

A FIRST NATIONS VOICE IN THE CONSTITUTION



Design Issues

Report to the Referendum Council

Cape York Institute for Policy and Leadership

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This Report

This Design Issues Report has been produced for the Referendum Council to identify the broad parameters of a First Nations Voice that may be enshrined in the Australian Constitution in a Referendum of the Australian people. The Referendum Council requested the Cape York Institute for Policy and Leadership to outline its ideas, and this is our final report.

This report does not propose a *design* of such a Voice, but rather seeks to identify the *design issues* that face the consideration and development of such an institution.

This report is intended to present preliminary ideas, issues, research and analysis to inform future discussion. It does not seek to present any definitive conclusions, but rather explores high-level issues. The report comprises the ideas and views of the Cape York Institute, and do not purport to represent the views of any other group or organization. It does not represent the views of the Referendum Council or Aboriginal and Torres Strait Islander Australians.

Two points need to be kept in mind:

Firstly, the design of the First Nations Voice needs to come out of a comprehensive process of engagement with Aboriginal and Torres Strait Islander First Peoples via an appropriate inquiry of a Parliamentary Committee. In the event that the Australian people authorize a Referendum enshrining the Voice, then a design process will need to be undertaken through a formal public process that engages the Australian public, and especially Aboriginal and Torres Strait Islander First People.

Secondly, it will be up to the Commonwealth Parliament to legislate the design of the First Nations Voice. The details of the institution cannot be set out in the Constitution. It will need to be set out in an Act of the Commonwealth Parliament, which could be amended from time to time. The expectation would be that the final design and any subsequent amendments would be undertaken through a process of engagement and close attention to the views of Aboriginal and Torres Strait Islander peoples through the proposed Voice.

In the event that the Australian people endorse a Referendum, consideration should be given to the establishment of a special Parliamentary Committee to undertake a comprehensive process of engagement and consultation. The special features of such a Committee might be:

- That an Aboriginal and Torres Strait Islander representative from each State and Territory be included on the Committee. This will ensure a greater level of inclusion of Aboriginal and Torres Strait Islander peoples in the process of engagement and consultation.
- That a parliamentary representative of each of the State and Territory parliaments be included on the Committee. This will ensure that the constituent State and Territory members of the Federation are engaged in the process of engagement and consultation.
- That a process akin to the First Nations Regional Dialogues undertaken as part of the work of the Referendum Council be considered as a model for Aboriginal and Torres Strait Islander communities to participate in the process of engagement and consultation. A version of the Dialogue process would provide opportunity for Aboriginal and Torres Strait Islander First Peoples to engage closely in the design of such a Voice.

It is suggested that such a parliamentary inquiry would advise the Commonwealth Parliament with respect to:

- how First Nations should be represented
- how the body's representatives should be chosen
- roles, functions and powers of the body
- processes and procedures for productive engagement with Parliament and Government in law and policy making for Indigenous affairs
- scope of engagement in law and policy making.

Finally, this report draws on ideas and views expressed at the Regional Dialogues and the National Constitutional Convention at Uluru, but as stated above, does not purport to reflect or represent these views. In the same way the report draws on the views of commentators and experts. It presents ideas and options for how a constitutionally mandated First Nations body could be structured to ensure First Nations are represented and heard in decisions made about them.

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Table of Contents

This Report	2
Introduction	6
1. Background	8
Uluru Statement from the Heart and input from the First Nations Regional Dialogues	9
Three lenses: First Nations, conservative, liberal	12
Synthesis insight: empowering local First Nations	13
Policy context: recognition, empowerment, cultural embrace	14
2. Justification for a First Nations Voice in the Constitution	15
History: First Nations have for decades advocated for a stronger voice	15
Practicality: genuine participation is conducive to good policy and outcomes.....	17
Morality: First Nations should have a say in decisions made about them	18
Human rights: UN Declaration requires Indigenous participation in decisions affecting Indigenous rights.....	19
International precedent: other countries use First Nations bodies effectively.....	20
Suitability: a representative and participatory solution fits Australia’s constitutional character	23
Viability: First Nations Voice is more politically viable than a new rights clause	24
3. Approaches to the constitutional amendment.....	25
Criteria for deciding appropriate constitutional amendment	29
4. Design principles	30
Bottom up, not top down: creating an upside-down pyramid	30
Learning from ATSIC.....	32
The Aboriginal and Torres Strait Islander Elected Body (ACT).....	36
Design principles to guide development of proposed structure	37
Cultural legitimacy	37
Responsibility	38
Subsidiarity.....	38
Interface	39
Inclusivity	39
Proactivity	39
Genuine dialogue	40
Low complexity	40
Flexibility	40
5. Design options	41
Representation of First Nations: geographic boundaries	41

First Nations representatives.....	43
Powers, functions and roles.....	45
Local First Nations representatives.....	45
National Council of First Nations	45
Policy Committees	46
How might the National Council interact with Government and Parliament?	47
6. Summary of preliminary suggestions.....	52
Process: achieving agreement on a reform package	52
Suggested design principles.....	53
Input and engagement into laws and policies with respect to Indigenous affairs	56
Conclusion.....	57
Appendix	59
Definition of an Indigenous Australian person	59
The scope question under Twomey’s draft amendment: when should advice be permissible?	61
How legislation can help clarify scope	63
Other options for representing local First Nations groups.....	64
Other options for systems of representation	70
Other options for National Council of First Nations	75

Introduction

The Uluru Statement from the Heart calls for substantive constitutional recognition of Aboriginal and Torres Strait Islander peoples through a First Nations Voice enshrined in the Constitution. The aim of such a body would be to represent and give voice to the ancient First Nations in their contemporary form; to enable the First Nations to participate more fully in the Australia's constitutional and political processes with respect to their affairs. A First Nations Voice to Parliament could recognise and represent, as Galarrwuy Yunupingu has described, "Aboriginal people in a modern world."¹

A First Nations body in the Constitution would ensure the First Nations of Australia a genuine voice in their affairs and a fair say in public decisions made about them and their communities. It aims to create a fairer and more productive partnership between Indigenous people and the Australian Government, to improve policy and outcomes in Indigenous affairs.

The Uluru Statement calls for a single, modest but substantive constitutional reform: a constitutional amendment to establish a First Nations Voice. The proposal builds on decades of Indigenous advocacy for greater self-determination through public representation, and represents a national First Nations consensus position on the form constitutional recognition should take.

In 2014, Noel Pearson raised the idea of a First Nations body in the Constitution as a way of addressing the legal uncertainty and parliamentary supremacy objections to a racial non-discrimination clause. As an alternative to a racial non-discrimination clause, Noel Pearson in his Quarterly Essay suggested:

"We can find a way of ensuring indigenous people get a fair say in laws and policies made *about us* without compromising the supremacy of parliament. Perhaps we could consider creating a mechanism to ensure that indigenous people can take more responsibility for our own lives, *within the democratic institutions already established* and without handing power to judges... A mechanism like this – guaranteeing the Indigenous voice in Indigenous affairs – could be a more democratic solution to the racial discrimination problem..."

¹ Galarrwuy Yunupingu, 'Rom Watangu', *The Monthly*, July 2016.

A new body could be established to effect this purpose, and to ensure that indigenous people have a voice in their own affairs.”²

The proposal for a First Nations Voice in the Constitution was developed to address Indigenous calls for substantive constitutional recognition and greater empowerment in their affairs, while also addressing concerns to uphold the Constitution and minimise legal uncertainty. The approach intended to guarantee First Nations a voice in decisions made about them, while totally respecting parliamentary supremacy and aligning with Australia’s process-driven constitutional culture. Professor Anne Twomey proposed an example of constitutional drafting embodying these principles in 2015, with a draft amendment designed to accord with the practical rulebook nature of Australia’s Constitution. Julian Leeser MP describes it as the kind of constitutional clause “Griffith and Barton might have drafted, had they turned their minds to it.”³ This is an apt description.

The Australian Constitution, in the words of Justice Ian Callinan, sets up a dynamic of “mutual respect and comity” between constituent parts of the Federation.⁴ The First Nations, however, were the omitted constitutional constituency. First Nations representatives were absent at the constitutional conventions and were unable to negotiate themselves a fair place in the compact of 1901 – instead there were clauses specifically excluding them.

Part of the problem was fixed in 1967, when Indigenous people were counted in the reckoning of the population and the Commonwealth obtained its power to legislate with respect to Indigenous affairs. The 1967 referendum empowered the Commonwealth to legislate about the First Nations, but it did not empower the First Nations with a fair voice in the exercise of that power. It did not set up a relationship of mutual respect and comity. This can be achieved through a guaranteed voice. As the Uluru Statement declares: “In 1967 we were counted, in 2017 we seek to be heard.”

A constitutionally guaranteed First Nations Voice would address the original omission of the First Nations from the compact of 1901, and it would complete the unfinished business of 1967. It would extend the principles of mutual respect and comity to the constitutional relationship between the First Nations of Australia and the Australian Government, by ensuring the First Nations a voice in laws and policies made about them.

² Noel Pearson, ‘A Rightful Place: race, recognition and a more complete Commonwealth’, *Quarterly Essay* 55, 2014, 66-67.

³ Julian Leeser, ‘Uphold and Recognise’ in Damien Freeman and Shireen Morris (eds), *The Forgotten People: liberal and conservative approaches to recognising indigenous peoples* (Melbourne University Press, 2016) 87.

⁴ *New South Wales v Commonwealth of Australia* (‘Work Choices’) (2006) 229 CLR 1, 322.

The constitutional amendment would confer upon Parliament the power and discretion to legislate the design of a First Nations institution. In the spirit of this intended reform, any structure going forward must be devised in genuine partnership between the First Nations and Parliament, and endorsed by the First Nations themselves.

1. Background

The call for First Nations representation in Australia's constitutional arrangements has a long history.⁵ Indigenous advocates for decades have called for better representation, fairer consultation and greater responsibility in their affairs. This is not a new proposal. Contemporary Indigenous leaders such as Michael Mansell,⁶ Tony McAvoy SC⁷ and many others have advocated for stronger forms of First Nations representation in Australia's political system.

In 2014, inspired by the history of Indigenous advocacy for better representation and greater empowerment, Cape York Institute also developed a proposal for a constitutionally mandated First Nations Voice to Parliament in collaboration with constitutional conservatives like Julian Leeser MP, Damien Freeman, Professor Greg Craven and Professor Anne Twomey. Professor Twomey produced a draft constitutional amendment to guarantee that First Nations voices are heard. The amendment would require Parliament to set up a body that would be empowered to engage with Parliament and Government on legislation and policy with respect to Indigenous affairs.⁸ This substantive constitutional recognition would be accompanied by a symbolic Declaration of Recognition, outside the Constitution.

Through the Uluru Statement from the Heart and the First Nations Regional Dialogues, Indigenous Australians have firmly rejected a minimalist or purely symbolic recognition model and have expressed consensus support for a First Nations Voice in the Constitution as a substantive form of constitutional recognition. Delegates at the Regional Dialogues suggested preferences for ways the structure could operate. The recurring theme was the need for grassroots, local voices to be recognised and represented. The structure must not be top down, but bottom up. It must empower local First Nations to have a say in their local affairs. Representatives must not be hand-picked by Government, but selected by

⁵ This history will be further explored later in this Report.

⁶ Michael Mansell, *Treaty and Statehood: Aboriginal Self-Determination* (The Federation Press, 2016).

⁷ Tony McAvoy SC's unpublished paper on an Assembly of First Nations for Australia.

⁸ Anne Twomey, 'Putting words to the tune of Indigenous recognition', *The Conversation*, 19 May 2015.

Indigenous people. People also felt strongly that the structure must be constitutionally guaranteed so it cannot be abolished at Government whim.

In addition to Indigenous support, the proposal has increasingly garnered enthusiasm amongst non-Indigenous Australian leaders. Apart from Julian Leeser MP,⁹ Professor Greg Craven¹⁰ and Professor Anne Twomey, other public advocates of this approach include Former Victorian Liberal Premier Jeff Kennett,¹¹ former NSW Liberal Premier Nick Greiner,¹² former Governor-General Major General Michael Jeffrey and Sir Angus Houston,¹³ Cardinal George Pell,¹⁴ and author Thomas Keneally,¹⁵ among others.¹⁶ Launching an essay by Warren Mundine, Tim Wilson MP also expressed support for a revised constitutional amendment guaranteeing First Nations representation as a way of furthering Indigenous self-determination.¹⁷ Former Aboriginal Affairs Minister, Fred Chaney, also supports a First Nations Voice in the Constitution.¹⁸

Uluru Statement from the Heart and input from the First Nations Regional Dialogues

The Dialogues expressed consistent support for a First Nations Voice and this support was reflected in the Uluru Statement from the Heart. The effectiveness of such a voice was seen as being contingent on a number of factors:

- it should have representative legitimacy
- it should have cultural legitimacy
- its members should not be hand-picked by government
- it should empower grassroots, local First Nations
- it should be bottom up not top down
- it should enable self-determination and empowerment.

Following are some insights on the proposal, captured in Regional Dialogue records.

⁹ Julian Leeser maiden speech: <http://www.smh.com.au/federal-politics/political-news/the-full-transcript-of-julian-leesers-maiden-speech-to-parliament-20160914-grgj6z.html>.

¹⁰ Greg Craven, 'Our first people need a blueprint for justice, not a treaty', *The Australian*, 20 May 2017.

¹¹ See <http://www.upholdandrecognise.com/blog/2017/5/30/jeff-kennett-recognise-uphold-but-also-celebrate> and also Jeff Kennett, 'As a nation, we need to be reconciled,' *Herald Sun*, 7 June 2016.

¹² <http://www.upholdandrecognise.com/blog/2017/2/27/guest-blog-nick-greiner>

¹³ Stephen Fitzpatrick, 'Conservatives back 'tangible' change model for Indigenous recognition', *The Australian*, 17 May 2017.

¹⁴ George Pell, 'Help us to listen and make a home in our land' in Damien Freeman and Shireen Morris (eds), *The Forgotten People: liberal and conservative approaches to recognising indigenous peoples* (Melbourne University Press, 2016) 69.

¹⁵ <http://www.upholdandrecognise.com/blog/2016/12/8/guest-blog-thomas-keneally>.

¹⁶ See contributors to Damien Freeman and Shireen Morris (eds), *The Forgotten People: liberal and conservative approaches to recognising indigenous peoples* (Melbourne University Press, 2016).

¹⁷ Comments made at launch of Warren Mundine's essay at Melbourne University Law School, 19 May 2017.

¹⁸ Fred Chaney, 'Uluru proposals deserve better than a knee-jerk reaction', *Sydney Morning Herald*, 8 June 2017.

In Hobart delegates felt the structure must have permanency. The Voice should not be just advisory – a better word may be ‘advocacy’. Michael Mansell has consistently argued against an advisory function in the Constitution. Delegates felt this should be about ensuring the First Nations have a political voice. It needs to be better than ATSIIC.¹⁹

In Broome, constitutionally guaranteed permanency was also considered very important. People thought the tabling of advice mechanism required under Professor Twomey’s draft amendment would be useful in creating a productive political dialogue. They saw the advantages of having advice recorded in Hansard, so it is on the public record. People felt that the structure’s members must not be handpicked, and any representatives must be connected and involved in their local communities.²⁰

In Darwin, it was suggested that other things could be achieved through a voice to Parliament as well, including support for agreement-making. However, the structure needs individuals who are chosen by the First Nations and connected to the community. “We are First Nations people and we have to have a voice,” one delegate stated.²¹

Perth delegates spoke of being invisible to bureaucracies and politicians and of lacking a political voice and political power. They said that all services in the community need more accountability through First Nations input, leadership and oversight. The Voice to Parliament should be representative of First Nations lands and waters across Australia, building on or incorporating existing regional and local decision-making bodies. The structure should be underpinned by First Nations cultural authority.²²

The Sydney Dialogue saw a First Nations Voice to Parliament as ‘crucial’, with important possible functions like scrutinizing legislation and policy. The absence of a First Nations representative voice in the political system was noted: “There are Aboriginal People who have been elected to Parliament. But they do not represent us. They represent the Liberal Party or the Labor Party, not Aboriginal People,” one delegate explained. A voice independent of government was seen as important.²³

¹⁹ Hobart record of meeting.

²⁰ Broome record of meeting.

²¹ Darwin record of meeting.

