossing, Mr Neil Carter, a Repatriation and Cultural Heritage Officer at the Kimberley Aboriginal Law and Cultural Centre, reflected on the way in which governments engage Aboriginal and Torres Strait Islander peoples in policy making. Mr Carter observed that people are often asked to advise on policy without the requisite information or time to reflect:

A lot of the time we have government issues that are put to us in a meeting, in a hall, and they expect Aboriginal people to come up with the answers right there and then, with our elders still grappling to understand government issues.¹⁸

2.25 The National Congress of Australia’s First Peoples (National Congress) suggested that, as a minority population, Aboriginal and Torres Strait Islander peoples are ‘easily marginalised’ and are ‘frequently treated as merely one of many stakeholders to government policy decisions’:

There are many factors which prevent governments from effectively developing new and innovative solutions to Aboriginal and Torres Strait Islander disadvantage. Firstly, governments tend to approach our challenges in a ‘conventional’ fashion, focusing on reducing costs and short timeframes instead of developing long term and intergenerational solutions. Furthermore, governments frequently lack the capacity and knowledge required to account for the diverse needs and circumstances of different communities, preferring instead to adopt a ‘one-size-fits-all approach’...¹⁹

¹⁶ Australian Bar Association, *Submission 171*, p. 7.

¹⁷ Australian Bar Association, *Submission 171*, p. 7.

¹⁸ Mr Neil Carter, Repatriation and Cultural Heritage Officer, Kimberley Aboriginal Law and Cultural Centre, *Committee Hansard*, Fitzroy Crossing, 13 June 2018, p. 5.

¹⁹ National Congress of Australia’s First Peoples, *Submission 292*, p. 6.

- 2.26 Ms Emily Carter, Chief Executive Officer of the Marninwarntikura Fitzroy Women's Resource Centre, emphasised the need for increased participation of Aboriginal and Torres Strait Islander people:

... at the present moment the policies are very punitive to us, and we think the only way we also are going to move forward is if we have a say in our destiny in parliament, to say, 'This is how it's going to work.' Until then the gap will only get wider. The government has been on the track of closing the gap for over 10 years, and they've hit only two targets.²⁰

Calling for empowerment with a clear voice

- 2.27 The *Uluru Statement from the Heart* suggested that the establishment of a Voice to advise the Australian Parliament will address structural disempowerment and, in so doing, enable Aboriginal and Torres Strait Islander peoples to shape the policy and legislation which governs their affairs and improve socio-economic outcomes:

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.²¹

- 2.28 The Australian Bar Association observed that 'Australia does not currently have an established body with a clear mandate and adequate funding which is able to independently speak for First Nations peoples in a representative capacity'.²²
- 2.29 National Congress argued that the presence of a Voice would ensure that 'the impacts of all government policies upon Aboriginal and Torres Strait Islander peoples are always properly accounted for'.²³
- 2.30 According to the Technical Advisers, delegates 'realised that constitutionalising a political voice was no guarantee' that laws contrary to Aboriginal and Torres Strait Islander peoples' interests would not be passed

²⁰ Ms Emily Carter, Chief Executive Officer, Marninwarntikura Fitzroy Women's Resource Centre, *Committee Hansard*, Fitzroy Crossing, 13 June 2018, p. 9.

²¹ *Uluru Statement from the Heart*, 2017, <https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart_0.PDF> viewed 6 July 2018.

²² Australian Bar Association, *Submission 171*, p. 7.

²³ National Congress of Australia's First Peoples, *Submission 292*, p. 6.

in the future. However, delegates felt that the establishment of a Voice would 'create a political limit, or political tension [so that] whenever Parliament exercised its power to pass laws affecting Aboriginal and Torres Strait Islander peoples, their voices would necessarily be heard'.²⁴

- 2.31 For example, a delegate at the Ross River Dialogue in the Northern Territory said:

Since the demise of ATSIC, we've had no say. ... If there was a voice to Parliament when they designed the intervention, we would have had a say.²⁵

- 2.32 Mr Carter likewise emphasised the ability of The Voice to provide advice to the Parliament of behalf of Aboriginal and Torres Strait Islander peoples:

We can see the light at the end of the tunnel where we can have a strong voice in Parliament. Decision-making on Aboriginal issues should come from the people on the ground...²⁶

- 2.33 The Technical Advisers submitted that the delegates attending the Torres Strait Dialogue referred to The Voice as 'creating an engine room for change that would facilitate self-determination, safeguard against discriminatory laws and support future agreement-making'.²⁷

- 2.34 Mr Nolan Hunter, Chief Executive of the Kimberley Land Council and Co-Chair of Oxfam Australia's Indigenous Advisory Committee, argued that a Voice would create a structural requirement for governments to consider Aboriginal and Torres Strait Islander perspectives:

If we had a way of having our voices heard, policies would improve, duplication and waste would be reduced and policies might be more effective. A voice for our First Nations structuralises and gives force to better engagement with indigenous people.²⁸

²⁴ Technical Advisers: Regional Dialogues and the Uluru First Nations Constitutional Convention, *Submission 206*, p. 7.

²⁵ Technical Advisers: Regional Dialogues and the Uluru First Nations Constitutional Convention, *Submission 206*, p. 7.

²⁶ Mr Neil Carter, Repatriation and Cultural Heritage Officer, Kimberley Aboriginal Law and Cultural Centre, *Committee Hansard*, Fitzroy Crossing, 13 June 2018, p. 4.

²⁷ Technical Advisers: Regional Dialogues and the Uluru First Nations Constitutional Convention, *Submission 206*, p. 7.

²⁸ Oxfam Australia, *Submission 274*, p. [2].

‘Augment current channels’

- 2.35 The Centre for Comparative Constitutional Studies at the University of Melbourne argued that the establishment of a Voice would ‘augment current channels for discussion and refinement of legislative detail in a way that respects and responds to the unique position of Indigenous peoples within the Australian polity’.²⁹
- 2.36 Ms Christy Hawker, Chief Executive Officer of the Binarri-binyja Yarrawoo Aboriginal Corporation, observed that The Voice could act as an ‘independent umpire’ and ensure that intergovernmental agreements and long-term development agendas for Aboriginal and Torres Strait Islander affairs are honoured despite changes in government.³⁰
- 2.37 Mr Ian Trust, Chairperson and Executive Director of the Wunan Foundation in the Kimberley region, agreed. He asserted that Aboriginal and Torres Strait Islander peoples need a representative body to safeguard policy stability:
- You can’t have [Indigenous affairs] being driven by politics every three or four years. That’s at the state level as well. It’s got to be consistent over time. I think that this is probably one way of trying to achieve that.³¹
- 2.38 Professor Tom Calma AO, former Aboriginal and Torres Strait Islander Social Justice Commissioner and Race Discrimination Commissioner, made a similar point:
- ... perpetual change with Indigenous affairs is really making people despondent and confused in the community... if we invest in those structures without continually changing, we will see better outcomes.³²
- 2.39 Mr Wayne Bergmann, Special Advisor to the Kimberley Land Council, said a similar sentiment was discussed during the convention at Uluru:
- ... that’s where the Voice came from, to be the advocate for Aboriginal people that could not be subject to the popular politics of the government of the time—Labor, Liberal or whoever’s in power.³³

²⁹ Centre for Comparative Constitutional Studies, *Submission 289*, p. 11.

³⁰ Ms Christy Hawker, Chief Executive Officer, Binarri-binyja Yarrawoo Aboriginal Corporation, *Committee Hansard*, Kununurra, 11 June 2018, p. 11.

³¹ Mr Ian Trust, Chairperson and Executive Director, Wunan Foundation, *Committee Hansard*, Kununurra, 11 June 2018, p. 1.

³² Professor Tom Calma AO, *Committee Hansard*, Canberra, 18 June 2018, p. 5.

- 2.40 However, stakeholders noted that the capacity of a Voice to empower Aboriginal and Torres Strait Islander peoples in this way will depend on its legitimacy and its authority, and on the ability and willingness of the Australian Government to receive its advice.

Genuine dialogue needs a voice *and* an ear: advice on active adaptation

- 2.41 The Committee heard views regarding the development of The Voice, but also heard that the decision-making environment needs to be adjusted in order to allow governments to effectively listen, thereby having ‘genuine’ dialogue.³⁴ Ms Teela May Reid, a Wiradjuri and Wailwan woman from New South Wales, suggested that enshrining The Voice in the constitution will provide a guarantee that the voices of First Nations people in communities will be heard by Parliament.³⁵

- 2.42 Professor Ian Anderson, Deputy Secretary of the Indigenous Affairs Group at the Department of the Prime Minister and Cabinet, expanded on that point. He warned that the political and administrative landscape will also have to adapt to successfully empower Indigenous Australians:

... it's not sufficient to just look outwards; you need to look inwards and redevelop the capability within government. Government systems need to change...³⁶

- 2.43 Dr Peter Burdon of the University of Adelaide Law School reiterated this:
- ... this is an opportunity not just for First Nations communities to figure out how they relate to government but for government to think about how they relate to First Nations people and how they change their processes for listening and taking on advice.³⁷

³³ Mr Wayne Bergmann, Special Advisor, Kimberley Land Council, *Committee Hansard*, Broome, 12 June 2018, p. 13.

³⁴ Technical Advisers: Regional Dialogues and the Uluru First Nations Constitutional Convention, *Submission 206*, p. 8.

³⁵ Ms Teela May Reid, *Submission 92*, p. 5.

³⁶ Professor Ian Anderson, Deputy Secretary, Indigenous Affairs Group, Department of the Prime Minister and Cabinet, *Committee Hansard*, Canberra, 25 June 2018, p. 17.

³⁷ Dr Peter Burdon, Adelaide Law School, University of Adelaide, *Committee Hansard*, Adelaide, 5 July 2018, p. 23.

- 2.44 The Hon. Fred Chaney AO, former Minister for Aboriginal Affairs, argued that the key to improving socio-economic outcomes is the ‘active participation’ of Aboriginal and Torres Strait Islander peoples in policy making and community management at the local level. He suggested that a Voice with strong local, regional, and national components could facilitate this if government administration is open to decentralisation and engaging with Indigenous Australians at each of these levels:

I think that if you had a really proper acceptance by government of the need to approach these things regionally rather than centrally, then the issue of the voice would be transformed, because you would be listening to the local voice in your arrangements.³⁸

... all progress is local. ... It happens in homes, classrooms, workplaces and streets. That’s where it all happens. So you actually have to be working at that level.³⁹

- 2.45 Professor Bertus de Villiers, Adjunct Professor of Curtin Law School, argued that a long-term bipartisan commitment from political parties to seriously engage with advice provided by The Voice is also paramount:

There needs to be a bipartisan buy-in. There needs to be a serious commitment. That cannot be legislated. That has to come from the heart. Unfortunately, that is where advisory bodies often fail.⁴⁰

Empowerment to improve socio-economic outcomes

- 2.46 The Committee heard that empowering Aboriginal and Torres Strait Islander peoples to shape the policy and legislation which governs their communities could support more effective ‘closing the gap’ initiatives.
- 2.47 National Congress said that ‘the creation of an independent, constitutionally entrenched Voice to Parliament will go a long way towards addressing’ the barriers to effective government solutions to Aboriginal and Torres Strait Islander disadvantage. It argued that Aboriginal and Torres Strait Islander peoples are best placed to shape the policy and legislation that supports

³⁸ The Hon. Fred Chaney AO, *Committee Hansard*, Perth, 6 July 2018, p. 35.

³⁹ The Hon. Fred Chaney AO, *Committee Hansard*, Perth, 6 July 2018, p. 36.

⁴⁰ Professor Bertus de Villiers, Adjunct Professor, Curtin Law School, *Committee Hansard*, Perth, 6 July 2018, p. 7.

their communities to flourish:

Aboriginal and Torres Strait Islander peoples have the knowledge required to develop long-term solutions which allow our communities to build local capacity and independence from government assistance. The representative nature of the Voice to Parliament will also ensure that the voices of Aboriginal and Torres Strait Islander peoples across Australia are heard, allowing for the development of policies tailored to the individual needs of different communities.⁴¹

- 2.48 National Congress argued that the presence of a Voice to Parliament is ‘particularly important, given that Aboriginal and Torres Strait Islander people are disproportionately affected by changes that may impact the entirety of the Australian population’:

Our economic disempowerment leads to greater reliance on government health and education services, and heightened vulnerability to changes in economic and fiscal policy.⁴²

- 2.49 The relationship between empowerment of Aboriginal and Torres Strait Islander peoples and improved social and economic outcomes is demonstrated by local and international evidence. Empowered Communities, a group of Aboriginal and Torres Strait Islander leaders working together to improve outcomes, outlined the evidence in their *Empowered Communities: Empowered Peoples Design Report*:

There is near-universal consensus on the foundational importance of empowerment to development, a consensus based on observations of the development processes around the world. Development agencies such as those of the United Nations system, including the World Bank, have placed great emphasis on empowerment in their work driving development.⁴³

- 2.50 Oxfam Australia suggested that, ‘outcomes are invariably better when [Aboriginal and Torres Strait Islander] peoples own the solutions to the challenges they face’.⁴⁴ It noted that this view is supported by the Productivity Commission:

In its 2016 report *Overcoming Indigenous Disadvantage*, the Commission said that when Aboriginal and Torres Strait Islander peoples make their own

⁴¹ National Congress of Australia’s First Peoples, *Submission 292*, pp. 6-7.

⁴² National Congress of Australia’s First Peoples, *Submission 292*, p. 6.

⁴³ Empowered Communities, *Empowered Communities: Empowered Peoples Design Report*, 2015, p. 11.

⁴⁴ Oxfam Australia, *Submission 274*, p. [3].

decisions about what approaches to take and what resources to develop, 'they consistently out-perform [non-Indigenous] decision makers'.⁴⁵

- 2.51 Oxfam Australia also referred to an American study demonstrating the link between empowerment and improved social outcomes for North American Indigenous peoples. The Harvard Project on American Indian Economic Development found that, 'self-determination led to improved outcomes for North American Indigenous people'.⁴⁶ Empowered Communities also quotes this study in its final report:

The research is clear: outsiders perform poorly when managing Native resources, designing Native policy, and creating Native governing institutions—no matter how well-meaning or competent they may be... The reasons are straightforward. The decision makers are more likely to experience the consequences of good and bad decisions. They are closer to local conditions. And they are more likely to have the community's unique interests at heart.⁴⁷

- 2.52 Professor de Villiers argued that political recognition 'inevitably' leads to improved socio-economic outcomes. He referred to several other international examples where empowering First Nations peoples to shape the policy and legislation governing their own affairs had resulted in better outcomes:

The first is the involvement of the Sami in the land management. Whenever there are activities planned for their traditional lands, their inputs are required. Secondly, they are capable of managing those lands and in the management they can reflect their own traditional laws and customs. The second is the obvious example of American Indian reserves in the USA and Canada, where recognition has given people a basis that was defined, from where they could undertake economic activities. The third example is that of traditional leaders in South Africa, where all local community development plans must include the local traditional leaders, so that they can make an input

⁴⁵ Oxfam Australia, *Submission 274*, p. [3].

⁴⁶ Harvard Project (The Harvard Project on American Indian Economic Development) nd, *The Harvard Project on American Indian Economic Development*, <http://hpaied.org/> (cited in Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2016*, p. 3.19.)

⁴⁷ Empowered Communities, *Empowered Communities: Empowered Peoples Design Report*, 2015, pp. 11-12.

and can identify potential benefits that may be derived from local economic plans for a local Indigenous community.⁴⁸

- 2.53 The Kimberley Aboriginal Law and Cultural Centre provided evidence from a Western Australian perspective. It referred to a 2011 report of the Western Australian Indigenous Implementation Board which found that socio-economic indicators were likely to continue to worsen without Aboriginal and Torres Strait Islander peoples' input into policy and legislation making:

Many of the accepted indicators of the effects of Council of Australian Government programs, i.e. education participation, health, engagement with the justice and corrective systems, are worsening for Western Australia...

The Board has developed the view that the help and cooperation of Aboriginal people are required if this trend is to be turned around. The fundamental premise is that only Aboriginal people can solve Aboriginal problems and they can only be empowered to do this through shared strategies and plans developed in a partnership that is based on equality and recognises and respects their cultures and knowledge.⁴⁹

- 2.54 Mr Des Jones, Chairperson of the Murdi Paaki Regional Assembly gave evidence of the economic benefit of the having the Regional Assembly—a potential Voice structure—in terms of economic benefits in housing, education, tourism, and youth leadership for his community.⁵⁰

International precedents for a Voice

- 2.55 As part of this inquiry, the Committee participated in a First Nations Governance Forum facilitated by the Australian National University. Delegates from comparable nations were in attendance and reported that Indigenous representative bodies are relatively commonplace internationally and have demonstrated the ability of First Nations peoples to have a say in the policy and legislation which governs their affairs. This was also borne out in the submissions received by the Committee. This is part of

⁴⁸ Professor Bertus de Villiers, Adjunct Professor, Curtin Law School, *Committee Hansard*, Perth, 6 July 2018, p. 6.

⁴⁹ Indigenous Implementation Board (Western Australia), *Report to the Hon. Peter Collier MLC, Minister for Indigenous Affairs*, 2011, p. 1 (cited in Kimberley Aboriginal Law and Cultural Centre, *Submission 380*, p. 4).

⁵⁰ Mr Des Jones, Chairperson, Murdi Paaki Regional Authority, *Committee Hansard*, Dubbo, 2 July 2018, p. 25.

an international trend, inspired by the United Nations Declaration on the Rights of Indigenous People, for First Nations peoples to have self-determination and the notion of ‘free, prior and informed consent’.⁵¹

- 2.56 The Centre for Comparative Constitutional Studies at the University of Melbourne submitted that Australia could learn from the example of Canada, which has recognised its Indigenous people in its Constitution and engages with them through an Assembly of First Nations:

In Canada, recognition of Aboriginal peoples and protection of their interests is provided by section 35 of the *Constitution Act, 1982*. This section protects existing Aboriginal property and treaty rights. The Supreme Court of Canada has found that this section supports the ‘Honour of the Crown’, which requires Canadian governments to consult with First Nations and accommodate their rights where their interests are affected by proposed legislation. Canada also has the assembly of First Nations peoples, which is a representative institution for Indigenous people.⁵²

- 2.57 Professor de Villiers drew the Committee’s attention to representative bodies in South Africa, Finland, and Germany. He noted that South Africa has separate, elected representative bodies for its Indigenous people which form ‘part of the legislative process, but Parliament remains sovereign; the advice given is not binding’. In contrast, the Sami Parliament of Finland is quite separate. According to Professor de Villiers, the Sami Parliament can comment on legislation and has some governance functions over Sami culture. Professor de Villiers also highlighted Germany’s Minority Council, an appointed body able to advise the Committees of Parliament ‘regarding its relationship with minority communities’.⁵³

- 2.58 Professor de Villiers assured the Committee that these representative bodies had improved the outcomes of the Indigenous populations in South Africa, Germany, and Finland:

... political recognition inevitably, in the long term, leads to economic improvement. That’s why people want political power, because they realise

⁵¹ United Nations, *United Nations Declaration on the Rights of Indigenous Peoples*, Article 19, 2007.

⁵² Centre for Comparative Constitutional Studies, Submission 289, p. 13.

⁵³ Professor Bertus de Villiers, Adjunct Professor, Curtin Law School, *Committee Hansard*, Perth, 6 July 2018, p. 1.

that through political power one can better take care of the interests of your community.⁵⁴

⁵⁴ Professor Bertus de Villiers, Adjunct Professor, Curtin Law School, *Committee Hansard*, Perth, 6 July 2018, p. 6.

3. Design principles

- 3.1 The major focus of the Committee's work has been to attempt to understand how The Voice proposal would work in a detailed manner. Responding to the wishes of Aboriginal and Torres Strait Islander people, as outlined in the First Nations Regional Dialogues conducted by the Referendum Council, and the Prime Minister's statement of 26 October 2017¹, there has been a shift in thinking from the primacy of a national voice to some combination of a local, regional, and national model. This shift has been reflected in submissions and evidence presented to the Committee.
- 3.2 In the time available, the Committee has been able to divine some principles which should underpin The Voice or voices and examined some models which could form the basis for The Voice or voices. However, at this stage it has no concluded view about what form The Voice or voices should take.
- 3.3 In considering the recommendation to establish a Voice, the Committee has sought to consider the structure that any institution to give effect to The Voice might take. This consideration has raised a number of questions relating to the structure of the body, its functions and scope, and its establishment.
- 3.4 The importance of engaging with these questions was highlighted by many, including Mr Eric Sidoti, who told the Committee that the institutional form of The Voice would be critical to its capacity to be legitimate, effective, and meaningful.²

¹ Australian Government, 'Response to Referendum Council's report on Constitutional Recognition', *Media Release*, 26 October 2016, <<https://ministers.pmc.gov.au/scullion/2017/response-referendum-councils-report-constitutional-recognition>> viewed 17 July 2018.

² Mr Eric Sidoti, *Committee Hansard*, Sydney, 4 July 2018, p. 29.

- 3.5 However, a consistent theme in evidence to the Committee has been that the design of The Voice should, in so far as possible, and particularly in relation to its representative characteristics, be led by Aboriginal and Torres Strait Islander peoples themselves.³
- 3.6 The Committee acknowledges this view. However, the Committee also considers that it is important to provide a substantive basis for any such consultation to proceed—that is, to identify some of the ways in which The Voice could work.
- 3.7 In this spirit, the purpose of this chapter is to consider the evidence put to the Committee in relation to the design of an institution to give effect to The Voice, to identify some broad principles that have emerged in this evidence, and to note particular areas where further consideration may be useful.
- 3.8 Chapter 4 considers examples of institutions that may inform the design of The Voice—including previous and current advisory structures and also new structures proposed in evidence to the Committee.
- 3.9 The experience of Aboriginal and Torres Strait Islander peoples is diverse. As one witness, Ms Ebony Hill, put it to the Committee in talking about agreement making:
- I don't believe in pan-Aboriginality, and that's come up over and over today. The Kimberley has a conglomerate of Aboriginal nations that are made up by clan groups, which are made up by language groups. You'd be looking at an individual treaty with each of those people if those people wanted a treaty. We're sovereign Indigenous people.⁴
- 3.10 One of the principles discussed later in this chapter is the importance of gender equity in any structure giving effect to The Voice, at local, regional, and national levels.

Structure and membership

- 3.11 The Committee received evidence on the structure of an institution to give effect to The Voice, the methods for choosing its members, and the nature of its relationship to existing organisations and bodies in Aboriginal and Torres Strait Islander communities.

³ Technical Advisers: Regional Dialogues and Uluru First Nations Constitutional Convention, *Submission 206*, p. 7.

⁴ Ms Ebony Hill, *Committee Hansard*, Fitzroy Crossing, 13 June 2018, p. 19.

Local and regional structure

- 3.12 As noted in the previous section, it is anticipated the creation of The Voice will fulfil a number of functions including: serving as a representative body or bodies which provide mechanisms to consult and engage with Aboriginal and Torres Strait Islander peoples on policies, legislation, and services which affect them, leading to a reduction to barriers to access, to advance self-determination, and as a consequence lead to greater local decision making, economic advancement and improved social outcomes, as well as contribute to a more unified and reconciled nation and be supported by the overwhelming majority of Australians.
- 3.13 While noting the critical role of the Australian Government in relation to social and economic policy, the Committee heard evidence that matters affecting Aboriginal and Torres Strait Islander peoples are not confined to the federal jurisdiction, and indeed often fall within the jurisdiction of state, territory, and local governments. Evidence in relation to the potential for interaction between The Voice and state, territory, and local governments is discussed later in this chapter.
- 3.14 Similarly, the Committee heard evidence that the matters affecting Aboriginal and Torres Strait Islander peoples may differ among communities across the country.
- 3.15 Mr Neil Carter, Repatriation and Cultural Heritage Officer at the Kimberley Aboriginal Law and Culture Centre, emphasised the diversity of Aboriginal and Torres Strait Islander peoples; ‘we’re made of different nations’.⁵
- 3.16 Stakeholders including Ms Patricia Turner, Chief Executive Officer of the National Aboriginal Community Controlled Health Organisation (NACCHO), Mr Carter, and others, argued that the structure of The Voice should have a strong local and regional foundation based upon Aboriginal and Torres Strait Islander communities.⁶ Mr Carter said issues should be ‘discussed at a local level first, with the elders, and then the information will

⁵ Mr Neil Carter, Repatriation and Cultural Heritage Officer, Kimberley Aboriginal Law and Culture Centre, *Committee Hansard*, Fitzroy Crossing, 13 June 2018, p. 16.

⁶ Mr Michael Dillon, *Committee Hansard*, Canberra, 18 June 2018, p. 14; Professor Peter Buckskin, Co-Chair, Reconciliation South Australia, *Committee Hansard*, Adelaide, 5 July 2018, p. 15; Indigenous Peoples Organisation, *Submission 338*, p. 13; Ms Patricia Turner, Chief Executive Officer, National Aboriginal Community Controlled Health Organisation, *Committee Hansard*, Canberra, 25 June 2018, p. 5.

be transferred up until we've got a representative who can really speak to the government'.⁷

3.17 As such, a strong theme in evidence to the Committee was that The Voice should be structured in such a way so as to give rise to a plurality of local, regional, and national voices, rather than simply a singular voice at the national level.⁸

3.18 For example, Ms Emily Carter, Chief Executive Officer of the Marninwarntikura Fitzroy Women's Resource Centre, told the Committee:

... the voice has to be made up of different regions right across the country. ... It has to really reflect the voices of the people right around the country.⁹

3.19 The submission from the Cape York Institute noted that the importance of empowering local voices was also a strong theme emerging from the Regional Dialogues conducted by the Referendum Council.¹⁰

3.20 The Cape York Institute suggested that, consistent with the principle of subsidiarity, the structure of The Voice should 'enable local input into local matters and should encourage the exercise of local authority and responsibility in local affairs'.¹¹

3.21 Associate Professor Matthew Stubbs argued that the structure should have sufficient flexibility to enable particular regional groups to come together at different times to engage with different levels of government in relation to particular issues.¹² However, Mr Des Jones, Chairperson of the Murdi Paaki Regional Assembly, noted that 'driving governance and leadership from a

⁷ Mr Neil Carter, Repatriation and Cultural Heritage Officer, Kimberley Aboriginal Law and Cultural Centre, *Committee Hansard*, Fitzroy Crossing, 13 June 2018, p. 16.

⁸ For example: Ms Christy Hawker, Chief Executive Officer, Binarri-binyja Yarrawoo Aboriginal Corporation *Committee Hansard*, Kununurra, 11 June 2018, p. 4; Mr Des Jones, Chairperson, Murdi Paaki Regional Assembly, *Committee Hansard*, Dubbo, 2 July 2018, p. 16; Mrs Lorraine Finlay, *Committee Hansard*, Perth, 6 July 2018, p. 55.

⁹ Ms Emily Carter, Chief Executive Officer, Marninwarntikura Fitzroy Women's Resource Centre, *Committee Hansard*, Fitzroy Crossing, 13 June 2018, p. 8.

¹⁰ Cape York Institute, *Submission 244*, pp. 13-14.

¹¹ Cape York Institute, *Submission 244*, pp. 31-32.