²² Perth record of meeting.

²³ Sydney record of meeting.

In Dubbo, delegates argued that the First Nations body must have real power. It must have “power to force the adoption of the 339 recommendations of the deaths in custody report”, and shouldn’t be another Government appointed body.

In Melbourne, delegates considered a Voice to Parliament could enable political empowerment for First Nations. It could encourage increased authority and help facilitate agreement-making. It could provide advocacy and input on the basis on the UN Declaration on the Rights of Indigenous Peoples. Delegates saw it as important that the voice be guaranteed in the Constitution.²⁴

The Cairns Dialogue emphasized the importance of the First Nations Voice being constitutionally guaranteed so it cannot be easily abolished, and also viewed the structure as potentially helpful in driving agreement-making. Some suggested that the voice could be drawn from an ‘Assembly of First Nations’. Its members should be chosen by communities, with grassroots peoples at the top, not at the bottom.²⁵

A delegate at the Ross River dialogue said: “Our voice is not being heard. ... There needs to be someone there, listening and talking to the government and telling them about our needs.” The delegates called for a representative First Nations body for communities across Australia, with legitimacy in remote as well as rural and urban areas. It must be a “land-based representative body that represents us nationally.” The structure being constitutionally guaranteed was considered important: “Since the demise of ATSIC, we’ve had no say. If it’s embedded in the Constitution, it’s hard to get rid of. If there was a voice to parliament when they designed the intervention, we would have had a say.”²⁶

The Adelaide Dialogue viewed self-determination as a strong priority and supported a First Nations Voice embedded in the Constitution. They suggested it could be designed to reflect ancient First Nations’ songlines.²⁷

The Brisbane Dialogue called for solutions in Indigenous affairs to be led by the First Nations. The Dialogue therefore saw a constitutionally entrenched voice as crucial and said it needs to be representative of grassroots people. “We want an authentic partnership, a real partnership,” one delegate said.²⁸

²⁴ Melbourne record of meeting.

²⁵ Cairns record of meeting.

²⁶ Ross River record of meeting.

²⁷ Adelaide record of meeting.

²⁸ Brisbane record of meeting.

The Torres Strait Islands dialogue called for a greater degree of autonomy and self-determination, as reflected in the UN Declaration on the Rights of Indigenous Peoples. As one delegate said:

“We need somebody in the Australian Parliament, an Indigenous voice making decisions. When I look at Ministers making decisions for Aboriginal and Torres Strait Islander peoples it is a white person. We should have our own people and not have non-Indigenous people talking to Parliament on our behalf, we should be talking for ourselves.”

Delegates said the structure should cut out the ‘middle man’ to create a more efficient relationship. This would give Torres Strait Islander peoples power in decision-making processes and increased authority over their own affairs. The Voice to Parliament could provide an “engine room” for change and could facilitate self-determination. It could temper discriminatory laws and support agreement-making.²⁹

Uluru delegates urged that this should be a “voice at the heart of the political process, enshrined in the Constitution”. In terms of desired structure and mechanisms for engagement, several themes emerged. The body should be “representative of First Nations and elected by our people” and should encourage self-determination and empowerment. It should have powers to review, monitor, supervise or scrutinise parliamentary powers exercised in relation to the First Nations, to “hold government accountable in relation to legislation and the race power”. It should ensure “government is more responsible and accountable in relation to indigenous people”. This can happen through mechanisms to create dialogue and productive political tension, through increased debate, committee reports and verbal interaction. Though there would be no veto, such mechanisms would improve the political culture and tenor of government work in relation to Indigenous affairs.

Three lenses: First Nations, conservative, liberal

The First Nations Voice proposal must stand up under scrutiny from different political perspectives, or ‘lenses’.

1. The Dialogues and the Uluru Statement from the Heart provide the First Nations lens. They confirm that recognition must be practical and substantive, not just symbolic. The First Nations state that the Constitution must guarantee that First Nations’ voices are heard in decisions affecting them. The Voice must be stable,

²⁹ Thursday Island record of meeting.

enduring and representative of First Nations. *Insight: the First Nations Voice must be constitutionally guaranteed.*

2. Constitutional conservatives like Julian Leeser MP and Professor Greg Craven have provided the conservative lens. Their contribution was in discovering how to guarantee the First Nations a permanent constitutional voice, without empowering the High Court or creating legal uncertainty: it is possible to achieve this reform in a way that upholds the Constitution. *Insight: there is a way to design a constitutional amendment so that it upholds the Constitution, removes legal uncertainty and totally respects parliamentary supremacy.*
3. The liberal lens insight, highlighted by Tim Wilson MP³⁰ and human rights experts like Melissa Castan,³¹ focusses on the right or ‘freedom’ of First Nations to self-determination – the right to take responsibility. The insight is that local voices are more crucial than a top-down national voice: this should be about keeping power, legitimacy, choice and accountability with local people and communities, so they can take charge of their affairs. *Insight: the First Nations Voice must be legitimate and accountable to local people. This is the way to enhance responsibility, enable self-determination and thus improve outcomes.*

These three critical lenses create a politically balanced prism through which to further develop the proposal for a First Nations Voice in a way that speaks to these constituencies, each necessary for a successful referendum: the First Nations, conservatives and liberals. This report aims to synthesise insights from each of these perspectives.

Synthesis insight: empowering local First Nations

A key synthesis insight emerging is that, in any First Nations structure going forward, the national should not overshadow the local. Accountability should rest with local First Nations. A national body should not act as a gate-keeper to local First Nations views. A constitutionally mandated First Nations Voice must empower the ‘small platoons’.

Edmund Burke said: “to be attached to the subdivision, to love the little platoon we belong to in society, is the first principle (the germ, as it were) of public affections”.³² Local people

³⁰ Media release on 19 May 2017 and speech: <http://www.upholdandrecognise.com/blog/2017/5/25/tim-wilson-my-journey-on-the-road-to-recognition>; see also Warren Mundine, ‘Practical recognition from the mobs’ perspective: focusing Australia’s Indigenous voices’, *Uphold & Recognise*, 2017.

³¹ Melissa Castan, ‘Constitutional recognition, self-determination and an Indigenous representative body’ 8(19) 2015 *Indigenous Law Bulletin* 15: <http://www.austlii.edu.au/au/journals/IndigLawB/2015/34.pdf>.

³² Edmund Burke, *Reflections on the French Revolution* (1790).

are best placed to take responsibility in their local affairs, because home is where the heart is. To look after our own affairs first is human nature. Love of home, or 'oikophilia' as philosopher Roger Scruton calls it,³³ drives our human aspiration to care for our country and community and to protect our families.

As Australians, our shared sense of oikophilia, or love of our home, unites us: this is the patriotism which propels us to strive for our country and community. The First Nations also carry this love: a love of homelands and patriotism to their country. The First Nations have an ancient, pre-colonial connection to their traditional lands. This attachment to country, tribe and kin, is exactly why the First Nations want a Voice in their distinct affairs – because no one is better placed to strive for the betterment of the First Nations than the First Nations themselves.

Empowering local First Nations to take responsibility for their lives and communities is the only way to shift the depressing trajectory of failure in Indigenous affairs policy. That is why these small platoons must be empowered with a constitutionally guaranteed voice. There must be a decisive, paradigmatic shift in the way Australia does business in Indigenous affairs. This shift must be about empowering the First Nations to take responsibility: the true meaning of self-determination.

Policy context: recognition, empowerment, cultural embrace

A First Nations Voice in the Constitution, as called for in the Uluru Statement from the Heart, would enable Australia to fulfill three high level aspirations in Indigenous affairs policy and the pursuit of national reconciliation:

1. Recognition
2. Empowerment
3. Cultural embrace.

Firstly, the proposed structure would achieve Indigenous constitutional recognition and is premised on the idea that recognition can be meaningfully achieved through representation – a concept reflected in decades of Indigenous advocacy that argues for greater authority, fairer consultation and more meaningful input into their affairs. A guarantee of a voice would be both practical and symbolic recognition of the First Nations in the Australian Constitution.

³³ Roger Scruton, *Green Philosophy: how to think seriously about the planet* (Atlantic Books, 2012).

Secondly, the structure will encourage and facilitate Indigenous empowerment. It will create a constitutional platform for Indigenous responsibility and leadership in their affairs, empowering the First Nations with a voice to influence in the political decisions that are made about them.

Thirdly, the structure will be an important step towards national cultural embrace of Indigenous culture and heritage. The body would represent formal, functional inclusion of the First Nations, culture and heritage into the constitutional and institutional arrangements of Australia. The structure, title and processes of the body can also reflect this culture and heritage. Cultural embrace can also be fostered through implementation of other accompanying reforms, including a Declaration and agreement-making processes going forward.

2. Justification for a First Nations Voice in the Constitution

It is important to recap the justifying arguments for this proposal. There are seven key reasons why this is a sensible, worthwhile and viable proposal for constitutional recognition:

1. History: First Nations have for decades advocated for a representative voice
2. Practicality: genuine participation is conducive to good policy and outcomes
3. Morality: First Nations should have a say in decisions made about them
4. Human rights: the UN Declaration requires Indigenous participation in decisions about Indigenous rights
5. International precedent: many other countries use First Nations bodies effectively
6. Suitability: a representative and participatory solution fits with Australia's constitutional character
7. Viability: a representative and participatory solution is more politically viable than a new rights clause.

Further argument supporting each of these reasons is summarised below.

History: First Nations have for decades advocated for a stronger voice

First Nations advocacy for specific political participation and increased consultation in political decisions concerning them and their rights has been longstanding and consistent throughout Australian history:

- In 1927 Fred Maynard in NSW wrote to the Premier calling for an Indigenous board to control Indigenous affairs.

- In 1933 King Burruga called for representation in Parliament.
- In 1937 William Cooper petitioned King George V for representation in Parliament; the petition was intercepted by the Australian Government and was finally delivered to Queen Elizabeth II in 2014.³⁴
- In 1949 Doug Nicholls wrote to the Prime Minister calling for representation in Parliament.
- In 1963 the Yolngu bark petitions called for better consultation; they asked to be heard before decisions regarding their rights and their land were made.
- In 1972 the Larrakia petition called for political representation and a treaty.
- In 1972 the Aboriginal Tent Embassy advocates called for the Northern Territory Parliament to be mostly made up of Indigenous people, for land rights and black control of black affairs.
- In 1979 the National Aboriginal Conference called for representation in Parliament and a Makarrata.
- In 1988 the Barunga Statement presented to Prime Minister Bob Hawke called for, among other initiatives, an Indigenous body to oversee Indigenous affairs.
- In 1995 ATSIC called for better political participation and engagement with the political process, including through granting the chairperson speaking rights to Parliament.
- In 1995 the Council for Aboriginal Reconciliation called for representation in parliament and political participation, through incorporation of the ATSIC chairperson as a full member of the Ministerial Council for Indigenous affairs.
- In 2008 the Yolngu petition to Prime Minister Kevin Rudd called for self-determination and greater Indigenous authority and control in Indigenous affairs.
- Calls for Indigenous political representation and participation have continued in recent years, including through advocacy for:
 - reserved Indigenous seats in Parliament³⁵
 - a 7th Aboriginal State³⁶
 - a national Indigenous representative body.³⁷

Now the Uluru Statement from the Heart is added to this list. However the Uluru Statement also stands apart from the Indigenous advocacy of the past, which has tended to emanate from particular regions. The Uluru Statement is perhaps the first time a unified national

³⁴ Timna Jacks, 'Queen accepts petition for Aboriginal rights, 80 years on', *The Age*, 4 October 2014.

³⁵ E.g. Mischa Schubert, 'Indigenous want reserved seats in Parliament: Congress', *The Age*, 31 July 2011.

³⁶ Michael Mansell, 'Self-determination through an Aboriginal 7th State of Australia: an Australian Provisional Government model', 30 July 2014.

³⁷ See Tony McAvoy SC's proposal for a First Nations Assembly.

Indigenous position has been decisively declared. It is a historic achievement of national consensus.

The Uluru Statement confirms that First Nations advocacy for self-determination, including mechanisms for better participation and consultation, has never dissipated. A constitutional recognition referendum must finally respond to this advocacy in a meaningful and enduring way. The time has come for the Australian people to make an enduring promise, implemented through a constitutional guarantee, that the First Nations of Australia will always be empowered with a voice in decisions made about them.

Practicality: genuine participation is conducive to good policy and outcomes

Australian governments spend over \$30 billion a year in the name of Indigenous Australians, if not directly on them.³⁸ Progress and outcomes do not reflect this expenditure.

Effective, efficient and targeted policy requires genuine participation of the people those policies are intended to benefit. Genuine First Nations input will help improve policies and avoid duplication and waste. It will also help ensure that those laws and policies are less discriminatory, more accepted by communities and therefore more effective. Creating an efficient mechanism for the participation of First Nations in law and policy development will help create better policies and outcomes on the ground.

In his 2016 Closing the Gap speech to Parliament, Prime Minister Malcolm Turnbull vowed to “do things with” Indigenous people, rather than “to” them.³⁹ All sides of politics agree that genuine consultation and engagement with Indigenous people is essential for the development of effective, productive and fair laws and policies with respect to Indigenous affairs.⁴⁰ Generations of politicians have promised to listen more to Indigenous people when making laws and policies intended to assist them, but no formal measures, processes or guarantees allowing for their meaningful participation have yet been put in place – therefore it generally doesn’t happen.

Former Prime Minister Tony Abbott set up the Indigenous Advisory Council, which acknowledged the necessity of Indigenous advice and input in Indigenous affairs. However,

³⁸ Productivity Commission, ‘Indigenous Expenditure Report’, 2014.

³⁹ Quoting Indigenous leader Chris Sarra who urged governments to “Do things with us, not to us.” See Malcolm Turnbull, ‘Speech to Parliament on the 2016 Closing the Gap Report’, Parliament House, Canberra, 10 February 2016.

⁴⁰ See also Bill Shorten, ‘Closing the gap’ speech, House of Representatives, Parliament House, Canberra, 15 February 2015; Bill Shorten, ‘Closing the Gap Report Statement’, 14 February 2017, Parliament House, Canberra.

there are no formal process for genuine government engagement and consultation with the Indigenous Advisory Council. Former chairman Warren Mundine last year expressed frustration that the Indigenous Advisory Council is not properly consulted in important Indigenous policy decisions.⁴¹ Many have criticised the ‘hand-picked’ and unrepresentative nature of the government-appointed Indigenous Advisory Council members.

Similarly, the National Congress of Australia’s First Nations is a national Indigenous representative body, but in the past it has been severely defunded⁴² and also regularly expresses dissatisfaction at lack of government engagement.⁴³ There remains no national First Nations structure that forms part of the public institutional architecture of Australia, appropriately empowered to engage with Parliament and governments.

Australia needs change the way it does business in Indigenous affairs. If we are serious about closing the gap, the First Nations need to have genuine input into the policies and laws that affect their lives and communities.

Morality: First Nations should have a say in decisions made about them

When Captain Arthur Phillip sailed his fleet to Botany Bay in 1787, he carried instructions from King George III. The instructions required Phillip “to endeavour, by every possible means, to open an intercourse with the natives, and to conciliate their affections, enjoining all our subjects to live in amity and kindness with them.” As the process of colonisation played out, these royal injunctions were largely not followed. The relationship between the First Nations and the colonisers, and successive Australian governments following, cannot be described as a relationship of “amity and kindness”. By contrast, it has been characterised by force: it has been top down, imposed and often oppressive.

Ensuring the First Nations a voice can fundamentally transform this dynamic. The idea that the First Nations should have a say when government makes decisions affecting them and their rights is a way of treating Indigenous people with the kindness and amity the Crown originally required. It is a way of creating a fairer, more honourable, more mutually respectful and dignified relationship. It is a moral way to behave.

⁴¹ Fergus Hunter, ‘Warren Mundine slams ‘joke’ inquiry into Indigenous incarceration’, *Sydney Morning Herald*, 27 October 2016.

⁴² Heath Aston, ‘Social Services scraps funding for homeless and housing groups’, *Sydney Morning Herald*, 22 December 2014.

⁴³ See Anna Henderson, ‘Prime Minister’s office confirms plans to meet with Indigenous Congress, after accusations of bias’, *ABC News website*, 15 March 2016.

Guaranteeing the First Nations a formal say when government exercises its power in relation to them also speaks to basic principles of natural justice and procedural fairness. Increased procedural fairness in the political governance of Indigenous affairs would increase the civility and respectfulness of the relationship between the First Nations and the Australian state.

Chief Justice Allsop describes civility in the law as a “manner of human expression and social intercourse that provides the environment for the exchange and debate of conflicting ideas. It is an environment of manners and peaceful willingness to see views and ideas of others.”⁴⁴ As a matter of civility, fairness and respect, the Australian Government should develop better ways of hearing Indigenous peoples’ views and ideas. We should set in place respectful procedures for the First Nations to have a fair say in decisions made about them.

Human rights: UN Declaration requires Indigenous participation in decisions affecting Indigenous rights

Australia has signed up to the UN Declaration on the Rights of Indigenous Peoples but has not implemented its requirements. Article 18 of the Declaration states:

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

Article 19 provides:

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

The right of the First Nations to participate where legislative action affects their rights and interests is also required under racial non-discrimination principles under the Convention on the Elimination of all forms of Racial Discrimination (‘CERD’). Racial non-discrimination principles allow for special measures: positive measures targeted at a particular group in order to promote equal opportunities and to address past discrimination.⁴⁵ The CERD

⁴⁴ Chief Justice Allsop, ‘Civility, Reason, Fairness and Justice, and the Law’, speech delivered at the Great Synagogue Sydney, 12 February 2014.

⁴⁵ CERD Article 1(4) states: “Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not

Committee has said that special measures should be implemented with the informed consent of the beneficiaries.⁴⁶ Proper consultation is therefore an important indicator of a valid special measure.⁴⁷

However, the current Australian law does not require such proper consultation with the First Nations on matters affecting their interests, and recent case law demonstrates that no clear-cut legal duty to consult exists in Australia. The *Racial Discrimination Act 1975* (Cth) does not explicitly incorporate a duty to consult into its legal definition of ‘special measures’ under s 8.⁴⁸ This means that Australian governments currently do not have an explicit legal duty to consult before implementing special measures.⁴⁹

The absence of a clear legal duty to consult is a deficiency in our system. It is a problem that should be rectified at the constitutional level, because mechanisms for consultation and representation implemented through legislation alone have historically proved ineffective and short lived. The duty to consult should be constitutionally mandated. This would represent an important and enduring fulfilment of one of Australia’s core obligations under DRIP and CERD.

International precedent: other countries use First Nations bodies effectively

First Nations representative structures are common in countries with minority Indigenous populations. Comparable democracies such as New Zealand, Canada, Finland, Sweden and Norway all have First Nations representative structures:

- Canada has the Assembly of First Nations
- New Zealand has the Maori Council which is empowered to act as a consultative and advisory body
- Norway, Sweden and Finland have Saami Parliaments which act as advisory bodies to government.

be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken to have been achieved.”

⁴⁶ CERD, General Recommendation No 23, ‘Indigenous Peoples’, 18/08/97 [4(d)]; Australian Human Rights and Equal Opportunities Commission, *Social Justice Report 2007*, Recommendations 7, 14; see also Shireen Morris, ‘Indigenous constitutional recognition, non-discrimination and equality before the law: why reform is necessary’ (2011) 7(26) *Indigenous Law Bulletin* 7, 10-11.

⁴⁷ *Gerhardy v Brown* (1985)159 CLR 70, 135. More recently, French CJ said: “...it should be accepted, as a matter of common sense, that prior consultation with an affected community and its substantial acceptance of a proposed special measure is likely to be essential to the practical implementation of that measure.” *Gerhardy v Brown* (1985)159 CLR 70, 135.

⁴⁸ Which refers to Article 1(4) of CERD.

⁴⁹ *R v Maloney* [2013] HCA 28, 334.

Internationally, First Nations representative bodies have varying levels of autonomy and power. Each differs in design. The bodies sit alongside other constitutional and legislative recognition measures.

The Saami Parliament of Norway is an elected advisory body housed in a building architecturally designed to resemble a traditional Saami tipi. The establishing legislation recognises the equal worth of the Saami and Norwegian languages,⁵⁰ establishes various practical Saami language rights, and also sets up a Saami Language Council.⁵¹ Norway's Constitution also guarantees Saami cultural and language rights under an amendment adopted in 1988.⁵² Norway's Constitution was adopted in 1814 and is the world's second oldest written Constitution and includes a bill of rights.

The Saami Parliament of Finland is also an elected advisory body. Its establishing legislation recognises and guarantees the Saami "cultural autonomy within their homeland in matters concerning their language and culture."⁵³ The task of the Sámi Parliament is to "look after the Sámi language and culture, as well as to take care of matters relating to their status as an indigenous people."⁵⁴ The establishing Act imposes on governments a "duty to negotiate" with respect to specified matters.⁵⁵ Section 17 of the Finnish Constitution recognises and protects Saami language rights, part of its bill of rights.

The Saami Parliament of Sweden is an elected advisory body, however its chairman is appointed by government. The Swedish Constitution includes a bill of rights. Some Saami Parliaments have delegates who represent mainstream political parties, and all Saami Parliaments join together to create a unified Saami voice in international affairs.

The Assembly of First Nations in Canada is made up of over 600 First Nations and conducts two First Nations Assemblies per year, where delegates decide the future advocacy of the organisation. It is headed by a national chief who is assisted by 10 regional chiefs, and includes an advisory Council of Elders which directs and advises on the internal processes and procedures of the Assembly.⁵⁶ First Nations treaty rights are protected under section 35 of the Canadian Constitution, part of its Charter of Rights and Freedoms.

⁵⁰ *Sami Act 1987 (Norway)*, s 1.5.

⁵¹ *Ibid*, s 3.12.

⁵² Section 110a of the Norwegian Constitution provides: "It is the responsibility of the authorities of the State to create conditions enabling the Sami people to preserve and develop its language, culture and way of life."

⁵³ *Saami Parliamentary Act 1995 (Finland)*, s 1.

⁵⁴ *Ibid*, s 5(1).

⁵⁵ *Ibid*, s 9.

⁵⁶ <http://www.afn.ca/en/about-afn/description-of-the-afn>

The Maori Council in New Zealand is a Maori-elected consultative and representative body, which allows Maori or non-Maori to stand for election, and enables individuals to stand either in the area in which they reside, or in the area to which they have “marae affiliations” (cultural connections).⁵⁷ It is headed by one chairman and 6 executive leaders, who are elected by local Maori Committees and District Maori Councils across New Zealand. New Zealand also has Maori reserved seats in Parliament, a settlement process under the Treaty of Waitangi facilitated by the Waitangi Tribunal,⁵⁸ and legislation that recognises Maori as an official language of New Zealand.⁵⁹

None of these representative bodies has a power to veto government legislation or policy, though some have a level of localised self-determination in their affairs. All these bodies are constituted by representatives chosen by Indigenous people, with the exception of the Chairman of the Swedish Saami Parliament. Most of these bodies form one part of a variety of constitutional and extra-constitutional measures substantively recognising the First Nations – they sit alongside other relevant measures and protections, for example guarantees to equality before the law or language and culture rights that are constitutionally protected.

Australia stands apart from these nations. The Australian Constitution has no bill of rights or equality guarantee. There is no formal recognition of First Nations languages. There was no founding treaty. And Australia’s First Nations have no dedicated voice in Australia’s political and institutional arrangements.

In implementing mechanisms for meaningful and substantive First Nations constitutional recognition, including representative mechanisms to ensure First Nations have a voice in their affairs, these countries have taken genuine steps towards creating mutually respectful relationships with Indigenous peoples. In Australia, there have been many iterations of Indigenous bodies, but most have lacked authority, legitimacy, effective processes for government engagement and have usually been short lived. This accentuates the need for a constitutional guarantee in the Australian context, both to ensure that a First Nations structure exists and to require Parliament and government to interact productively with it.

⁵⁷ *Maori Community Development Act 1962 (NZ)*, s 19(4).

⁵⁸ *Treaty of Waitangi Act 1975 (NZ)*.

⁵⁹ *Maori Language Act 1987 (NZ)*.

Suitability: a representative and participatory solution fits Australia's constitutional character

Australia has no federal constitutional bill of rights to protect minority interests from majoritarian power. Australia's Constitution protects citizens' rights mostly through the checks and balances of the federal political process: by giving the various constitutional constituencies a say, by guaranteeing them fair representation, and by ensuring they participate in political decision-making.

The Constitution guarantees even the most minority States equal representation in the Senate, ensuring that the might of the majority is tempered by minority interests. It recognises the distinct political, historical and geographical identities of the former colonies and ensures those localised voices are always heard by central powers.⁶⁰ These constituencies create an important check and balance on Commonwealth power.

The mandated sharing of power under the Australian Constitution compels a culture of 'mutual respect' in the relationships between the constituent parts of the Federation.⁶¹ In the words of Justice Ian Callinan:

The whole Constitution is founded upon notions of comity, comity between the States which replaced the former colonies, comity between the Commonwealth as a polity and each of the States as a polity, and comity between the Imperial power, the Commonwealth and the States... Federations compel comity, that is to say mutual respect and deference in allocated areas.⁶²

Australia's First Nations are the omitted constitutional constituency who went unrecognised and unrepresented in the constitutional compact. They were not represented in the drafting of the Constitution and so could not negotiate themselves a fair place within it. Constitutional recognition must rectify this. It must belatedly extend the principles of mutual respect and comity to the constitutional relationship between the First Nations and Australian governments.

A constitutional amendment guaranteeing that the First Nations of Australia will always have a say in political decisions affecting them would be fundamentally in keeping with Australia's process-driven constitutional character and design. That is why Julian Leeser MP

⁶⁰ As Professor Cheryl Saunders has pointed out, under the Constitution there is also a minimum representation requirement for each State in the House of Representatives, irrespective of population, further emphasising the importance the Constitution attaches to minority representative voices.

⁶¹ Michelle Evans, 'Re-thinking the Federal Balance: How Federal Theory Supports States' Rights' (2010) 1 *The West Australian Jurist* 14, 16.

⁶² *New South Wales v Commonwealth of Australia* ('Work Choices') (2006) 229 CLR 1, 322. Quoted in *ibid.*

argues it is the kind of constitutional clause “Griffith and Barton might have drafted, had they turned their minds to it.”⁶³

This approach would protect First Nations interests by compelling comity: by creating mutually respectful dialogue and ensuring the First Nations a say in political decisions about them.

Viability: First Nations Voice is more politically viable than a new rights clause

Through the Uluru Statement from the Heart, the First Nations of Australia have made clear that they seek substantive reform, not minimalism or mere symbolism. A minimalist proposal – removal of s 25, alteration of the Race Power and inserting some poetic words in the Constitution – would not receive First Nations support. Indeed, Indigenous people have indicated they would actively oppose it. Such a proposal would likely fail, just like John Howard’s attempted symbolic preamble in 1999. The history of constitutional reform in Australia demonstrates that the Australian people will vote ‘yes’ to make practical changes and fix specific practical problems, but not to make symbolic gestures. No successful referendum in Australia has been just symbolic.

Any substantive model for recognition reform must, however, also be capable of winning bipartisan and public support – or it too will fail. A racial non-discrimination clause, as proposed by the Expert Panel in 2012 and the Joint Select Committee in 2015, has not won the political consensus necessary for a referendum. The Joint Select Committee recommended three variations of a racial non-discrimination clause in its Final Report,⁶⁴ but its Chairman and Liberal MP, Ken Wyatt, subsequently observed that such a clause was unlikely to succeed at referendum because it was already being opposed in his own party.⁶⁵

This was not the first time in Australia’s history that the push for a racial non-discrimination protection was politically defeated before it was put to the people. A racial non-discrimination clause was proposed by Liberal MP Billy Wentworth prior to the 1967 referendum,⁶⁶ but it did not become part of the referendum proposal for similar reasons: concerns about parliamentary supremacy and the High Court striking down Parliament’s

⁶³ Julian Leaser, ‘Uphold and Recognise’ in Damien Freeman and Shireen Morris (eds), *The Forgotten People: liberal and conservative approaches to recognising indigenous peoples* (Melbourne University Press, 2016).

⁶⁴ Joint Select Committee, *Final Report*, 2015, Recommendation 5.

⁶⁵ Natasha Robinson, ‘Ken Wyatt: time to get a move on with constitutional recognition’, *The Australian*, 10 July 2015.

⁶⁶ Expert Panel report, 30.

laws.⁶⁷ Indeed, all previous attempts to curtail Parliament's power through the implementation of new constitutional rights clauses or judicially adjudicated restraints have failed when put to referendum. Australia so far has not succeeded in implementing a legislated federal bill of rights, let alone any new constitutional rights clause.

In contrast to a judicial solution (a racial non-discrimination clause, or variations thereof) which enlivens concerns about parliamentary supremacy and empowering the High Court, a representative and participatory solution presents a more politically viable way forward. A non-justiciable constitutional guarantee of First Nations political participation, representation and consultation in decisions regarding them is a way of responding to the concerns about parliamentary supremacy and legal uncertainty raised in relation to a racial non-discrimination clause, while also responding to the decades of First Nations advocacy calling for better consultation and a stronger voice in their affairs.

This proposal does not empower the High Court and eliminates risk of laws being struck down. It removes legal uncertainty and respects the procedural rulebook nature of the Constitution. That is why constitutional conservatives support it over the insertion of a racial non-discrimination clause, and over the insertion of uncertain symbolic language in the Constitution. The modest and constitutionally conservative nature of this proposal, together with the growing consensus across the political spectrum in support of this kind of reform, demonstrates this as a viable way forward.

The 1967 referendum empowered the Commonwealth to legislate with respect to the First Nations of this country. The next logical step, in keeping with Australia's constitutional character and strong attachment to parliamentary supremacy, is to empower the First Nations themselves to have a say in the exercise of that power and other laws and policies impacting them.

3. Approaches to the constitutional amendment

Experts and leaders have proposed options for draft constitutional amendments giving effect to the proposal for a First Nations Voice to Parliament. One proposed approach was developed by Professor Anne Twomey. This option constitutionally guarantees a First Nations advisory body to provide non-binding advice to Parliament and government. It requires advice be tabled in Parliament and requires Parliament to consider the advice when making laws with respect to the First Nations.

⁶⁷ John Gardiner-Garden, 'The Origin of Commonwealth Involvement in Indigenous Affairs and the 1967 Referendum', Department of the Parliamentary Library, Background Paper No. 11, 1996-7.

The amendment is drafted to be non-justiciable, which means these are constitutional clauses that would be adjudicated by Parliament, rather than the High Court.⁶⁸ The High Court generally does not intervene in constitutional clauses with respect to ‘proposed laws’, because the Court’s role is determine matters of law, not to intervene in the *making* of laws by Parliament.⁶⁹ This is because, in the words of Justice McTiernan, “Parliament is master in its own household”.⁷⁰

CHAPTER 1A

Aboriginal and Torres Strait Islander Body

60A(1) There shall be an Aboriginal and Torres Strait Islander body, to be called the [TITLE], which shall provide 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, functions and procedures of the [TITLE].

(3) The Prime Minister shall cause a copy of the [TITLE]’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 tabled advice of the [TITLE] in debating proposed laws with respect to Aboriginal and Torres Strait Islander peoples.

The procedural issue of scope is often raised in relation to Professor Twomey’s draft amendment: for what matters can advice be given? Professor Twomey’s draft under subsection (1) enables the body to provide advice on broad matters relating to Indigenous peoples, but subsection (4) only requires Parliament consider the advice where the proposed law is specifically “with respect to” Indigenous peoples. Whether there has been “consideration” would be a matter for Parliament, not the High Court. The scope issue can also be clarified by Parliament in its legislation, and is discussed in further detail in the Appendix to this report.

Apart from Professor Twomey’s amendment, former chairman of the Prime Minister’s Indigenous Advisory Council, Warren Mundine, proposed two alternative amendments which would empower First Nations voices in a more localised way.⁷¹ While Professors Twomey’s amendment constitutionalises a single, national First Nations Voice along with its

⁶⁸ For more on the non-justiciability of this amendment, see Shireen Morris, ‘The Argument for a Constitutional Procedure for Parliament to Consult with Indigenous Peoples when Making Laws for Indigenous Affairs’, (2015) 26 *Public Law Review* 166.