¹² Associate Professor Matthew Stubbs, Adelaide Law School, University of Adelaide, *Committee Hansard*, Adelaide, 5 July 2018, pp. 23-24.

community level into a regional level and turning that into strategies or decisions is not easy'.¹³

- 3.22 In its submission to the Committee, Uphold & Recognise suggested that, if Aboriginal and Torres Strait Islander peoples' voices are to be heard in a practical way, then any structure giving effect to The Voice should be accountable and responsive to Aboriginal and Torres Strait Islander communities and reflect the diversity of experiences in modern Australia.¹⁴
- 3.23 Professor Alexander Reilly suggested to the Committee that a structure similar to the former Aboriginal and Torres Strait Islander Commission (ATSIC) would be effective. Professor Reilly submitted that developments since the establishment of ATSIC would improve the interface between the local, regional, and national levels.¹⁵
- 3.24 It was submitted that addressing matters at a local level would be important for the effectiveness of The Voice. For example, Ms Anne Cregan, Partner at Gilbert + Tobin, observed that initiatives that had succeeded in addressing challenges and bringing about better circumstances in Aboriginal and Torres Strait Islander communities had been initiated and led by the communities themselves.¹⁶
- 3.25 However, it was noted in evidence to the Committee that there may be limitations in the extent to which a large number of voices could be effectively represented. For example, Professor Anne Twomey cautioned that voices could become 'scattered and diffused'.¹⁷ Similarly, Mr Bill Gray noted the challenge of representing a range of voices without 'damaging or diminishing' those voices.¹⁸
- 3.26 Professor Twomey also noted that, while local Indigenous bodies or voices might represent their area effectively and be able to negotiate in relation to

¹³ Mr Des Jones, Chairperson, Murdi Paaki Regional Assembly, *Committee Hansard*, Dubbo, 2 July 2018, p. 20.

¹⁴ Uphold & Recognise, *Submission 172*, Attachment 2, p. 6.

¹⁵ Professor Alexander Reilly, Director, Public Law and Policy Research Unit, University of Adelaide, *Committee Hansard*, Adelaide, 5 July 2018, p. 23

¹⁶ Ms Anne Cregan, Partner, Gilbert + Tobin, *Committee Hansard*, Sydney, 4 July 2018, pp. 61-62.

¹⁷ Professor Anne Twomey, *Committee Hansard*, Sydney, 4 July 2018, p. 51.

¹⁸ Mr Bill Gray AM, *Committee Hansard*, Canberra, 18 June 2018, p. 17.

local service issues, they might not have the capacity to provide advice in relation to legislation.¹⁹

3.27 Both Professor Twomey and Mrs Lorraine Finlay noted the challenge involved in identifying a structure that is appropriately decentralised but that does not require an extensive bureaucracy to support it.²⁰

3.28 A number of witnesses submitted that whatever structure is adopted, it would need to derive its legitimacy from the Aboriginal and Torres Strait Islander communities that it is intended to represent. For example, Professor Tom Calma AO, former Aboriginal and Torres Strait Islander Social Justice Commissioner and Race Discrimination Commissioner, said ‘the key issue is that any voice has to be genuine’. He noted that this concern informed the design of the National Congress:

We needed to look at ways we can take control and get a genuine voice for Aboriginal and Torres Strait Islander people, selected by our people.²¹

3.29 Mr Sidoti suggested that without credibility in communities, The Voice would not be genuinely representative.²² Similarly, Mr Gray emphasised that credibility and legitimacy among families and communities was fundamental:

... whatever structure you have that might want to be constituted as some form of national voice will also have to have a foundation which allows people to believe and to see their views being expressed through those structures in which they have some role and an ability to participate in.²³

3.30 Mr Ian Trust, Chairperson and Executive Director of the Wunan Foundation, suggested that the success of The Voice would be measured by the impact it would have for people in local communities.²⁴

3.31 Mr Gray suggested that a structure to give effect to The Voice should be simple and transparent in order to gain legitimacy:

¹⁹ Professor Anne Twomey, *Committee Hansard*, Sydney, 4 July 2018, p. 51.

²⁰ Professor Anne Twomey, *Committee Hansard*, Sydney, 4 July 2018, p. 51; Mrs Lorraine Finlay, *Committee Hansard*, Perth, 6 July 2018, p. 56.

²¹ Professor Tom Calma AO, *Committee Hansard*, Canberra, 18 June 2018, pp. 1, 2.

²² Mr Eric Sidoti, *Committee Hansard*, Sydney, 4 July 2018, p. 27.

²³ Mr Bill Gray AM, *Committee Hansard*, Canberra, 18 June 2018, p. 14.

²⁴ Mr Ian Trust, Chairperson and Executive Director, Wunan Foundation, *Committee Hansard*, Kununurra, 11 June 2018, p. 10.

The more complexity you add into the structure, the more complexity you add into the processes which support that structure, the less likely it is that people will understand it, and then it will have less credibility and therefore less legitimacy.²⁵

- 3.32 Speaking more generally, Professor Ian Anderson, Deputy Secretary of the Indigenous Affairs Group at the Department of the Prime Minister and Cabinet, highlighted the importance of local systems having cultural legitimacy and also being context relevant. Professor Anderson noted that, for various reasons, not all communities are at the same point in their development.²⁶
- 3.33 The Committee was also reminded that aspects of The Voice should be able to change over time, if required.²⁷

Representative nature

- 3.34 While a strong theme in evidence was that the institution to give effect to The Voice should be chosen by Aboriginal and Torres Strait Islander peoples, the Committee received a range of evidence on possible approaches to providing representation of Aboriginal and Torres Strait Islander peoples.
- 3.35 In a submission to the Committee, the Technical Advisers to the Regional Dialogues and Uluru First Nations Constitutional Convention (Technical Advisers) stated that the dialogues considered a range of ideas as to how to achieve representation that was legitimate and inclusive. The submission went on:

The Dialogues consistently discussed the need for the body to have representation for women, elders, youth, traditional owners and the Stolen Generations, representation across urban, regional and remote areas, and representation for Torres Strait Islander people in both the Torres Strait and the mainland.²⁸

²⁵ Mr Bill Gray AM, *Committee Hansard*, Canberra, 18 June 2018, p. 16.

²⁶ Professor Ian Anderson, Deputy Secretary, Indigenous Affairs Group, Department of the Prime Minister and Cabinet, *Committee Hansard*, Canberra, 25 June 2018, p. 13.

²⁷ Mr Michael Dillon, *Committee Hansard*, Canberra, 18 June 2018, pp. 17; Professor Alexander Reilly, Director, Public Law and Policy Research Unit, University of Adelaide, *Committee Hansard*, Adelaide, 5 July 2018, p. 24.

²⁸ Technical Advisers: Regional Dialogues and Uluru First Nations Constitutional Convention, *Submission 206*, p. 7.

- 3.36 The Committee heard evidence that The Voice should be comprised of a body of members chosen by the Aboriginal and Torres Strait Islander community.
- 3.37 For example, representatives of the New South Wales Aboriginal Land Council stated that it was the strong view of the Council that The Voice must be a democratically elected body of representatives from Aboriginal and Torres Strait Islander peoples and that it must account for people living in regional and remote Australia.²⁹ Ms Turner made a similar point.³⁰ The Barang Regional Alliance suggested that regions should 'sort out' their own representation and then 'affiliate as needed to provide a voice to Parliament at the federal level'.³¹
- 3.38 Mr Jones agreed that The Voice must be representative; 'The voice within that body must come from the people. It must be the people's voice'.³²
- 3.39 Councillor Bonnie Edwards from the Shire of Halls Creek emphasised the importance of the legitimacy that comes with being elected.³³
- 3.40 However, some witnesses also submitted that the concept of an election may have a different meaning in different communities, and that any mechanism for electing representatives should have sufficient flexibility to accommodate these differences. For example, Professor Rosalind Dixon explained:
- ... in some communities, election won't have the same meaning as in a non-Indigenous context. The way that I would suggest that that be dealt with is that there be a formal requirement of election and that there should be a recognition that some communities may choose to elect elders by a form of oral acclamation or some other customary model that meets the minimum requirements of election but also has a more traditional kind of instantiation.³⁴

²⁹ Mr James Christian, Chief Executive Officer, New South Wales Aboriginal Land Council, *Committee Hansard*, Sydney, 4 July 2018, p. 37.

³⁰ Ms Patricia Turner, Chief Executive Officer, National Aboriginal Community Controlled Health Organisation, *Committee Hansard*, Canberra, 25 June 2018, p. 8.

³¹ Barang Regional Alliance, *Submission 319*, p. 4.

³² Mr Des Jones, Chairperson, Murdi Paaki Regional Assembly, *Committee Hansard*, Dubbo, 2 July 2018, p. 16.

³³ Councillor Bonnie Edwards, Councillor, Shire of Halls Creek, *Committee Hansard*, Halls Creek, 11 June 2018, p. 11.

³⁴ Professor Rosalind Dixon, *Committee Hansard*, Sydney, 4 July 2018, p. 21.

- 3.41 Professor Dixon suggested that the Australian Electoral Commission (AEC) should be required to certify that elections meet with ‘sufficient norms of community consensus’.³⁵ Mr Gray noted that the elections for ATSIC were conducted by the AEC.³⁶
- 3.42 Mr Sidoti agreed that elections were critical, noting the expectations that are associated with elected representatives. Mr Sidoti also agreed with the view that there should be some allowance made for cultural and customary arrangements.³⁷
- 3.43 As an example of a representative structure, the Committee heard evidence from the Murdi Paaki Regional Assembly. This evidence is discussed in Chapter 4.
- 3.44 However, the Committee also heard evidence in relation to participation in elections for previous and existing Aboriginal and Torres Strait Islander representative structures and bodies where there was poor turnout.³⁸ Evidence in relation to voter turnout in ATSIC elections is discussed in Chapter 4.
- 3.45 Professor Bertus de Villiers of the Law School at Curtin University suggested that elections be held on the same day as state elections to encourage participation.³⁹ Professor de Villiers also recommended that there should not be a separate electoral roll for Aboriginal and Torres Strait Islander peoples nor any test of Aboriginality, and that people who vote in the election for the body should not be disqualified from voting in other elections.
- 3.46 Professor Dixon suggested that consideration be given to establishing targets for gender diversity in the membership of the body, overlaid with deference to customary authority.⁴⁰ Ms Turner and Mr Alistair Ferguson, Executive

³⁵ Professor Rosalind Dixon, *Committee Hansard*, Sydney, 4 July 2018, p. 21.

³⁶ Mr Bill Gray AM, *Committee Hansard*, Canberra, 18 June 2018, p. 16.

³⁷ Mr Eric Sidoti, *Committee Hansard*, Sydney, 4 July 2018, p. 26.

³⁸ For example: Ms Katrina Fanning, Chairperson, ACT Aboriginal and Torres Strait Islander Elected Body, *Committee Hansard*, Adelaide, 5 July 2018, pp. 29-30.

³⁹ Professor Bertus de Villiers, Adjunct Professor, Curtin Law School, *Committee Hansard*, Perth, 6 July 2018, p. 2.

⁴⁰ Professor Rosalind Dixon, *Committee Hansard*, Sydney, 4 July 2018, p. 21. See also: Mr Ian Trust, Chairperson and Executive Director, Wunan Foundation, *Committee Hansard*, Kununurra, 11 June 2018, p. 8; Professor Adrienne Stone, Director, Centre for Comparative Constitutional Studies, *Committee Hansard*, Perth, 6 July 2018, p. 42; Cape York Institute, *Submission 244*, p. 34.

Director of the Maranguka Justice Reinvestment Project, also supported gender parity amongst Aboriginal and Torres Strait Islander representatives which comprise The Voice.⁴¹

- 3.47 In its submission, the Indigenous Peoples Organisation highlighted the challenge of developing a model that provides for the proper representation of the many Aboriginal and Torres Strait Islander peoples who are displaced from their ancestral lands:

The large numbers of Aboriginal and Torres Strait Islander people currently displaced is not just related to the Stolen Generations, of which there are many thousands, but also applies to many Aboriginal people forcibly removed to missions and reserves and relates to the many Aboriginal and Torres Strait Islander people who now live in cities, urban centres and regional towns.⁴²

- 3.48 Reflecting on his involvement in the establishment of ATSIC, Mr Gray noted that challenge of identifying suitable boundaries for a regional structure.⁴³
- 3.49 Professor de Villiers suggested that members be elected on a ward basis with regions that are smaller than states. Noting the connection of Aboriginal and Torres Strait Islander peoples to their land, Professor de Villiers submitted that a system of proportional representation would not be appropriate.⁴⁴
- 3.50 In contrast, Dr Bede Harris cautioned against an electorate-based voting system, suggesting that where boundaries are drawn is a determinant of which voices are heard. Dr Harris recommended a nationwide list-based voting system.⁴⁵ But this may see the emergence of parties in the elections.
- 3.51 Uphold & Recognise proposed a structure involving local Aboriginal and Torres Strait Islander communities deciding how they wish to be represented. An appointed 'Recognition Commission' would have

⁴¹ Ms Patricia Turner, Chief Executive Officer, National Aboriginal Community Controlled Health Organisation, *Committee Hansard*, Canberra, 25 June 2018, p. 6; Mr Alistair Ferguson, Executive Director, Maranguka Justice Reinvestment Project, Director, Birrang Enterprise Development Company Ltd, *Committee Hansard*, Dubbo, 2 July 2018, p. 12.

⁴² Indigenous Peoples Organisation, *Submission 338*, p. 9.

⁴³ Mr Bill Gray AM, *Committee Hansard*, Canberra, 18 June 2018, p. 16.

⁴⁴ Professor Bertus de Villiers, Adjunct Professor, Curtin Law School, *Committee Hansard*, Perth, 6 July 2018, p. 2.

⁴⁵ Dr Bede Harris, *Committee Hansard*, Sydney, 4 July 2018, p. 41.

responsibility for certifying which people speak for which community and the boundaries of any community.⁴⁶

- 3.52 Similarly, the Cape York Institute suggested that each First Nation should be able to adopt their own system of representation, which would be approved and monitored by a 'First Nations board'.⁴⁷
- 3.53 Speaking more broadly, Ms Turner suggested a governance arrangement whereby 20 regional authorities were established around Australia. The authorities would then elect one representative in each state and territory to be a member of The Voice.⁴⁸
- 3.54 Mr Peter Yu, Chief Executive Officer of Nyamba Buru Yawuru, the development company of the Yawuru prescribed bodies corporate (PBC), submitted to the Committee that The Voice should be comprised of a body of representatives appointed by each regional PBC. Mr Yu went on to explain that in Broome the directors of the Yawuru PBC are both self-selected, based on cultural authority, and elected from the general membership.⁴⁹
- 3.55 On the other hand, the Hon. Ian Viner AO QC argued against using existing organisations or representative bodies as a basis for electoral franchise because they would not be as purely democratic.⁵⁰ Similarly, the Indigenous Peoples Organisation argued that organisational representation would not enable equal input for all Aboriginal and Torres Strait Islander peoples and therefore would not legitimately represent the community.⁵¹
- 3.56 Ms Christy Hawker, Chief Executive Officer of the Binarri-binyja Yarrawoo Aboriginal Corporation, noted that traditional authority structures have been 'cemented' in contemporary form in PBCs:

It seems to me that to achieve legitimacy a voice needs to contain a balance between the legitimacy arising from traditional authority, through native title

⁴⁶ Uphold & Recognise, *Submission 172*, Attachment 2, p. 10.

⁴⁷ Cape York Institute, *Submission 244*, p. 34.

⁴⁸ Ms Patricia Turner, Chief Executive Officer, National Aboriginal Community Controlled Health Organisation, *Committee Hansard*, Canberra, 25 June 2018, p. 5.

⁴⁹ Mr Peter Yu, Chief Executive Officer, Nyamba Buru Yawuru, *Committee Hansard*, Broome, 12 June 2018, pp. 5-6. See also: Mr Tyronne Garstone, Deputy Chief Executive Officer, Kimberley Land Council, *Committee Hansard*, Broome, 12 June 2018, p. 14.

⁵⁰ The Hon. Robert Ian Viner AO QC, *Committee Hansard*, Perth, 6 July 2018, p. 16.

⁵¹ Indigenous Peoples Organisation, *Submission 338*, p. 8.

and prescribed bodies corporate, and also contemporary legitimacy enacted through electoral processes.⁵²

- 3.57 Speaking to the Committee in Kununurra, Mr Trust suggested that members of the body should be appointed by ‘a cross-section of the Parliament’. Mr Trust submitted that an appointed body would be more suitable than a representative body for providing long-term leadership.⁵³
- 3.58 However, other witnesses in Kununurra submitted that members of any advisory body should be appointed from the community, and that any process of election or choosing should be a matter for the community itself to decide.⁵⁴ The New South Wales Aboriginal Land Council and the Indigenous Peoples Organisation also cautioned against the appointment of members.⁵⁵

Relationship with existing structures

- 3.59 The Committee received little evidence on the possible interaction between the structure to give effect to The Voice and existing Aboriginal and Torres Strait Islander organisations and representative structures.
- 3.60 As noted in the previous section, the Committee heard a range of views on the membership of The Voice being drawn to some extent from existing organisations such as PBCs. However, a consistent message arising in evidence to the Committee was that decisions about the use of existing organisations to represent local communities should be a matter for those communities.
- 3.61 A number of witness submitted that The Voice should not replace representative structures that are already operating in Aboriginal and Torres Strait Islander communities.

⁵² Ms Christy Hawker, Chief Executive Officer, Binarri-binyja Yarrawoo Aboriginal Corporation, *Committee Hansard*, Kununurra, 11 June 2018, p. 8.

⁵³ Mr Ian Trust, Chairperson and Executive Director, Wunan Foundation, *Committee Hansard*, Kununurra, 11 June 2018, p. 5.

⁵⁴ Ms Nawoola Selina Newry, *Committee Hansard*, Kununurra, 11 June 2018, pp. 13-14.

⁵⁵ Mr James Christian, Chief Executive Officer, New South Wales Aboriginal Land Council, *Committee Hansard*, Sydney, 4 July 2018, p. 37; Indigenous Peoples Organisation, *Submission 338*, p. 8.

- 3.62 Ms Cregan emphasised that The Voice should not create a barrier between local decision making and government agencies.⁵⁶ This principle was also expressed in the submission from the Cape York Institute.⁵⁷
- 3.63 Similarly, Mr Danny Gilbert, Managing Partner at Gilbert + Tobin, noted that there may be circumstances where local community elect to make representations outside the ambit of The Voice.⁵⁸
- 3.64 More generally, Professor Dixon submitted that The Voice would not be an ‘exclusive model of consultation’ and should not replace existing statutory obligations to consult. Professor Dixon instead suggested that The Voice would be an ‘additional model of consultation’.⁵⁹
- 3.65 Similarly, Mr Sidoti expressed the view that the institutional form of The Voice should be considered as one part of the overall democratic architecture, and should not preclude the participation of Aboriginal and Torres Strait Islander peoples in other ways.⁶⁰
- 3.66 Mr Michael Dillon echoed this point, emphasising that there should be ‘a depth and breadth of Indigenous voices in civic discussion’. Mr Dillon went on to suggest that existing bodies would have a role in informing The Voice.⁶¹
- 3.67 In its submission to the inquiry, the National Congress of Australia’s First Peoples (National Congress) suggested that it could function as The Voice. The submission outlined the consultation process undertaken prior to the establishment of the National Congress and suggested that, as the peak representative body for Aboriginal and Torres Strait Islander peoples, the work undertaken by the National Congress aligns with the role that is envisaged for The Voice.⁶²
- 3.68 Further evidence in relation to the National Congress is outlined later in Chapter 4.

⁵⁶ Ms Anne Cregan, Partner, Gilbert + Tobin, *Committee Hansard*, Sydney, 4 July 2018, p. 63.

⁵⁷ Cape York Institute, *Submission 244*, p. 32.

⁵⁸ Mr Danny Gilbert, Managing Partner, Gilbert + Tobin, *Committee Hansard*, Sydney, 4 July 2018, p. 63.

⁵⁹ Professor Rosalind Dixon, *Committee Hansard*, Sydney, 4 July 2018, pp. 22-23.

⁶⁰ Mr Eric Sidoti, *Committee Hansard*, Sydney, 4 July 2018, p. 29.

⁶¹ Mr Michael Dillon, *Committee Hansard*, Canberra, 18 June 2018, p. 18.

⁶² National Congress of Australia’s First Peoples, *Submission 292*, pp. 7-9.

Function and operation

- 3.69 The Committee received evidence on a range of functions that could be carried out by The Voice, including a proposed function of providing advice to the federal Parliament.
- 3.70 In relation to this function, a number of questions were identified in relation to the scope, provision, and timing of advice, and, more generally, the operation of the body and the nature of its interaction with the federal Parliament and federal, state, territory, and local governments.

Possible functions

- 3.71 As noted above, a range of views was expressed to the Committee in relation to the possible functions of The Voice.
- 3.72 In making the recommendation to provide for a Voice to the Parliament, the Referendum Council recommended that one of the specific functions of The Voice be to ‘monitor the use of the heads of power in section 51(xxvi) and section 122’ of the Constitution.⁶³
- 3.73 In a submission to the Committee, the Technical Advisers stated that all dialogues agreed that the ‘primary function’ of The Voice was to provide an Aboriginal and Torres Strait Islander perspective whenever federal laws were passed that affected them.⁶⁴
- 3.74 However, the submission noted that delegates discussed the possibility of The Voice having other functions, including:
- ... designing new policies; advising Ministers; reviewing, monitoring and overseeing funding coming into communities; and auditing and evaluating service delivery in Aboriginal and Torres Strait Islander affairs.⁶⁵
- 3.75 The submission also noted the possibility of functions such as advising state, territory, and local governments, representing Aboriginal and Torres Strait Islander peoples internationally, and negotiating or overseeing treaties.⁶⁶

⁶³ Referendum Council, *Final Report of the Referendum Council*, 2017, p. 2.

⁶⁴ Technical Advisers: Regional Dialogues and Uluru First Nations Constitutional Convention, *Submission 206*, pp. 7-8.

⁶⁵ Technical Advisers: Regional Dialogues and Uluru First Nations Constitutional Convention, *Submission 206*, p. 8.

⁶⁶ Technical Advisers: Regional Dialogues and Uluru First Nations Constitutional Convention, *Submission 206*, p. 8.

- 3.76 However, the Committee received little evidence in relation how the body might carry out these functions.
- 3.77 The Centre for Comparative Constitutional Studies at the University of Melbourne submitted that it understood that The Voice was intended to:
- ... facilitate Indigenous participation in the processes of democracy rather than to create an administrative bureaucracy tasked with multiple mandates, such as service delivery.⁶⁷
- 3.78 However, the submission noted that it would be a matter for the Parliament to determine the functions of The Voice, in consultation with Aboriginal and Torres Strait Islander peoples.⁶⁸
- 3.79 Associate Professor Stubbs suggested that the body should have functions beyond providing advice to Parliament about legislation and cautioned of the risk of narrowing the body's functions.⁶⁹
- 3.80 Some witnesses suggested that the body should have functions similar to a parliamentary committee, such as the ability to conduct inquiries and review policies and expenditure in relation to Aboriginal and Torres Strait Islander affairs.⁷⁰
- 3.81 Mr Dillon stated that the operation of the body should incorporate a mechanism for accountability.⁷¹ Professor Dixon, along with several other witnesses, noted that, if representatives of the body were elected, then they would be accountable through the electoral system.⁷²
- 3.82 Responding to a question from the Committee, Professor Dixon suggested that members of the body would have a 'moral duty' to consult with their constituencies. However, Professor Dixon recommended against codifying a duty to consult except in the case that the members of body were appointed.⁷³

⁶⁷ Centre for Comparative Constitutional Studies, *Submission 289*, p. 9.

⁶⁸ Centre for Comparative Constitutional Studies, *Submission 289*, p. 9.

⁶⁹ Associate Professor Matthew Stubbs, Adelaide Law School, University of Adelaide, *Committee Hansard*, Adelaide, 5 July 2018, p. 26.

⁷⁰ Professor Tom Calma AO, *Committee Hansard*, Canberra, 18 June 2018, pp. 1, 3-4; Mr Eric Sidoti, *Committee Hansard*, Sydney, 4 July 2018, pp. 29-30.

⁷¹ Mr Michael Dillon, *Committee Hansard*, Canberra, 18 June 2018, p. 17.

⁷² Professor Rosalind Dixon, *Committee Hansard*, Sydney, 4 July 2018, p. 23.

⁷³ Professor Rosalind Dixon, *Committee Hansard*, Sydney, 4 July 2018, p. 22.

- 3.83 As noted earlier in this chapter, there was recognition among submitters that matters affecting Aboriginal and Torres Strait Islander peoples often fall within the jurisdiction of state, territory, and local governments. As such, the Committee heard evidence that The Voice should also have a function of advising state, territory, and local government bodies.
- 3.84 For example, citing current rates of incarceration among Aboriginal and Torres Strait Islander peoples, Professor Dixon submitted that the body should have the ‘right, if not the duty’ to consider state legislation and provide recommendations to state parliaments. Professor Dixon explained:
- ... if we have a voice that cannot touch on criminal justice issues it will not do the job that it needs to do of addressing current disparities and sources of disadvantage.⁷⁴
- 3.85 Professor Twomey noted that there are a number existing bodies that are used at both federal and state level. Professor Twomey suggested that legislation enacting The Voice could confirm that states and territories could consult with the body, suggesting that states would be ‘enthusiastic’. However, Professor Twomey recommended adopting an approach that facilitated consultation rather than imposed a requirement on the states to consult.⁷⁵
- 3.86 A number of states and territories have bodies and organisations that are engaged in policy design and service delivery. For instance the New South Wales Government’s Local Decision Making initiative enables Aboriginal communities to ‘have a genuine voice in determining what and how services are delivered in their communities’. Accords (agreements) will be negotiated between regional alliances of Aboriginal communities and the New South Wales Government. Regional alliances will ‘decide on the most suitable representative structure, membership and operating arrangements’.⁷⁶
- 3.87 The Northern Territory Government has a program called Local Decision Making, a 10-year plan where the Government will provide opportunities to transfer government service delivery to Aboriginal and Torres Strait Islander peoples and organisations based on their community aspirations. The

⁷⁴ Professor Rosalind Dixon, *Committee Hansard*, Sydney, 4 July 2018, p. 16.

⁷⁵ Professor Anne Twomey, *Committee Hansard*, Sydney, 4 July 2018, p. 49.

⁷⁶ New South Wales Department of Aboriginal Affairs, ‘Local Decision Making’, <<https://www.aboriginalaffairs.nsw.gov.au/working-differently/local-decision-making/about-local-decision-making>> viewed 16 July 2018.

Northern Territory Government will work ‘with Aboriginal people about how this may look and what it will mean for each community based on their ideas’.⁷⁷

- 3.88 The Committee heard evidence from the ACT Aboriginal and Torres Strait Islander Elected Body (see Chapter 4).
- 3.89 Nevertheless, the Committee heard that the absence of a direct role with respect to state, territory, and local government matters would not preclude The Voice from influencing outcomes in relation to those matters.

Ms Cregan explained:

The conditions of people’s lives that result in the sort of crisis that then result in people having contact with the criminal justice system, for example, can be very much influenced by decisions of the Commonwealth. If Aboriginal and Torres Strait Islander people were to have a greater say in those policy developments and have a say at an earlier stage, that would be a very powerful way that The Voice could influence those day-to-day outcomes.⁷⁸

- 3.90 Similarly, Mr Gilbert noted that a voice at the Commonwealth level could have a ‘trickle-down effect’ that would impact upon Commonwealth-state relations and the operation of the states.⁷⁹
- 3.91 In relation to proposals to empower local Aboriginal and Torres Strait Islander peoples’ bodies, the Cape York Institute suggested that the functions of those bodies could include managing native-title land, preserving culture and language, and advancing welfare.⁸⁰
- 3.92 In a submission to the Committee, Professor de Villiers stressed that the objectives of The Voice should be clear and widely accepted. Reflecting on the experience of advisory institutions in other jurisdictions, Professor de Villiers suggested that unless this was acceptance was established,

⁷⁷ Northern Territory Government, Department of the Chief Minister, ‘Local Decision Making’ <<https://dcm.nt.gov.au/supporting-government/office-of-aboriginal-affairs/our-priorities>> viewed 16 July 2018.

⁷⁸ Ms Anne Cregan, Partner, Gilbert + Tobin, *Committee Hansard*, Sydney, 4 July 2018, pp. 64-65.

⁷⁹ Mr Danny Gilbert, Managing Partner, Gilbert + Tobin, *Committee Hansard*, Sydney, 4 July 2018, p. 65.

⁸⁰ Cape York Institute, *Submission 244*, pp. 26-27, 36-38.

‘disappointment and frustration may ultimately erode the [body’s] credibility and legitimacy’.⁸¹

- 3.93 The Committee also received evidence in relation to the resources that should be made available to The Voice to enable it to carry out its functions.
- 3.94 Dr Gabrielle Appleby noted that funding of The Voice was discussed at the Regional Dialogues conducted by the Referendum Council. Referring to these discussions, Dr Appleby stated that the level of funding should be commensurate with the functions of the body and that funding should be guaranteed, which would contribute to the independence of the body.⁸²
- 3.95 Professor Dixon explained that the body would require staff with expertise in Indigenous policy and also a professionalised secretariat with expertise in parliamentary processes. Professor Dixon emphasised that the success of the body would depend on its ability to understand and interface with the Parliament.⁸³
- 3.96 Mr Dillon suggested that the body would require the capacity to undertake research, both to manage the information coming before it and to examine issues in a proactive way.⁸⁴
- 3.97 The remainder of this section considers evidence in relation to the proposed function of providing advice to the Parliament—in particular, the provision and timing of advice and the scope of matters for advice.

Provision of advice

- 3.98 There were two options as to whom The Voice should provide advice. One option was that The Voice should provide advice to Parliament through a committee modelled on the Joint Standing Committee on Human Rights after the legislative process has already commenced. The other option was that The Voice should provide advice to the Minister or Cabinet—with such advice to be published—so that the advice is placed at the earliest available opportunity in the policy making process.

⁸¹ Professor Bertus de Villiers, *Submission 6*, Attachment 1, pp. 16-17 (39-40). See also: Professor Bertus de Villiers, Adjunct Professor, Curtin Law School, *Committee Hansard*, Perth, 6 July 2018, p. 3.

⁸² Dr Gabrielle Appleby, *Committee Hansard*, Perth, 6 July 2018, p. 14. See also: Technical Advisers: Regional Dialogues and Uluru First Nations Constitutional Convention, *Submission 206*, p. 8.

⁸³ Professor Rosalind Dixon, *Committee Hansard*, Sydney, 4 July 2018, p. 23.

⁸⁴ Mr Michael Dillon, *Committee Hansard*, Canberra, 18 June 2018, pp. 14-15.

3.99 A common suggestion in evidence to the Committee was that advice provided by The Voice should be tabled in the Parliament and made public. This mechanism was put forward as part of a constitutional provision drafted by Professor Twomey, which is discussed later in this chapter.

3.100 Referring to an article written by Professor Twomey, Dr Morris explained that tabling of advice provides a formal mechanism of engagement between the body and the Parliament:

As Twomey explains, ensuring the advice is tabled ‘provides a permanent public record of that advice; it gives the advice the status of a privileged document... and it provides a direct channel from the Indigenous body into the parliament, providing a constitutional means for Aboriginal people and Torres Strait Islanders to have a voice in parliamentary proceedings concerning their affairs.’⁸⁵

3.101 In evidence to the Committee, many submitters emphasised that, in providing advice to the Parliament, the body would have no power of veto and that its advice would be non-binding in nature. It was also emphasised that Parliament would retain its full power to make laws, including laws with respect to Aboriginal and Torres Strait Islander peoples.⁸⁶ For instance, Mr Yu explained that the powers of The Voice should not include a veto power:

I don’t think people viewed it as a model to, in any way, contradict the existing nature of the powers of parliament but rather to work with them in a way that we’re able to bring a greater understanding and leveraging to the very specific and real concern and interest that we have... it’s never been about contradicting the nature of the powers of the parliament but rather to substantially build on the better performance of the Parliament.⁸⁷

3.102 Mrs Finlay noted that while The Voice might not be able to provide a veto, ‘the political and moral authority that this body will have will be enormous.’⁸⁸ Similarly, Mr Gilbert explained:

⁸⁵ Dr Shireen Morris, *Submission 195*, p. 21. See also: Anne Twomey, ‘Putting words to the tune of Indigenous constitutional recognition’, *The Conversation*, 20 May 2015.

⁸⁶ For example: Professor Anne Twomey, *Submission 57*, p. 2; Centre for Comparative Constitutional Studies, *Submission 289*, p. 12.

⁸⁷ Mr Peter Yu, Chief Executive Officer, Nyamba Buru Yawuru, *Committee Hansard*, Broome, 12 June 2018, p. 9.

⁸⁸ Mrs Lorraine Finlay, *Committee Hansard*, Perth, 6 July 2018, p. 54.

... there will be an expectation that these voices will be heard, and there will be political consequences if the parliament were to override and ignore sensible policy, sensible deliberations.⁸⁹

- 3.103 Reflecting on the regional dialogues, Dr Appleby noted the concerns of some Aboriginal and Torres Strait Islander peoples about The Voice having insufficient power.

I would say that in most of the dialogues there were sentiments expressed along the lines that the voice needs to have political power, and it needs to not be able to simply be dismissed by parliament. So the design questions that you raise around how political power, authority and status get created and discussions around that, for example, making sure the voice had constitutional status and authority was part of delivering that political power.⁹⁰

- 3.104 The *Final Report of the Referendum Council* noted:

There was a concern that the proposed body would have insufficient power if its constitutional function was 'advisory' only, and there was support in many Dialogues for it to be given stronger powers so that it could be a mechanism for providing 'free, prior and informed consent'. Any Voice to Parliament should be designed so that it could support and promote a treaty-making process.⁹¹

- 3.105 The Committee also heard that the body would not be able to delay or frustrate the passage of legislation in the Parliament.⁹²

- 3.106 Dr Freeman submitted that the ability to table advice in the Parliament would give The Voice political agency.⁹³

- 3.107 Professor Dixon suggested that a decision not to follow advice should engage a duty on the part of the Attorney-General or the person introducing the legislation to explain why that advice had not been followed. Professor Dixon explained that such a proposal was a 'middle path' between

⁸⁹ Mr Danny Gilbert, Managing Partner, Gilbert + Tobin, *Committee Hansard*, Sydney, 4 July 2018, p. 63.

⁹⁰ Dr Gabrielle Appleby, *Committee Hansard*, Perth, 6 July 2018, pp. 10-11.

⁹¹ Referendum Council, *Final Report of the Referendum Council*, 2017, p. 30.

⁹² For example: Professor Gregory Craven AO, Vice-Chancellor and President, Australian Catholic University, *Committee Hansard*, Sydney, 4 July 2018, p. 7.

⁹³ Dr Damien Freeman, PM Glynn Institute, Australian Catholic University, *Committee Hansard*, Canberra, 18 June 2018, pp. 8-9.

The Voice being purely advisory and The Voice having a veto over the Parliament.⁹⁴

- 3.108 In advice provided to Dr Galarrwuy Yunupingu AM and attached to Dr Yunupingu's submission to the Committee, Mr David Jackson QC noted that consideration should be given to the practicalities of providing advice to the Parliament:

Parliament ... has its own structures, procedures, rule, and so on. Matters in Parliament also do not necessarily arise in circumstances where it is possible for there to be lengthy consideration by bodies outside Parliament. Amendments to legislation in the course of passage through the Parliament afford an example.⁹⁵

- 3.109 Similarly, Mrs Finlay told the Committee that there is sometimes a need for the Parliament to deal with matters urgently.⁹⁶

- 3.110 Mrs Finlay submitted that for The Voice to be effective, its input would need to be sought before legislation is brought into the Parliament. As a counterexample, Mrs Finlay referred to the Parliamentary Joint Committee on Human Rights, which:

... gets to consider legislation once it has been laid before Parliament, but by the time that happens, there's often very little appetite for amendments to be put ...⁹⁷

- 3.111 A number of other witnesses suggested in similar terms that advice that was sought and provided earlier in the legislative process would be more likely to be effective.⁹⁸ However, some other witnesses emphasised that the idea of a Voice to the Parliament should be retained, given the constitutional significance of the Parliament and its role in enacting legislation, and so that the Parliament can acknowledge advice received.

⁹⁴ Professor Rosalind Dixon, *Committee Hansard*, Sydney, 4 July 2018, p. 16.

⁹⁵ Dr Galarrwuy Yunupingu AM, *Submission 329*, Attachment A, pp. 6-7.

⁹⁶ Mrs Lorraine Finlay, *Committee Hansard*, Perth, 6 July 2018, p. 57. See also: The Hon. Amanda Vanstone, *Committee Hansard*, Adelaide, 5 July 2018, p. 55.

⁹⁷ Mrs Lorraine Finlay, *Committee Hansard*, Perth, 6 July 2018, p. 57. See also: Professor Rosalind Dixon, *Committee Hansard*, Sydney, 4 July 2018, p. 18.

⁹⁸ Professor Rosalind Dixon, *Committee Hansard*, Sydney, 4 July 2018, pp. 18-19; Professor Adrienne Stone, Director, Centre for Comparative Constitutional Studies, *Committee Hansard*, Perth, 6 July 2018, p. 41; Professor Cheryl Saunders AO, Member, Centre for Comparative Constitutional Studies, *Committee Hansard*, Perth, 6 July 2018, p. 41.

3.112 Dr Freeman submitted that over time, a set of conventions would evolve about how The Voice interacted with executive government.⁹⁹ Similarly, Professor Twomey suggested that there would be ‘good sense’ in the bureaucracy consulting with the body prior to introducing legislation into the Parliament. Professor Twomey explained:

... behind the form there will be a practice that one would expect goes back to a much earlier stage in negotiation.¹⁰⁰

3.113 Representing the Centre for Comparative Constitutional Studies, Professor Adrienne Stone and Professor Cheryl Saunders agreed that the advice should be sought at the policy development stage.¹⁰¹ Professor Saunders explained:

For example, when a proposal goes forward to cabinet seeking permission to introduce legislation there could be a ... check list to get a sense of whether the views of the Indigenous body had been received and to get a sense of what they said, so that the cabinet process can be informed. In my experience, taking those sorts of measures ensures that really quite early on in the process when matters are in the public sector ... there would be some natural consciousness that there may be another source of advice ... that needs to be obtained.¹⁰²

3.114 Professor Dixon suggested a two-stage process whereby advice would be provided to the executive in the preparation of draft legislation and then again after the legislation is introduced into the Parliament. However, Professor Dixon submitted that any duty to give reasons would only be engaged at the second stage, whereas the first stage would be more flexible, informal, and confidential.¹⁰³

3.115 Previous bodies did not have such a close relationship with the Cabinet. Ms Patricia Turner, who was a former Chief Executive Officer of ATSIC, noted that while ATSIC met regularly with the Minister:

⁹⁹ Dr Damien Freeman, PM Glynn Institute, Australian Catholic University, *Committee Hansard*, Canberra, 18 June 2018, pp. 8-9.

¹⁰⁰ Professor Anne Twomey, *Committee Hansard*, Sydney, 4 July 2018, p. 47.

¹⁰¹ Professor Adrienne Stone, Director, Centre for Comparative Constitutional Studies, *Committee Hansard*, Perth, 6 July 2018, p. 41; Professor Cheryl Saunders AO, Member, Centre for Comparative Constitutional Studies, *Committee Hansard*, Perth, 6 July 2018, p. 41.

¹⁰² Professor Cheryl Saunders AO, Member, Centre for Comparative Constitutional Studies, *Committee Hansard*, Perth, 6 July 2018, p. 41.

¹⁰³ Professor Rosalind Dixon, *Committee Hansard*, Sydney, 4 July 2018, pp. 17-20.

In all of my four years we got one meeting with the Cabinet; whereas I think there should have been more – an event every year at least.¹⁰⁴

Scope of advice

- 3.116 The Committee received evidence in relation to the intended scope of matters on which The Voice is to provide advice.
- 3.117 As noted above, in their submission, the Technical Advisers stated that the Dialogues agreed that the voice should provide an Aboriginal and Torres Strait Islander perspective whenever federal laws were passed that affected Aboriginal and Torres Strait Islander peoples. However, the submission also noted that ‘the exact breadth of this mandate was not decided upon’.¹⁰⁵
- 3.118 The submission also refers to an understanding in the dialogues that Aboriginal and Torres Strait Islander voices should be heard whenever the Parliament exercised its powers to enact laws under section 51(xxvi) and section 122 of the Constitution.¹⁰⁶
- 3.119 Referring to the findings of the Referendum Council, Dr Shireen Morris submitted that the scope of advice provided by the body should include ‘laws and policies directed at, or significantly or especially impacting, Indigenous people’.¹⁰⁷
- 3.120 Professor de Villiers suggested that the body should give advice ‘with regard to matters that affect Aboriginal laws, customs, and traditions’. However, Professor de Villiers went on to say that what is within the scope of advice would determine how seriously the Parliament could be expected to consider the advice:

The more narrow the objectives, the easier it would be to know when [The Voice] is consulted. The wider the objectives ... the more reluctant parliament would be to consult.¹⁰⁸

¹⁰⁴ Ms Patricia Turner, Chief Executive Office, National Aboriginal Community Controlled Health Organisation, *Committee Hansard*, Canberra, 25 June 2018, p. 8.

¹⁰⁵ Technical Advisers: Regional Dialogues and Uluru First Nations Constitutional Convention, *Submission 206*, pp. 7-8.

¹⁰⁶ Technical Advisers: Regional Dialogues and Uluru First Nations Constitutional Convention, *Submission 206*, p. 7.

¹⁰⁷ Dr Shireen Morris, *Submission 195*, pp. 17-18.

¹⁰⁸ Professor Bertus de Villiers, Adjunct Professor, Curtin Law School, *Committee Hansard*, Perth, 6 July 2018, pp. 3-6.

- 3.121 Professor de Villiers recommended three categories of advice: advice that must be sought; advice that may be sought; and advice that may be self-initiated.¹⁰⁹
- 3.122 Professor Dixon submitted that the body should have a mandatory jurisdiction, where the Parliament expressly relies on either section 51(xxvi) or section 122 as the basis for legislation, in which case the body should be provided an opportunity to advise the Parliament. Professor Dixon also submitted that the body should have a permissive or optional jurisdiction in all other matters, including matters pertaining to state legislation.¹¹⁰
- 3.123 Referring to a proposal for an advisory council submitted by Uphold & Recognise, Dr Freeman suggested that there would be an obligation to refer 'designated bills' to the council for consideration and advice. Dr Freeman explained that 'designated bills' would be those listed in a schedule to the Act establishing the council, and also any Act made under section 51(xxvi) or section 122, provided that the Act is directed to Aboriginal and Torres Strait Islander peoples. However, Dr Freeman also noted that the Council would have the discretion to provide advice in relation to other bills.¹¹¹
- 3.124 Professor Stone suggested that scope should open to definition by the body itself, and not restricted to matters on which the Parliament wishes to be advised. However, Professor Stone also suggested that stronger obligations in relation to consultation should apply in relation to the use of section 51(xxvi) and section 122.¹¹²
- 3.125 Similarly, Professor Saunders suggested that the body should have the power to provide advice on matters generally, and would therefore be able to provide advice on state matters without a formal process of providing advice to state bodies, although Professor Saunders did not rule out this possibility.¹¹³

¹⁰⁹ Professor Bertus de Villiers, *Submission 6: 1*, pp. 1-2; Professor Bertus de Villiers, Adjunct Professor, Curtin Law School, *Committee Hansard*, Perth, 6 July 2018, p. 7.

¹¹⁰ Professor Rosalind Dixon, *Committee Hansard*, Sydney, 4 July 2018, p. 16.

¹¹¹ Dr Damien Freeman, PM Glynn Institute, Australian Catholic University, *Committee Hansard*, Canberra, 18 June 2018, pp. 9-10. See also: Uphold & Recognise, *Submission 172*, Attachment 2, p. 12.

¹¹² Professor Adrienne Stone, Director, Centre for Comparative Constitutional Studies, *Committee Hansard*, Perth, 6 July 2018, p. 43.

¹¹³ Professor Cheryl Saunders AO, Member, Centre for Comparative Constitutional Studies, *Committee Hansard*, Perth, 6 July 2018, p. 39.

- 3.126 In a submission to the inquiry, the Centre for Comparative Constitutional Studies argued that the body's voice should be 'proactive, not merely reactive', and that the body's ability to raise issues and provide opinions on any matter within its remit should be guaranteed.¹¹⁴

Establishment and implementation

- 3.127 The Committee heard a range of views on how a Voice should be established and implemented. Evidence addressed constitutional and legislative mechanisms of establishing The Voice, the process for further consultation in relation these matters, and the need for any transitional arrangements in implementing The Voice.

Constitutional versus statutory enshrinement

- 3.128 The *Uluru Statement from the Heart* called for the 'establishment of a First Nations Voice enshrined in the Constitution'.¹¹⁵ However, the Committee received evidence about the benefits and challenges of this approach compared with enshrining a First Nations Voice in Commonwealth statute.
- 3.129 Many stakeholders argued that enshrining The Voice in the Constitution would afford an important form of recognition to Aboriginal and Torres Strait Islander peoples and would contribute to a more unified and reconciled nation.
- 3.130 Dr Harris suggested that the special recognition of Indigenous Australians in the Constitution is justified by, and may go some way towards, addressing the fact that 'of all the ethnic groups who collectively comprise the population of Australia, only the Indigenous inhabitants were subject to conquest and were therefore involuntary participants in the union of cultures'.¹¹⁶

¹¹⁴ Centre for Comparative Constitutional Studies, *Submission 289*, p. 12. See also: Mr Michael Dillon, *Committee Hansard*, Canberra, 18 June 2018, p. 14.

¹¹⁵ *Uluru Statement from the Heart*, 2017, <https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart_0.PDF> viewed Tuesday, 10 July 2018.

¹¹⁶ Dr Bede Harris, *Submission 81*, p. 2.

- 3.131 Mr Keith Thomas, Chief Executive Officer of the South Australian Native Title Services, submitted that enshrining The Voice in the Constitution offered important recognition of the ‘unique’ status of Aboriginal and Torres Strait Islander peoples as Australia’s first people:

The First Nations Voice needs to be established in the Constitution first and foremost.¹¹⁷

- 3.132 The Australian Bar Association echoed this sentiment, also noting that Constitutional enshrinement would ‘remedy the omission of First Nations peoples from the Constitution’.¹¹⁸

- 3.133 The Committee also heard views which suggested that negative consequences could arise.

- 3.134 For example, Mrs Finlay expressed concern that the enshrinement of The Voice in the Australian Constitution could be divisive, suggesting that ‘establishing a separate constitutional “voice” for one particular group of Australians based upon race... undermines the foundational concept of equality before the law’. She also expressed concerns that the establishment of a Voice may entrench the marginalisation of Aboriginal and Torres Strait Islander peoples:

Establishing a separate *constitutional* voice enshrines a permanent signal that Indigenous Australians are to be considered separately from other Australians, and are expected only to engage with policy and politics in a prescribed and limited way.¹¹⁹

- 3.135 Mrs Finlay asserted that, ‘at the very least’, these risks support the case for establishing a Voice through legislation in the first instance.¹²⁰

- 3.136 By contrast, Mr Sidoti submitted that a constitutionally enshrined Voice would complement existing methods through which Aboriginal and Torres Strait Islander peoples can participate in the political process:

[A First Nations Voice] is one part of the overall democratic architecture. It does not preclude Indigenous members of parliament, through party arrangements or others. It’s not an either/or situation. It does not preclude

¹¹⁷ Mr Keith Thomas, Chief Executive Officer, South Australian Native Title Services, *Committee Hansard*, Adelaide, 5 July 2018, p. 8

¹¹⁸ Australian Bar Association, *Submission 171*, p. 2.

¹¹⁹ Mrs Lorraine Finlay, *Submission 94*, pp. 4-5.

¹²⁰ Mrs Lorraine Finlay, *Submission 94*, p. 6.

other developments at state level. It is not, and should not be, the sole conduit for Aboriginal and Torres Strait Islander people to be involved in their communities and in decision-making...¹²¹

3.137 The Committee also considered suggestions that enshrining a Voice in the Constitution could provide stability and longevity that had not been achieved by previous statutory representative bodies for Aboriginal and Torres Strait Islander peoples, such as ATSIC.

3.138 Stakeholders including the Cape York Institute and National Congress expressed the view that providing for The Voice in the Constitution would create ‘a permanent, constitutional guarantee’ for its existence. They contrasted this approach to statutory enshrinement, which they suggested left The Voice vulnerable to being ‘repealed, leaving Indigenous people voiceless and disempowered in their affairs’.¹²²

3.139 However, the level of protection afforded by enshrinement in the Constitution was debated by witnesses. Mr Phillip Boulten SC, Chair of the Australian Bar Association’s Indigenous Issues Committee, claimed that any move to abolish a constitutionally enshrined Voice, ‘would be unconstitutional’, comparing such a move to ‘abolishing the High Court’.¹²³

3.140 A contrasting view was expressed by the Centre for Comparative Constitutional Studies at the University of Melbourne, highlighting the example of the Inter-State Commission, which, despite inclusion in the Constitution, has operated sporadically:

Section 101 of the Constitution mandates the existence of an Inter-State Commission with adjudicatory powers. Despite this constitutional imperative, no Inter-State Commission has existed for most of Australia’s history. The key lesson from the Inter-State Commission is that the existence of a Constitution does not always entail the existence of the institutions mandated by it. Similarly, constitutional clauses do not always guarantee that Parliament will follow the rules contained within them. Rather, constitutional institutions and the authority of constitutional provisions all depend upon political will.¹²⁴

¹²¹ Mr Eric Sidoti, *Committee Hansard*, Sydney, 4 July 2018, p. 29.

¹²² Cape York Institute, *Submission 244*, p. 9; National Congress of Australia’s First Peoples, *Submission 292*, p. 7.

¹²³ Mr Phillip Boulten SC, Chair, Indigenous Issues Committee, Australian Bar Association, *Committee Hansard*, Sydney, 4 July 2018, p. 61.

¹²⁴ Centre for Comparative Constitutional Studies, *Submission 189*, p. 14.

3.141 However, the Centre also acknowledged that the comparison has limited value, as the Inter-State Commission was opposed by the Commonwealth and the states, and there was no constituency to agitate on its behalf.¹²⁵ And the High Court effectively struck down the Commission's primary function in 1915.¹²⁶

3.142 This was contrasted with the proposed Voice, which will have been endorsed by the majority of Australians in the majority of states at referendum, and will be supported by a constituency of Aboriginal and Torres Strait Islander peoples, providing a powerful mandate for its maintenance:

It would be unthinkable that Parliament would ignore this powerful political, moral and constitutional imperative, as reflected in the constitutional amendment. Yet should this occur, Indigenous Australians would demand the constitutional imperative be respected and the institution operate.¹²⁷

3.143 There was general consensus among stakeholders who supported the constitutional enshrinement of The Voice that any referendum question put to the Australian people should be as simple as possible.

3.144 Some witnesses supported a hybrid approach involving the establishment of The Voice via legislation first with a referendum to be held when it is accepted by the Australian public and a when a successful outcome at the referendum is more assured.

3.145 The New South Wales Aboriginal Land Council, the largest elected Aboriginal organisation in the country, noted that, while it 'has been on the record and clear about the need to ensure that a voice to the federal Parliament is enshrined in the Constitution', it accepts that a 'stepping stone approach' to building support for the proposal may be required:

It needs to start in that way, building into greater momentum and understanding within the Australian community about what [a First Nations Voice] does and doesn't mean for them and for us.¹²⁸

¹²⁵ Centre for Comparative Constitutional Studies, *Submission 189*, p. 15.

¹²⁶ *New South Wales v Commonwealth* (1915) 20 CLR 54 ('Wheat Case').

¹²⁷ Centre for Comparative Constitutional Studies, *Submission 189*, p. 15.

¹²⁸ Mr James Christian Chief Executive Officer, New South Wales Aboriginal Land Council, *Committee Hansard*, Sydney, 4 July 2018, pp. 36-37.

- 3.146 Similarly, National Congress expressed support for the establishment of a statutory Voice on the proviso that constitutional enshrinement is pursued in the longer term:

National Congress stresses, however, that even if a legislative approach is initially taken, the Voice should be constitutionally enshrined via a referendum.¹²⁹

- 3.147 Mr Henry Burmester AO QC also supported the establishment of a statutory enshrined First Nations Voice as a first step. Mr Burmester asserted that, ‘only then will it be possible to say whether the interests of Indigenous Australians will be able to be properly recognised in the Constitution by a Voice to Parliament’.¹³⁰

Constitutional provisions

- 3.148 There was general consensus amongst stakeholders that any constitutional provision for a Voice should be succinct and defer detail on the structure and responsibilities of any resultant representative body to the Australian Parliament. The Committee heard that such an approach was in keeping with Australia’s constitutional tradition and would safeguard the flexibility of The Voice to adapt to changing circumstances.

- 3.149 The Centre for Comparative Constitutional Studies asserted that there is national and international precedent for the design of a constitutional body to be deferred to parliamentary statute as it allows for greater institutional flexibility:

This reflects the understanding that it is not appropriate for all institutional details to be set out in a Constitution. Such details need to be flexible so they can evolve as needed. This flexibility is provided by legislation.¹³¹

- 3.150 Professor Dixon characterised ‘deferral in constitutional design’ as ‘best practice’, citing the establishment of the High Court of Australia as a prominent example.¹³² Professor Dixon noted that, ‘the Constitution uses the phrase “until the Parliament otherwise provides” on at least 18 occasions’.¹³³

¹²⁹ National Congress of Australia’s First Peoples, *Submission 292*, p. 7.

¹³⁰ Mr Henry Burmester AO QC, *Submission 7*, p. 4.

¹³¹ Centre for Comparative Constitutional Studies, *Submission 289*, p. 13.

¹³² Professor Rosalind Dixon, *Committee Hansard*, Sydney, 4 July 2018, p. 17.

¹³³ Professor Rosalind Dixon, *Submission 316*, Attachment 1, p. 7.

- 3.151 The Australian Bar Association suggested that the flexibility of The Voice could be further assured by avoiding ‘overly prescriptive language’ in its founding constitutional provision:

If the wording of the [constitutional] amendment is broad, then this will provide flexibility well into the future for Government and First Nations peoples in determining what sort of body the Voice should be.¹³⁴

- 3.152 Associate Professor Stubbs suggested that even a reference to the Parliament may be too prescriptive. He recommended that that any constitutional provision employ broader language:

... describing it as a voice to the parliament and a body that advises the parliament... could actually end up nobbling it. ... I would much rather have ‘to represent Aboriginal and Torres Strait Islander views’ or ‘to represent First Nations groups to the Australian people’ —something that is not going to be at any risk of narrowing the functions of the voice.¹³⁵

Justiciability

- 3.153 The question of whether or not any constitutional provision establishing The Voice should be justiciable was also raised by stakeholders. Justiciability refers to the potential for the judiciary to be called upon to interpret the requirements of a constitutional provision. For example, the constitutional provisions establishing the Parliament provide for its non-justiciability, meaning that the Parliament is ‘immune to judicial review in respect of its internal procedures and choices to exercise its powers’.¹³⁶
- 3.154 The Cape York Institute submitted that non-justiciability is desirable. It suggested that non-justiciability would recognise ‘the primacy of the political process and the subsidiary role of the judiciary’ and would avoid uncertainty arising from the prospect of the judiciary being called upon to interpret whether the operation of The Voice fulfils the requirements of its constitutional provision.
- 3.155 The Centre for Comparative Constitutional Studies suggested that a non-justiciable constitutional provision for The Voice would align with the

¹³⁴ Australian Bar Association, *Submission 171*, p. 10.

¹³⁵ Associate Professor Matthew Stubbs, Adelaide Law School, University of Adelaide, *Committee Hansard*, Adelaide, 5 July 2018, p. 26.