⁶⁹ For example, the non-justiciable character of section 53 of the Constitution was discussed in *Osborne v Commonwealth* (1911) 12 CLR 321, 336, 339; *Western Australia v Commonwealth* (1995) 183 CLR 373, 482.

⁷⁰ *Victoria v Commonwealth* (1975) 134 CLR 81, 138.

⁷¹ Warren Mundine, ‘Practical recognition from the mobs’ perspective: focusing Australia’s Indigenous voices’, *Uphold & Recognise*, 2017.

advisory functions and some mandated interaction with Parliament, Warren Mundine's proposal would constitutionalise local First Nations voices, and the rest would be left to legislation.

Warren Mundine's approach is also different because it would incorporate the requirement for Parliament to establish local bodies into a new Indigenous head of power replacing the Race Power. His first suggestion adapts a subject matter power along the lines of that suggested by Professor Twomey and other constitutional lawyers:

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

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

Warren Mundine also proposed a more modest version that leaves Parliament to decide what functions to give the local bodies, and which retains a broader plenary power for Indigenous affairs:

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

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

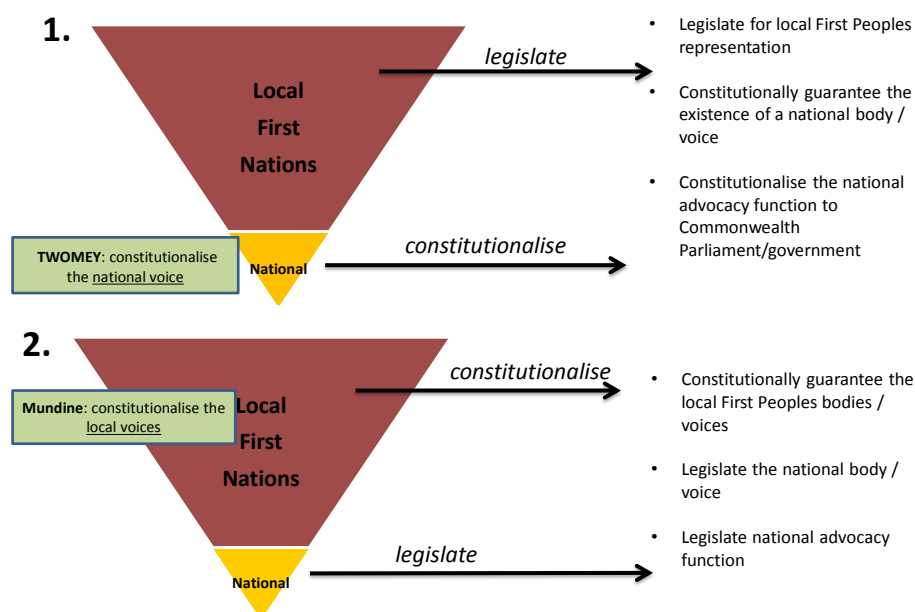
Notably, Professor Twomey and Warren Mundine offered two contrasting yet entirely complementary conceptual approaches to constitutionalising a First Nations Voice, or First Nations voices. Professor Twomey's approach constitutionalises a national advisory body and constitutionally mandates some of its interaction with Parliament, leaving local representation (which would naturally connect and give rise to the national representation) and any other functions to be determined by Parliament in the legislation setting up the body.

The Warren Mundine approach constitutionalises local First Nations bodies. His first option constitutionalises some functions of the local bodies, leaving any national advocacy function

or parliamentary interaction for Parliament to determine in the legislation. His second option is the more modest: it constitutionalises the local First Nations bodies, leaving their functions, any national advocacy function and any required parliamentary interaction to legislation.

Professor Twomey and Warren Mundine highlight two ways of constitutionally empowering First Nations to have a voice in their affairs – one constitutionalising a national voice and the other constitutionalising local voices. Their proposed constitutional amendments could entrench different parts of the same connecting structure.

2 options for a constitutionally guaranteed voice



The Uluru Statement from the Heart only calls for one constitutional amendment: a First Nations Voice. It did not call for amendment of the Race Power. Notably, Mundine’s proposal to incorporate a requirement for First Nations bodies into the new power could equally appear in a standalone clause.

Professor Twomey’s draft may be the preferable constitutional approach because it provides the more robust constitutional guarantees. Some at the Dialogues, however, expressed a preference for an advisory function not to be included in the constitutional amendment, leaving it open to Parliament to determine all functions of the body in legislation.

A more modest constitutional amendment could omit any specific advisory function and could simply require Parliament to establish a First Nations body, leaving all its functions to be articulated outside the Constitution in legislation. This kind of amendment would be

shorter and simpler, however the constitutional guarantee it would provide is weaker. Professor Twomey's amendment constitutionally requires (though non-justiciably) the body's existence, tabling of advice and consideration of advice. Omitting advisory mechanisms from the constitutional amendment would mean the Constitution would only guarantee the existence of a First Nations body.

Criteria for deciding appropriate constitutional amendment

Drafting of the proposed constitutional amendments should continue to be discussed, with pros and cons of each approach evaluated. Most importantly, the First Nations themselves should decide in negotiation with Parliament the constitutional approach, taking into account the strength of the constitutional guarantee and also legal workability and political viability.

The Twomey approach provides a more robust constitutional guarantee. It guarantees the national body's existence and also guarantees tabling of advice and consideration of advice by Parliament. Though these are non-justiciable guarantees which could only be enforced politically, they are still important because the clauses constitutionally mandate interaction with government. Other more modest versions of the amendment, omitting the advisory function, could however also be considered.

The purpose of any amendment should be to guarantee the First Nation of Australia a voice in their affairs, while also upholding the Constitution and maintaining parliamentary supremacy. Any revised constitutional drafting, therefore, should retain key characteristics to ensure viability. These constitutional characteristics are as follows:

- The drafting should uphold the Constitution and respect parliamentary supremacy
- The amendment should be non-justiciable, avoiding any risk of Parliament's laws being struck down by the High Court and minimising legal uncertainty
- Any advice from a national body should not be binding and could not enable a veto
- Parliament need not wait for advice and could not be delayed (unless it chooses to subject itself to timing requirements through its own legislation) so there is no possibility of this proposal operating as a veto by practical operation; the legislation should set out appropriate procedures to ensure the body can fairly participate, with appropriate timelines, in relevant proposed laws and policies – this is discussed in more detail the Appendix.
- The details of the body's structures and processes would be set out in legislation, not in the Constitution, ensuring Parliament's flexibility to improve the institution over time as needed, in consultation with the First Nations body.

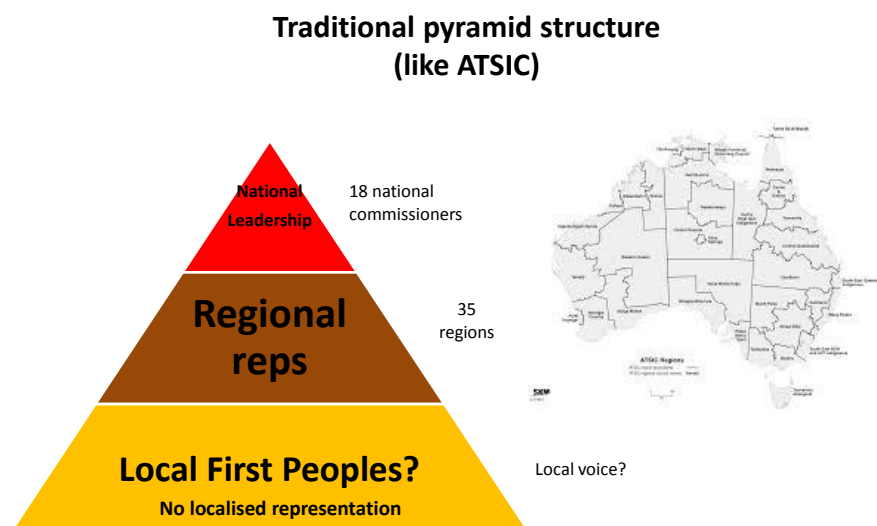
4. Design principles

Bottom up, not top down: creating an upside-down pyramid

Under a constitutional amendment guaranteeing the existence of a First Nations body, the Parliament would have power to enact legislation to set up the body, its structures, functions and procedures. Ultimately, therefore, the design of the body is a matter for Parliament in negotiation with the First Nations themselves. As noted in the introduction, a Parliamentary Committee should be formed to engage with Indigenous Australians on design of a First Nations body. The following are some ideas and insights to inform this process.

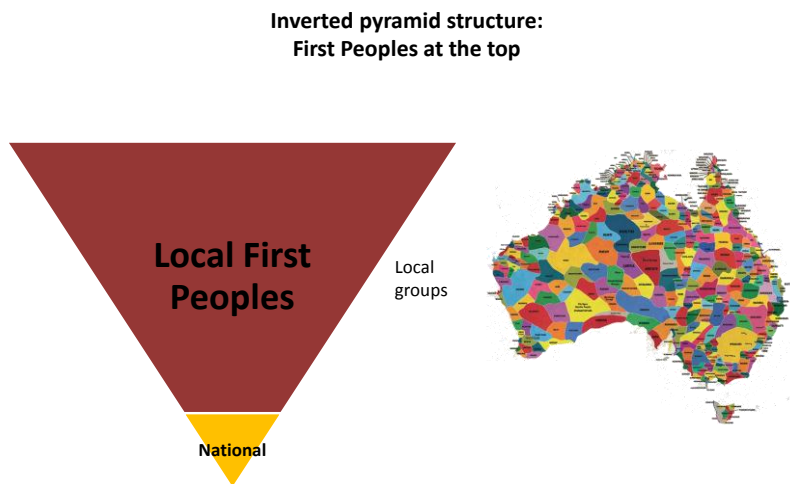
At every dialogue it was emphasised that the structure of any First Nations body must be bottom up, not top down. It must empower grassroots, local people with a voice. Rather than a traditional top down pyramid, like ATSIC, this structure should be an upside-down pyramid. It should place local First Nations in the position of accountability, empowerment and responsibility.

ATSIC was structured to represent 35 regions across Australia, each with a regional council, with 18 national commissioners driving national advocacy. It was a traditional pyramid structure which arguably left First Nations at the local level unrepresented. Power was vested at the regional and national levels, not the local level.



Dr Marion Scrymgour in a 2014 lecture argued that the ATSIC model could be improved upon by shifting the focus to “self-determination at a much more grass roots and local level.”⁷² Dr Scrymgour’s sentiments were echoed at the Dialogues.

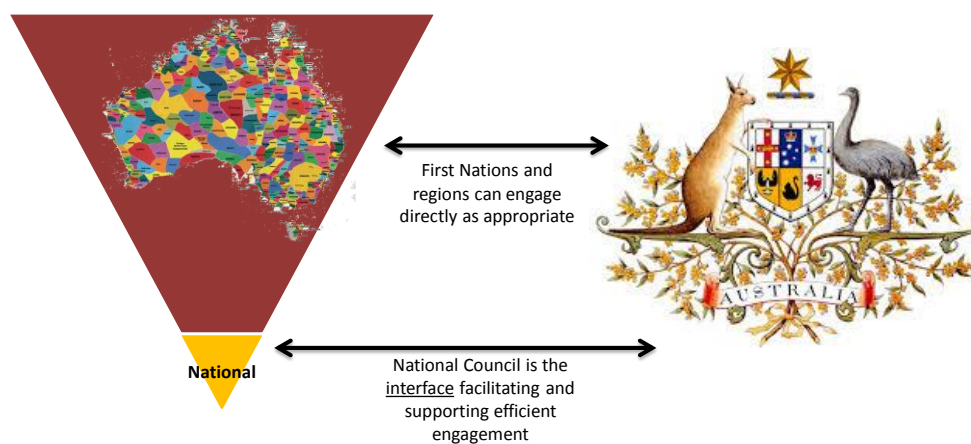
Truly empowering local First Nations requires a fundamental flipping of the traditional top-down pyramid. It requires an inverted, upside-down pyramid.



Rather than a top down representative structure like ATSIC, under this approach the focus would be on local groups. A small national council could facilitate and support First Nations to engage productively with Government and Parliament on matters concerning them and could advocate on their behalf where requested by the First Nations. This national council would facilitate consultation with local First Nations and provide input and engagement into Government and Parliament on laws and policies with respect to the First Nations, on the basis of that consultation.

⁷² Marion Scrymgour, ‘Nugget Coombs Memorial Lecture’, Charles Darwin University, 8 October 2014.

Local voices take primacy, national council is the interface



Processes and procedures for engagement and input into law and policy making could be set out in the Constitution and in legislation, as under Professor Twomey’s approach, or they could be completely provided for in legislation.

Learning from ATSIC

The design of the First Nations Voice should learn from and improve upon structures of the past and present, including the Aboriginal and Torres Strait Islander Commission (‘ATSIC’),⁷³ as well as from international experience.⁷⁴ It may also be appropriate to take lessons from the design of the National Congress of Australia’s First Nations (‘Congress’), but given Congress is a private corporation rather than a public institution, this is not explored in detail here.⁷⁵

ATSIC was a representative institution and consultative body that allowed the First Nations to have a voice in national affairs.⁷⁶ The objectives of ATSIC were:

⁷³ It should also learn from the Aboriginal and Torres Strait Islander Elected Body (‘ATSIEB’) in the ACT. Information and discussion of ATSIEB is included in the Appendix to this report.

⁷⁴ International lessons from the Maori Council, the Scandinavian Saami Parliaments and the Canadian Assembly of First Nation influence all the ideas canvassed in this report.

⁷⁵ See however article by Muir: Sam Muir, ‘A new representative body for Aboriginal and Torres Strait Islander people: just one step’ (2010) 14 *Australian Indigenous Law Review* 86.

⁷⁶ Kinglsey Palmer, ‘ATSIC: Origins and Issues for the Future. A Critical Review of Public Domain Research and Other Materials’ (2004) 12 *AIATSIS Research Discussion Paper*, 10. See also: Aboriginal and Torres Strait Islander Commission, ‘Review of the operation of the ATSIC Act’ (1989) *Report to the Minister for ATSI Affairs*; Angela Pratt, ‘Make or Break? A Background to the ATSIC Changes and the ATSIC Review’ (2003) Parliament of Australia, *Current Issues Brief no. 29*, Social Policy Group; Aboriginal and Torres Strait Islander Social Justice

- to ensure maximum participation of Aboriginal and Torres Strait Islander people in government policy formulation and implementation
- to promote indigenous self-management and self-sufficiency
- to further indigenous economic, social and cultural development, and
- to ensure co-ordination of Commonwealth, state, territory and local government policy affecting indigenous people.⁷⁷

ATSIC had three key functions or roles:

- advising governments at all levels on indigenous issues
- advocating for indigenous rights
- delivering and monitoring indigenous programs and services.⁷⁸

An arguable weakness in the design of ATSIC was its wide mandate and the tension between its competing dual roles.⁷⁹ It was both an administrative body and a representative body, at once tasked with administering programs and being an independent national Indigenous voice. This meant that its representative role was compromised.⁸⁰ It was ultimately answerable to the government of the day, rather than the Indigenous people it represented.⁸¹ This complexity arguably arose because ATSIC was charged with a wide a spectrum of tasks: sometimes it may have been unclear whether ATSIC was primarily a public servant, or primarily a public advocate.

Secondly, as highlighted by Dr Marion Scrymgour, ATSIC may have been too far removed in its accountability structures from Indigenous people at the local level.⁸² Thirdly, ATSIC was intended to be a national representative body that would influence government policy, but there were few formal structures for productive interaction with government.⁸³ ATSIC was

Commissioner, Human Rights and Equal Opportunity Commission, 'Submission to the Review of ATSIC (2003) Will Sanders, 'ATSIC's Achievements and Strengths: Implications for Institutional Reform' (2004) *Centre for Aboriginal Economic Policy Research; Shooting the Banker: Essays on ATSIC and self-determination*. P Sullivan (ed.), North Australia Research Unit, The Australian National University, Darwin.

⁷⁷ *The Aboriginal and Torres Strait Islander Commission Act 1989*, s 3.

⁷⁸ See Angela Pratt, 'Make or Break? A Background to the ATSIC Changes and the ATSIC Review' (2003) Parliament of Australia, *Current Issues Brief no. 29*, Social Policy Group.

⁷⁹ Will Sanders, 'ATSIC's Achievements and Strengths: Implications for Institutional Reform' *Centre for Aboriginal Economic Policy Research; Shooting the Banker: Essays on ATSIC and self-determination* (2004).

⁸⁰ Kinglsey Palmer, 'ATSIC: Origins and Issues for the Future. A Critical Review of Public Domain Research and Other Materials' (2004) 12 *AIATSIS Research Discussion Paper*, 11; see also John Chesterman, 'National Policy-Making in Indigenous Affairs: Blueprint for an Indigenous Review Council' (2008) 67(4) *Journal of Public Administration* 419, 422.

⁸¹ Kinglsey Palmer, 'ATSIC: Origins and Issues for the Future. A Critical Review of Public Domain Research and Other Materials' (2004) 12 *AIATSIS Research Discussion Paper*, 5-6, 22.

⁸² *Ibid*, 22-23.

⁸³ *Ibid*, 5-6, 23.

supposed to be a “corner-stone of national Indigenous representation and the source of advice to government”, but this was “neither mandated nor facilitated by required process”. A more robust system was arguably needed to effect the desired outcomes.⁸⁴

There are several ways the proposed First Nations Voice is distinguishable from ATSIC, and could improve upon ATSIC.

Firstly, the proposed institution could be focussed on facilitating First Nations participation in the processes of Australian democracy. While service delivery and management of funding might not be the body’s focus, it is important to acknowledge that the outcomes of the democratic process that truly matter for the First Nations are most often expressed in service delivery. In the design process for the First Nation’s Voice, there will be a need to balance the views of those who believe that service delivery should not be within the remit of the body and those that point out that it is the delivery of services that most impact on the daily lives of the First Peoples. In this consideration, a synthesis of these competing views could be that the Voice be supportive of and complementary to other reforms which seek to improve program delivery on the ground through the empowerment of First Nations to have a say in the services delivered to their communities.

Secondly, the body design can learn from ATSIC by ensuring the devolution and decentralisation of power. ATSIC was made up of regional councils, but was also centralised in its structure. A review into ATSIC found that it would have benefitted from greater control at the regional level.⁸⁵ Others suggest there could have been “better representation of community views.”⁸⁶ The design of the First Nations Voice can learn from this feedback, by ensuring that national leadership is closely connected and accountable to First Nations at a local level,⁸⁷ and by ensuring local communities and regions can speak for themselves in relation to their local matters.

The structure could represent the First Nations of Australia, focussing on local groups rather than larger regions. It could build upon and connect with existing and developing representative mechanisms, including Native Title representative structures where Native

⁸⁴ *Ibid*, 5-6, 23.

⁸⁵ See John Hannaford, Jackie Huggins and John Collins, ‘In the Hands of the Regions: a New ATSIC’, 2003.

⁸⁶ Kinglsey Palmer, ‘ATSIC: Origins and Issues for the Future. A Critical Review of Public Domain Research and Other Materials’ (2004) 12 *AIATSIS Research Discussion Paper*, 11, 22-23.

⁸⁷ Marion Scrymgour, ‘Nugget Coombs Memorial Lecture’, Charles Darwin University, 8 October 2014; H.C. Coombs also argued that “any organisation designed to give Aborigines an effective influence on government policies must be firmly based on, derive its authority from, and be accountable to, local groups and communities and their organisations...” H.C. Coombs, *Aboriginal Autonomy* (Cambridge University Press, 1994) 141-142.

Title has been recognised. At the same time, the body should ensure that Indigenous Australians who do not or cannot win native title recognition, perhaps due to a legal finding of loss of cultural connection,⁸⁸ can also be represented. It should allow Indigenous people living in remote, regional or urban areas, whether or not they are culturally connected with their traditional lands in a way that satisfies native title legal requirements,⁸⁹ to have a voice in the law and policy making that affects them.

Thirdly, this proposal could set in place a constitutionally established procedure for the body to engage with Parliament, as suggested by Professor Twomey. Such procedures should also be extrapolated in the legislation establishing the body, or if Professor Twomey's approach is not adopted, they could be wholly articulated in legislation. A constitutional engagement procedure and/or any legislated procedures could address the concern that ATSIC did not have clear, mandated mechanisms for effective government engagement and dialogue. In this respect the body design can also draw upon the systems being utilised by the ACT's current Aboriginal and Torres Strait Islander Elected Body (discussed below).

Finally, the abolishment of ATSIC demonstrates why it is important this body has a constitutional foundation. The First Nations Voice should not be abolished the moment there are difficulties. All institutions are made up of, run and designed by imperfect human beings who inevitably make mistakes and must be held accountable, and must learn and improve over time. Institutions themselves are imperfect and must evolve. When there are corrupt or incompetent politicians in Parliament, no one seriously calls for the institution of Parliament to be abolished – rather the politicians are held accountable. Similarly, just because ATSIC had problems and was ultimately abolished, does not mean First Nations representative structures should not be pursued. The challenge is to get the design right.

The success of the institution will depend not only on its First Nations representatives, it will also depend on how well it is supported and respected by the arms of government, and the spirit with which it is designed, legislated, implemented and engaged. The institution can be supported to work well.

The details of the First Nations Voice would be articulated in legislation, though its existence will be required by the Constitution. This would ensure a balance between certainty and flexibility for the body to evolve and improve over time. However, when problems do arise there should be a constitutional imperative for Parliament to sort them out.

⁸⁸ See e.g. *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

⁸⁹ See *Native Title Act (1993) (Cth)*, s 223.

The Aboriginal and Torres Strait Islander Elected Body (ACT)

The ACT Elected Body is an example of a First Nations Voice to Parliament that is working relatively well at the ACT level.

The ACT Elected Body was established under the *Aboriginal and Torres Strait Islander Elected Body ACT 2008 (ACT)* to enable First Nations in the ACT to have an elected voice. It consists of seven people representing the interests and aspirations of the local Aboriginal and Torres Strait Islander community and provides direct advice to the ACT government. Section 8 sets out the body's functions, which include:

- a) to receive, and pass on to the Minister, the views of Aboriginal and Torres Strait Islander people living in the ACT on issues of concern to them;
- b) to represent Aboriginal and Torres Strait Islander people living in the ACT and to act as an advocate for their interests;
- c) to foster community discussion about—
 - i. issues of concern to Aboriginal and Torres Strait Islander people living in the ACT; and
 - ii. the functions of ATSIEB; and
 - iii. this Act;
- d) to conduct regular forums for Aboriginal and Torres Strait Islander people living in the ACT and report the outcomes of those forums to the Minister;
- e) to conduct research and community consultation to assist ATSIEB in the exercise of its functions;
- f) to propose programs and design services for Aboriginal and Torres Strait Islander people living in the ACT for consideration by the government and its agencies;
- g) to monitor and report on the effectiveness of programs conducted by government agencies for Aboriginal and Torres Strait Islander people living in the ACT;
- h) to monitor and report on the accessibility by Aboriginal and Torres Strait Islander people living in the ACT to programs and services conducted by government agencies for the general public;
- i) when asked by the Minister, to give the Minister information or advice about any matter stated by the Minister;
- j) when asked by a government agency or another person, and in consultation with UNEC, to recommend any reasonable action it considers necessary to protect Aboriginal and Torres Strait Islander cultural material or information considered sacred or significant by Aboriginal and Torres Strait Islander people living in the ACT...

One of the important functions of the ACT Elected Body is to monitor the ACT Government's policy success by reviewing effectiveness of programs and services being delivered. To deliver this function, the body developed a system in negotiation with Treasury for giving

guidance on expenditure and efficiencies in Indigenous affairs. A system of Senate Estimate style hearings to engage with politicians was developed, along with the development of Indigenous Expenditure Reports to examine expenditure against outcomes and challenge the decision-making and priorities adopted by government. Many of the questions raised at the hearings are those that are raised by communities through consultation with the ACT Elected Body. The hearings are held annually over two days around December. A three month lead time and preparation is required, and transcripts of the hearings are available on Hansard.⁹⁰ A report is then submitted to the Minister and the Government responds. This creates an ongoing dialogue between the body and the ACT Government.

The ACT Elected Body provides an example of a First Nations representative institution using negotiated Government engagement mechanisms to positively influence Indigenous affairs policy. The body has influenced the ACT Government on the development of a housing program for elders⁹¹ and was instrumental in driving amendments to the *ACT Human Rights Act* to recognise Indigenous cultural rights.⁹²

The design and processes of a broader First Nations Voice can draw upon the processes and systems employed by the ACT Elected Body, particularly in relation to the use of hearings as a means for enabling verbal dialogue.

Design principles to guide development of proposed structure

This Report adopts the following nine design principles to inform analysis of design options:

1. Cultural legitimacy
2. Responsibility
3. Subsidiarity
4. Interface
5. Inclusivity
6. Proactivity
7. Genuine dialogue
8. Low complexity
9. Flexibility.

Cultural legitimacy

A First Nations Voice should have legitimacy in the eyes of the First Nations of Australia. It should reflect their cultures and heritage, and should give voice to the diverse,

⁹⁰ <http://atsieb.com.au/wp-content/uploads/2016/07/Estimate-Hearings-and-process.pdf>

⁹¹ <http://atsieb.com.au/wp-content/uploads/2016/07/Housing-Design-program.pdf>

⁹² *Human Rights Act 2004 (ACT)*, s 27. Thanks to Rod Little for providing this information.

contemporary First Nations. As much as possible, the structure should reflect and incorporate both the contemporary First Nations diaspora and the ancient heritage of the country. It should represent and recognise “Aboriginal people in a modern world”.⁹³

To have cultural legitimacy the representatives should, as much as possible, be chosen by First Nations people, through mechanisms that are freely adopted by them. It is important that the First Nations themselves are involved in the development of, and approve of, the representative selection methods and body structures ultimately adopted.

Legitimacy in the eyes of the First Nations will help ensure that the proposed structure is also legitimate in the eyes of Australian governments and the Australian people at large. The structure should carry appropriate cultural and political authority as an empowering institution for the contemporary First Nations of Australia. The First Nations Voice will also represent the inclusion of First Nations culture and heritage into Australia’s constitutional framework.

Responsibility

This should be a structure to encourage First Nations responsibility, empowerment and self-determination in their affairs. Self-determination means the free pursuit of social, economic and cultural development. It means taking responsibility for the future of your life, your family and your community.

The First Nations having an effective voice in decisions about the futures of their communities and taking an active leadership role in the development choices facing First Nations is essential to taking responsibility and achieving self-determination. Without power, responsibility cannot be exercised. This must be a structure to empower the First Nations to take responsibility in their affairs.

Subsidiarity

Subsidiarity is the principle that responsibilities should be left with the lowest level of government practicable, to encourage local input into decision-making and to ensure policies, laws and services suit local preferences. Subsidiarity is a core principle of Australia’s federal constitutional arrangements, which gives even the most sparsely populated States an equal say in the Senate. It is a core principle enlivening the proposal for a First Nations

⁹³ Galarrwuy Yunupingu, ‘Rom Watangu’, *The Monthly*, July 2016.

Voice in constitutional arrangements with respect to Indigenous affairs. This should be about empowering the ‘small platoons’.

The structure should therefore promote subsidiarity. It should not be a top down bureaucracy – it should be bottom up, enabling empowerment of local First Nations communities. The structure should enable local input into local matters and should encourage the exercise of local authority and responsibility in local affairs.

Interface

The structure need not act as a gatekeeper for First Nations’ views, preventing direct engagement between local First Nations groups and government. Rather, it could operate as an interface, facilitating First Nations engagement and consultation with government at appropriate levels, and enabling engagement to occur in a fairer, more efficient and mutually respectful way. A national council could facilitate national advice to the Commonwealth, where appropriate, on the basis of consultation with the First Nations. It could also facilitate State/Territory, regional and local consultation where appropriate (for example a Northern Intervention bill should have been informed by the views of Northern Territory First Nations).

Inclusivity

The proposed structure should be inclusive rather than exclusive or divisive. While traditional heritage and ownership is very important and should be recognised, the structure should ensure that all Indigenous Australians participate fairly. The structure should not exclude those who have lost cultural connections with their traditional lands, or those who do not have Native Title determinations in their name, or those who are not traditional owners. The structure should give appropriate voice to the contemporary Indigenous diaspora while also incorporating traditional connections and recognition of traditional ownership. This should be a structure to unite the First Nations, while also enabling First Nations communities to advocate independently, reflecting and incorporating the rich cultural diversity of First Nations people across the country.

Proactivity

In many of the dialogues it was reiterated that the First Nations Voice “must have teeth”. It is unlikely that Parliament would empower an external institution to veto its own authority, however there are other ways of ensuring the structure “has teeth” which are totally compatible with parliamentary supremacy.

For example, the First Nations body could be empowered to advocate proactively, rather than just reactively. The body need not only be reactive and passive, waiting for Parliament and government to initiate proposals to which it can respond. It could be proactive with its own reform and policy proposals for government consideration. The legislation could set out criteria establishing the circumstances in which proposals to government of Parliament might be proactively developed and delivered, for example in relation to proposed laws and policies with respect to Indigenous affairs or significantly or especially impacting Indigenous Australians.

Genuine dialogue

The structure could enable genuine, mutually respectful and ongoing dialogue between the First Nations and Australian Parliaments and governments. Processes and rules set out in legislation could be conducive to regular communication and interaction, to increase mutual understanding and information sharing between the parties, helping to ensure a fairer and more productive relationship and better outcomes in Indigenous affairs.

This dialogue need not only occur through written advice delivered by the body to Parliament and government. The communication channels could be dynamic and reciprocal, and verbal as well as written.

Low complexity

The proposed structure needs to be politically viable and practically implementable. It needs to be accepted and supported by Australian governments and people. The structure should deliver an efficient and productive way for Australian governments to consult, engage and interact with the First Nations in the law and policy making process with respect to Indigenous affairs. It should set out efficient processes for mutually respectful dialogue, with the aim of achieving greater productivity and better outcomes.

To be efficient and productive, the proposed structure should be low in complexity. It should not create a cumbersome bureaucracy, but should enable efficient First Nations input into the processes of democracy. The body must be appropriately structured and resourced to deliver efficient, effective and high quality advice and consultation in a timely manner.

Flexibility

The majority of the details of structures and processes in relation to the structure should be set out in legislation, so they can be adapted and improved over time as needed. Inherent

mechanisms to allow and promote positive evolution and improvement of the body over time should be built into the design.

Similarly, the body should provide a degree of flexibility in its approach to representation, allowing local people to choose how they participate and how they are represented, while balancing the need for certainty and stability in representative arrangements. The proposal for a First Nations Voice in the Constitution seeks to balance the certainty and stability of a constitutional guarantee with legislative flexibility and options enabling community choice.

5. Design options

A First Nations Voice in the Constitution should enable local First Nations to have a voice in matters affecting them. It should recognise and represent “Aboriginal people in a modern world”.⁹⁴ The design options explored in this Report draw from the discussions and feedback received at the dialogues, as well as advice from other commentators and experts.

This section explores: who are the local First Nations to be recognised in this structure? How are these groups best identified and represented in this body? The appropriate definition of an Indigenous Australian person is discussed in the Appendix.

Representation of First Nations: geographic boundaries

Local First Nations communities could be geographically defined and represented in the following ways:

- self-identifying First Nations
- Tindale/Horton language groups map
- Native Title determinations
- ATSIC boundaries
- local government boundaries
- State / Territory boundaries.



The pros and cons of each of these options, as assessed against the design principles, are listed in the Appendix to this report.

A preliminary suggestion is that a combination of existing native determinations and the Tindale/Horton language groups map would be a good starting point. This structure should

⁹⁴ Galarrwuy Yunupingu, ‘Rom Watangu’, *The Monthly*, July 2016.

build on what works: it should build on native title determinations to identify First Nations that have been recognised under Native Title law. At the same time, First Nations groups who do not or cannot win native title determinations should not go unrepresented. Native title determinations do not cover the whole of Australia, yet there are Indigenous Australians living all over the country in urban, regional and remote areas. As the dialogues emphasised, this structure should enable all these groups to have a voice.