¹³⁶ Cape York Institute, *Submission 244*, p. 21.

provisions made for the Senate, the House of Representatives, and the High Court of Australia.¹³⁷

- 3.156 Dr Appleby addressed the question of justiciability in her submission to the former Joint Select Committee. In that submission, Dr Appleby distinguished between the justiciability of an Aboriginal and Torres Strait Islander representative body's structure and its operation.¹³⁸
- 3.157 Dr Appleby suggested that drafting a constitutional provision which made the functions of an Aboriginal and Torres Strait Islander representative body non-justiciable may not be desirable. She cautioned that if any disagreement arose between the representative body and the Parliament regarding its functions as provided for in its constitutional provision, then, as a purely advisory body, the body would be in a poor negotiating position to seek compliance with its constitutional provision.¹³⁹
- 3.158 Dr Appleby also contended that it may be beneficial to draft a constitutional provision which ensures that the structure of the Aboriginal and Torres Strait Islander representative body is justiciable, as this would 'provide minimum guarantees for the status and independence of the body' and would increase the likelihood that it could operate effectively.¹⁴⁰
- 3.159 Dr Appleby also noted that it would be difficult to draft a constitutional provision which ensured the structure of an Aboriginal and Torres Strait Islander representative body was non-justiciable without including a non-justiciability clause.¹⁴¹
- 3.160 In discussing possible constitutional provisions for a Voice, many stakeholders referred favourably to an option drafted by Professor Twomey:
- 60A

(1) There shall be an Aboriginal and Torres Strait Islander body, to be called the [insert appropriate name, perhaps drawn from an Aboriginal or Torres

¹³⁷ Centre for Comparative Constitutional Studies, *Submission 289*, p. 14.

¹³⁸ Dr Gabrielle Appleby, Associate Professor, UNSW Law, *Submission 132 to the 2015 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples*, pp. 3-4.

¹³⁹ Dr Gabrielle Appleby, Associate Professor, UNSW Law, *Submission 132 to the 2015 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples*, pp. 3-4.

¹⁴⁰ Dr Gabrielle Appleby, Associate Professor, UNSW Law, *Submission 132 to the 2015 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples*, pp. 3-4.

¹⁴¹ Dr Gabrielle Appleby, Associate Professor, UNSW Law, *Submission 132 to the 2015 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples*, pp. 3-4.

Strait Islander language], which shall have the function of providing advice to the Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander peoples.

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

(3) The Prime Minister [or the Speaker/President of the Senate] shall cause a copy of the [body'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 [body] in debating proposed laws with respect to Aboriginal and Torres Strait Islander peoples.¹⁴²

3.161 In discussing this draft provision with the Committee, Professor Twomey noted that, while it does not include a non-justiciability clause, it does refer to 'debating proposed laws' and that such language has been established in case law to indicate that the body concerned has non-justiciable functions, on the basis that it refers to the inner workings of the Australian Parliament:

... those words are there to indicate that this is an internal parliamentary matter that is to be dealt with through parliament and Indigenous people and the executive government but is not one to be dealt with in the courts.¹⁴³

3.162 A number of stakeholders canvassed possible amendments to Professor Twomey's draft provision.

3.163 Uphold & Recognise proposed a nearly identical provision with 'Aboriginal and Torres Strait Islander affairs' substituted for 'Aboriginal and Torres Strait Islander peoples' in section (1).¹⁴⁴

3.164 Mr Gregory McIntyre SC, a barrister who was involved in the Mabo case, suggested removing the name of the Aboriginal and Torres Strait Islander representative body from the provision and establishing it through legislation. He noted that, as it is currently drafted, the provision does not

¹⁴² Professor Anne Twomey, *Establishing an Indigenous Advisory Body*, in Damien Freeman and Shireen Morris, *The Forgotten People: Liberal and Conservative Approaches to Recognising Indigenous Peoples*, Melbourne University Press, 2016, pp. 155-163.

¹⁴³ Professor Anne Twomey, *Committee Hansard*, Sydney, 4 July 2018, p. 46.

¹⁴⁴ Uphold & Recognise, *Submission 172*, Attachment 2, p. 32.

safeguard the longevity of The Voice, also stating that he was not aware of any other draft provision that included such a safeguard.¹⁴⁵

- 3.165 The Australian Bar Association and the Cape York Institute both raised the possibility of removing sections (3) and (4), which prescribe how the body provides advice and how the Parliament should consider that advice.¹⁴⁶ However, Mr Boulten emphasised the need to retain language requiring Parliament to establish the body:

To give any real meaning to the expressions that have come from the referendum council on this issue, there would need to be some prescription... 'There should be a voice' or 'There shall be a voice' ought to be the sorts of words that appear in the terms of the Constitution.¹⁴⁷

- 3.166 An alternative provision omitting the procedure for the tabling and consideration of advice was outlined by the Cape York Institute:

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].¹⁴⁸

- 3.167 A simpler provision omitting the name of the body was also outlined:

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.¹⁴⁹

- 3.168 Additional options for a constitutional provision to establish Aboriginal and Torres Strait Islander peoples representation to Parliament were presented

¹⁴⁵ Mr Gregory McIntyre SC, *Committee Hansard*, Perth, 6 July 2018, pp. 23-24.

¹⁴⁶ Mr Simeon Beckett, Member, Indigenous Issues Committee, Australian Bar Association, *Committee Hansard*, Sydney, 4 July 2018, p. 54; Cape York Institute, *Submission 244*, p. 24.

¹⁴⁷ Mr Phillip Boulten SC, Chair, Indigenous Issues Committee, Australian Bar Association, *Committee Hansard*, Sydney, 4 July 2018, p. 56.

¹⁴⁸ Cape York Institute, *Submission 244*, p. 24.

¹⁴⁹ Cape York Institute, *Submission 244*, p. 25.

by the Cape York Institute. The Institute adapted an early provision drafted by Mr Warren Mundine, which provides for the recognition of local voices, as follows:

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 Parliament and the Executive on proposed laws and other issues relating to these matters, under procedures to be determined by Parliament.¹⁵⁰

3.169 The Cape York Institute also outlined another version, which does not define the responsibilities of the local bodies:

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.¹⁵¹

3.170 A similar provision was suggested by Uphold & Recognise:

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.¹⁵²

3.171 The Committee also heard about the importance of capturing the ‘intent’ of the *Uluru Statement from the Heart* in any constitutional provision for a First Nations Voice. For example, Mr Sidoti suggested that the statement offers a ‘sense of the spirit of this land’ and cautioned against ‘unnecessary legalese’.¹⁵³

¹⁵⁰ Cape York Institute, *Submission 244*, p. 27.

¹⁵¹ Cape York Institute, *Submission 244*, pp. 27-28.

¹⁵² Uphold & Recognise, *Submission 172*, Attachment 2, p. 14.

¹⁵³ Mr Eric Sidoti, *Committee Hansard*, Sydney, 4 July 2018, p. 25.

Timing of further consultation, legislation, and a referendum

- 3.172 As noted in the previous section, stakeholders emphasised the importance of consulting Aboriginal and Torres Strait Islander peoples in relation to the design and implementation of a First Nations Voice.
- 3.173 The Technical Advisers said that discussion at the dialogues highlighted that a Voice ‘must be designed through a process that is led by Aboriginal and Torres Strait Islander people’.¹⁵⁴
- 3.174 The New South Wales Aboriginal Land Council submitted that the input of Aboriginal and Torres Strait Islander peoples into a Voice is essential to its legitimacy.¹⁵⁵ The Australian Bar Association asserted that ‘the nature and functions of a First Nations Voice are best developed by First Nations peoples in negotiation with the government’.¹⁵⁶ Dr Shayne Bellingham, a descendent of the Wotjobaluk people in Victoria said:
- The Voice to Parliament should be designed through a ‘bottom-up’ process, just like the Uluru Statement was. This should be through [a] series of Regional Dialogues to seek Aboriginal and Torres Strait Islander people input into and feedback on draft legislative proposals.¹⁵⁷
- 3.175 However, there was debate among stakeholders regarding whether the design of The Voice should take place before or after a referendum.¹⁵⁸
- 3.176 Mr Jackson outlined two possible approaches to implementing a Voice in advice provided to Dr Yunupingu.
- 3.177 The first approach involves drafting a broad constitutional provision to enshrine an undefined Voice, proceeding to a referendum, and then, should the referendum be successful, consulting with Aboriginal and Torres Strait Islander peoples to design the exact structure, responsibilities and powers of The Voice.¹⁵⁹

¹⁵⁴ Technical Advisers: Regional Dialogues and Uluru First Nations Constitutional Convention, *Submission 206*, p. 7.

¹⁵⁵ Mr Charles Lynch, Councillor, Northern Region, New South Wales Aboriginal Land Council, *Committee Hansard*, Sydney, 4 July 2018, pp. 33, 37.

¹⁵⁶ Australian Bar Association, *Submission 171*, p. 13.

¹⁵⁷ Dr Shayne Bellingham, *Submission 212*, p. 2.

¹⁵⁸ Of the 329 submissions authorised at 17 July 2018 only 10 submissions said that a referendum should take place before any supporting legislation is enacted.

¹⁵⁹ Dr Galarrwuy Yunupingu AM, *Submission 329*, Attachment A, pp. 7-8.

3.178 The second option contemplates extensive consultation with Aboriginal and Torres Strait Islander peoples to determine the exact structure, responsibilities, and functions of a Voice, before drafting an appropriate constitutional provision and proceeding to a referendum.¹⁶⁰ Mr Thomas Mayor of the Maritime Union of Australia supported this approach:

I would hope that after November we enter into a very clear and stepped-out process of consultations with first nations and that there is the development of a question pretty much immediately after the recommendation and then embarking on a campaign that may be 12 months perhaps into 2020 for a vote.¹⁶¹

3.179 Reflecting on these two approaches, Mr Jackson concluded that both are flawed. He suggested that success at a referendum may be more difficult to achieve if information about the structure and functions of The Voice is not available to Australian voters. However, he also noted that the alternative approach of clarifying these details through consultation before a referendum could delay recognition considerably. Mr Jackson wrote:

To put it shortly I think that the First Amend the Constitution approach goes too far too quickly, but the Work Out the Detail First Approach will take far too long.¹⁶²

3.180 Professor Twomey also observed that both approaches present challenges to achieve a successful outcome at a referendum:

On the one hand, if you put up the details so that people know precisely what they're voting for, the difficulty then is that people will decide on the basis of one tiny thing in the detail that they don't like... however, if you don't put the detail up in advance then you have the conspiracy theories—that this is all a Trojan horse for something else...¹⁶³

3.181 Professor Twomey suggested that there is merit in preparing a draft proposal for a Voice prior to a referendum to provide some indication of the Voice's possible form, but suggested that it would be difficult to outline its exact form in advance of a referendum.¹⁶⁴

¹⁶⁰ Dr Galarrwuy Yunupingu AM, *Submission 329*, Attachment A, pp. 9-10.

¹⁶¹ Mr Thomas Mayor, Maritime Union of Australia, *Committee Hansard*, Melbourne, 18 April 2018, p. 4

¹⁶² Dr Galarrwuy Yunupingu AM, *Submission 329*, Attachment A, p. 10.

¹⁶³ Professor Anne Twomey, *Committee Hansard*, Sydney, 4 July 2018, p. 52.

¹⁶⁴ Professor Anne Twomey, *Committee Hansard*, Sydney, 4 July 2018, pp. 45, 49.

- 3.182 Professor Dixon also supported the clear definition of the core details of a Voice proposal before going to a referendum.¹⁶⁵
- 3.183 Mr Jackson advised that the best approach involves determining the core characteristics of a Voice and proceeding to a referendum on the basis that:
- the Australian Government will appoint a small interim Voice (in consultation with Aboriginal and Torres Strait Islander leaders) consisting of no more than five members, for a prescribed period of no more than five years;
 - consultation with Aboriginal and Torres Strait Islander peoples to finalise the design of a permanent Voice will conclude whilst the interim Voice is in operation; and
 - a permanent Voice will be legislated following the conclusion of the consultation.¹⁶⁶
- 3.184 In making this recommendation, Mr Jackson noted that an interim Voice could recommend arrangements for transitioning to the permanent body and may influence its final configuration.¹⁶⁷
- 3.185 The Cape York Institute and Uphold & Recognise both suggested that it may be necessary to appoint a body to oversee the creation of the local component of The Voice. The organisations agreed that Aboriginal and Torres Strait Islander communities should determine how their representatives are elected to speak on their behalf, but suggested an overseeing body should be appointed.
- 3.186 Uphold & Recognise recommended that the body be responsible for determining the jurisdiction for each local body and certifying the legitimacy of organisations nominated by communities to represent these regions. The Cape York Institute suggested that such a body could mediate any disputes that arose.¹⁶⁸
- 3.187 As noted earlier in the report, the possibility of legislating for a Voice and testing its operation before proceeding to a referendum was also canvassed. Mrs Finlay argued that proceeding with a statutory approach would

¹⁶⁵ Professor Rosalind Dixon, *Committee Hansard*, 4 July 2018, p. 16.

¹⁶⁶ Dr Galarrwuy Yunupingu AM, *Submission 329*, Attachment B, p. 6.

¹⁶⁷ Dr Galarrwuy Yunupingu AM, *Submission 329*, Attachment B, p. 6.

¹⁶⁸ Uphold & Recognise, *Submission 172*, Attachment 2, p. 10; Dr Damien Freeman, PM Glynn Institute, Australian Catholic University, *Committee Hansard*, Canberra, 18 June 2018, pp. 7-8; Cape York Institute, *Submission 244*, pp. 33-34.

‘provide an opportunity to establish mechanisms, see how they work and make whatever amendments are necessary in the parliamentary context’ with the possibility of constitutional entrenchment ‘down the track’. She argued that testing and refining the concept through legislation would increase the likelihood of a successful referendum as the merit of The Voice will have been demonstrated to Australian voters.¹⁶⁹

3.188 However, Professor Reilly suggested that a two-step process is ‘unnecessary’:

... there have been three iterations of an advisory body already—Whitlam’s National Aboriginal Consultative Committee, Fraser’s National Aboriginal Conference and Hawke’s Aboriginal and Torres Strait Islander Commission—along with the national Indigenous congress. So we have plenty of knowledge on how a body might be set up.¹⁷⁰

3.189 Moreover, the Hon. Kyam Maher MLC, Shadow Minister for Aboriginal Affairs in South Australia, argued that momentum for constitutionalising a First Nation Voice could be wasted if The Voice is legislated for in the first instance:

Once you take half the step, it’s very easy not to take the full step. There’s a bit of incentive to say, ‘It’s working okay, so let’s not take that next step to constitutionally enshrine it’.¹⁷¹

3.190 Mr Sidoti observed that the key to the success of The Voice is its ability to generate a sense of hope in the Aboriginal and Torres Strait Islander community in relation to their engagement with the Australian Government. He warned that legislating for The Voice, even with the intention of moving to constitutional enshrinement in the long term, could endanger that goodwill by fostering scepticism:

The perceived lack of inactivity may be seen as a diversionary tactic, a stalling tactic. It may fail to deliver, and it leaves the door open to scepticism. The one thing that’s critical in these debates and the decisions we make is that we generate... a sense of hope, and the constitutional change is the key...¹⁷²

¹⁶⁹ Mrs Lorraine Finlay, *Committee Hansard*, Perth, 6 July 2018, p. 55.

¹⁷⁰ Professor Alexander Reilly, Director, Public Law and Policy Research Unit, University of Adelaide, *Committee Hansard*, 5 July 2018, p. 20.

¹⁷¹ The Hon. Kyam Maher MLC, Shadow Minister for Aboriginal Affairs, South Australian Parliament, *Committee Hansard*, Adelaide, 5 July 2018, p. 6.

¹⁷² Mr Eric Sidoti, *Committee Hansard*, 4 July 2018, p. 28.

4. Examples of advisory structures

- 4.1 As outlined in the previous chapter, the Committee received a wide range of evidence in relation to the design of an institutional structure to give effect to a First Nations Voice.
- 4.2 However, the Committee also received some evidence in relation to past and current advisory structures, including structures specifically intended to represent the views of Aboriginal and Torres Strait Islander peoples at a national level. This chapter outlines this evidence, noting in particular evidence in relation to the strengths and weaknesses of these structures, with a view to further informing the design of The Voice.
- 4.3 A small number of indicative structures for The Voice were submitted to the Committee for consideration. This evidence is also outlined in this chapter.
- 4.4 As outlined in Chapter 2, several international jurisdictions have established structures to represent Indigenous people or provide an advisory role. Experiences in relation to the operation and effectiveness of these structures may also be useful in informing the design of The Voice.

Past models

- 4.5 The Committee is aware of the National Aboriginal Consultative Committee (NACC) and the National Aboriginal Conference (NAC), but received very little evidence about the structure of these bodies and their effectiveness.

National Aboriginal Consultative Committee, 1972-1977

- 4.6 The NACC was an advisory body made up of 41 nationally elected Aboriginal and Torres Strait Islander people who advised the Minister for Aboriginal Affairs on Aboriginal and Torres Strait Islander policy. In 1973 voter turnout was 78 per cent. The constitution developed by the NACC

gave it policy-making and administrative powers, contrary to the government's desire that it remain simply advisory. Ultimately, the NACC did not have the capacity to develop into an independent, agenda-setting policy organisation due to a lack of government support for such a function.

National Aboriginal Conference, 1977-1985

- 4.7 The NAC was created as a government consultative body comprising 35 full-time salaried members. The NAC had state and territory branches and a national executive of 10 members. The executive represented the state and territory branches and was chosen by them rather than being directly elected. An annual meeting of interested Indigenous constituents was held, to ensure that the elected representatives might be accountable to their constituents. None of the three tiers of the organisation were bound by any decisions of the others. The organisation was consultative in nature, without executive authority.

Aboriginal and Torres Strait Islander Commission, 1990-2005

- 4.8 Throughout the inquiry, the Committee heard about the strengths and weaknesses of the former Aboriginal and Torres Strait Islander Commission (ATSIC). ATSIC was established in 1990 and abolished in 2005.
- 4.9 The objects of the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) gave ATSIC the responsibility:
- to ensure maximum participation of Aboriginal persons and Torres Strait Islanders in the formulation and implementation of government policies that affect them;
 - to promote the development of self-management and self-sufficiency among Aboriginal persons and Torres Strait Islanders;
 - to further the economic, social and cultural development of Aboriginal persons and Torres Strait Islanders; and
 - to ensure co-ordination in the formulation and implementation of policies affecting Aboriginal persons and Torres Strait Islanders by the Commonwealth, State, Territory and local governments, without detracting from the responsibilities of State, Territory and local governments to provide services to their Aboriginal and Torres Strait Islander residents.¹

¹ *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth), s. 3.

- 4.10 ATSIC consisted of two parts: a representative arm and an administrative arm. However, the structure of ATSIC was altered several times throughout its history, and ATSIC's responsibilities changed over time as a result of functions being transferred to and from other agencies.
- 4.11 The original representative structure of ATSIC comprised 60 regional councils and a 20-member board consisting of 17 commissioners elected from within 17 geographical zones, plus a chairperson and two commissioners appointed by the Minister.²
- 4.12 Direct elections were held for regional council positions, followed by elections among the representatives for regional council chairs and zone commissioners.³
- 4.13 In 1993, the number of regional councils was reduced to 36. This change followed ATSIC's representation to government that it found the administration of 60 regional councils 'unwieldy'.⁴ Positions of both regional council chairs and commissioners were also made full-time and salaried.⁵
- 4.14 In 1994, the number of regional councils was reduced to 35 following the establishment of the Torres Strait Regional Authority.⁶
- 4.15 In 1999, the position of chairperson became elected (from among the elected commissioners) rather than appointed.⁷
- 4.16 Elections were conducted by the Australian Electoral Commission. Entitlement to nominate and vote was restricted to Aboriginal and Torres

² John Hannaford, Jackie Huggins, and Bob Collins, *In the Hands of the Regions - A New ATSIC: Report of the Review of the Aboriginal and Torres Strait Islander Commission*, November 2003, p. 18.

³ W. Sanders, J. Taylor, and K. Ross, *Participation and representation in ATSIC elections: a ten-year perspective*, Centre for Aboriginal Economic Policy Research, 2000, p. 1.

⁴ John Hannaford, Jackie Huggins, and Bob Collins, *In the Hands of the Regions - A New ATSIC: Report of the Review of the Aboriginal and Torres Strait Islander Commission*, November 2003, p. 19. See also: Mr Bill Gray AM, *Committee Hansard*, Canberra 18 June 2018, p. 16.

⁵ W. Sanders, J. Taylor, and K. Ross, *Participation and representation in ATSIC elections: a ten-year perspective*, Centre for Aboriginal Economic Policy Research, 2000, p. 2.

⁶ John Hannaford, Jackie Huggins, and Bob Collins, *In the Hands of the Regions - A New ATSIC: Report of the Review of the Aboriginal and Torres Strait Islander Commission*, November 2003, p. 18

⁷ W. Sanders, J. Taylor, and K. Ross, *Participation and representation in ATSIC elections: a ten-year perspective*, Centre for Aboriginal Economic Policy Research, 2000, p. 2.

Strait Islander people over the age of 18 years who were on the Commonwealth Electoral Roll, and voting was voluntary.⁸

- 4.17 The electoral system used was proportional representation with a single transferable vote.⁹
- 4.18 Throughout the ten years from 1990 to 1999, voter turnout in ATSIC elections varied between 20 and 25 per cent of the estimated voting-age population. In the 1999 election, 49 252 people voted across all regions.¹⁰
- 4.19 However, voter turnout as a percentage of voting age population varied widely among ATSIC regions. In the 1999 election, for example, turnout ranged from 73.7 per cent to 5.8 per cent. Remote areas in northern and central Australia in general reported higher turnout than southern metropolitan regions and more densely settled rural regions.¹¹
- 4.20 The administrative arm of ATSIC was comprised of Commonwealth public servants, headed by a Chief Executive Officer appointed by the relevant Minister. The administrative arm supported ATSIC's elected representatives to administer various programs.¹²
- 4.21 In 1992-93, the ATSIC budget was approximately \$800 million, accounting for approximately two-thirds of the Australian Government's expenditure on Indigenous-specific programs. In 2003-04, the budget was approximately \$1.3 billion, accounting for approximately half of this expenditure.¹³
- 4.22 The majority of the ATSIC budget was quarantined by the government for expenditure on particular programs. This included ATSIC's two largest programs, the Community Development Employment Program and the

⁸ W. Sanders, J. Taylor, and K. Ross, *Participation and representation in ATSIC elections: a ten-year perspective*, Centre for Aboriginal Economic Policy Research, 2000, p. 2.

⁹ W. Sanders, J. Taylor, and K. Ross, *Participation and representation in ATSIC elections: a ten-year perspective*, Centre for Aboriginal Economic Policy Research, 2000, p. 3.

¹⁰ W. Sanders, J. Taylor, and K. Ross, *Participation and representation in ATSIC elections: a ten-year perspective*, Centre for Aboriginal Economic Policy Research, 2000, pp. 5, 8.

¹¹ W. Sanders, J. Taylor, and K. Ross, *Participation and representation in ATSIC elections: a ten-year perspective*, Centre for Aboriginal Economic Policy Research, 2000, pp. 12-16.

¹² Information and Research Services Parliamentary Library, *Current Issues Brief No. 4 2004-05*, 'The end of ATSIC and the future administration of Indigenous Affairs', pp. 8-9.

¹³ John Hannaford, Jackie Huggins, and Bob Collins, *In the Hands of the Regions - A New ATSIC: Report of the Review of the Aboriginal and Torres Strait Islander Commission*, November 2003, p. 18; Information and Research Services Parliamentary Library, *Current Issues Brief No. 4 2004-05*, 'The end of ATSIC and the future administration of Indigenous Affairs', p. 9.

Community Housing and Infrastructure Program, which together accounted for two-thirds of the Commission's budget.¹⁴

- 4.23 The remaining budget was spent on programs for, among other things, the preservation and promotion of Indigenous culture and heritage and the advancement of Indigenous rights and equity.¹⁵
- 4.24 As at 30 June 2003, ATSIC reported having 1052 permanent staff, which included 501 Aboriginal and Torres Strait Islander staff.¹⁶
- 4.25 In 2003, a new executive agency, the Aboriginal and Torres Strait Islander Services, was established to administer ATSIC's programs and make decisions about grants and funding to Aboriginal and Torres Strait Islander organisations.¹⁷
- 4.26 An Australian Government review of ATSIC in 2003 found that an urgent structural change was needed.¹⁸ It recommended the overhaul of ATSIC's representative arm to strengthen the connection between local Indigenous communities and the national board and regional planning processes. However, after the review it was announced that ATSIC would be abolished.¹⁹
- 4.27 The Committee notes that the review considered a number of matters that have been raised in relation to proposals for The Voice, including:
 - input and access to policy development and the Cabinet;
 - achieving an interface with all levels of government;
 - international activity;

¹⁴ John Hannaford, Jackie Huggins, and Bob Collins, *In the Hands of the Regions - A New ATSIC: Report of the Review of the Aboriginal and Torres Strait Islander Commission*, November 2003, p. 18; Information and Research Services Parliamentary Library, *Current Issues Brief No. 4 2004-05*, 'The end of ATSIC and the future administration of Indigenous Affairs', p. 9.

¹⁵ Information and Research Services Parliamentary Library, *Current Issues Brief No. 4 2004-05*, 'The end of ATSIC and the future administration of Indigenous Affairs', p. 9.

¹⁶ Aboriginal and Torres Strait Islander Commission, *Annual Report 2002-03*, Appendix 5, p. 295.

¹⁷ Information and Research Services Parliamentary Library, *Current Issues Brief No. 4 2004-05*, 'The end of ATSIC and the future administration of Indigenous Affairs', p. 8; John Hannaford, Jackie Huggins, and Bob Collins, *In the Hands of the Regions - A New ATSIC: Report of the Review of the Aboriginal and Torres Strait Islander Commission*, November 2003.

¹⁸ Information and Research Services Parliamentary Library, *Current Issues Brief No. 4 2004-05*, 'The end of ATSIC and the future administration of Indigenous Affairs', p. 10.

¹⁹ Information and Research Services Parliamentary Library, *Current Issues Brief No. 4 2004-05*, 'The end of ATSIC and the future administration of Indigenous Affairs', p. 10.

- regional structure;
- incorporation of Aboriginal and Torres Strait Islander organisations;
- representation of women;
- electoral participation;
- accountability; and
- resourcing and cost.²⁰

4.28 The Committee heard views on the features of ATSIC that could inform the design of The Voice, including its relationship with Aboriginal and Torres Strait Islander communities and its regional boundaries.²¹

4.29 In response to questions from the Committee, Mr Bill Gray AM, a former Secretary of the Department of Aboriginal Affairs and former Chief Executive Officer of ATSIC, outlined the importance of connections between the national executive and regional councils:

I think the ... biggest lesson learned is that you need to retain your connection to, and your advice from, the regions. I think [ATSIC's] national executive got out ahead of the regional base of the organisation and there was a disconnect between the regional councils and then what was being stated on their behalf, if you like, by the national executive.²²

4.30 Mr Gray emphasised that it is up to the Parliament to ensure that it has a mature approach to the establishment and embedding of an organisation or institution, regardless of how the institution is structured.²³

4.31 As noted in the previous chapter, Professor Alexander Reilly suggested that a structure similar to ATSIC could be appropriate for The Voice, with 'regional councils elected by Indigenous communities themselves scaffolding up to a national body'.²⁴

²⁰ John Hannaford, Jackie Huggins, and Bob Collins, *In the Hands of the Regions - A New ATSIC: Report of the Review of the Aboriginal and Torres Strait Islander Commission*, November 2003.

²¹ Mr Des Jones, Chairperson, Murdi Paaki Regional Assembly, *Committee Hansard*, Dubbo, 2 July 2018, p. 21; Professor Peter Buckskin, Co-Chair, Reconciliation South Australia, *Committee Hansard*, Adelaide, 5 July 2018, p. 15; Ms Patricia Turner, Chief Executive Officer, National Aboriginal Community Controlled Health Organisation, *Committee Hansard*, Canberra, 25 June 2018, p. 6.

²² Mr Bill Gray AM, *Committee Hansard*, Canberra, 18 June 2018, p. 16.

²³ Mr Bill Gray AM, *Committee Hansard*, Canberra, 18 June 2018, p. 16.

²⁴ Professor Alexander Reilly, Director, Public Law and Policy Research Unit, University of Adelaide, *Committee Hansard*, Adelaide, 5 July 2018, p. 23.