Taking into account these considerations, First Nations communities could be geographically identified using both native title determinations and the First Nations groupings broadly provided by the Horton/Tindale language groups map. The Joint Parliamentary Committee investigating body design should be tasked with coming up with a map identifying all the First Nations geographic boundaries in the first instance. Once this structure is operational, any requested changes to these boundaries could be overseen and processed by a small overseeing First Nations board. This board could be appointed by government in the first instance, and then appointed by First Nations themselves once this structure is operational.⁹⁵

A combination of native title determinations and the Tindale/Horton map, with flexibility for boundaries to change over time, appears preferable as a starting point for discussion because:

- The smaller geographical areas represented would encourage subsidiarity by ensuring the local First Nations communities a voice, enabling local people to be heard in local matters.
- The language names and boundaries would reflect the ancient heritage, culture and languages of the First Nations of Australia, enabling First Nations names and languages to be incorporated into the design and practice of this institution, helping those languages and names become part of Australia's national life and part of the intended dialogue and consultation with Australian governments. This objective can be furthered in the legislation setting up the body.
- It provides scope for boundaries and names to evolve and change as necessary, according to community choice and necessity.
- It provides scope for contemporary First Nations communities to be created, identified, recognised and represented, if desired by the community; e.g. a contemporary 'Redfern First Nation' might be needed.

⁹⁵ This First Nations board could be akin to the Council of Elders that advises on processes and structures in the Assembly of First Nations.

- It provides certain geographical boundaries on the basis of a map with which most Australians are broadly familiar.
- It covers the entire Australian land mass thus ensuring that no Indigenous Australians are left out.
- It is potentially fairer, more certain and inclusive than relying on Native Title determinations alone, because First Nations who have not won Native Title could still be included.
- It is geographically based and would include the contemporary Indigenous diaspora living within each boundary.
- While there is likely to be a wide variation in population living within each First Nation boundary, this would be in keeping with Australia's constitutional arrangements, which gives equal representation to even the most sparsely populated States (e.g. Tasmania).
- It would be based on the principle that even the most small and remote First Nation deserves a voice within this structure.

The options for the appropriate geographic boundaries for the purposes of First Nations participation in this structure should be further discussed in consultation by the Joint Parliamentary Committee going forward.

First Nations representatives

A number of options for systems of local First Nations representation are considered with pros and cons in the Appendix. A preliminary suggestion is that authority should vest with local First Nations bodies. This approach was advocated by Indigenous people through the regional dialogues.

In keeping with the idea that local people should take responsibility to self-determine their local affairs, local First Nations themselves could decide how their community is represented in this structure. The legislation could, however, stipulate that key principles should apply to local representative structures for each First Nation. For example:

1. Self-selected: Local First Nations people should choose their local representatives (they should not be hand-picked by government).
2. Inclusivity: all Indigenous residents within each First Nation geographical boundary should be able to participate and be represented by choosing representatives or standing as a representative.

3. Traditional ownership: the local representative structure should incorporate recognition of traditional owners of the country, while also incorporating Indigenous residents who are not necessarily traditional owners.
4. Individual choice as to participation location: individuals should be free to choose whether they participate in the First Nation area within which they reside, or in the area within which they are culturally connected.⁹⁶
5. Gender balance: the local representative structure should insofar as possible incorporate a reasonable level of gender balance.
6. Responsibility: responsible leadership should be encouraged and the principle of responsibility should be incorporated into selection and accountability processes at the local level.

Under this approach, each First Nation would adopt their own local system of representation, which could be approved and monitored by the overseeing First Nations board. In the Canadian Assembly of First Nations, a Council of Elders advises the Assembly on its internal structures and processes. Similarly, A First Nations board in the Australian context could be made up of responsible Indigenous elders or leaders, tasked with ensuring that all processes are fair, inclusive and abide by the appropriate principles.

To ensure practical workability, a standard mechanism for selection of local representatives could be decided by First Nations board in the first instance. Then, local groups could be free to adopt varied approaches once they are operational, with oversight from the First Nations board.

Where a First Nation already has a Native Title determination and an appropriate representative structure in place,⁹⁷ this could be built upon. In such situations, the standard mechanism could be that the existing structure be used to create a local committee or board that incorporates the principles. Where there is no Native Title determination, an appropriate local organization, nominated by the First Nations board, should facilitate selection of a local committee or board that incorporates the principles.

For example, a standard selection mechanism could incorporate an open vote of all Indigenous residents over the age of 18 to select a male and female representative, and a mechanism for traditional owners to select a male and female traditional owner representative, thus ensuring the local structure reflects both traditional ownership and

⁹⁶ This approach aligns with the Maori Council system, which allows individuals to stand either in the area in which they reside, or in the area with which they have cultural connections, thus incorporating residency as well as traditional connections.

⁹⁷ For example, through a Prescribed Body Corporate.

residency, as well as gender balance. Indigenous individuals resident in the area, or culturally connected to the area, should be able to participate.

If the community desires, however, it should be able to alter the selection method to a mechanism that better suits their community and culture, provided the overseeing board confirms that the method adopted aligns with the required principles. For example, First Nations may want local organisations to be involved in representative selection, or they may wish for Indigenous people younger than 18 to participate.

Powers, functions and roles

This section explores possibilities for the powers, functions and roles that could be undertaken by the First Nations body.

Local First Nations representatives

Local First Nations representatives chosen to represent their First Nation could:

- represent and advocate for the views and interests of their First Nation
- assist with community consultation to ascertain local views on matters of relevance
- play a facilitative role in liaising with the National Council (see below) to ensure their community's views are heard by State/Territory and Commonwealth governments in relevant matters
- collaborate with other First Nations communities in the region to achieve shared regional goals or undertake joint advocacy
- choose a State/Territory representative from among the First Nations representatives in their State/Territory to sit on the National Council
- participate in Indigenous Policy Committees (see below) to research, consult on and investigate particular policy areas of special concern to First Nations.

National Council of First Nations

A National Council of First Nations could facilitate and support First Nations to have a voice at the national level. The National Council could be a small group of First Nations representatives, chosen from among the First Nations representatives in each State/Territory. The National Council could lead the input and engagement with the Commonwealth Parliament and government on matters relating to the First Nations.

In light of consultation with First Nations communities, and with the appropriate policy and expert support, the National Council could provide input and engage with Parliament and Government on laws and policies with respect to the First Nations. The National Council could also provide national leadership to assist First Nations to achieve their objectives and goals.

Options for the makeup of the National Council, along with pros and cons of each option, are canvassed in the Appendix. A preliminary approach to consider is First Nations representatives in each State/Territory (excluding ACT which would be included in NSW) choosing one representative from among First Nations representatives in each State/Territory to sit on the National Council. This would create a small National Council of seven First Nations representatives, one from each State/Territory. This option is recommended because it is low complexity and low in numbers, and it has cultural legitimacy because representatives would be chosen by First Nations. The representatives would therefore be well placed to facilitate consultation and engagement between those communities and Government.

The National Council could improve upon the Prime Minister's existing Indigenous Advisory Council. It would have constitutional permanency, it would have legislated and/or constitutional mechanisms for engagement with Government and Parliament, and it would carry the legitimacy of members that are selected by the First Nations rather than hand-picked by Government.

Policy Committees

An idea for further consideration is the incorporation of First Nations Policy Committees to support the development of policy solutions devised and led by the First Nations. These Committees could be appointed as desired by the National Council to inform input and engagement into laws and policies, and could enable a cross section of First Nations representatives to have input into policy development on particular subject areas important to their communities.⁹⁸ The Policy Committees could focus on things like land and economic development, culture and language, health, education or suicide prevention. The Policy Committees could be responsible for:

- leading policy development in the Indigenous policy area
- leading consultation with other First Nations representatives and Indigenous people generally on the policy area
- consulting with experts as necessary

⁹⁸ The Saami Parliaments in Scandinavia incorporate Saami policy offices, e.g. a Language Office and an Education office.

- informed by consultation with First Nations communities, helping to develop proposed reforms for the policy area
- where appropriate, engaging with Parliament and Government on the policy area.

The National Council, in appointing Policy Committee members, could take into account factors such as:

- the representative's skills and expertise in the policy area
- the representative's experience in the policy area
- the extent to which the policy is especially important and relevant to the representative's community or region
- the preferences expressed by the representative
- the workload, availability and interest of the representative.

New Policy Committees could be created by the National Council as new issues arise, and place-based Committees could also be created where necessary. For example, a Northern Territory Intervention Committee might have been created to engage with the Commonwealth government and Parliament on development and implementation of the Northern Territory Intervention – this Committee would sensibly be made up of Northern Territory First Nations representatives.

Or when the closure of Aboriginal communities in Western Australia was being contemplated by Government, a Policy Committee made up of West Australian First Nations could have been created to engage with Government on the issue of remote community sustainability, to devise solutions in partnership.

The Policy Committees could share the policy, legal and administrative support provided to the National Council.

How might the National Council interact with Government and Parliament?

The legislation setting up the First Nations body could set out processes for Parliament and Government to interact productively with the National Council when making laws and policies with respect to Indigenous affairs.⁹⁹ The Act could emulate ordinary procedures and requirements in existing pieces of legislation requiring respectful engagement, consultation and dialogue in law-making processes. In this way, the First Nations body can build upon what already works in the system.

⁹⁹ These processes could be emulated at all levels of the federal system, as appropriate, facilitated through an inter-governmental agreement.

The legislation could add rules, process and certainty to the National Council's interaction with government. By way of example, it could provide for:

1. A non-justiciable duty for rule-makers to consult with the National Council before making a rule with respect to Indigenous affairs (as in s 17 of the *Legislation Act 2003*).
2. Statements of Advocacy in relation to proposed laws and policies with respect to Indigenous affairs or significantly or especially impacting Indigenous peoples (like Statements of Compatibility in ss 8 and 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011*).
3. Notifications and requests for input when new Indigenous affairs policy proposals are initiated.

1. A non-justiciable duty to consult

The *Legislation Act 2003 (Cth)* requires rule-makers to consult before making legislative instruments. This establishing Act could similarly require law-makers with respect to Indigenous affairs, or with respect to proposed laws or policies significantly or especially impacting Indigenous people, to properly consult with the National Council of First Nations.

An example of a duty to consult, emulating s 17 of the *Legislation Act*, could be:

Rule-makers should consult with the National Council of First Nations before making legislative instruments with respect to Aboriginal and Torres Strait Islander affairs

(1) Before a legislative instrument with respect to Aboriginal and/or Torres Strait Islander affairs or significantly or especially impacting Aboriginal and/or Torres Strait Islander peoples is made, the rule-maker must be satisfied that there has been undertaken any consultation with the National Council of First Nations that is:

- (a) considered by the rule-maker to be appropriate; and
- (b) reasonably practicable to undertake.

(2) In determining whether any consultation that was undertaken is appropriate, the rule-maker may have regard to any relevant matter including the extent to which the consultation:

- (a) drew on the knowledge of the National Council of First Nations; and
- (b) ensured that the National Council of First Nations had an adequate opportunity to comment on its proposed content.

(3) Without limiting, by implication, the form that consultation referred to in subsection (1) might take, such consultation could involve notification of the National Council of First Nations. Such notification could invite input to be offered by a specified date or might invite participation in Parliamentary Committee hearings to be held concerning the proposed instrument.

(4) The fact that consultation does not occur does not affect the validity or enforceability of a legislative instrument.

(5) The fact that consultation does not occur may be a matter for further investigation by Parliament.

Note: An explanatory statement relating to a legislative instrument with respect to Aboriginal and/or Torres Strait Islander affairs or of significant impact on Aboriginal and/or Torres Strait Islander peoples must include a description of consultation undertaken or, if there was no consultation, an explanation for its absence, and an indication of the National Council's views in relation to the legislative instrument.

2. Statements of Advocacy

The *Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)* sets up mechanisms for non-binding Statements of Compatibility on human rights compliance with respect to proposed laws. The legislation setting up the First Nations body could similarly enable Statements of Advocacy with respect to Indigenous affairs to be prepared by the National Committee and tabled in Parliament.

An example of a duty to consult could be, emulating s 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, could be:

Statements of advocacy in relation to legislative instruments with respect to Aboriginal and Torres Strait Islander affairs

(1) The rule-maker in relation to a legislative instrument with respect to Aboriginal and/or Torres Strait Islander affairs or significantly or especially impacting Aboriginal and/or Torres Strait Islander peoples must request a statement of advocacy to be prepared in respect of that legislative instrument.

Note: The statement of advocacy must be included in the explanatory statement relating to the legislative instrument (see section 15J of the *Legislation Act 2003*).

(2) A statement of advocacy must include an assessment of whether the legislative instrument is beneficial or detrimental to Aboriginal and/or Torres Strait Islander peoples and may include suggestions for how the Bill can be improved.

(3) A statement of advocacy prepared under subsection (1) is not binding on any court or tribunal.

(4) A failure to comply with this section in relation to a legislative instrument does not affect the validity, operation or enforcement of the instrument or any other provision of a law of the Commonwealth.

A further example of legislation for the tabling of advocacy in relation to Bills, emulating s 8 of the *Human Rights (Parliamentary Scrutiny) Act*, could be:

Statements of Advocacy in relation to Bills with respect to Aboriginal and Torres Strait Islander affairs

(1) A member of Parliament who proposes to introduce a Bill for an Act with respect to Aboriginal and/or Torres Strait Islander affairs or significantly or especially impacting Aboriginal and/or Torres Strait Islander peoples into a House of the Parliament must request a statement of advocacy to be prepared by the National Council of First Nations in respect of that Bill.

(2) A member of Parliament who introduces a Bill for an Act with respect to Aboriginal and/or Torres Strait Islander affairs or significantly and especially impacting Aboriginal and/or Torres Strait Islander peoples into a House of the Parliament, or another member acting on his or her behalf, must cause a statement of advocacy prepared under subsection (1) to be presented to the House.

A statement of advocacy must include an assessment of whether the Bill is beneficial or detrimental to Aboriginal and/or Torres Strait Islander peoples and may include suggestions for how the Bill can be improved.

(3) A statement of advocacy prepared under subsection (1) is not binding on any court or tribunal.

A failure to comply with this section in relation to a Bill that becomes an Act does not affect the validity, operation or enforcement of the Act or any other provision of a law of the Commonwealth.

3. Notifications for new proposed policies

Just as existing legislation can be emulated in devising mechanisms for engagement and input into legislation, existing governmental procedures and processes can be adapted to enable the National Council can provide input into relevant policies in development.

When new proposed policies with respect to or significantly or especially impacting Indigenous peoples are initiated, a notification could be issued to the National Council. These notifications could be issued by:

- **The Minister for Indigenous Affairs** when initiating or developing a policy
- **The Indigenous Affairs department** when it is initiating or developing a policy, with processes set out in the policy manual
- **Other government departments**, where initiating policy that significantly or especially impacts Indigenous peoples and rights, could include an 'Indigenous Impact Statement' to highlight the foreseeable impacts of the proposed policy on Indigenous people, and where the impact is significant or special, a notification could be issued to the National Council. Processes could be set out in the policy manuals of all Government departments.

In this way, First Nations participation and input could be encouraged at each stage of the Indigenous policy process, across levels and departments.

Scope: which measures would require consultation?

The legislation could specify that proposed laws and policies with respect to Indigenous affairs, or significantly or especially impacting Indigenous people, would require consultation with the National Council or the relevant First Nations representatives.

It would be up to law-makers and policy-makers (members of Parliament and Government) to use their discretion in deciding which measures are with respect to Indigenous affairs, or which measures significantly or especially impact Indigenous people. The National Council members could also use discretion as to which measures they think constitute proposed laws and policies with respect to Indigenous affairs or significantly or especially impacting Indigenous people, and therefore which measures they wish to engage on.

As demonstrated in the example clauses above, the legislation could ensure that:

- Parliament would be the adjudicator of these processes, not the High Court
- Failure to comply with consultation procedures could not invalidate legislation
- Input and advocacy from the First Nations would be non-binding.

The Minister could issue further regulations setting out guidelines for the kinds of measures which are proposed laws and policies with respect to Indigenous affairs, or significantly or especially impacting Indigenous people. Further discussion of the assessment of such matters is included in the Appendix.

What would consultation mean?

The establishing legislation could spell out what consultation means, as demonstrated in the example clauses above. For example, it could specify that consultation can mean:

- issuing notifications to the National Council when a relevant new proposed policy is being initiated
- requesting a statement of advocacy or other input in relation to a relevant proposed law
- setting out an appropriate timeline for input to be received
- any other actions required under the Act.

These examples demonstrate the ways in which legislation, regulations and Government department policies can set out clear procedures for efficient engagement between the National Council of First Nations and the Australian Government.