4.32 The Hon. Fred Chaney AO, a former Minister for Aboriginal Affairs, noted that ATSIC brought together regional administration, which he suggested was ‘essential to closing the gap’ but could also feed up to a national voice.²⁵

4.33 However, Dr Peter Burdon suggested some structural problems affected ATSIC, including:

... the underrepresentation of women, which was around 30 per cent in representative roles, and the difficulty of gaining legitimacy in First Nations communities when the organisation and structures were based around Western political and administrative models.²⁶

4.34 The Hon. Kyam Maher MLC, Shadow Minister for Aboriginal Affairs in South Australia, told the Committee that the abolition of ATSIC ‘left a void in the space where all levels of government were able to easily and recognisably go to seek advice’. Mr Maher noted that following the abolition of ATSIC some states, including South Australia, established advisory councils.²⁷

4.35 The Hon. Amanda Vanstone, who was the federal Minister for Indigenous Affairs at the time of the abolition of ATSIC, in response to questions about ATSIC’s regional councils had this to say:

I didn’t have as negative a view of the ATSIC regional structures as of the central one, but if something’s going to go, you really have to make a clean job of it. In hindsight, that might have been a mistake.²⁸

Current models

4.36 A number of current advisory bodies were discussed in evidence to the Committee.

Human Rights Committee

4.37 Some witnesses noted the Parliamentary Joint Committee on Human Rights²⁹ as an example of a body with an advisory or consultative role in the legislative process.

²⁵ The Hon. Fred Chaney AO, *Committee Hansard*, Perth, 6 July 2018, pp. 32, 37.

²⁶ Dr Peter Burdon, Adelaide Law School, University of Adelaide, *Committee Hansard*, Adelaide, 5 July 2018, p. 22.

²⁷ The Hon. Kyam Maher MLC, Shadow Minister for Aboriginal Affairs, South Australian Parliament, *Committee Hansard*, Adelaide, 5 July 2018, p. 4.

²⁸ The Hon. Amanda Vanstone, *Committee Hansard*, Adelaide, 5 July 2018, p. 54.

- 4.38 The Committee is established under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). Under section 7 of the Act, the Committee has the following functions:
- to examine bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue;
 - to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on that issue; and
 - to inquire into any matter relating to human rights which is referred to it by the Attorney-General, and to report to both Houses of the Parliament on that matter.³⁰
- 4.39 Human rights are defined in section 3 of the Act as those contained in seven human rights treaties to which Australia is a party.³¹
- 4.40 The Committee reports its findings to both Houses of the Parliament, and the powers and proceedings of the Committee are determined by a resolution of both Houses of the Parliament.
- 4.41 The Committee consists of 10 members—five members of the Senate and five members of the House of Representatives.³² Members are formally appointed by each chamber.
- 4.42 The Committee elects a government member as its chair from either the House of Representatives or the Senate. The deputy chair is elected from one of the non-government members of the Committee. The chair and deputy chair of parliamentary committees generally receive an additional salary as office holders.
- 4.43 The Committee secretariat is staffed by parliamentary officers drawn from the Department of the Senate.
- 4.44 Dr Bede Harris, a senior lecturer at Charles Sturt University, suggested that an analogy could be drawn between the Human Rights Committee and the

²⁹ Parliamentary Joint Committee on Human Rights, <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights> viewed 9 July 2018.

³⁰ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), s. 7.

³¹ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), s. 3.

³² *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), s. 5.

intended function of The Voice.³³ Dr Harris suggested that The Voice could be modelled on the Committee, noting:

... the voice would have the role of scrutinising federal government legislation and advising the federal parliament on whether or not this legislation furthered or negatively impacted Indigenous people.³⁴

- 4.45 However, in discussing this suggestion, Dr Harris noted that advice on draft legislation should be given at the most opportune point during the legislative process.³⁵
- 4.46 The Committee is also aware of concerns about the practical influence the Human Rights Committee is able to exert on improving outcomes, and the view that it has already become a hollow activity to ensure compliance.
- 4.47 Mrs Lorraine Finlay and Dr Freeman both argued against a model based on the Human Rights Committee, suggesting that the Committee considers legislation too late in the legislative process.³⁶ Professor Calma illustrated this point. He observed that parliamentary committees, like the Human Rights Committee, provided advice when bills for the Northern Territory Intervention were being considered by Parliament but that advice was, 'not heard by the legislators'. He suggested that parliamentary committees, 'do not have a lot of authority', except for Senate committees through their scrutiny of public administration.³⁷

Torres Strait Regional Authority

- 4.48 The Torres Strait Regional Authority (TSRA) is an example of a regional structure that may inform the design of The Voice.
- 4.49 The TSRA is an Australian Government statutory authority that was established under the *Aboriginal and Torres Strait Islander Commission Act*

³³ Dr Bede Harris, *Submission 81*, p. 8.

³⁴ Dr Bede Harris, *Committee Hansard*, Sydney, 4 July 2018, p. 39.

³⁵ Dr Bede Harris, *Committee Hansard*, Sydney, 4 July 2018, p. 40.

³⁶ Mrs Lorraine Finlay, *Committee Hansard*, Perth, 6 July 2018, p. 57. See also: Professor Cheryl Saunders AO, Member, Centre for Comparative Constitutional Studies, *Committee Hansard*, Perth, 6 July 2018, pp. 41-42; Dr Damien Freeman, PM Glynn Institute, Australian Catholic University, *Committee Hansard*, Canberra, 18 June 2018, p. 8.

³⁷ Professor Tom Calma AO, *Committee Hansard*, Canberra, 18 June 2018, pp. 3-4.

1989 (Cth), now the *Aboriginal and Torres Strait Islander (ATSI) Act 2005* (Cth).³⁸

- 4.50 The TSRA consists of two parts: the elected board and the administration. The TSRA board is made up of 20 elected members who are all Aboriginal or Torres Strait Islander people living in the region. Each is elected to represent a particular region or 'ward' for a four year term. Voting is overseen by the Australian Electoral Commission and is open to Torres Strait Islander and Aboriginal people aged 18 years or over who were correctly enrolled at an address within the Authority's jurisdiction.³⁹ The TSRA Chairperson noted 'increased interest and higher levels of participation among candidates and voters throughout the Torres Strait region' during the last TSRA election (held in 2016) although six of the 20 wards were uncontested.⁴⁰
- 4.51 Following general TSRA elections, board members also elect a Chairperson and Executive Members at the Authority's first board meeting. The Chairperson is a fulltime officer holder and is paid approximately \$298 850 per annum.⁴¹ The Chairperson is required to convene at least four board meetings each year. Other board members are part-time officials who receive a daily fee for work of \$491, in accordance with the Remuneration Tribunal.⁴²
- 4.52 The TSRA's elected board determines the Authority's policies and budget allocations, including:
- setting out the Authority's vision for the Torres Strait;
 - overseeing the Authority's strategic objectives and direction;
 - approving programme mandates;
 - reviewing the authority's performance, objectives and outcomes; and

³⁸ Torres Strait Regional Authority, *The TSRA*, <<http://www.tsra.gov.au/the-tsra>> viewed 9 July 2018.

³⁹ Torres Strait Regional Authority, *Structure*, <<http://www.tsra.gov.au/the-tsra/tsra-structure>> viewed 9 July 2018; Australian Electoral Commission, *Torres Strait Regional Authority Elections*, <<https://www.aec.gov.au/Elections/tsra/index.htm>> viewed 17 July 2018.

⁴⁰ Torres Strait Regional Authority, *Annual Report 2016-17*, p. 2.

⁴¹ Remuneration Tribunal, *Remuneration Tribunal (Remuneration and Allowances for Holders of Full-time Public Office) Determination 2018*, p. 10.

⁴² Remuneration Tribunal, *Remuneration Tribunal (Remuneration and Allowances for Holders of Part-time Public Office) Determination 2018*, p. 22.

- managing strategic risk and regional stakeholder relations.⁴³

4.53 The TSRA administration is staffed by Commonwealth public servants and carries out the functions and responsibilities of the Authority. It employs 159 people, 120 of which are Torres Strait Islander and Aboriginal people, making the TSRA a government entity with one of the highest percentages of Indigenous employment.⁴⁴ The Chief Executive Officer is appointed by the Minister for Indigenous Affairs.⁴⁵

Murdi Paaki Regional Assembly

- 4.54 The Murdi Paaki Regional Assembly is the peak representative structure that represents the interests of Aboriginal and Torres Strait Islander peoples in 16 communities across Western New South Wales.⁴⁶ It has two levels of representation: a community public meeting known as a 'working party' to which any Aboriginal and Torres Strait Islander person who resides in the relevant community is entitled to attend. The working parties meet in each of its 16 communities on a monthly basis. Once a year each of the 16 working parties elect a Chair for each working party who is responsible for organising the meetings, hiring the meeting venue, following up issues raised at the meeting and reporting back. The Chair has to be contactable between meetings. The Chair also informs local meetings of government initiatives, such as programs and grants, which may be available for the community. State agencies (and sometimes local and federal agencies) attend the meetings. Each Chair sits on the regional assembly which meets four times a year to deal with strategic issues facing the region.⁴⁷
- 4.55 At a public hearing in Dubbo, the Committee heard from Mr Des Jones, Chairperson of the Assembly. Mr Jones described the Assembly's membership at the regional level as native title claimants and land council members. He noted that the community working parties deal with local

⁴³ Torres Strait Regional Authority, *Governance Framework*, <<http://www.tsra.gov.au/news-and-resources/annual-reports/annual-report-2016-2017/section-4-corporate-governance-and-accountability/governance-framework>> viewed 17 July 2018.

⁴⁴ Torres Strait Regional Authority, *Annual Report 2016-17*, p. 8.

⁴⁵ Torres Strait Regional Authority, *Structure*, <<http://www.tsra.gov.au/the-tsra/tsra-structure>> viewed 9 July 2018.

⁴⁶ Murdi Paaki Regional Assembly, About us, <<http://www.mpra.com.au/about-us>> viewed 9 July 2018

⁴⁷ Mr Des Jones, Chairperson, Murdi Paaki Regional Assembly, *Committee Hansard*, Dubbo, 2 July 2018, pp. 18-20.

issues and the Regional Assembly focusses on broader regional issues by engaging with government agencies and industry. The Regional Assembly also disseminates information down to the community working parties.⁴⁸ Mr Jones stated that this model, through the elected chair, allows for a local voice to translate to a regional level.⁴⁹

- 4.56 The Committee heard that the Murdi Paaki model is about a community voice, where an Aboriginal person who resides in one of the communities or shires has the right to air their issues at a community table.⁵⁰ The community working parties encourage individuals to come along and have their voice heard on all matters that relate to those communities. Issues of concern raised during community working party meetings are followed up by the Chair.⁵¹
- 4.57 The Assembly's Charter of Governance describes its goals as:
- ensuring 'Aboriginal people participate in all decision making that affects our lives';
 - connecting 'Aboriginal people with all service delivery arrangements';
 - having 'a legislative regime which reinforces the connection between Aboriginal participation and accountable service delivery by government agencies to provide an authoritative and consistent framework of shared responsibility and accountability'; and
 - influencing and controlling 'the way policies and services are implemented'.⁵²
- 4.58 Mr Jones noted that the Murdi Paaki model evolved from the previous regional ATSIC body for Western New South Wales, with Murdi Paaki maintaining the ATSIC boundary. He told the Committee that the model was designed to be unincorporated so that it could not be abolished by government and would not be bound by quorum or legislative requirements

⁴⁸ Mr Des Jones, Chairperson, Murdi Paaki Regional Assembly, *Committee Hansard*, Dubbo, 2 July 2018, pp. 21-22.

⁴⁹ Mr Des Jones, Chairperson, Murdi Paaki Regional Assembly, *Committee Hansard*, Dubbo, 2 July 2018, p. 20.

⁵⁰ Mr Des Jones, Chairperson, Murdi Paaki Regional Assembly, *Committee Hansard*, Dubbo, 2 July 2018, p. 16.

⁵¹ Mr Des Jones, Chairperson, Murdi Paaki Regional Assembly, *Committee Hansard*, Dubbo, 2 July 2018, p. 19.

⁵² Murdi Paaki Regional Assembly, *Charter of Governance*, 2007, p. 5, <<http://www.mpra.com.au/uploads/documents/MPRA%20Charter%20of%20Governance.pdf>> viewed 17 July 2018.

under the Corporations Act.⁵³ In the absence of legislative arrangements or incorporation law, the Assembly is governed by a *Charter of Governance* which provides the regulation, functions, and principles for its operation.⁵⁴

- 4.59 The Murdi Paaki Regional Assembly operates with the financial support of other regional bodies, including Murdi Paaki Housing, Maari Ma Health and the Murdi Paaki Regional Enterprise Corporation.⁵⁵ Mr Jones noted that the Commonwealth Government also provides some support for the Assembly, in particular, the Chairperson's role, administration services and the young leaders program:

I think [the budget is] \$1.2 million over three years for the assembly to meet and for the chairperson's role in that. Some of the young leaders and the development of capacity building are also within that budget.⁵⁶

- 4.60 Each of the community working parties receives approximately \$4 000 a year to cover the cost of conducting community meetings, including hall hire and catering. A small secretariat of volunteers and four staff support the work of the Regional Assembly.⁵⁷

Prime Minister's Indigenous Advisory Council

- 4.61 Another example of an advisory structure discussed in evidence to the Committee is the Prime Minister's Indigenous Advisory Council (IAC).
- 4.62 The IAC is appointed by the Prime Minister, in consultation with the Minister for Indigenous Affairs, to advise the Australian Government on Indigenous policy and programs. It is comprised of a Chair, Deputy Chair and up to 12 members, appointed for up to three years.

⁵³ Mr Des Jones, Chairperson, Murdi Paaki Regional Assembly, *Committee Hansard*, Dubbo, 2 July 2018, pp. 16, 22.

⁵⁴ Indigenous Governance Toolkit, *Murdi Paaki Regional Assembly*, <<http://toolkit.aigi.com.au/case-studies/murdi-paaki-regional-assembly>> viewed 17 July 2018.

⁵⁵ Mr Des Jones, Chairperson, Murdi Paaki Regional Assembly, *Committee Hansard*, Dubbo, 2 July 2018, p. 17.

⁵⁶ Mr Des Jones, Chairperson, Murdi Paaki Regional Assembly, *Committee Hansard*, Dubbo, 2 July 2018, p. 24.

⁵⁷ Mr Des Jones, Chairperson, Murdi Paaki Regional Assembly, *Committee Hansard*, Dubbo, 2 July 2018, pp. 19-20, 24.

4.63 The Remuneration Tribunal reported that the Chair of the IAC is paid an annual fee of \$76 000 and Members are paid a daily fee of \$409.⁵⁸

4.64 According to the Australian Government, members of the IAC are highly regarded, pre-eminent Indigenous thinkers and practitioners with experience in their respective fields:

Members will have a strong understanding of Indigenous culture and bring a diversity of expertise in economic development and business acumen, employment, education, youth participation, service delivery and health. The membership will include representation from both the private, public and civil society sectors and be drawn from across Australia, with at least one representative from a remote area.⁵⁹

4.65 The website states that the role of the IAC is to advise Government on practical changes which can be made to improve the lives of Indigenous peoples, including but not limited to:

- improving school attendance and educational attainment;
- creating lasting employment opportunities in the real economy;
- reviewing land ownership and other drivers of economic development;
- preserving Aboriginal and Torres Strait Islander cultures;
- building reconciliation and creating a new partnership between black and white Australians;
- empowering Aboriginal and Torres Strait Islander communities;
- building the capacity of communities, service providers and governments;
- promoting better evaluation to inform government decision-making;
- supporting greater shared responsibility and reducing dependence on government within indigenous communities; and

⁵⁸ Remuneration Tribunal, *Remuneration Tribunal (Remuneration and Allowances for Holders of Part-time Public Office) Determination 2018*, pp. 4, 9.

⁵⁹ Department of the Prime Minister and Cabinet, *Prime Minister's Indigenous Advisory Council*, <<https://www.pmc.gov.au/indigenous-affairs/prime-ministers-indigenous-advisory-council>> viewed 9 July 2018; Australian Government, *Prime Minister's Indigenous Advisory Council*, <<https://www.directory.gov.au/portfolios/prime-minister-and-cabinet/department-prime-minister-and-cabinet/prime-ministers-indigenous-advisory-council>> viewed 17 July 2018.

- achieving constitutional recognition of Aboriginal and Torres Strait Islander people.⁶⁰

4.66 The Department of the Prime Minister and Cabinet reported that the IAC's forward agenda is negotiated between the Department and the Chairs of the council:

The committee has set out a forward agenda over the next three years. We've had an opportunity to say, 'These are the key policy issues over the next period,' and they have then said, 'Well, these are the sorts of issues that we would like to surface and actually have a conversation about'.⁶¹

4.67 The IAC's terms of reference (dated from November 2013 to January 2017) outlined that the IAC would have 12 members for a three year term and be required to meet three times annually with the Prime Minister and relevant senior ministers. The current terms of reference do not refer to membership or meeting requirements⁶² although the IAC has met with the Indigenous policy sub-committee of Cabinet.⁶³

4.68 A recent communique published by IAC noted that the council has an evolving relationship with 'the Indigenous Policy Committee of Cabinet' and viewed this relationship as an opportunity to 'strengthen the partnership between Aboriginal and Torres Strait Islander Australians and the Commonwealth Government'.⁶⁴

⁶⁰ Australian Government, *Prime Minister's Indigenous Advisory Council*, <<https://www.directory.gov.au/portfolios/prime-minister-and-cabinet/department-prime-minister-and-cabinet/prime-ministers-indigenous-advisory-council>> viewed 17 July 2018.

⁶¹ Professor Ian Anderson, Deputy Secretary, Indigenous Affairs Group, Department of the Prime Minister and Cabinet, *Committee Hansard*, Canberra, 25 June 2018, p. 13.

⁶² Department of the Prime Minister and Cabinet, *Terms of Reference: Indigenous Advisory Council*, <<https://www.pmc.gov.au/resource-centre/indigenous-affairs/terms-reference-indigenous-advisory-council>> viewed 9 July 2018.

⁶³ Department of the Prime Minister and Cabinet, *Meeting Communique: Indigenous Advisory Council*, 4 April 2018 <<https://www.pmc.gov.au/news-centre/indigenous-affairs/meeting-communique-indigenous-advisory-council-4-april-2017>> viewed 16 July 2018.

⁶⁴ Department of the Prime Minister and Cabinet, *Meeting Communique: Indigenous Advisory Council*, 27-28 June 2018, <<https://www.pmc.gov.au/news-centre/indigenous-affairs/meeting-communique-indigenous-advisory-council-27-28-june-2018>> viewed 17 July 2018.

- 4.69 The Department of the Prime Minister and Cabinet provides supporting secretariat services to the IAC.⁶⁵ The number of supporting staff or the annual budget allocated to the IAC is unclear.
- 4.70 The Committee heard from some witnesses who suggested that the fact that the IAC was an appointed body undermined its legitimacy.

ACT Aboriginal and Torres Strait Islander Elected Body

- 4.71 The Committee heard evidence about the structure and operation of the ACT Aboriginal and Torres Strait Islander Elected Body (ATSIEB).⁶⁶ Ms Katrina Fanning, Chairperson of the ATSIEB, explained that the body was set up by the ACT Government in response to the abolition of ATSIC.⁶⁷
- 4.72 The ATSIEB has seven sitting members who are elected for three-year terms. Each member is elected by the ACT Aboriginal and Torres Strait Islander community, with non-compulsory elections conducted by the ACT Electoral Commission.⁶⁸ There were 435 votes admitted for the count in 2017.
- 4.73 Members of the ATSIEB are paid in line with the Remuneration Tribunal determination and paid fortnightly. The Chairperson receives \$23 970, the Deputy Chairperson receives \$19 180, and ordinary members receive \$14 385 annually, paid fortnightly. The ATSIEB has two full-time staff, with any additional support required provided by the Office for Aboriginal and Torres Strait Islander Affairs.⁶⁹
- 4.74 The ATSIEB has a discretionary annual budget through the Office of Aboriginal and Torres Strait Islander Affairs. Last financial year, the discretionary budget was approximately \$65 000. The discretionary budget allows for the body to hold six meetings per year and a minimum of two community consultations, and also fund other activities including events,

⁶⁵ Australian Government, *Prime Minister's Indigenous Advisory Council*, <<https://www.directory.gov.au/portfolios/prime-minister-and-cabinet/department-prime-minister-and-cabinet/prime-ministers-indigenous-advisory-council>> viewed 17 July 2018.

⁶⁶ Ms Katrina Fanning, Chairperson, ACT Aboriginal and Torres Strait Islander Elected Body, *Committee Hansard*, Adelaide, 5 July 2018, p. 28.

⁶⁷ Ms Katrina Fanning, Chairperson, ACT Aboriginal and Torres Strait Islander Elected Body, *Committee Hansard*, Adelaide, 5 July 2018, p. 28.

⁶⁸ Ms Katrina Fanning, Chairperson, ACT Aboriginal and Torres Strait Islander Elected Body, *Committee Hansard*, Adelaide, 5 July 2018, p. 29.

⁶⁹ ACT Aboriginal and Torres Strait Islander Elected Body, *Correspondence*, July 2018.

printing, publication of reports and a website, and other administrative requirements such as annual hearings.⁷⁰

- 4.75 Ms Fanning noted that the body does not have a budget appropriation that allows it to determine program or service delivery funding. She advised that the body only has the ability to conduct community consultations and provide advice to the ACT Government.⁷¹
- 4.76 Each of the seven members is allocated an ACT Government Directorate (portfolio area). They meet every month with the relevant Director-General, and bi-monthly with the ACT Minister for Aboriginal and Torres Strait Islander Affairs. Depending on the size of the directorate and the services and programs relevant to Aboriginal and Torres Strait Islander people, members can spend up to 40 hours per week on meetings, emails and other tasks such as attending consultations and events.⁷²
- 4.77 Ms Fanning suggested that in designing local, regional, and national bodies for a Voice, it is important to work with traditional owners and not to extinguish or devalue their right and proper role into determining traditional-owner matters.⁷³

National Aboriginal Community Controlled Health Organisation

- 4.78 The Committee heard evidence from the National Aboriginal Community Controlled Health Organisation (NACCHO), the national peak body representing Aboriginal Community Controlled Health Services across Australia on Aboriginal health and wellbeing issues.⁷⁴
- 4.79 NACCHO is a public company limited by guarantee, incorporated under the *Corporations Act (2001)* (Cth) and funded by the federal government for a secretariat in Canberra to increase the capacity of the Aboriginal community to participate in national policy development.⁷⁵

⁷⁰ ACT Aboriginal and Torres Strait Islander Elected Body, *Correspondence*, July 2018.

⁷¹ Ms Katrina Fanning, Chairperson, ACT Aboriginal and Torres Strait Islander Elected Body, *Committee Hansard*, Adelaide, 5 July 2018, p. 29.

⁷² ACT Aboriginal and Torres Strait Islander Elected Body, *Correspondence*, July 2018.

⁷³ Ms Katrina Fanning, Chairperson, ACT Aboriginal and Torres Strait Islander Elected Body, *Committee Hansard*, Adelaide, 5 July 2018, p. 29.

⁷⁴ Mr John Singer, Chairperson, National Aboriginal Community Controlled Health Organisation, *Committee Hansard*, Canberra, 25 June 2018, p. 1.

⁷⁵ Mr John Singer, Chairperson, National Aboriginal Community Controlled Health Organisation, *Committee Hansard*, Canberra, 25 June 2018, p. 1.

- 4.80 Ms Patricia Turner, Chief Executive Officer of NACCHO, explained that NACCHO has 140-plus Aboriginal Community Controlled Health Services associated at a local level. They are direct members of NACCHO and each of them is responsible for the delivery of primary health care. Ms Turner explained the structure of NACCHO to the Committee saying:

Within each jurisdiction, at the state and territory level, there is what is called an affiliate. Our members, the local health services, which are called Aboriginal Community Controlled Health Services—ACCHS—are members of the affiliates, but the affiliates are not members of NACCHO. So NACCHO is constituted at the national level, [comprised] of an elected chair and deputy at an annual general meeting every three years, and there are nominees through the affiliates to the NACCHO board: two from each jurisdiction except Tasmania and the ACT, who have one each. So we have a board of 16.⁷⁶

- 4.81 The NACCHO submission highlighted that the other 14 Directors' terms can change each year as determined at Affiliate annual general meetings.⁷⁷ In 2017, 67 per cent of eligible voters exercised their right to vote at the NACCHO annual general meeting.⁷⁸
- 4.82 NACCHO's budget per annum is \$25 million, with the bulk of the NACCHO budget provided to the Affiliates.⁷⁹ NACCHO has 30 staff and as highlighted in their submission the NACCHO network is one of the largest employers of Aboriginal and Torres Strait Islander peoples with 56 per cent of staff being Indigenous.⁸⁰

National Congress of Australia's First Peoples

- 4.83 The National Congress of Australia's First Peoples (National Congress) is the peak representative body for Aboriginal and Torres Strait Islander peoples.⁸¹ Its membership comprises over 180 organisations and over 9 000 individuals⁸² sorted into three chambers:

⁷⁶ Ms Patricia Turner, Chief Executive Officer, National Aboriginal Community Controlled Health Organisation, *Committee Hansard*, Canberra, 25 June 2018, p. 2.

⁷⁷ National Aboriginal Community Controlled Health Organisation, *Submission 373*, p. 3.

⁷⁸ National Aboriginal Community Controlled Health Organisation, *Submission 373*, p. 3.

⁷⁹ National Aboriginal Community Controlled Health Organisation, *Submission 373*, p. 3.

⁸⁰ National Aboriginal Community Controlled Health Organisation, *Submission 373*, pp. 3-4.

⁸¹ National Congress of Australia's First Peoples, *Submission 292*, p. 2.

⁸² National Congress of Australia's First Peoples, *Submission 292*, p. 2.

- one comprising Aboriginal and Torres Strait Islander individuals;
- one comprising organisations; and
- a third comprising national and peak representative bodies.⁸³

4.84 The membership of each chamber elects 40 delegates (for a combined total of 120 delegates) to represent them at a national annual general meeting and two directors to participate in a national board (for a total of six).⁸⁴ The combined membership of the three chambers also elects male and female Co-Chairs to lead the national board. All elected representatives serve for two years.⁸⁵

4.85 Member participation in elections is on a voluntary basis.⁸⁶ At a public hearing in Adelaide, Committee Co-Chair, Mr Julian Leeser MP, observed that the member turn out for National Congress elections is low. However, Mr Rod Little, Co-Chair of National Congress argued that as a relatively new representative body without significant funding support, National Congress has done well to grow its membership to the extent that it has—although he welcomed further expansion.⁸⁷

4.86 According to Mr Little, National Congress' current operational budget is approximately \$2.3 million per annum, but around \$5 million per annum is required to grow its membership. He explained that National Congress currently has approximately three staff and earns money by providing consultancy services to the Department of the Prime Minister and Cabinet:

We are currently in contracts with the federal government Department of the Prime Minister and Cabinet on a fee-for-service basis, where they want us to

⁸³ National Congress of Australia's First Peoples, *Congress Fact Sheet*, <<https://nationalcongress.com.au/wp-content/uploads/2018/05/CongressFactSheet.pdf>> viewed 9 July 2018

⁸⁴ National Congress of Australia's First Peoples, *Congress Fact Sheet*, <<https://nationalcongress.com.au/wp-content/uploads/2018/05/CongressFactSheet.pdf>> viewed 17 July 2018.

⁸⁵ National Congress of Australia's First Peoples, *Congress Fact Sheet*, <<https://nationalcongress.com.au/wp-content/uploads/2018/05/CongressFactSheet.pdf>> viewed 9 July 2018.

⁸⁶ Mr Rod Little, Co-Chair, National Congress of Australia's First Peoples, *Committee Hansard*, Adelaide, 5 July 2018, p. 49.

⁸⁷ Mr Rod Little, Co-Chair, National Congress of Australia's First Peoples, *Committee Hansard*, Adelaide, 5 July 2018, pp. 48-52.

advise and collaborate with them and to extract information about the impacts of Closing the Gap and the Redfern Statement.⁸⁸

4.87 The design of the National Congress was influenced by criticism of ATSIC:

Because around 80 per cent of the ATSIC councillors were men, the constitution of the National Congress requires gender equality in all elected positions. And because of controversies about its last chair and its financial management, an Ethics Council was established to watch over all aspects of National Congress' operations and ensure that its actions were consistent with its values and mission. In addition, police checks are required for all elected officers of National Congress.⁸⁹

4.88 At the national annual general meeting, the 120 delegates from the three chambers of the National Congress 'discuss strategy, issues of concern to Aboriginal and Torres Strait Islander Peoples, and the priorities for Congress'.⁹⁰ Dr Jackie Huggins, Co-Chair of the National Congress, described the body's role as:

...[advocating] for self-determination and the implementation of the United Nations Declaration on the Rights of Indigenous Peoples. We believe that we should be central in terms of the decisions that are made about our lives and our communities in all aspects, whether they relate to land, health, education, law, governance et cetera. We promote respect for our culture and recognition as the core of our national heritage.⁹¹

4.89 National Congress often surveys its members to determine their priorities.⁹²

4.90 As noted in the previous chapter, National Congress submitted that, with appropriate funding and support, the organisation could function as The Voice.⁹³ In its submission to the Committee, National Congress suggested it

⁸⁸ Mr Rod Little, Co-Chair, National Congress of Australia's First Peoples, *Committee Hansard*, Adelaide, 5 July 2018, pp. 48, 52.

⁸⁹ National Congress of Australia's First Peoples, *History of National Representative Bodies*, <<http://nationalcongress.com.au/history-national-representative-bodies/>> viewed 16 July 2018.

⁹⁰ National Congress of Australia's First Peoples, *Congress Fact Sheet*, <<https://nationalcongress.com.au/wp-content/uploads/2018/05/CongressFactSheet.pdf>> viewed 17 July 2018.

⁹¹ Dr Jackie Huggins, Co-Chair, National Congress of Australia's First Peoples, *Committee Hansard*, Adelaide, 5 July 2018, p. 47.

⁹² Mr Rod Little, Co-Chair, National Congress of Australia's First Peoples, *Committee Hansard*, Adelaide, 5 July 2018, p. 48.

⁹³ National Congress of Australia's First Peoples, *Submission 292*, p. 7.

is ‘uniquely suited’ because of its representative nature and its accountability mechanisms, ‘which effectively regulate its activities and ensure that it is acting in its members’ best interests’.⁹⁴

- 4.91 The submission recommended building upon the ‘firm foundation’ proven by National Congress.⁹⁵

Prescribed Bodies Corporate

- 4.92 After the decision in *Mabo vs Queensland* (No. 2) (1992), where the High Court recognised the rights of Aboriginal and Torres Strait Islander peoples as traditional owners of their land, the *Native Title Act 1993* (Cth) (NTA) established a statutory regime for claiming and recognising native title land in Australia.⁹⁶
- 4.93 Under the NTA, when a native title determination is made, native title holders must establish a corporation called a Prescribed Bodies Corporate (PBC) to manage and protect native title rights and interests.⁹⁷ The PBCs have obligations under the NTA, including a requirement to incorporate under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (CATSI Act). PBCs have roles and responsibilities under the NTA, PBC Regulations, the CATSI Act, and other Commonwealth, state, and territory legislation.⁹⁸
- 4.94 A PBC is the first point of contact for government and other parties wishing to undertake activities on native title land. PBCs manage and protect native title on behalf of native title holders and are required, under the NTA, to consult and gain consent from traditional owners in any decisions that surrender or affect native title rights and interests.⁹⁹

⁹⁴ National Congress of Australia’s First Peoples, *Submission 292*, p. 8.

⁹⁵ National Congress of Australia’s First Peoples, *Submission 292*, p. 9.

⁹⁶ Prescribed Bodies Corporate, *PBC national snapshot*, <<https://www.nativetitle.org.au/learn/role-and-function-pbc/pbc-national-snapshot>> viewed 18 July 2018.

⁹⁷ Prescribed Bodies Corporate, *About PBCs*, <<https://www.nativetitle.org.au/learn/role-and-function-pbc/about-pbcs>> viewed 18 July 2018.

⁹⁸ Prescribed Bodies Corporate, *About PBCs*, <<https://www.nativetitle.org.au/learn/role-and-function-pbc/about-pbcs>> viewed 18 July 2018.

⁹⁹ Prescribed Bodies Corporate, *About PBCs*, <<https://www.nativetitle.org.au/learn/role-and-function-pbc/about-pbcs>> viewed 18 July 2018.

Aboriginal Land Councils

- 4.95 Aboriginal Land Councils represent Aboriginal affairs at state or territory level, with the aim to protect the interests and aspirations of Aboriginal communities.¹⁰⁰
- 4.96 The arrangements under which Aboriginal Land Councils are established, and their responsibilities, differ among states and territories. For example, in the Northern Territory, the Commonwealth has direct responsibility for Land Rights through the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). Under this Act, traditional owners hold decision-making powers over the use of Aboriginal land. Land Councils assist traditional owners to acquire and manage their land.¹⁰¹ The primary responsibilities of Land Councils include:
- ascertaining and expressing the wishes of Aboriginal people living in the area of the land council as to the management of Aboriginal land in that area;
 - protecting the interests of traditional owners of, and other Aboriginal people interested in, Aboriginal land in the area;
 - consulting with the traditional owners of, and other Aboriginal people interested in, Aboriginal land in the area regarding any proposed use of that land;
 - assisting Aboriginal people within the area of the land council to carry out commercial activities (including developing resources, providing tourist facilities and engaging in agricultural activities);
 - assisting in protecting sacred sites; and
 - assisting Aboriginal people to make traditional land claims.¹⁰²
- 4.97 The executive councils of the four Northern Territory Land Councils are democratically elected in processes overseen by the Australian Electoral Commission. For example, elections for the Central Land Council occur every three years:

¹⁰⁰ Creative Spirits, *What are Aboriginal Land Councils?*, <<https://www.creativespirits.info/aboriginalculture/selfdetermination/aboriginal-land-councils>> viewed 18 July 2018.

¹⁰¹ Department of the Prime Minister and Cabinet, Indigenous Affairs, *Land*, <<https://www.pmc.gov.au/indigenous-affairs/land>> viewed 18 July 2018.

¹⁰² Australian Agency for International Development, *Making Land Work: Volume Two Case Studies on Customary Land and Development in the Pacific*, 2008, p. 111, <http://dfat.gov.au/about-us/publications/Documents/MLW_VolumeTwo_CaseStudy_6.pdf> viewed 23 July 2018.

Communities and outstations in the CLC area nominate one or more members for a three year term. At the first meeting of the new council, the members vote for the positions of chair and deputy chair, and to elect the five members who will represent the CLC on the Aboriginals Benefit Account (ABA) Advisory Committee. These elections are run by the Australian Electoral Commission. Members then gather in nine groups to nominate an executive member for their region.

The last CLC election was held in April 2016.¹⁰³

4.98 Other land councils can be governed or represented by larger councils or peak bodies. For example, the New South Wales Aboriginal Land Council has a network of 120 Local Aboriginal Land Councils (LALCs) divided into nine regions:

- Central Region;
- Central Coast Region;
- North Coast Region;
- North West Region;
- Northern Region;
- South Coast Region;
- Sydney/Newcastle Region;
- Western Region; and
- Wiradjuri Region.

4.99 The number of LALCs within each region ranges from 9 to 21.¹⁰⁴

4.100 Elections for the New South Wales Aboriginal Land Council are conducted by the Electoral Commission of New South Wales every four years in accordance with the *Aboriginal Land Rights Act (1983)* (ALRA). All Aboriginal people who are 18 years of age or over and who are listed on a LALC membership roll are entitled to vote in elections. Voting occurs via a secret ballot using an optional preferential system whereby voters may choose to indicate a preference for one candidate, some of the candidates or all of the candidates. The voting members of the LALCs in each of the nine regions elect one councillor to represent their region as part of the New South Wales Aboriginal Land Council.

¹⁰³ Central Land Council, *The Council*, <<https://www.clc.org.au/index.php?/articles/info/the-chairman-the-executive-and-the-council/>> viewed 23 July 2018.

¹⁰⁴ New South Wales Aboriginal Land Council, *LALC Boundaries and Contact Details*, <<http://alc.org.au/land-councils/lalc-boundaries--contact-details.asp>> viewed 18 July 2018.

- 4.101 At the first meeting of the newly elected New South Wales Aboriginal Land Council, nominations are called for the position of Chairperson and Deputy Chairperson. If more than one nomination is received for each position then a secret ballot of the nine councillors is conducted under the auspices of the Office of the Registrar of the ALRA. A Returning Officer counts the votes of the nine councillors and the nominees that receive the most votes are declared the winners. The successful nominees hold the positions of Chairperson and Deputy Chairperson for a two-year term.¹⁰⁵
- 4.102 The Committee has met with representatives from a number of Aboriginal Land Councils across Australia during the inquiry.

Indicative proposals for a First Nations Voice

- 4.103 During its inquiry, the Committee received a small number of indicative proposals for the structure, establishment, and operation of a Voice.

Proposals made by Uphold & Recognise

- 4.104 Uphold & Recognise submitted two proposals for a constitutionally enshrined Voice.¹⁰⁶ Speaking to the Committee in Canberra, Dr Damien Freeman outlined the proposals, which would establish local bodies for various Aboriginal and Torres Strait Islander peoples (speaking for country option) and establish a national advisory council tasked with providing advice on Aboriginal and Torres Strait Islander affairs (Advisory Council option).¹⁰⁷
- 4.105 Constitutional provisions relating to these proposals are discussed at paragraphs 3.163 and 3.170.

Speaking for country option

- 4.106 This model provides for a new section 70A of the Constitution which would require the Parliament to establish or recognise local entities for the various Indigenous peoples.¹⁰⁸

¹⁰⁵ New South Wales Aboriginal Land Council, *New South Wales Aboriginal Land Council Elections*, <<http://alc.org.au/events/nswalc-elections.aspx>> viewed 23 July 2018.

¹⁰⁶ Uphold & Recognise, *Submission 172*, Attachment 2, p. 8.

¹⁰⁷ Dr Damien Freeman, PM Glynn Institute, Australian Catholic University, *Committee Hansard*, Canberra, 18 June 2018, p. 7.

¹⁰⁸ Uphold & Recognise, *Submission 172*, Attachment 2, p. 9.

- 4.107 Legislation would then detail how the Indigenous entities would be established and recognised, with local Indigenous peoples organising themselves and deciding how they wish to be represented.¹⁰⁹
- 4.108 Once the local bodies have determined how they wished to be set up, they would, under the legislation, have the right to affiliate and would be independent. There would not be a prescribed constitution for each of the bodies as it would be for the local people to work out what structure their bodies should have.¹¹⁰
- 4.109 An appointed Recognition Commission would be responsible for certifying regional boundaries and which group of people speaks for which local region by determining the process leading to the formal recognition of a local Indigenous entity in each region.¹¹¹ The Recognition Commission would then formally recognise a national affiliation, which would have a statutory right to provide advice to the Parliament.¹¹²
- 4.110 Dr Freeman outlined to the Committee how the views of the local entities would be provided to the Parliament:
- The idea here is that the national affiliation would be a conduit between the local bodies and the national parliament. So it would be for the national affiliation to have advice tabled in parliament but the obligation is imposed on this national affiliation to provide the advice from the local organisations. So if there is a consensus position, it presents the consensus position. If there are divergent positions amongst the local organisations, then the obligation is to make the parliament aware of those divergent positions.¹¹³
- 4.111 It would be up to the Parliament to consider the divergent positions differently or work with the national affiliation to find a compromise that addressed the different concerns.¹¹⁴

¹⁰⁹ Uphold & Recognise, *Submission 172*, Attachment 2, p. 10.

¹¹⁰ Dr Damien Freeman, PM Glynn Institute, Australian Catholic University, *Committee Hansard*, Canberra, 18 June 2018, p. 7.

¹¹¹ Uphold & Recognise, *Submission 172*, Attachment 2, p. 10.

¹¹² Dr Damien Freeman, PM Glynn Institute, Australian Catholic University, *Committee Hansard*, Canberra, 18 June 2018, p. 7.

¹¹³ Dr Damien Freeman, PM Glynn Institute, Australian Catholic University, *Committee Hansard*, Canberra, 18 June 2018, p. 7.

¹¹⁴ Uphold & Recognise, *Submission 172*, Attachment 2, p. 11.

- 4.112 Uphold & Recognise submitted that, under this option, the attributes of authenticity are incorporated at the local level, and then local entities may voluntarily affiliate in order to speak effectively at the national level.¹¹⁵

Advisory Council option

- 4.113 The Advisory Council option provides for a new section 60A of the Constitution establishing an Advisory Council for Aboriginal and Torres Strait Islander affairs entitled to provide advice to the Parliament.¹¹⁶
- 4.114 Legislation would then outline the roles, functions, and composition of the Advisory Council. It would also provide for local Indigenous entities to nominate delegates to participate in a National Conference that would select members of the Advisory Council.¹¹⁷
- 4.115 Uphold & Recognise suggested that under this model the Advisory Council would be entitled to table advice in both Houses of Parliament.¹¹⁸ As outlined in the previous chapter, the Parliament would only be required to consider the advice if it relates to a Designated Bill. Uphold & Recognise explained the concept of a Designated Bill:

Designated Bills are bills that seek to amend or enact Designated Acts. Designated Acts are those Acts listed in the schedule to the Advisory Council for Aboriginal and Torres Strait Islander Affairs Bill, or any Act made under section 51(xxvi) or section 122 of the Constitution, if the Act is directed to Aboriginal or Torres Strait Islander peoples.¹¹⁹

- 4.116 Uphold & Recognise submitted that, under this option, the attributes of authenticity are incorporated at the national level, and then the national entity would be linked to local entities.¹²⁰

Proposal made by Cape York Institute

- 4.117 The Committee notes a position paper from the Cape York Institute on the Cape York Pama Futures model. Pama Futures is a reform agenda developed by the First Nations of the Cape York Peninsula. It aims to

¹¹⁵ Uphold & Recognise, *Submission 172*, Attachment 2, p. 9.

¹¹⁶ Uphold & Recognise, *Submission 172*, Attachment 2, p. 11.

¹¹⁷ Uphold & Recognise, *Submission 172*, Attachment 2, p. 9.

¹¹⁸ Uphold & Recognise, *Submission 172*, Attachment 2, p. 12.

¹¹⁹ Uphold & Recognise, *Submission 172*, Attachment 2, p. 12.

¹²⁰ Uphold & Recognise, *Submission 172*, Attachment 2, p. 9.

empower Aboriginal and Torres Strait Islander communities and close the gap over three generations.¹²¹ The Pama Futures model for Cape York builds on Empowered Communities and offers an example of how Aboriginal and Torres Strait Islander voices could be locally and regionally empowered.¹²²

- 4.118 The Pama Futures model proposes both an appropriate constitutional guarantee of First Nations Voices and a legislated framework to give effect to the constitutional guarantee. Legislation would establish a Regional Partnerships Authority that would be an interface between regional Aboriginal and Torres Strait Islander communities and Commonwealth, state, and local governments.¹²³ It would allow the regional partnerships to be underpinned by local decision making arrangements, enabling co-design planning and co-purchasing of services.
- 4.119 The Cape York Institute stated that the Pama Futures model incorporates multiple mechanisms for grassroots empowerment, ensures traditional owners have the full say in appropriate matters, and provides mechanisms for interfacing and agreement making with government.¹²⁴

Proposal made by Mr Eric Sidoti

- 4.120 In a submission to the Committee, Mr Eric Sidoti outlined a model for an Indigenous Parliamentary Committee that he had developed in 2008. Mr Sidoti suggested the model was 'illustrative of the fact that it is possible to give practical effect to [The Voice] within the Australian Parliament'.¹²⁵
- 4.121 Mr Sidoti described the proposal as follows:

The establishment of an Indigenous Parliamentary Committee, adapting the Senate standing committee model, would provide a means for elected Indigenous representatives to have a direct role in policy development and, more particularly, law-making, as well as a meaningful oversight function of the policy, legislative and regulatory activity, appropriations and performance of the Australian Government and its agencies.¹²⁶

¹²¹ Cape York Institute, *Submission 244*: 2, p. 2.

¹²² Cape York Institute, *Submission 244*, p. 37.

¹²³ Cape York Institute, *Submission 244*: 2, p. 2.

¹²⁴ Cape York Institute, *Submission 244*: 2, p. 10.

¹²⁵ Mr Eric Sidoti, *Submission 295*, p. 7.

¹²⁶ Mr Eric Sidoti, *Submission 295*, p. 7.

- 4.122 According to the proposal, the Indigenous Parliamentary Committee would be mandated to inquire into general matters, consider proposed government expenditure, consider legislation and consider annual reports, and examination of government administration.¹²⁷
- 4.123 In his submission, Mr Sidoti described how the Indigenous Parliamentary Committee might operate, specifying a number of features, including:
- membership of 15 members who would be directly elected;
 - powers similar to Senate committees, including the protection of parliamentary privilege, the power to summon witnesses and documents, and the provision to issue reports; and
 - provision of a secretariat similar to Senate committees.¹²⁸
- 4.124 The submission noted that members of the Indigenous Parliamentary Committee would not be Senators and would not have voting rights in the Parliament.¹²⁹
- 4.125 Speaking to the Committee in Sydney, Mr Sidoti emphasised that the Indigenous Parliamentary Committee would not constitute a ‘third chamber’ of the Parliament, explaining that, similar to other committees of the Parliament, its role would be advisory only and that it would have no power to exercise a veto.¹³⁰

¹²⁷ Mr Eric Sidoti, *Submission 295*, pp. 8-9.

¹²⁸ Mr Eric Sidoti, *Submission 295*, pp. 10-11.

¹²⁹ Mr Eric Sidoti, *Submission 295*, p. 10.

¹³⁰ Mr Eric Sidoti, *Committee Hansard*, Sydney, 4 July 2018, pp. 27-29.

5. Proposals for constitutional recognition

- 5.1 This chapter provides a brief overview of recent initiatives aimed at progressing the constitutional recognition of Aboriginal and Torres Strait Islander peoples, including:
- the Expert Panel on Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution (2012);
 - the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (2013);
 - the Referendum Council (2015); and
 - the *Uluru Statement from the Heart* (2017).
- 5.2 It also outlines major recommendations for constitutional recognition arising from these initiatives. These recommendations are listed in Appendix C.

Expert Panel on Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution

- 5.3 In 2010, the Gillard Government appointed an Expert Panel on Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution to examine and report on ‘possible options for constitutional change, including advice as to the level of support from Indigenous people and the broader community for each option’. In performing this role, the Expert Panel was tasked with:
- conducting broad consultation to seek the views of a ‘wide spectrum of the community’;

- working closely with existing organisations with expertise in relation to this issue; and
- raising awareness about the importance of Indigenous constitutional recognition.¹

5.4 The Expert Panel was also required to ‘have regard to’:

- ‘issues raised by the community in relation to Indigenous constitutional recognition’;
- forms of constitutional change likely to attract widespread support;
- the ‘implications of any proposed changes to the Constitution’; and
- the ‘advice of constitutional law experts’.²

5.5 The Expert Panel’s membership comprised ‘Australians from Indigenous and non-Indigenous communities and organisations, small and large business, community leaders, academics, and members of Parliament from across the political spectrum’.³

5.6 The Expert Panel delivered a final report in 2012 recommending changes to the Constitution and a preferred approach to conducting a referendum to achieve these changes. These recommendations are discussed in more detail in the second half of the chapter.

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

5.7 In 2013, the Australian Parliament appointed a Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples to ‘inquire into and report on steps that can be taken to progress towards a successful referendum on Indigenous constitutional recognition’. In conducting this inquiry, the Committee was charged with considering:

- the recommendations of the 2012 Expert Panel;

¹ Expert Panel on Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, 2012, pp. 1-3.

² Expert Panel on Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, 2012, p. 3.

³ Expert Panel on Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, 2012, p. 2.

- mechanisms to build support for constitutional recognition of Indigenous Australians; and
 - the creation of an advisory group, including Aboriginal and Torres Strait Islander peoples, to work with the Committee.
- 5.8 However, the Committee chose to disregard the final of these considerations as it believed ‘wider consultation with Aboriginal and Torres Strait Islander leaders, communities and organisations would provide broader input into the committee’s work’.⁴
- 5.9 The Committee made ten recommendations including:
- that sections 25 and 51(xxvi) be repealed;
 - that new sections be inserted to:
 - provide the power to legislate with respect to Aboriginal and Torres Strait Islander peoples;
 - recognise their unique cultural heritage languages, and their status as the first Australians; and
 - to prevent racial discrimination; and
 - that constitutional conventions and a referendum be held to enact these changes.⁵
- 5.10 These recommendations are discussed in more detail in the second half of the chapter.

Referendum Council

- 5.11 The Referendum Council was jointly appointed by the Prime Minister Malcolm Turnbull and the Leader of the Opposition Bill Shorten in December 2015.
- 5.12 The Council was tasked with building on the work of the 2012 Expert Panel and the 2013 Joint Select Committee by advising the Prime Minister and the Leader of the Opposition on ‘next steps towards a successful referendum to recognise Aboriginal and Torres Strait Islander peoples in the Constitution’. Its membership comprised Indigenous and non-Indigenous Australians from ‘a range of expert fields and backgrounds’.⁶

⁴ Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Final Report*, 2015, p. 1.

⁵ Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Final Report*, 2015, pp. xiii-xvi.

⁶ Referendum Council, *Final Report of the Referendum Council*, 2017, pp. 3, 46.

- 5.13 In late 2016 and early 2017, the Referendum Council conducted a series of Regional Dialogues around Australia to canvass and debate options for the recognition of Aboriginal and Torres Strait Islander peoples. Each dialogue involved an average of 100 First Nation delegates with a total of 1 200 delegates participating throughout the process. The Referendum Council described the Regional Dialogues as ‘the most proportionately significant process that has ever been undertaken with First Peoples’.⁷
- 5.14 The Regional Dialogues culminated in a national constitutional convention at the base of Uluru involving over 250 delegates, representative of the Regional Dialogues. At the end of the convention all but seven delegates endorsed the *Uluru Statement from the Heart*. The Statement is discussed in more detail in the next section.⁸
- 5.15 Shortly after the national convention, the Referendum Council published a final report making two recommendations:
- that a constitutionally enshrined ‘First Nations Voice to the Commonwealth Parliament’ be established to represent Aboriginal and Torres Strait Islander peoples and to monitor the use of section 122 and section 51(xxiv) of the Constitution; and
 - that an ‘extra-constitutional Declaration of Recognition be enacted by legislation passed by all Australian Parliaments’ to ‘articulate a statement of recognition to unify Australians’.⁹
- 5.16 These recommendations are discussed in more detail in the second half of the chapter.

Uluru Statement from the Heart

- 5.17 As discussed in the previous section, the *Uluru Statement from the Heart* arose from a national constitutional convention conducted by the Referendum Council following a series of Regional Dialogues in 2016-17. The *Uluru Statement from the Heart* was issued towards the end of this convention with the support of all but seven of the over 250 delegates in attendance.

⁷ Referendum Council, *Final Report of the Referendum Council*, 2017, p. 10.

⁸ Referendum Council, ‘Uluru – National Convention’, *Media Release*, May 2017, <<https://www.referendumcouncil.org.au/event/first-nations-regional-dialogue-in-uluru>> viewed 7 July 2018; The Conversation, ‘Listening to the Heart: What Now for Indigenous Recognition After the Uluru Summit’, May 2017, <<https://theconversation.com/listening-to-the-heart-what-now-for-indigenous-recognition-after-the-uluru-summit-77853>> viewed 7 July 2018.

⁹ Referendum Council, *Final Report of the Referendum Council*, 2017, p. 2.

- 5.18 The *Uluru Statement from the Heart* reflected ‘some of the ideas and proposals advanced by Indigenous and political leaders, and constitutional experts over many years’.¹⁰ It called for the establishment of a First Nations Voice enshrined in the Constitution and a Makarrata Commission to oversee agreement-making between governments and First Nations and truth-telling about Aboriginal and Torres Strait Islander people’s history.¹¹ It described the form of constitutional recognition favoured by Aboriginal and Torres Strait Islander peoples without outlining specific models for the recommended Voice or the Makarrata Commission.
- 5.19 These recommendations of the *Uluru Statement from the Heart* are examined in detail in Chapters 2, 3, and 6 of this report.

Recommendations of recent constitutional recognition initiatives

- 5.20 This section of the report briefly outlines the major recommendations for constitutional recognition arising from recent initiatives aimed at progressing the constitutional recognition of Aboriginal and Torres Strait Islander peoples. It is not intended to be exhaustive.

Repeal of section 25 and section 51(xxvi)

- 5.21 Section 25 and section 51(xxvi) of the Constitution both contain references to outdated notions of race.
- 5.22 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.
- 5.23 Section 51(xxvi)—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

¹⁰ Mr Daniel McKay, Law and Bills Digest Section, Parliamentary Library, *Uluru Statement: A Quick Guide*, 2017, <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/UluruStatement> viewed 7 July 2018.

¹¹ Referendum Council, ‘Uluru – National Convention’, *Media Release*, May 2017, <<https://www.referendumcouncil.org.au/event/first-nations-regional-dialogue-in-uluru>> viewed 7 July 2018; Referendum Council, *Final Report of the Referendum Council*, 2017, pp. i, 11.

Torres Strait Islander peoples. Since 1967, the federal Parliament has enacted laws pursuant to section 51(xxvi) in areas including cultural heritage and native title laws.¹²

- 5.24 The Expert Panel and the Joint Select Committee both recommended repealing section 25 and section 51(xxvi) of the Constitution.
- 5.25 The Expert Panel argued that ‘... in order to recognise Aboriginal and Torres Strait Islander peoples in the Constitution, there was a case for removing the two provisions that contemplate discrimination against them (as well as against people of any so called “race”’).¹³
- 5.26 The Joint Select Committee similarly recommended the repeal of section 25 and section 51(xxvi) of the Constitution and the establishment of a replacement head of power to make laws with respect to Aboriginal and Torres Strait Islander peoples.¹⁴
- 5.27 The Referendum Council’s final report made no recommendations in relation to section 25 or section 51(xxvi) of the Constitution. It noted that section 25 was understood by regional dialogue delegates 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.¹⁵ Repealing or amending section 51(xxvi) was rated as a low priority in many of the Regional Dialogues conducted by the Council and was rejected in others. The Council noted that delegates discussed the discriminatory potential of section 51(xxvi) but were concerned in relation to the judicial interpretation and implications on existing legislation of any changes to the provision.¹⁶

¹² For example, see: *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth); *Native Title Act 1993* (Cth).

¹³ Expert Panel on Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, p. 137.

¹⁴ Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Final Report*, June 2015, pp. 19-22.

¹⁵ Referendum Council, *Final Report of the Referendum Council*, June 2017, p. 12.

¹⁶ Referendum Council, *Final Report of the Referendum Council*, June 2017, pp. 12-13.

Replacement of section 51(xxvi) and a prohibition of racial discrimination

5.28 The Expert Panel and the Joint Select Committee both proposed the insertion of new sections into the Constitution to:

- replace the head of power 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.