6. Summary of preliminary suggestions

Following are some preliminary ideas on how a First Nations Voice to Parliament could work. These ideas are intended to generate further discussion, and are not definitive. A summary of preliminary suggestions follows below.

Process: achieving agreement on a reform package

Suggestion 1

The First Nations and the Australian Parliament should agree on a package of reforms

A consensus position has been adopted by the First Nations of Australia. The Uluru Statement from the Heart calls for a First Nations Voice in the Constitution and a Makarrata Commission outside it. The Australian Parliament should now undertake a process of good faith engagement with Indigenous leaders, to agree on the details of a package of reforms for constitutional recognition. This package should include both constitutional and legislative reforms.

The engagement process should enable the First Nations to form an agreement with politicians from across the political spectrum on the package of reforms to be pursued, including a timeline or roadmap for implementation of the reforms. The agreed package and timeline could be enacted as a legislated commitment.

Suggestion 2

The Australian Parliament should establish a Joint Parliamentary Committee to facilitate consultation on and development of the design of a constitutionally mandated First Nations Voice

Following a successful referendum, a Joint Parliamentary Committee should be established to consult widely with Indigenous people to develop the structure and design of a First Nations body. The Committee should then report to Parliament on the appropriate structure. Legislation establishing the body should then be drafted in full collaboration with the First Nations.

Suggested design principles

The following principles and ideas are intended to inform the development and design of a First Nations body.

Suggestion 3

Empowering local First Nations: the structure should create an upside-down pyramid that empowers local voices

A First Nations Voice should enable local First Nations to have a voice in their local affairs. The structure should be bottom up, not top down. Unlike ATSIC, it should be like an inverted pyramid, with local voices taking primacy over the national, and authority and accountability vesting in local communities.

Suggestion 4

The following design principles could guide the design of a First Nations body

- *Cultural legitimacy*: the structure should be legitimate in the eyes of the First Nations and should reflect First Nations cultures and heritage. It should assist in ongoing processes of First Nations building, by supporting the First Nations to express themselves, and their ancient and contemporary identities, more effectively.
- *Responsibility*: the structure should encourage and foster First Nations responsibility, empowerment and self-determination.

- *Subsidiarity*: the structure should enable local voices to be heard on local issues. It should empower local First Nations communities to influence political decision-making affecting them. It should not be a top down bureaucracy, but a structure for grassroots, local authority over local matters – it should empower the ‘small platoons’.
- *Interface*: the structure should not act as a gatekeeper for First Nations views, preventing direct engagement between local First Nations groups and Government. Rather, it should facilitate and support local First Nations communities to directly engage with Government in a fairer, mutually respectful and more productive way.
- *Inclusivity*: the structure should be inclusive of all Indigenous Australians. It should enable and support productive collaboration amongst the First Nations of Australia, where desired, so they groups can work together more effectively.
- *Proactivity*: the structure could enable proactivity, rather than just reactivity and passivity, so it can proactively respond to the objectives and goals of the First Nations.
- *Respectful dialogue*: the processes set in place should encourage and enable mutually respectful, reciprocal and ongoing dialogue between the First Nations and Australian governments.
- *Low complexity*: the structure should be designed so that it is low in complexity and practically implementable.
- *Flexibility*: the design should be flexible so it can be improved over time.

Suggestion 5

For the purposes of recognising and representing local First Nations, a combination of Native Title determinations and the Tindale/Horton language groups map could be used, with flexibility for change built in.

A preliminary idea is for local First Nations communities to be geographically identified using a combination of Native Title determinations and the Tindale/Horton language groups map. The Joint Select Committee consulting on the structure should put forward boundaries in the first instance, in consultation with the First Nations.

Once operational, any requested variations of identified First Nations or First Nations community names should be managed and mediated by a small overseeing First Nations board, appointed by government in the first instance, then chosen by First Nations representatives once the structure is operational.

Suggestion 6

Local First Nations should decide on their local representation.

A preliminary suggestion, in keeping with the idea that local people should take responsibility to self-determine their local affairs, is for local First Nations themselves to decide how their First Nation is represented. The legislation could stipulate key guiding principles, for example:

1. Self-selected: Local Indigenous people should choose their local representatives (they should not be hand-picked by Government).
2. Inclusivity: all Indigenous residents within each First Nation geographical boundary should be able to participate and be represented by choosing representatives or standing as a local representative.
3. Traditional ownership: the local representative structure should incorporate recognition of traditional owners of the country, as well as other Indigenous residents.
4. Individual choice as to participation: the local representative structure should enable individuals who are living away from their homeland to participate either in the area in which they reside, or in the area with which they are culturally connected.
5. Gender balance: the local representative structure should insofar as possible incorporate a reasonable level of gender balance.
6. Responsibility: responsible leadership should be encouraged and the principle of responsibility should be incorporated into selection and accountability processes.

Suggestion 7

First Nations could adopt their own election/selection mechanisms should they wish to do so, provided those mechanisms are inclusive and fair

A preliminary idea is for First Nations to be able to alter their standard selection mechanism (see Suggestion 6 above) to a mechanism that better suits their cultural and leadership practices, provided the overseeing First Nations board confirms that the method adopted adheres with the adopted principles.

For example, communities may want local First Nations organisations to be involved in representative selection, or they may wish for Indigenous people younger than 18 years of age to participate in selection.

It is suggested that the assessment of whether selection procedures are appropriate, according to the principles above in Recommendation 6, should not be a justiciable question, but one managed internally by the First Nations board.

Input and engagement into laws and policies with respect to Indigenous affairs

Suggestion 8

A National Council of First Nations could facilitate and lead First Nations engagement and input into laws and policies affecting the First Nations, on the basis of consultation with First Nations communities.

The structure could incorporate a National Council of First Nations, supported by a small secretariat, tasked to:

- consult with local First Nations communities on matters of concern to them
- advocate for the views and interests of the First Nations
- in light of consultation with First Nations communities, and with appropriate policy and expert support, provide input and engagement to Parliaments and governments on laws and policies with respect to the First Nations
- where necessary, establish Policy Committees to investigate particular policy areas and inform development of reform proposals.

Suggestion 9

The National Council could be made up of First Nations representatives chosen by First Nations.

A preliminary idea is for the National Council to be made up of First Nations representatives chosen by the First Nations themselves, as these representatives would benefit from an intimate understanding of and connection with local First Nations views and priorities.

Suggestion 10

The National Council could be made up of seven First Nations representatives – one for each State and Territory – chosen by the First Nations community representatives in each State and Territory.

A preliminary idea is for First Nations representatives in each of the States and Territories (excluding the ACT whose representatives could be included in NSW) to choose one representative for each State and Territory, making seven First Nations representatives who would sit on the National Council.

These seven representatives could consult with local First Nations communities in each State/Territory, and in light of the consultation and with the appropriate policy and expert support, provide input to Parliament and Government on laws and policies affecting the First Nations.

Suggestion 11

The legislation setting up the First Nations body, together with regulations created by the Minister, could set out processes and procedures for efficient engagement between the National Council and Government and Parliament.

Such processes and procedures could provide for:

- a non-justiciable duty to consult
- statements of advocacy
- notifications and requests for input
- appropriate timelines for input and engagement.

Conclusion

This Design Issues Report has presented preliminary ideas and issues for further development by a Parliamentary Committee in collaboration with Aboriginal and Torres Strait Islander peoples. This Report does not represent the views of Aboriginal and Torres Strait Islander peoples, nor the Referendum Council. It does not provide definitive conclusions, but rather it sets out suggestions for further discussion, consultation and consensus-building.

This Report has sought to progress the proposal for a First Nations Voice to Parliament in a way that takes into account the discussions that occurred at the Indigenous regional dialogues and continues to build the broad consensus necessary for a successful referendum. It develops suggestions for ways to empower local First Nations to better take responsibility in their local affairs.

Australia can and should improve the way it does business in Indigenous affairs. This is necessary if we are going to improve policy outcomes and close the gap.

A constitutional amendment to guarantee the First Nations of Australia a voice in political decisions affecting them is a sensible and achievable reform proposal. Supported by efficient legislative mechanisms for productive engagement and dialogue between the First Nations and Government, this reform would instigate a fundamental and paradigmatic shift for the better in the relationship between the First Nations and the Australian state.

This could be the long awaited constitutional promise to do things with Indigenous people, rather than to them, creating a relationship of greater mutual respect and comity in keeping with Australia's fundamental constitutional culture. This would be a worthy promise for Australia to make and to live up to.

Appendix

The Appendix contains further research and discussion of options and ideas discussed in this report.

Definition of an Indigenous Australian person

A basic design question for any First Nations body is: who is being represented? How is Indigenous identity to be ascertained, legally and politically, for the purposes of this body?

A standard three-part definition of Indigeneity has been operating in Australia since the 1980s. It requires:

1. Aboriginal and/or Torres Strait Islander descent
2. self-identification as an Aboriginal and/or Torres Strait Islander person, and
3. acceptance by the community as an Aboriginal and/or Torres Strait Islander person.¹⁰⁰

For the purposes of accessing Indigenous-specific services, the three-part definition often requires some element of proof, usually provided through a Confirmation of Aboriginality from an Indigenous community organisation.¹⁰¹

The three-part definition is generally viewed as preferable to ‘blood quatum’ definitions of earlier times and to identification in terms of ‘race’ which still persists in some pieces of legislation.¹⁰²

There have been some problems with the three-part definition, particularly in areas where Indigenous people and identity have suffered the greatest adverse impacts of colonisation, such as in Tasmania.¹⁰³ In these areas, debate about who is legitimately Indigenous can become divisive.

¹⁰⁰ See e.g. *Aboriginal Land Rights Act 1983 (NSW)*, s 4 ‘definitions’.

¹⁰¹ For information see: <http://aiatsis.gov.au/research/finding-your-family/before-you-start/proof-aboriginality>.

¹⁰² See e.g. *Native Title Act 1993 (Cth)*, s 253; *Aboriginal and Torres Strait Islander Commission Act (Cth)*, s 4.

¹⁰³ For a full discussion the definition of Indigenous Australian see Dr John Gardiner-Garden, ‘Defining Aboriginality in Australia’, Current Issues Brief no. 10 2002-03, Parliament of Australia 3 February 2003: http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/cib0203/03Cib10#threepartdefinition.

Identity is largely a personal and subjective question; however, for the purposes of public policy some kind of objective test must be adopted. Disputes do arise and no legal definition of human identity can ever be perfect or avoid all contention.

Other countries take different approaches to Indigenous identification. New Zealand utilizes definitions based on self-identification and does not legally require community acceptance.¹⁰⁴ The USA employs a variety of definitions and in some cases still uses 'blood quotums'. The Saami in Norway, under the *Saami Act* establishing the Saami Parliament, uses a different three-part definition: a Saami is a person with Saami as their first language, or whose father or mother or one of whose grandparents has or had Saami as a first language and who considers themselves a Saami.¹⁰⁵ In Finland, a slightly different three-part definition is used.¹⁰⁶

Australia's three-part test adopts a more stringent approach than the legal definition of Maori in New Zealand, but arguably a broader and less strict approach than 'blood quotum' definitions used in the USA. The three-part definition seeks to strike an appropriate balance between individual choice and objective proof of identity, to minimise potential for dishonest identification.

On the other hand, if there are community divisions and historical factors which make community acceptance difficult to obtain for individuals who do in fact have Indigenous descent, then a less onerous definition may be preferred. For example, the process of colonisation, child removal and the Stolen Generations history may mean that some Indigenous people do not have proof of descent and may not be known by the community to have Indigenous heritage which they later discover. Asking these individuals to obtain

¹⁰⁴ The New Zealand definition of Maori is "A person has Māori descent if they are of the Māori race of New Zealand; this includes any descendant of such a person." For the purposes of this definition, it is assumed that individuals will give accurate information, although where monetary payments are involved, proof of descent may be required. See: <http://www.stats.govt.nz/methods/classifications-and-standards/classification-related-stats-standards/maori-descent/definition.aspx>.

¹⁰⁵ E.g. The *Saami Act 1987 (Norway)* s 2.6, providing for Saami Parliament electoral processes, states: "All persons who make a declaration to the effect that they consider themselves to be Sami, and who either a. have Sami as their domestic language, or b. have or have had a parent, grandparent or great-grandparent with Sami as his or her domestic language, or c. are the child of a person who is or has been registered in the Sami electoral register may demand to be included in a separate register of Sami electors in their municipality of residence."

¹⁰⁶ Section 3 provides "For the purpose of this Act, a Sámi means a person who considers himself a Sámi, provided: (1) That he himself or at least one of his parents or grandparents has learnt Sámi as his first language; (2) That he is a descendent of a person who has been entered in a land, taxation or population register as a mountain, forest or fishing Lapp; or (3) That at least one of his parents has or could have been registered as an elector for an election to the Sámi Delegation or the Sámi Parliament.

proof and community acceptance may be unfair. Such complexities should be taken into account in the adoption or formulation of any legal definition of Indigeneity.

For the purposes of this report it is suggested that the three-part definition of Indigeneity be maintained and adopted. However, further discussion about the appropriate test for Indigenous identity for the purposes of a First Nations body may be necessary.

The question of the appropriate definition of Indigenous identity should be part of the consultation to further the design of the body.

The scope question under Twomey’s draft amendment: when should advice be permissible?

In consultations discussing Twomey’s draft amendment for a First Nations body, the question of scope is often raised. When is the First Nations Voice to Parliament allowed to provide advice? Should it provide advice only on matters specifically and directly dealing with Indigenous affairs (e.g. Native Title amendments), or should it also provide advice on matters indirectly impacting Indigenous peoples (e.g. climate change policy impacting development opportunities on Indigenous land) – if the First Nations want to have a say on that matter?

To be effective and worthwhile, the body should be able to exercise to discretion to advise on a wide range of matters that the First Nations themselves consider important. To disallow or significantly restrict this discretion could diminish the effectiveness and utility of the institution. The First Nations Voice should have discretion to advise on broad matters, from Native Title and cultural heritage laws, to closing the gap and economic development policies, to matters that may especially impact Indigenous people in unexpected or unintended ways. Importantly, any advice would be non-binding and must not delay parliamentary processes. Therefore there is little reason to severely restrict the range of matters for which advice can be given.

Nonetheless, Twomey’s amendment does provide some relevant restrictions on scope, and has been deliberately drafted in order to ensure that the scope question is non-justiciable, and that the courts cannot become involved in its enforcement. While the proposed s 60A(1) requires Parliament to establish an Aboriginal and Torres Strait Islander body to broadly “provide advice to the Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander peoples,” the requirement in the proposed s 60A(4) for the House of Representatives and the Senate to “give consideration to tabled advice ... in debating proposed laws with respect to Aboriginal and Torres Strait Islander

peoples” is more narrow. “With respect to” Indigenous peoples is narrower than “matters relating to” Indigenous peoples. This distinction in Twomey’s drafting is deliberate. It empowers the body to advise on broad matters, but only requires parliamentarians to consider the advice in relation to a narrow range matters – matters “with respect to” Indigenous peoples.

The difference is largely technical. All constitutional obligations imposed under Twomey’s draft amendment would be non-justiciable and would therefore only be enforced politically. Accordingly, obligations to table advice and for parliamentarians to consider advice would matters for Parliament to manage and determine, not the Courts. The amendment enables advice on a broad range of matters. While technically parliamentarians need only consider advice on matters specifically ‘with respect to’ Indigenous peoples (the Native Title Act, for example, or Indigenous heritage protection laws), the spirit of this proposal (and indeed its practical logic as a reform to improve policy making and outcomes in Indigenous affairs) should enable advice about broader relevant matters. Where advice is received on broader matters, it would be up to parliamentarians whether they consider the advice – which they should, because the advice may be valuable. It is in highlighting previously unknown impacts of intended laws and policies that the greatest value of this institutional engagement can be realised.

For example, climate change or tree felling policy may have distinct economic development implications for under-developed native title land, and advice in relation to this issue may be valuable to Parliament in promoting development in remote communities. Tax reform policy may have a particular impact on the efficiency of Indigenous corporations that may be subject to different (and perhaps unhelpful) corporate rules – advice on these issues may enable refinement of both the tax issue and Indigenous corporate law issues. A policy in relation to alcohol licensing may have an unintended impact on vulnerable First Nations communities, to which the First Nations wish to alert government – advice on this could issue could potentially minimise unintended harm or exacerbation of alcohol abuse in Indigenous communities. A national suicide prevention scheme may benefit from advice on how to best tackle the high rates of suicide in Indigenous communities specifically. These are examples of proposed laws and policies for which a First Nations Voice to Parliament may sensibly wish to provide advice, to make Parliament or government aware of a particular, special or perhaps unexpected impact on the First Nations, and to help improve policy outcomes in Indigenous affairs.