5.29 The Expert Panel proposed two new sections to be inserted into the Constitution via referendum. It recommended a new 'section 51A' be inserted after section 51 as follows:

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.¹⁷

5.30 The Expert Panel also recommended the insertion of a new section 116A into the Constitution to prohibit the Commonwealth, a state, or a territory from discriminating 'on the grounds of race, colour or ethnic or national origin',

¹⁷ Expert Panel on Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, p. 153.

but not precluding it from legislating ‘for the purpose of overcoming disadvantage’.¹⁸

5.31 In making these recommendations, the Expert Panel argued that this approach:

- incorporates a statement recognising Aboriginal and Torres Strait Islander peoples as the first Australians through the new section 51A;
- removes unacceptable references to race by repealing section 51(xxvi);
- avoids jeopardising existing or future Commonwealth legislation with respect to Aboriginal and Torres Strait Islander peoples by replacing the head of power provided by the current section 51(xxvi) with the new section 51A;¹⁹
- clarifies, through the use of the word ‘advancement’ in section 51A, that laws passed under this head of power should be assessed on the basis that they operate for the benefit of the group of people concerned;²⁰ and
- provides a constitutional prohibition, through the new section 116A, on Commonwealth legislative and executive action and laws that discriminate on the basis of race.²¹

5.32 The Joint Select Committee proposed three different options for a head of power to replace section 51(xxvi) of the Constitution and to prohibit the Commonwealth from legislation or executive action which adversely discriminates on the basis of race.²²

5.33 All three proposals recommended by the Joint Select Committee contain a similar statement of recognition to that outlined in the Expert Panel’s recommended section 51A. Indeed, the first proposal recommended by the

¹⁸ Expert Panel on Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, p. 173.

¹⁹ Expert Panel on Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, p. 146.

²⁰ Expert Panel on Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, pp. 150-151.

²¹ Expert Panel on Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, pp. 167-168.

²² Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Final Report*, June 2015, pp. 43-45.

Committee is simply section 51A and section 116A, with the removal of the provision in section 51A which suggests that legislation enacted under the head of power should be for the benefit of the group of people concerned. In recommending this proposal, the Committee cited negativity associated with the word 'advancement' as well as uncertainty around the legal interpretation of the word.²³ It characterised section 116A as a broad prohibition of discrimination, offering protection to all Australians by limiting the constitutional capacity of the Commonwealth, states, and territories to discriminate.²⁴

- 5.34 The second and third options for a replacement head of power presented by the Joint Select Committee are also modelled on section 51A with its statement of recognition, but exclude section 116A which prohibits racial discrimination. Instead a new section 80A, proposed for insertion after Chapter III of the Constitution, qualifies the Commonwealth power to legislate in relation to Aboriginal and Torres Strait Islander peoples with the words, 'but so as not to discriminate against them'.²⁵
- 5.35 Similarly a new section 60A, proposed for insertion after Chapter I of the Constitution, asserts that 'a law of the Commonwealth, a State or a Territory must not discriminate adversely against Aboriginal and Torres Strait Islander peoples'.²⁶ In proposing these two approaches, the Joint Select Committee noted that, unlike the Expert Panel's proposed section 116A, section 80A and section 60A confine the prohibition on racial discrimination to Aboriginal and Torres Strait Islander peoples. It also highlighted that section 80A limits the constitutional capacity of the Commonwealth without impacting the states and territories, whereas section 60A extends this limitation to all jurisdictions.²⁷

²³ Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Final Report*, June 2015, p. 30.

²⁴ Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Final Report*, June 2015, pp. 43-45, 47-50.

²⁵ Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Final Report*, June 2015, pp. 43-45.

²⁶ Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Final Report*, June 2015, pp. 43-45.

²⁷ Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Final Report*, June 2015, pp. 43-45, 47-50.

Proposals for a statement of recognition

- 5.36 As discussed in the preceding section, the Expert Panel and the Joint Select Committee both recommended that a statement recognising Aboriginal and Torres Strait Islander peoples be incorporated into the Constitution as a component of a new head of power to replace section 51(xxvi).²⁸ The Expert Panel and the Committee both felt that this approach would attract broader community support and involve fewer legal risks than other proposals, such as including a statement of recognition in the preamble to the Constitution.²⁹
- 5.37 In addition to including a statement of recognition in the proposed section 51A, the Expert Panel recommended the insertion of a new section 127A in the Constitution to recognise Aboriginal and Torres Strait Islander languages as the ‘original Australian languages’.³⁰ This approach contrasts with that espoused by the Referendum Council which recommended an extra-constitutional declaration of recognition, to be enacted by legislation passed by all Australian parliaments (ideally on the same day).
- 5.38 The Referendum Council suggested that, ‘A Declaration of Recognition should be developed, containing inspiring and unifying words articulating Australia’s shared history, heritage and aspirations’.³¹ In making this recommendation, the Council noted that a declaration was endorsed in most of its Regional Dialogues whereas a statement of recognition or acknowledgement in the Constitution was rejected³². The Council noted concerns among First Nation delegates in relation to sovereignty and also about the content of any statement of acknowledgement.³³

²⁸ Expert Panel on Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, pp. 115, 117-119, 130, 133; Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Final Report*, June 2015, pp. 43-45.

²⁹ Expert Panel on Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, pp. 115, 117-119, 130, 133; Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Final Report*, June 2015, pp. 43-45.

³⁰ Expert Panel on Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, pp. 126-128, 131-133.

³¹ Referendum Council, *Final Report of the Referendum Council*, June 2017, p. 2.

³² Referendum Council, *Final Report of the Referendum Council*, June 2017, pp. 11-12.

³³ Referendum Council, *Final Report of the Referendum Council*, June 2017, pp. 11-12.

Proposals for an Indigenous advisory body

- 5.39 As acknowledged above, the Referendum Council and the *Uluru Statement from the Heart* both called for the establishment of an Indigenous representative body to advise Parliament in relation to Aboriginal and Torres Strait Islander affairs, known as the First Nations Voice.
- 5.40 The Referendum Council recommended that The Voice be enshrined in the Constitution, with its structure and functions to be set out in legislation, including a specific responsibility to monitor the use of the heads of power in section 51 (xxvi) and section 122 of the Constitution.³⁴ In making this recommendation, it noted that, ‘the proposal for the enhanced participation of Aboriginal and Torres Strait Islander peoples in the democratic life of the Australian state, especially the federal Parliament, is not a new one’. It claimed that advocacy for better Indigenous representation has been, ‘equally prominent in Aboriginal political advocacy as a racial non-discrimination clause’.³⁵
- 5.41 In its final report, the Expert Panel did consider several proposals for mechanisms, structures, or bodies to advise the Parliament on laws and policies affecting Aboriginal and Torres Strait Islander peoples, but did not make recommendations in relation to these proposals.³⁶ The Joint Select Committee on Constitutional Recognition also considered a proposal for an advisory council made up of Aboriginal and Torres Strait Islander peoples.³⁷ However, it suggested that the proposal would benefit from further consultation, particularly with Aboriginal and Torres Strait Islander peoples, and made no recommendation.³⁸

³⁴ Referendum Council, *Final Report of the Referendum Council*, June 2017, p. 2.

³⁵ Referendum Council, *Final Report of the Referendum Council*, June 2017, p. 14.

³⁶ Expert Panel on Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, pp. 177-187.

³⁷ Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Final Report*, June 2015, pp. 33-38.

³⁸ Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Final Report*, June 2015, p. 38.

6. Agreement making and truth-telling

- 6.1 This chapter discusses the proposal for a Makarrata Commission to oversee agreement making and truth-telling, and considers evidence received on these issues. The Committee found that stakeholders had different understandings of what ‘agreement making’, ‘Makarrata’, and ‘truth-telling’ might encompass, and held disparate views on mechanisms for achieving these forms of recognition.
- 6.2 The Committee acknowledges that historical discussions have been highly contested, with little consensus on a national approach. While terminology is often unclear and sometimes confusing, this report will use the term ‘agreement making’, based the rationale outlined at paragraph 6.12, below.
- 6.3 The Committee notes that much of the debate surrounding agreement making and truth-telling involves some views that the two are interconnected, or inextricably linked.
- 6.4 Some evidence suggests that no further progress can be made on any kind of recognition without truth-telling, and some suggests that agreement making paves the way for more honest interaction between Indigenous and non-Indigenous peoples, including acknowledgement and acceptance of the facts of Australia’s history.
- 6.5 Other submitters pointed out that the recognition of Aboriginal and Torres Strait Islander peoples through recognition in all the State Constitutions, agreement making, acknowledgments of country, reconciliation action plans and local forms of truth-telling has become a ‘fixed part of the Australian legal and social landscape’. Native title, land rights, heritage protection and

Indigenous Land Use Agreements are ‘all acknowledgements of Aboriginal collective identity’.¹

- 6.6 The Committee also notes evidence suggesting that agreement making and truth-telling are related to the proposal for a First Nations Voice.
- 6.7 The Committee will examine the discussions arising from the Regional Dialogues of the Referendum Council, and the *Uluru Statement from the Heart*, before considering evidence received on agreement making and truth-telling.

Regional Dialogues process

- 6.8 The *Uluru Statement from the Heart* called for a Makarrata Commission to supervise a process of truth-telling about Aboriginal and Torres Strait Islander peoples’ history and agreement-making between governments and First Nations.²
- 6.9 Makarrata is a Yolngu word from north-eastern Arnhem Land describing ‘a coming together after a struggle, facing the facts of wrongs and living again in peace’.³ The Committee notes that some people have expressed concern regarding use of the name ‘Makarrata’.⁴ The Committee would be pleased to receive more evidence on the cultural context of Makarrata and its potential practical application in the broader Australian democratic context (see paragraph 7.46).
- 6.10 Delegates who participated in the Regional Dialogues conducted by the Referendum Council characterised Makarrata as the culmination of their agenda. They felt that truth-telling and agreement making would capture

¹ The Hon. Fred Chaney AO, *Committee Hansard*, Perth, 6 July 2018, p. 31; Ms Karen Mundine, Chief Executive Officer, Reconciliation Australia, *Committee Hansard*, Melbourne, 18 April 2018, p. 37; Mr Michael Mansell, *Submission 95*, p. 1; Mr Thomas Mayor, Maritime Union of Australia, *Committee Hansard*, Melbourne, 18 April 2018, p. 43.

² *Uluru Statement from the Heart*, 2017, <https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart_0.PDF> viewed 12 July 2018.

³ Northern Territory Department of Tourism and Culture, ‘Makarrata Agreement’, *Records 1981*, <<https://dtc.nt.gov.au/arts-and-museums/northern-territory-archives-service/cabinet-records/1981-records/makarrata-agreement>> retrieved 30 April 2018; Expert Panel on the Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander People in the Constitution: Report of the Expert Panel*, January 2012, p.193.

⁴ For example: Mr Les Coe, *Committee Hansard*, Dubbo, 2 July 2018, p. 30.

their aspirations for a fair and honest relationship with government and for a better future for their children based on justice and self-determination.⁵

- 6.11 Truth-telling was highlighted at many of the regional dialogues as an important factor in improving the relationship between Aboriginal and Torres Strait Islander peoples and the government.⁶ The Technical Advisers to the Regional Dialogues and the Uluru First Nations Constitutional Convention (Technical Advisers) suggested that delegates felt that truth-telling is about acknowledging the historical context of the current recognition discussion. The Technical Advisers noted commentary from a Torres Strait Islander working group:

This is not about portraying the negative, but it's about telling the truth. Australia was occupied, and it is still being occupied, that hasn't changed.⁷

- 6.12 There was also strong support for 'agreement making' across all regional dialogues. Professor Sean Brennan, a law academic and one of the Technical Advisers, explained to the Committee that the term 'agreement making' was deliberately adopted to reflect the diversity of agreements desired by Aboriginal and Torres Strait Islander peoples:

I think the choice of 'agreement-making' is a deliberate one to try and undoubtedly accommodate the very strong support and interest in the notion of treaty-making, and also to respect the fact that people have an intrinsic interest in persuading governments and others—developers and non-government organisations—to come to a table and to engage in the opposite of unilateral dealings; to try and engage in roundtable dealings that allow the people involved to reach the solutions that work for each other.⁸

- 6.13 According to the Technical Advisers, many delegates to the Regional Dialogues noted their long support for agreement making as they felt it offered appropriate means for 'expressing the reality that Aboriginal and Torres Strait Islander people have never ceded their sovereignty, and respecting that fact'.⁹

⁵ Referendum Council, *Final Report of the Referendum Council*, 30 June, 2017, p. 21.

⁶ Referendum Council, *Final Report of the Referendum Council*, 30 June, 2017, p. 32.

⁷ Technical Advisers: Regional Dialogues and the Uluru First Nations Constitutional Convention, *Submission 206*, p. 11.

⁸ Professor Sean Brennan, *Committee Hansard*, Perth, 6 July 2018, p. 12.

⁹ Technical Advisers: Regional Dialogues and the Uluru First Nations Constitutional Convention, *Submission 206*, p. 8.

Views on agreement making

- 6.14 The Indigenous Peoples Organisation submitted that Aboriginal and Torres Strait Islander peoples have a history of advocacy for agreement making ‘as a tool to establish self-determination’:

... the 1963 Yirrkala Bark Petitions, 1972 Larrakia Petition and the 1988 Barunga Statement, all clearly called for a Treaty...¹⁰

- 6.15 It also argued that, although the High Court overturned the fiction of *terra nullius* when it upheld the rights of the Meriam People in the Mabo decision of 1992, ‘the implications of the case remain unresolved’ in the absence of an agreement between the Australian Government and Aboriginal and Torres Strait Islander peoples.¹¹

- 6.16 The Technical Advisers observed that delegates felt that agreement making could be a vehicle for empowerment and could deliver greater autonomy to Aboriginal and Torres Strait Islander peoples in the management of community and family affairs:

Through negotiating agreements with government, they saw a way of tackling the tough issues facing their communities by taking responsibility for dealing with them, rather than having governments control their affairs and generally do an unsatisfactory job of improving the situation.¹²

- 6.17 While the Referendum Council acknowledged the strong support for agreement making within the Aboriginal and Torres Strait Islander community, it provided few details regarding the process by which agreements could be negotiated, what they might encompass, or what their desired outcomes might be.

- 6.18 The Council’s final report noted that the dialogues had:

- canvassed the negotiation of a ‘national framework agreement under which regional and local treaties’ could be made;
- discussed the possibility of agreement making encompassing:
 - ‘a proper say in decision making;
 - the establishment of a truth commission;

¹⁰ Indigenous Peoples Organisation, *Submission 338*, p. 5.

¹¹ Indigenous Peoples Organisation, *Submission 338*, p. 4.

¹² Technical Advisers: Regional Dialogues and the Uluru First Nations Constitutional Convention, *Submission 206*, p. 8.

- reparations;
- a settlement;
- the resolution of land, water and resourcing issues;
- recognition of authority and customary law; and
- guarantees of respect for the rights of Aboriginal and Torres Strait Islander peoples'; and
- debated the 'legal force' agreement making should have, 'particularly whether it should be backed by legislation or given constitutional force'.¹³

6.19 The views of stakeholders on the process, content, and outcomes of agreement making varied.

6.20 Some, for example the Hon. Mr Kyam Maher MLC, Shadow Minister for Aboriginal Affairs in the South Australian Parliament, felt that agreement making between Aboriginal and Torres Strait Islander peoples and Australian governments should commence at the local level. Before the most recent state election, Mr Maher oversaw the now disbanded agreement making process in South Australia. He noted that extensive consultation with the Aboriginal and Torres Strait Islander community in that state revealed 'overwhelming' support for 'place-based or nation-based agreements'.¹⁴

6.21 Speaking to the Committee in a private capacity in Adelaide, Dr Roger Thomas, the South Australian Treaty Commissioner, also expressed a preference for commencing agreement making with local or regional processes. He suggested that the Aboriginal and Torres Strait Islander community in South Australia would benefit from exposure to agreement making on a smaller scale before engaging at the state or federal level:

When you then start asking people, which is what I did, about what they see as being the important characteristics of a treaty for them and what it could mean to them, a lot of our people did not have clear answers, because it wasn't something that they gave the bigger picture thought to or had been exposed to the detail of what a treaty could be. So the message for me was that I had to do a lot of work in informing and making them aware of the different models and different aspects of a treaty, using both the Canadian model and certainly

¹³ Referendum Council, *Final Report of the Referendum Council*, 30 June 2017, p. 31.

¹⁴ The Hon. Kyam Maher MLC, Shadow Minister for Aboriginal Affairs, South Australian Parliament, *Committee Hansard*, Adelaide, 5 July 2018, p. 2.

using the Treaty of Waitangi model... it's a matter of building up from the region...¹⁵

6.22 The Indigenous Peoples Organisation focussed on prospects for a national agreement. It suggested that a national agreement would settle sovereignty issues and reduce resistance to constitutional recognition.¹⁶

6.23 A similar view was submitted by the Statement from the Heart Working Group. The group argued that agreements should be 'negotiated in the first part as a national framework of agreement making, under which regional and local treaties are made'.¹⁷

6.24 Mr Yingiya (Mark) Guyula MLA, of the Northern Territory Parliament, highlighted the importance of incorporating traditional decision making processes into agreement making:

... those nations with traditional decision-making processes must be able to implement these processes... we are sovereign people and we will rely on our law to negotiate and create a genuine treaty.¹⁸

6.25 The Committee also received a broad range of evidence regarding the possible content of agreements and the possible benefits of agreement making for Aboriginal and Torres Strait Islander peoples.

6.26 Mr Maher observed that Aboriginal and Torres Strait Islander communities in South Australia generally felt that agreement making should encompass:

- recognition of the past;
- formal and legally binding mechanisms for including Aboriginal and Torres Strait Islander communities in government decision making; and
- economic independence and development.¹⁹

6.27 Mr Stephen Hynd, Executive Director of Business Improvement at the New South Wales Land Council suggested that agreement making should encompass the return of traditional lands and compensation:

Again, any treaty throughout history has involved components of land and restitution. While the *Uluru Statement from the Heart* is a very generous

¹⁵ Dr Roger Thomas, *Committee Hansard*, Adelaide, 5 July 2018, p. 10.

¹⁶ Indigenous Peoples Organisation, *Submission 338*, pp. 4-5.

¹⁷ Statement from the Heart Working Group, *Submission 302*, p. 8.

¹⁸ Mr Yingiya (Mark) Guyula MLA, Northern Territory Parliament, *Submission 290*, p. i.

¹⁹ The Hon. Kyam Maher MLC, Shadow Minister for Aboriginal Affairs, South Australian Parliament, *Committee Hansard*, Adelaide, Thursday, 5 July 2018, p. 3.

statement in its spirit, underlying that is still the need for restitution, including for the spiritual side, for the whole of this nation but also restitution for the dispossession of land.²⁰

- 6.28 Mr Garry Goldsmith, Business Manager of the Narungga Nations Aboriginal Corporation in South Australia, suggested that agreement making should be based on recognising sovereignty and representation in decision making. He also argued that agreements should deliver economic empowerment:

... with any sort of treaty... it is the certainty or ascertainment that we are sovereign people, or that we have our own nations and laws that we are governed by and we want the state to recognise those. We also wanted to look at the dispossession of our country—the industries that have taken, and continue to take, from our country—and be compensated for that. We also wanted to look at our representation on local and state government. And we also wanted to look at the ongoing continuation of looking after future generations through resource sharing from the continued taking from our country.²¹

- 6.29 The Indigenous Peoples Organisation felt that a national agreement should encompass the establishment of The Voice and would enable Aboriginal and Torres Strait Islander peoples to assert their self-determination to address political, social, and economic marginalisation and develop their communities.²²
- 6.30 The organisation also supported the establishment of a Makarrata Commission, separate to the Referendum Council, to oversee agreement making. It advocated for the inclusion of a Commissioner from each state, to ensure issues from across the nation are considered, and suggested that the terms of a national agreement should be developed through extensive consultation with Aboriginal and Torres Strait Islander peoples.²³

²⁰ Mr Stephen Hynd, Executive Director, Business Improvement, New South Wales Aboriginal Land Council, *Committee Hansard*, Melbourne, 17 April 2018, p. 35.

²¹ Mr Garry Goldsmith, Business, Manager Narungga Nations Aboriginal Corporation, *Committee Hansard*, Adelaide, 5 July 2018, p. 45.

²² Indigenous Peoples Organisation, *Submission 338*, pp. 4-5.

²³ Indigenous Peoples Organisation, *Submission 338*, p. 14.

- 6.31 The organisation also highlighted the need to incorporate traditional decision-making processes and involve Senior Elders and community members.²⁴
- 6.32 The Committee also heard evidence about the operation of the South West Native Title Settlement, negotiated between the South West Aboriginal Land and Sea Council (on behalf of the Noongar people whose traditional lands stretch from Geraldton to Esperance) and the Western Australian Government.²⁵
- 6.33 Ms Gail Beck, Regional Development Manager of the South West Aboriginal Land and Sea Council, outlined the process undertaken to negotiate the settlement. She described an extensive, two-year consultation and deliberation process amongst the Noongar people regarding the desirable components of an agreement before three years of negotiations with the state government.²⁶
- 6.34 Like the Narungga Nations Aboriginal Corporation, Ms Beck highlighted the potential for agreements such as the South West Native Title Settlement to improve the socio-economic outcomes of Aboriginal and Torres Strait Islander peoples:
- ... this settlement is going to give our people, [the Noongar people] job opportunities. It's going to give our young ones a sense of hope that they could become whatever they want to become. While at the moment it's always the hand out and not the hand up, this is going to give us, in time, our own bank so that we can come to the federal government with \$5 000 and say, 'Can you match that?' And it's going to give us a sense of pride and an opportunity to reinvigorate or awaken our cultural knowledge and practices, because they have been asleep for a while.²⁷
- 6.35 The Committee received a submission from the Victorian Minister for Aboriginal Affairs, the Hon. Natalie Hutchins MP, outlining the current state of the Victorian Government's process to work towards a treaty or treaties with Aboriginal Victorians. The submission stated that the *Advancing*

²⁴ Indigenous Peoples Organisation, *Submission 338*, p. 14.

²⁵ Government of Western Australia, *South West Native Title Settlement*, <<https://www.dpc.wa.gov.au/swnts/Pages/Publications.aspx>> viewed 12 July 2018.

²⁶ Ms Gail Beck, Regional Development Manager, South West Aboriginal Land and Sea Council, *Committee Hansard*, Perth, 6 July 2018, p. 49.

²⁷ Ms Gail Beck, Regional Development Manager, South West Aboriginal Land and Sea Council, *Committee Hansard*, Perth, 6 July 2018, p. 50.

the Treaty Process with Aboriginal Victorians Bill 2018 (Vic) creates a roadmap towards future treaty negotiations through:

- requiring the future Aboriginal Representative Body and the Victorian Government to establish the elements to support future treaty negotiations, including a Treaty Authority, treaty negotiation framework and a fund to support Aboriginal self-determination;
- enabling the Aboriginal Representative Body, once established, to be formally recognised as the State's equal partner in the next stage of the treaty process; and
- enshrining guiding principles for the treaty process.²⁸

6.36 The submission highlighted that constitutional recognition and agreement making are not mutually exclusive and can work in parallel to contribute to reconciliation and ensure Aboriginal self-determination is realised in a practical way.²⁹

6.37 The New South Wales Aboriginal Land Council highlighted its advocacy for agreement making in that state:

At the moment, the New South Wales Aboriginal Land Council is engaging with all parties in the parliament and is seeking to commence a process that is bipartisan—in fact, a multiparty process that has Aboriginal people and the parliament meeting as equals... It's an important issue for Aboriginal people and the entire state of New South Wales.³⁰

Views on truth-telling

6.38 The Committee did not receive a great deal of detailed evidence on the structure, responsibilities or operation of a Makarrata Commission. A large number of submissions expressed support for the concept of truth-telling without suggesting any specific mechanisms to facilitate this process.

6.39 The Referendum Council noted that 'a truth-telling commission could be established as part of any reform, for example, prior to a constitutional reform or as part of a treaty negotiation'. It also emphasised that truth-

²⁸ The Hon. Natalie Hutchins MP, Minister for Aboriginal Affairs, Victorian State Government, *Submission 335*, pp. 1-2.

²⁹ The Hon. Natalie Hutchins MP, Minister for Aboriginal Affairs, Victorian State Government, *Submission 335*, p. 2.

³⁰ Mr Stephen Hynd, Executive Director, Business Improvement, New South Wales Aboriginal Land Council, *Committee Hansard*, Melbourne, 17 April 2018, p. 33.

telling should encompass the ‘true history of colonisation’ and the ‘stories of how First Nations peoples have contributed to protecting and building’ Australia.³¹

- 6.40 Ms Ebony Hill of the Djugun, Guda Guda, and Gooniyandi sovereign nations, suggested a royal commission or a parliamentary inquest.³²
- 6.41 The National Congress of Australia’s First Peoples (National Congress) recommended the creation of a Truth and Justice Commission to supervise, amongst other things, the process of truth-telling.³³ It recommended that the Commission be tasked with:
- investigating the histories of various Aboriginal and Torres Strait Islander nations;
 - holding tribunals;
 - recording findings in official reports for each nation; and
 - setting up ‘keeping places’ for each nation.³⁴
- 6.42 Dr Roger Thomas suggested that truth-telling could also contribute to reconciliation if it is structured in a way that engages Aboriginal and Torres Strait Islander peoples and the broader public:
- We then have to ask ourselves a question, as First Nations people: how do we design and structure and present it in a way that brings people along with us, rather than having them go away feeling negative and feeling as though they’ve been put into a situation where they’ve got to wear the bad practices and policies of their predecessors? So that is a challenge that we, as First Nations people, have got to take on.³⁵
- 6.43 The Statement from the Heart Working Group emphasised the importance of establishing a Truth-Telling Commission to strengthen the process of agreement making. It argued that failing to establish a Truth-Telling Commission could ‘dilute the process of agreement making’.³⁶
- 6.44 Mr Peter Yu, Chief Executive Officer of Nyamba Buru Yawuru, a not-for-profit company owned by the Yawuru native title holders of Western

³¹ Referendum Council, *Final Report of the Referendum Council*, 30 June, 2017, p. 32.

³² Ms Ebony Hill, *Committee Hansard*, Fitzroy Crossing, 13 June 2018, p. 19.

³³ National Congress of Australia’s First Peoples, *Submission 292*, p. 9.

³⁴ National Congress of Australia’s First Peoples, *Submission 292*, p. 16.

³⁵ Dr Roger Thomas, *Committee Hansard*, Adelaide, 5 July 2018, p. 12.

³⁶ Statement From the Heart Working Group, *Submission 302*, p. 4.

Australia, also highlighted the importance of a Makarrata Commission as a way of dealing with historical grievances. He suggested that it should encompass a national oral history project and the establishment of a centre at the Australian National University.³⁷

- 6.45 Mr Yu spoke of the need for communities to take ownership of truth-telling, telling the Committee that his suggested model would empower communities in such a way:

... local communities involving local governments to tell their stories, their oral histories, so that they can research that and keep those stories in their local shire council offices or historical centres.³⁸

- 6.46 Mr Yu argued that the model would provide ‘a healing process’ that brought people together.³⁹

- 6.47 Professor Megan Davis of the University of New South Wales also advocated for a local truth-telling process:

... clearly people wanted that truth telling to be done on a local level—not to have some South African style truth commission but to allow First Nations to map out that truth with local Australian historical societies and local councils.⁴⁰

³⁷ Mr Peter Yu, Chief Executive Officer, Nyamba Buru Yawuru, *Committee Hansard*, 12 June 2018, p. 3.

³⁸ Mr Peter Yu, Chief Executive Officer, Nyamba Buru Yawuru, *Committee Hansard*, 12 June 2018, p. 3.

³⁹ Mr Peter Yu, Chief Executive Officer, Nyamba Buru Yawuru, *Committee Hansard*, 12 June 2018, p. 3.

⁴⁰ Professor Megan Davis, University of New South Wales, *Committee Hansard*, Melbourne, 17 April 2018, p. 27.

7. Committee comment

- 7.1 This interim report has collected and summarised the views the Committee has heard to date. In this concluding chapter, the Committee sets out its own comments and highlights areas where the Committee is seeking further submissions, particularly with regard to the design of The Voice, including its constitutionality, structure, function, and establishment. The Committee also welcomes views on other aspects of its terms of reference, including issues of agreement making and truth-telling.
- 7.2 The Joint Select Committee wishes to thank sincerely the many individuals and organisations who prepared submissions and gave their evidence to the Committee.
- 7.3 The Committee acknowledges the long history of advocacy for constitutional recognition of Aboriginal and Torres Strait Islander peoples. Much has been achieved to date, but recognition is an ongoing process.
- 7.4 A number of submissions expressed frustration at the length of time taken to advance these issues without resolution. The committee understands the frustrations. It also notes that the *Uluru Statement from the Heart* changed the direction of the debate on constitutional recognition. This change required time to develop and consider necessary detail for The Voice proposal. While many people support the principle of constitutional recognition of Aboriginal and Torres Strait Islander peoples, the debate about the form of recognition has widened to include local and regional voice proposals.
- 7.5 This evolution started during the regional consultations leading to Uluru, during which a strong desire for local voices was expressed by Aboriginal and Torres Strait Islander peoples. It was also supported in the Prime Minister's statement of 26 October 2017 in response to the *Uluru Statement*

from the Heart, when he rejected one particular model of constitutional recognition but supported stronger local voices and empowerment of local people.

- 7.6 Organisations involved in drafting the *Uluru Statement from the Heart* have put proposals to the Committee which include both local and national structures for a Voice. The Committee's consultations have heard significant support for local and regional voices. This does not diminish the level of support that has been expressed for a national voice.
- 7.7 For any change to occur it is important to build consensus both among Aboriginal and Torres Strait Islander peoples and among the general community. It is also important to get the detail of any change right.
- 7.8 The Committee notes the significant body of work undertaken since 2010; beginning with the Expert Panel and culminating in the *Uluru Statement from the Heart* and the final report of the Referendum Council.
- 7.9 This work has made an important contribution to the national dialogue around how best to achieve meaningful recognition.
- 7.10 Consistent with the principles articulated by the Expert Panel, the Committee is committed to taking this work forward and identifying a form of recognition which:
- contributes to a more unified nation;
 - is of benefit to and accords with the wishes of Aboriginal and Torres Strait Islander peoples;
 - is capable of being supported by an overwhelming majority of Australians from across the political and social spectrums; and
 - is technically and legally sound.
- 7.11 With this in mind, the Committee acknowledges that the Regional Dialogues, culminating in the *Uluru Statement from the Heart*, undertaken by the Referendum Council are evidence of the strong support among Aboriginal and Torres Strait Islander peoples for the proposal for a Voice.

First Nations Voice

- 7.12 As outlined in this interim report, the First Nations Voice is described by the Referendum Council as a representative body able to ensure Aboriginal and Torres Strait Islander peoples' perspectives are considered whenever Parliament makes laws under section 51(xxvi) and section 122 of the Constitution.

- 7.13 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.
- 7.14 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.
- 7.15 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.
- 7.16 As outlined in this interim report, the Committee has heard a range of views on how to give effect to The Voice proposal, however constituted. At this stage, there are disparate views on how a Voice should be established, what its structure should be, and how it should operate.
- 7.17 The Committee is conscious of the complexities involved in designing models for The Voice because of the very different circumstances in which Aboriginal and Torres Strait Islander peoples live across Australia. Many who appeared before the Committee made the point that there is as much diversity of opinion and experience in Aboriginal and Torres Strait Islander communities as there is in the broader Australian community.
- 7.18 Some common themes have emerged from the submissions and evidence presented to the Committee.
- There is strong support for the concept of The Voice.
 - Most significant is the strong support for local and regional structures.
 - The members of the voice, whether at local, regional, or national level, should be chosen by Aboriginal and Torres Strait Islander peoples rather than appointed by government.
 - The design of 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, both at local, regional, and national level, should be used by state, territory, and local governments as well as the federal government. It seems logical if The Voice is to have a role regarding federal

legislation, policy and services that it should have the same or similar functions in relation to state and local government policies, laws, and services. The major impacts on Aboriginal and Torres Strait Islander peoples are found at this level of government and the nexus between the voice at local or regional level and state or territory government will be imperative in delivering desired outcomes. Where differences between federal and state matters arise (for example with regard to housing, health, or education policy) that would need to be conveyed to the national voice for consideration at the national level.

- The voices, whether local, regional, or national, should provide oversight, advice and plans but not necessarily administer programs or money.
- The voices should 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.

7.19 It is apparent to the Committee that legitimacy is critical to the proposal for a Voice.

7.20 Evidence to the Committee suggested that legitimacy will be derived, in part, from the extent to which The Voice is grounded in Aboriginal and Torres Strait Islander communities and provides for the proper representation of members of those communities.

7.21 Evidence also suggested that legitimacy will depend on the extent to which The Voice enables meaningful participation on the part of Aboriginal and Torres Strait Islander peoples in decision making, and the extent to which this participation results in positive change.

7.22 Related to this, the Committee also notes the view that the effectiveness of The Voice will depend on its relationship with the parliament and executive government and the ability of a Voice to operate effectively and survive even if its advice is out of favour with the government.

Developing a detailed design

- 7.23 The Committee recognises the potential of various Voice proposals to provide meaningful recognition of Aboriginal and Torres Strait Islander peoples.
- 7.24 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.
- 7.25 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.
- 7.26 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.
- 7.27 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.
- 7.28 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.
- 7.29 The Committee also considers that, through this inquiry, it can play a constructive role in the process of developing the proposal for a Voice.
- 7.30 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.
- 7.31 The range of models and the principles behind them have been outlined in earlier chapters. In considering these models, the Committee is faced with a

series of questions related to detailed design, which are outlined below. Responses to these questions will help the Committee further develop options for inclusion in its final report.

Constitutional entrenchment

- 7.32 The Committee received a range of views on the issue of constitutional entrenchment of various voice proposals.
- 7.33 The Committee heard that constitutional entrenchment would prevent any attempt by a future Parliament or Executive to abolish such an entity. Consistent with the recommendations of the Referendum Council, a number of submissions favoured the option that The Voice proposal should proceed to referendum before anything else is done.¹
- 7.34 Other submissions urged the Committee to provide either some basic principles or a draft bill to outline what The Voice would do before putting anything to a vote.
- 7.35 Others urged the Committee to recommend the establishment of The Voice outside the Constitution—that is, to use existing powers within the Constitution to legislate The Voice into existence.
- 7.36 At this stage, it is hard to establish whether there is community and bipartisan support for a constitutional voice or voices, especially as there is as yet no agreement as to how such a body would be structured or what its functions should be. In addition, there is scepticism about how such a change would influence or cause the Parliament and Executive to respond to any advice it received, especially given that any voice would ultimately be a creation of the Parliament. As a consequence, there are varying views on the effectiveness, or capacity to bind, that any such constitutional guarantee may deliver.
- 7.37 The Committee notes that the effect of any successful referendum held on entrenching The Voice would be moral, political, and legal.
- 7.38 The Committee will continue to consider proposals for constitutional entrenchment alongside proposals for the design of the range of Voice proposals.

¹ Of the 329 submissions authorised at 17 July 2018 only 10 submissions said that a referendum should take place before any supporting legislation is enacted.

Questions for consultation

7.39 This interim report canvasses options for the possible structure, functions, and implementation of various Voice proposals. The Committee is seeking further evidence in relation to these options and proposes a set of questions for consideration.

National voice

Function and operation

- What is the role of a national voice? How does it intersect with or differ from the role of any local/regional voice?
- What powers and functions should the national voice have—only advice on laws made under section 122 and section 51(xxvi) or broader policy issues?
- Which legislation should the voice have the power to advise on?
 - During which part of the policy making process should the voice provide its advice?
 - By which avenues should this advice be provided? When?
 - How could the voice advise the Executive in early stages of policy development?
 - Should the provision of advice be mandatory or discretionary? Why?
 - Should that advice be made public and if so how and when?
 - How much time should the voice be provided to advise in relation to legislation?
 - How does the national body advise on legislation that needs a quick turnaround?
- How should issues of justiciability (challenge in the courts) be dealt with?
- What matters should the national voice not deal with?
- Should the voice be responsible for service delivery?
- Should the voice have a say on the provision of services by government (state, territory, and local governments)?
- Should the voice have the power to review government expenditure?
- Should the voice have the power to self-initiate inquiries?
- How could the voice review programs and service delivery?
- How should the voice interact with the Parliament in a transparent, accountable manner representing the views of Aboriginal and Torres Strait Islander peoples across Australia? Should the advice from the voice be binding or advisory only?

- What resources would be required for the operation of an effective voice?
- What governance mechanisms should oversee the national voice?
 - How are internal disputes resolved?
 - If members of the voice act in a way as to bring the voice into disrepute, what is the procedure for removing them?

Structure and membership

- Who should be able to choose national representatives?
- By what process should they be chosen?
- How long should members serve?
- How does the voice ensure equal representation of men and women?
- How does the voice ensure both young people and elders are heard?
- What duties should such representatives have to their constituents?
- Should the voice have the power or obligation to conduct consultation or inquiries?
- What mechanisms can be used to promote the active participation of Aboriginal and Torres Strait Islander peoples in the voice at the national level?
- How can local voices be effectively represented at the national level?
- How should the national voice interact between existing representative bodies, in particular local/regional bodies and community-based organisations?
- How would the voice interact with national Indigenous organisations with expertise in areas such as health, housing, and education?

Establishment and implementation

- What is the relationship between the national voice and the local/regional voice?
- What is the relationship between the national voice and the Minister for Indigenous Affairs, and other members of the Executive? How will it work?
- What is the most cost effective way the voice can be implemented?
- What is the relationship with state, territory, and local government?
 - Should the voice have the power to advise the Council of Australian Governments?
- Should the national voice be in the Constitution? If so, what should the Constitution say?

Local and regional voices

Function and operation

- What is the role of a local/regional voice? How does it intersect with or differ from the role of the national voice?
- What powers and functions should a local/regional voice have? What matters should they not deal with?
- What is the relationship between the local/regional and national voices?
- What is their relationship with state, territory, and local government?
- Should the voice be responsible for service delivery?
- Should the voice have a say on the provision of services by government?
- What are the governance mechanisms that oversee local and regional voices?
 - Should there be an adaptable national template of model rules for organisations to adapt? If so, what should they look like?
 - How are internal disputes resolved?
 - If members of the voice act in a way as to bring the voice into disrepute, what is the procedure for removing them?
- Should the local and/or regional voice have the right to provide advice direct to the Commonwealth Parliament or Australian Government?
- Should local voices have broader roles than just providing advice?

Structure and membership

- How should a local or regional area be determined? Are there any existing boundaries that could be used?
- How could local/regional voices be constituted to best represent the traditions, practices and interests of local communities?
- Is there one model to serve as a template or should each voice be designed to local needs and cultural priorities?
- Should the local and regional voices be existing bodies with a new mandate or should they be new bodies?
- How should the local voice interact between existing representative bodies, in particular local bodies, such as native title bodies?
- Who should be able to choose local/regional representatives?
- By what process should they be chosen?
- How long should members serve?
- How do the voices ensure equal representation of men and women?
- How do the voices ensure both young people and elders are heard?

- What mechanisms can be used to promote the active participation of Aboriginal and Torres Strait Islander peoples in the voice at the local/regional level?

Establishment and implementation

- What should the relationship be between local/regional voices and the Commonwealth Parliament and Australian government?
- What is the relationship with state, territory, and local governments?
- What resources would be required for effective operation of local or regional voices?
- What is the most cost effective way the voice can be implemented?
- Should the local/regional voice be entrenched in the Constitution? If so, what should the Constitution say?

General

- What is the most appropriate and effective means for constitutional recognition of Aboriginal and Torres Strait Islander peoples?
- Should The Voice (local, regional, or national) be constitutionally entrenched, enacted by legislation, both, or either? Why?
- What order should the implementation of The Voice (local, regional, or national) proceed?
 - Should a referendum or statute to establish The Voice (local, regional, or national) come first?
 - Should consultation to co-design The Voice (local, regional, or national) precede or follow legislation or a referendum?
 - Should some provision be made in relation to the possibility of an unsuccessful referendum?
 - What benefits and challenges do these alternative approaches present?
- What should a constitutional provision for The Voice (local, regional, or national) encompass? Why?
 - Should it acknowledge the unique status of Aboriginal and Torres Strait Islander peoples, their enduring presence, languages, cultures, and heritage? If so, how?
 - Should it ensure the non-justiciability of the structure or function of The Voice? How could it do this and why is it important?
 - Should it describe the structure and functions of The Voice? Why?
 - What provision should it make for possible local, regional, and national elements of The Voice?

- What provision should it make for the provision of advice to different levels of government?
- How could a constitutional provision for The Voice (local, regional, or national) safeguard its longevity?
- What should a statutory provision for The Voice (local, regional, or national) encompass? Why?
- How could a statutory provision for The Voice (local, regional, or national) safeguard its longevity?
 - What provision should it make for possible local, regional, and national elements of The Voice?
 - What provision should it make for the provision of advice to different levels of government?
- When and how should Aboriginal and Torres Strait Islander peoples be consulted in relation to the co-design of The Voice (local, regional, or national)?
 - Who should oversee this consultation?
 - How should proposals for The Voice (local, regional, or national) be formulated for consultation?
 - How should consensus of Aboriginal and Torres Strait Islander peoples be ascertained?
 - How should the words for any constitutional amendment and referendum question be settled?
- What transitional arrangements are necessary to implement The Voice?
 - Should there be an interim Voice? If so, what structure and functions should it have?
 - Should there be a body tasked with overseeing the implementation of The Voice (local, regional, or national)? If so, what structure and responsibilities should it have? How would it be created?

Consideration of past, existing, and proposed structures

- 7.40 As outlined in this report, the Committee is aware of a number of past and existing structures that could inform the design of The Voice.
- 7.41 The Committee notes that several indicative models for The Voice have been presented in evidence over the course of the inquiry so far.
- 7.42 For instance, the Committee heard from regional bodies (such as Murdi Paaki in Western New South Wales) who, with a minimum of public sector outlays, have established a community controlled regional mechanism for

consultation on government services and programs. Where such bodies exist, there have been demonstrable improvements in community engagement with local, regional, and federal government agencies in establishing dialogue, partnership, and agreement with the Aboriginal and Torres Strait Islander community of the region. The Committee is particularly interested in learning of more good examples of regional governance and decision-making.

- 7.43 The Committee encourages submitters to reflect on these existing models, assess their relative advantages and disadvantages, and suggest how they might be built upon and improved.
- 7.44 The Committee also strongly encourages and would welcome new proposals for consideration.

Agreement making and truth-telling

- 7.45 The Committee appreciates that the *Uluru Statement from the Heart* also called for a Makarrata Commission to supervise a process of truth-telling about Aboriginal and Torres Strait Islander history and agreement making between governments and First Nations.
- 7.46 More evidence would be required for a fuller understanding of what Makarrata means and how it might operate. The Committee would be pleased to receive more evidence on the cultural context of Makarrata and its potential practical operation in the broader Australian democratic context.
- 7.47 The Committee is of the view at this stage that there would be value in considering what truth-telling means and how it might work both in formal and informal settings at the regional and local level, where communities could come together to commemorate both positive and negative examples of the history of the community through identifying and supporting activities such as:
- historical exhibits in museums and art galleries;
 - commemorative signage at key historical sites;
 - cultural events (dance, music, and arts) that bring together the community to acknowledge and celebrate the shared Aboriginal and Torres Strait Islander history of a community and a region;
 - naming of electorates and public spaces;
 - support for promoting oral history and language revival and maintenance; and

- formalised processes of reconciliation.

Other matters

7.48 The Committee notes that little evidence has been received on other proposals in relation to the recognition of Aboriginal and Torres Strait Islander people, including:

- proposals for a declaration of recognition; and
- proposals in relation to section 25 and section 51(xxvi).

7.49 It may be that some of the proposals from earlier reports might form part of a package of reforms. Some of the proposals, or a version of them, may potentially have cross party support but may face some opposition from Aboriginal and Torres Strait Islander peoples. If there was an entrenchment of The Voice first would any of these previous recommendations be worth pursuing?

7.50 The Committee would welcome further evidence on these proposals.

The way forward

7.51 The Committee looks forward to receiving further evidence on the matters that are discussed in this interim report. The Committee encourages those wishing to make a further contribution to consider the questions outlined in this chapter.

7.52 The Committee intends to travel to more communities around Australia to speak with both Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians.

7.53 The Committee will also consider other methods of engaging with individuals and organisations with particular expertise that could inform the Committee's deliberations, and with the Australian community more broadly.

7.54 The Committee would appreciate submissions dealing with the questions raised in this report by 17 September 2018.

7.55 The Committee is required to present its final report on or before 29 November 2018.

**Senator Patrick Dodson
Co-Chair**

**Mr Julian Leeser MP
Co-Chair**

24 July 2018

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 to Submission 6
- 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 to Submission 10
- 11 Michael and Michele Delaney
- 12 Mr Peter Fisher
 - 12.1 Supplementary to Submission 12
- 13 Professor George Williams AO
- 14 Mr John van Riet
- 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
- 49 Lorraine Wilson Ovington
- 50 Mr Michael Mullerworth
- 51 Ms Gillian Coote
- 52 Robin Sevenoaks
- 53 Ms Marie Sellstrom
- 54 Professor Hugh Taylor AC
- 55 Dr James Thyer
- 56 Wilhelmina Newman
- 57 Professor Anne Twomey
- 58 Dr Heather O'Connor
- 59 Ms Pauline Kennedy
- 60 Pam Griffin
- 60.1 Supplementary to Submission 60
- 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
- 71 Mr Martin McKowen
- 72 Emeritus Professor 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 to Submission 95
- 96 Rachel Green & Ben Hibbard
- 97 Jamie Hanson
- 98 Justin Tutty
- 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
- 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, 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 Professor Lesley Head
- 151 Mr Jeremy Dawkins
- 152 Ms Danya Luo
- 153 Mr David Hall
- 154 Dr Helen Keane
- 155 Mr Nick Carey
- 156 Glen Jennings
- 157 Ms Jane Needham
- 158 Mr Gould Warren

-
- 159 General Practice Registrars Australia
- 160 Dr Denise Beale
- 161 Dr Bryan Keon-Cohen
- 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 *Name Withheld*
- 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 to Submission 182
- 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 Professor Anna Yeatman
- 189 Mr Harry Hobbs
- 190 Mr Daniel Bourke *et al*
- 191 Ms Rebecca Harcourt
- 192 National Justice Project
- 193 Mr Jason O'Neil
- 194 Professor Cheryl Saunders
- 195 Dr Shireen Morris
- 196 Mr Greg McIntyre SC
- 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
- 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 Abrahmz

-
- 214 Collingwood Country Women's Association
- 215 EcoFeminist Fridays
- 216 Mr Christopher Lynch
- 217 Mr Patrick Quin
- 218 Professor 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 to Submission 244
 - 244.2 Supplementary to Submission 244
- 245 Ms Stacey C
- 246 Ms Amanda Sapienza
- 247 Mr Thomas Mayor
- 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
- 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 Marcia Langton
- 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 to Submission 281
- 282 Mark and Sabine Hagan
- 283 Charles Sturt University
- 284 Woden Community Service
- 285 Dr Louise Fitzgerald
- 286 Rosa Flaherty
- 287 Liz Burton
- 288 Law Council of Australia
- 289 Centre for Comparative Constitutional Studies
- 290 Yingiya Mark Guyula MLA
- 291 Ms Stephanie Abi-Hanna
- 292 National Congress of Australia's First Peoples
- 293 Tom Gordon
- 294 Yvonne Bradley
- 295 Adjunct Professor Eric Sidoti
- 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
- 303** Edward Synot
- 304** Elinor Morris
- 305** Dr Janet Hunt
- 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
- 316** Rosalind Dixon
- 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 Alexsandra 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 Elizabeth Quinn
- 331 Australian Council of Social Service
- 332 Herbert Smith Freehills
- 333 Croakey
- 334 Human Rights Law Centre
- 335 The Hon Natalie Hutchins MP, Minister for Aboriginal Affairs,
Victorian Parliament
- 336 Kingsford Legal Centre and Community Legal Centres NSW
- 337 Anne Kricker
- 338 Indigenous Peoples Organisation
- 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 (AbSec)
- 344 The Law Society of New South Wales Young Lawyers
- 345 Foundation for Aboriginal and Islander Research Action
- 346 Victorian Aboriginal Child Care Agency (VACCA)
- 347 Inner West Council
- 348 Aimee Raymond
- 349 Rosalind Byass
- 350 Georgie Spreadborough
- 351 Chris and Pauline Vigus
- 352 United Voice
- 353 City of Sydney

-
- 354 Lowitja Institute
- 355 Business Council of Australia
- 356 Aboriginal Peak Organisations of the Northern Territory
- 357 Central Land Council and Northern Land Council
- 358 Stewart Jensen
- 359 Concerned Australians
- 360 David Bishop
- 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
- 377 UNICEF Australia
- 378 Apmer Aharreng-arenykenh Agknanenty Aboriginal Corporation
- 379 CASSE Australia
- 380 KALACC
- 381 Suzanne Wargo

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 Yarrawoo 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 Tyronne 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 Dorrough, 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

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 aliened from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.

These dimensions of our crisis tell plainly the structural nature of our problem. This is *the torment of our powerlessness*.

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.

D. List of Aboriginal and Torres Strait Islander parliamentarians

The following information draws on publicly available information and was prepared with the assistance of the Parliamentary Library.

Federal parliamentarians

Neville Bonner (Senate, Qld, LIB; IND) 11.6.71 – 4.2.83

Mr Bonner was the first Indigenous member of any Australian Parliament in 1971.

David Kennedy (HR, Vic, ALP) 7.6.1969 – 2.12.1972

Mr Kennedy was the first Indigenous Australian to be elected to both a state parliament and the Federal Parliament (having served as the federal Member for Bendigo prior to entering the Victorian Parliament in 1982 (MLA, ALP). However, his Indigenous heritage was not known when he entered both parliaments nor did he self-identify as Indigenous at that time. For these reasons Neville Bonner is recorded as the first Indigenous federal parliamentarian.

Aden Ridgeway (Senate, NSW, Australian Democrats) 1.7.99 – 30.6.05

Ken Wyatt (HR, WA, LIB) 21.8.10 – *current*

Mr Wyatt is the first Indigenous member of the House of Representatives and the first Indigenous Member of Parliament to hold a ministerial position as the Assistant Minister for Health from 30 September 2015.

Nova Peris OAM (Senate, NT, ALP) 7.9.2013 – 9.5.2016

Ms Peris was the first female Indigenous Senator.

Jackie Lambie (Senate, Tas, Palmer United Party; IND from November 2014) 1.7.14 – 13.11.17

Joanna Lindgren (Senate, Qld, LIB) 21.5.15 – 2.7.16

Ms Lindgren is the great-niece of Neville Bonner.

Patrick Dodson (Senate, WA, ALP) 28.4.16 – *current*

Malarndirri McCarthy (Senate, NT, ALP) 2.7.16 – *current*

Ms McCarthy was formerly elected to the NT Assembly (ALP) from 8.6.05 – 24.8.12. Ms McCarthy and Ms Burney are the first Indigenous women to be elected to both a state/territory parliament and the Federal Parliament.

Linda Burney (HR, NSW, ALP) 2.7.16 – *current*

Ms Burney is the first Indigenous female member of the House of Representatives. She was also the first and only Indigenous member of the New South Wales Parliament, having been elected in 2003. Ms McCarthy and Ms Burney are the first Indigenous women to be elected to both a state/territory parliament and the Federal Parliament.

State and territory parliamentarians

Northern Territory

Hyacinth Tungutalum (NT LA, CLP) 19.10.74 – 12.8.77

Ms Tungutalum was the first Indigenous Australian elected to any state/territory parliament.

Neville Perkins (NT LA, ALP) 12.8.77 – 6.3.81

Wesley Lanhupuy (NT LA, ALP) 3.12.83 – 25.8.95

Stanley Tipiloura (NT LA, ALP) 7.3.87–20.09.92

Maurice Rioli (NT LA, ALP) 7.11.92 – 17.8.01

John Ah Kit (NT LA, ALP) 7.10.95 – 17.6.05

Mr Ah Kit and his daughter Ngaree Ah Kit (see below) are the first Indigenous father and daughter to serve in any state parliament.

Matthew Bonson (NT LA, ALP) 18.8.01 – 8.8.08

Elliot McAdam (NT LA, ALP) 18.8.01 – 8.8.08

Marion Scrymgour (NT LA, ALP; IND from June 2009; ALP from August 2009) 18.8.01 – 24.8.12

Ms Scrymgour was the first female Indigenous minister in 2003; she was later appointed as the Deputy Chief Minister of the Northern Territory, becoming (at that time) the highest-ranked Indigenous parliamentarian in Australian history.

Alison Anderson (NT LA, ALP; IND from August 2009; CLP from September 2011; PUP from April 2014; IND from November 2014) 8.6.05 – 27.8.16

Malarndirri McCarthy (NT LA, ALP) 8.6.05 – 24.8.12

Ms McCarthy has also been elected to Federal Parliament (2.7.16 – *current*).

Karl Hampton (NT LA, ALP) 23.9.06 – 24.8.12

Adam Giles (NT LA, CLP) 9.8.08 – 27.8.16

Mr Giles was the first Indigenous head of government as the Chief Minister of the Northern Territory from 14.3.13 – 27.8.16.

Bess Price (NT LA, CLP) 25.8.12 – 27.8.16

Francis Kurrupuwu (NT LA, CLP; PUP from April 2014; CLP from September 2014) 25.8.12 – 27.8.16

Larisa Lee (NT LA, CLP; PUP from May 2014; IND from November 2014) 25.8.12 – 27.8.16

Kenneth (Ken) Vowles (NT LA, ALP) 25.8.12 – *current*

Ngaree Ah Kit (NT LA, ALP) 27.8.12 – *current*

Ms Ah Kit and her father John Ah Kit are the first Indigenous father and daughter to serve in any state parliament.

Lawrence Costa (NT LA, ALP) 27.8.12 – *current*

Yingiya Mark Guyula (NT LA, IND) 27.8.12 – *current*

Chansey Paeche (NT LA, ALP) 27.8.12 – *current*

Western Australia

Ernie Bridge (WA LA, ALP, IND from July 1996) 23.2.80 – 10.2.01

Mr Bridge was the first Indigenous minister in any Australian government, as Minister for Water Resources, the North-West and Aboriginal Affairs, a position he held from July 1986 until February 1989.

Carol Martin (WA LA, ALP) 10.2.01 – 9.3.13

Benjamin (Ben) Wyatt (WA LA, ALP) 11.3.06 – *current*

Josephine (Josie) Farrer (WA LA, ALP) 9.3.13 – *current*

Zak Kirkup (WA LA, LP), 11.3.17 – *current*

In his first speech (16.5.17), Mr Kirkup identified his grandfather as Aboriginal.

Queensland

Eric Deeral (NP) 7.12.74 – 12.11.77

Leanne Enoch (ALP) 31.1.15 – *current*

William (Billy) Gordon (ALP; IND from March 2015) 31.1.05 – *current*

Cynthia Lui (ALP) 25.11.17 – *current*

In her first speech (15.2.18), Ms Lui identified as Indigenous.

Victoria

Cyril Kennedy (LC, ALP) 5.5.79 – 2.10.92

Mr Cyril and Mr Andrew Kennedy were the first brothers of Indigenous heritage to serve concurrently in any state parliament.

David (Andrew) Kennedy (LA, ALP) 3.4.82 – 1.3.85; 2.3.85 – 2.10.92

Mr Cyril and Mr Andrew Kennedy were the first brothers of Indigenous heritage to serve concurrently in any state parliament.

Lidia Thorpe (LA, Greens) 18.11.17 (Northcote by-election)

In her first speech (29.11.17), Ms Thorpe identified as Indigenous.

Tasmania

Paul Harriss (LC, IND) 25.5.96 – 24.2.14; (HA, LIB) 30.3.14 – 18.2.16

Kathryn Hay (HA, ALP) 20.7.02 – 18.3.06

New South Wales

Linda Burney (LA, ALP) 22.3.03 – 6.5.16

Ms Burney was subsequently elected to the Federal Parliament (2.7.16 – *current*).

Jai Rowell (LA, LP) 26.3.11 – *current*

Greg Warren (LA, ALP) 28.3.15 – *current*

In an article published (28.11.17), Mr Warren identified as Indigenous.

Australian Capital Territory

Christopher (Chris) Bourke (ALP) 2.6.11 – *current*