How legislation can help clarify scope

Under Twomey’s proposed amendment, subsection (2) confers upon the Parliament the power to make laws with respect to the composition, roles, functions and procedures of the First Nations Voice to Parliament. If desired, this legislation could set out rules clarifying the circumstances in which advice may be developed and delivered. For example, the legislation could specify that advice may be developed where it is requested by Parliament or government, or proactively in relation to proposed laws and policies with respect to Indigenous affairs or significantly or especially impacting Indigenous people. The legislation could, if desired, set out processes and rules clarifying the issue of scope and preventing development of advice on matters for which significant or special impact on Indigenous people cannot be reasonably shown. The legislation could establish Parliament or government as the arbitrator of such matters, rather than the courts.

In Finland, legislation setting up the Saami Parliament, a representative Saami institution empowered to advise Parliament on Saami matters, provides an example of how scope matters can be clarified in legislation. The Act in s 9 sets out an “obligation to negotiate”, which seems far stronger than Twomey’s proposed advisory function, but s 9(2) defines the obligation to negotiate as simply ensuring Saami “the opportunity to be heard and discuss matters”.¹⁰⁷ In terms of scope, s 9 states that such negotiation is required,

“in all far-reaching and important measures which may directly and in a specific way affect the status of the Saami as an indigenous people and which concern the following matters in the Saami homeland:

- community planning;
- the management, use, leasing and assignment of state lands, conservation areas and wilderness areas;
- applications for licences to stake mineral mine claims or file mining patents;
- legislative or administrative changes to the occupations belonging to the Sámi form of culture;
- the development of the teaching of and in the Sámi language in schools, as well as the social and health services; or
- any other matters affecting the Sámi language and culture or the status of the Sámi as an indigenous people.”

The Finnish legislation demonstrates how scope can be clarified in legislation. Australian legislation could similarly articulate the rules outlining when advice can be given. Given that Twomey’s proposal is advisory and advice is non-binding, a flexible approach is

¹⁰⁷ The legislation also clarifies that “failure to use this opportunity (to be heard) in no way prevents the authority from proceeding in the matter” thus eliminating any possibility of a veto by abstention.

recommended. The legislation could set out criteria or guidelines for when First Nations input is appropriate, allowing the First Nations representatives to exercise discretion. The rules can be extrapolated in regulations created by the Minister.

Any guidelines adopted should enable advice on a broad range of matters affecting the First Nations, including:

- native title and land rights
- Indigenous heritage, culture and language
- economic development
- closing the gap issues – measures addressing social and economic disadvantage
- Indigenous affairs funding and budget issues
- other measures which indirectly impact Indigenous people or communities in a distinct or special way.

Other options for representing local First Nations groups

1. Self-identifying First Nations

Under this approach, First Nations communities would self-identify and opt into the Consultative Committee system, to enable their voices to be heard more effectively by governments. First Nations would put their hands up to be recognised and represented in the structure, and would provide details of their First Nations geographical boundaries, as well as adopting their First Nations name (e.g. the ‘Wik and Wik Way peoples’).

Any boundary or other disputes arising between or within groups would be mediated by a small overseeing First Nations board (appointed in the first instance by government, but when operational, this would be managed by the Consultative Committee). The overseeing First Nations board would make final determinations on the geographical boundaries of each First Nations community opting in, taking into account all relevant evidence and factors including Native Title determinations, submissions from groups, and other evidence.

The self-identifying First Nations communities need not only be confined to those that have won Native Title recognition – it could also include contemporary groups resident in particular areas, or First Nations that have not won Native Title.¹⁰⁸

- Pros:

¹⁰⁸ Tony McAvoy SC suggests in his proposal for a First Nations Assembly, that “As an assembly of First Nations, all First Nations should be permitted membership of the Assembly, regardless of whether native title has been determined or not.”

- Based on free choice, opting in, community agency and self-organisation, therefore fully in keeping with self-determination principles.
 - Would allow smaller First Nations groups to amalgamate for the purposes of this body if they choose to do so – thereby enabling a practical approach that suits local needs and contemporary circumstances.
 - Boundaries would reflect First Nations’ heritage, history and culture in a way that is freely adopted by contemporary First Nations. E.g. the ‘Wik and Wik Way Nation’ might opt in to participate in the consultative structure, but a new, contemporary ‘Redfern First Nations’ might also opt in if local Indigenous residents feel specific representation is necessary in Redfern.
 - Strong in subsidiarity, as would enable local voices to be heard and represented.
- Cons:
 - Lack of certainty and a relatively high complexity process.
 - Potential for boundary disputes to arise.
 - Self-organisation may be difficult for some groups who are under resourced and lack capacity to organise or travel within their region to discuss opting in, boundaries and other details with Indigenous people in their area.
 - Potentially high number of groups, depending on the number and size of the self-identifying First Nations, some of which may be small in population.¹⁰⁹
 - Wide variation in population: some First Nations communities would have a large population of Indigenous people living within their boundaries and other communities might be sparsely populated by Indigenous people. However, if equal representation were afforded to each group, this would be in line with the federal approach to representation in Australia, which gives equal voice to sparsely populated States (e.g. Tasmania).
 - Depending on which groups opt in, the entire land mass of Australia may not be covered within boundaries, and therefore some Indigenous Australians may not be engaged in this process, unless they organise to opt in themselves.¹¹⁰

2. Tindale/Horton language group map

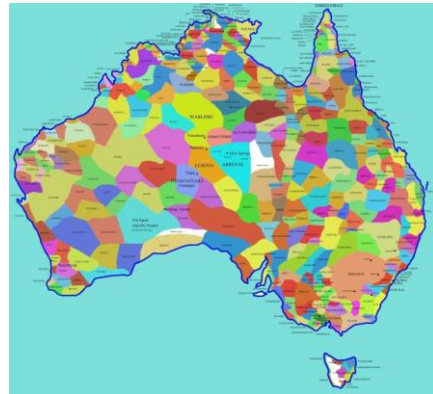
First Nations communities could be broadly geographically identified in the first instance using the Norman Tindale/David Horton language groups map of Australia. Any requested variations, additions or changes to the boundaries or names could be requested by the

¹⁰⁹ See for example, the list of 300 First Nations language groups later in this report.

¹¹⁰ In the Finland Saami Parliament, the Saami constituencies do not cover the entirety of Finland.

Indigenous residents in each community and processed and mediated by an overseeing First Nations board (appointed by government in the first instance and then managed by the Consultative Committee thereafter). The overseeing board would make any final determinations on any requested changes, taking into account all relevant evidence, including local First Nations consensus regarding the proposed changes, submissions, Native Title determinations etc.

- Pros:
 - Provides certainty in the first instance, while also providing for flexibility and change of boundaries and names as needed and desired by communities.
 - Reflects the ancient cultural heritage and diverse languages of Australia, but has the potential to adapt to changing contemporary circumstances and accommodate the contemporary diaspora on the basis of community choice. Therefore would reflect principles of self-determination, as well as reflecting the ancient heritage of Australia.¹¹¹
 - Allows scope for small First Nations communities to amalgamate with other communities if they feel this would be more practical, and also allows scope for new First Nations to be created if desired (E.g. the 'Redfern First Nations').¹¹²
 - It is not confined to, and is more inclusive and certain than, Native Title determinations.
 - It covers the entire land mass of Australia, which means all Indigenous Australians can be easily engaged in this process and no one is left out.¹¹³
 - Strong in subsidiarity, as would allow local voices to be heard and represented.



¹¹¹ Giving the districts First Nation names is important. In New Zealand, of the 16 Maori districts, all have a Maori name except for 'Wellington'.

¹¹² The New Zealand Maori Council is made up of Maori Councils and Maori Districts, and the system allows new committees to be created via the following procedure: 1. You must notify the local District Māori Council in your area of your intention to establish a new Māori Committee. 2. Confirm the Māori Committee area/boundaries with the District Māori Council. 3. Place a public notice of Māori Committee elections in the local newspaper. 4. The Meetings held are to elect 7 members to constitute each Māori Committee and to appoint 2 members to go forward to the District Māori Council. <http://www.maoricouncil.com/maori-district-map/>.

¹¹³ The Norwegian Saami Parliament has constituencies which cover the whole of Norway, and so does the Maori Council.

- Does not burden communities with the complex and potentially divisive task of figuring out their own boundaries and First Nations names – they only need to do this if changes are desired.
- Cons:
 - Language groups do not necessarily correspond to First Nations identification. For example the ‘Wik and Wik Way peoples’ is a cultural bloc in Western Cape York that includes members of several language groups.
 - It would create a high number of groups, with a wide variation in First Nations population within each boundary. However, if equal representation were afforded to each group, this variation would be in keeping with Australia’s federal system which gives equal voice to sparsely populated States (e.g. Tasmania).
 - Not every Indigenous person living within a particular First Nations community, is necessarily culturally connected to that community, and so may not identify with its name or heritage. Many Indigenous people live away from their homelands. (Note – this issue can be resolved by allowing flexibility and individual choice with respect to where individuals stand or vote. This will be discussed further below.)

3. Native Title determinations

First Nations communities and their geographical boundaries would be identified according to Native Title determination boundaries.

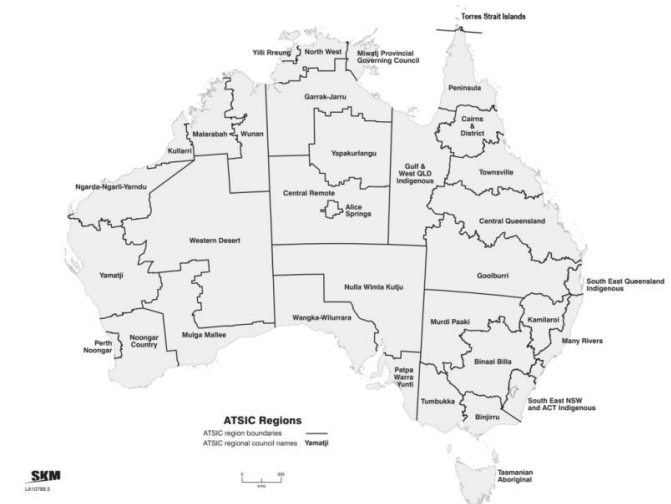
- Pros:
 - There would be certainty where Native Title has been determined.
 - Takes into account contemporary circumstances as well as traditional connections.
 - Would incorporate First Nations names, culture and languages.
- Cons:
 - Not all Native Title determinations are complete and sometimes groups miss out on Native Title recognition. The Native Title process only recognises traditional connection to land, and may not adequately recognise the contemporary Indigenous diaspora who may reside in places where Native Title has been extinguished.
 - Native Title determinations do not cover the entire Australian land mass, and Indigenous Australians living on land not subject to a Native Title determination may not be represented.

- Weak on inclusivity: may be divisive because it favours those who are able to prove their traditional connections to land. Does not adequately take into account the contemporary First Nations diaspora.

4. ATSIC region boundaries

The body could use the same geographical boundaries, using 35 defined regions, as under ATSIC.

- Pros:
 - Would provide a level of certainty, because these boundaries have been used before for several years under ATSIC.
 - Lower complexity because the number of groupings is reduced to 35, rather than hundreds of First Nations.
 - The regions are drawn to cohere to State/Territory boundaries, eliminating overlap, perhaps making State/Territory government engagement a simpler matter.
 - It incorporates some First Nations names, and also some English descriptions, perhaps creating a good mix of First Nations and British heritage.
 - The entire land mass of Australia is covered, so no Indigenous person misses out.
- Cons:
 - Low on subsidiarity, because there is less scope for local First Nations communities to be represented and have a distinct local voice – the focus is on larger regions.
 - Does not represent or reflect the ancient First Nations or language groups of Australia.
 - The boundary lines drawn along State/Territory lines reflect imposed colonial boundaries, rather than the First Nations heritage which pre-dated the imposition of State/Territory boundaries.



5. Local government boundaries

Local First Nations communities would be identified using mainstream local government electoral boundaries.

- Pros:
 - Provides certainty, stability and localised representation of First Nations.
 - Corresponds with local government boundaries for easy local government engagement.
 - Strong on subsidiarity, because it would enable local voices to be heard and represented.
 - Would cover the whole Australian land mass, so no Indigenous people are left out.
 - Strong on inclusivity, because it does not rely on proof of cultural connection or successful Native Title determinations.
- Cons:
 - Does not reflect First Nations' culture, history or heritage – they are boundaries imposed by governments.
 - Does not usually incorporate First Nations language or names (unless the local government shire has an Indigenous language name).
 - Low on self-determination, because there is little scope for First Nations to choose to change their representative boundaries and First Nations names.

6. State/Territory boundaries

First Nations local groups would be identified using State and Territory government electoral boundaries.

- Pros:
 - Would provide certainty and stability, and would correspond with State and Territory government boundaries for easy engagement at the State and Territory level.
 - Would cover the entire Australian land mass so no Indigenous people are left out.
 - May reduce the number of representatives, because there would only be State and Territory representatives rather than local representatives for smaller geographical areas – helping to reduce complexity.
- Cons:

- Low on subsidiarity: less localised representation of First Nations.
- Low on cultural legitimacy: would not reflect First Nations' culture, history or heritage – State and Territory boundaries were imposed by colonial governments.
- Would not in any way incorporate First Nations language names or reflect cultural connections to land.
- Provides no scope for First Nations choice in boundaries and names, therefore low on self-determination.
- Does not represent or reflect the ancient and contemporary First Nations of Australia.

Other options for systems of representation

There are a number of options with respect to the method of choice of representatives, as well as the number and kinds of representatives within each First Nations community. The following options could be considered:

1. One Indigenous representative for each First Nations community, based on residency

Each First Nations community chooses one Indigenous representative.¹¹⁴ All Indigenous people resident within each boundary can elect or choose a representative for that community. Those standing to be chosen must also be resident within the boundary.

- Pros:
 - Inclusive: every Indigenous person gets a say in choosing their First Nations representative, without any distinctions or divisions.
 - Low complexity: only one representative for each community, based on residency. Though it may be that each representative is supported by a team or committee of local people.¹¹⁵
 - A simple process whereby all Indigenous people resident in the First Nations community choose who they want to represent them on this body.
- Cons:

¹¹⁴ Note the Saami Council in Norway requires that any person standing for election must also be Saami.

¹¹⁵ This might be a Prescribed Body Corporate structure or other organisational structure. Note, Tony McAvoy SC argues that if a First Nations Assembly were to have one delegate from each First Nation, then “each delegate could be supported by such team each nation can provide”.

- Does not especially or specifically recognise traditional ownership and cultural connection to land.
- Inflexibility: is based only on residency and so does not recognise the fact that some Indigenous people may live away from their traditional homeland or the community in which they grew up, but may still wish to participate in having a say or representing their homeland rather than in the area in which they currently reside. (E.g. A person living in Redfern may be a member of the Yolngu people, and may feel it is more important to have a say in Yolgnu matters than in Redfern matters.)

2. One Indigenous representative for each First Nations community, with individual choice between participating in place of residence and place of cultural connection

Each First Nations community chooses one representative. All Indigenous individuals resident within the First Nations boundary may choose whether to stand as a representative in the community within which they reside, or for the community with which they are culturally connected. Indigenous individuals may also participate in voting or choosing a representative for the First Nations community within which they reside, or the community to which they are culturally connected.¹¹⁶ But they may only stand or vote in one place.

- **Pros:**
 - Strong on self-determination because allows for individual choice as to the First Nations community individuals wish participate in.
 - Flexible and based on choice: reflects the contemporary diaspora which may be living away from their traditional lands, and allows Indigenous individuals to maintain their cultural and historical connections to their traditional homelands through this structure if they choose to do so.
 - Only one representative for each First People, so low in complexity.

- **Cons:**

¹¹⁶ The *Maori Community Development Act 1962 (NZ)* sets up the Maori Council. Section 19 allows representatives to stand in the area in which they are resident or the area with which they are culturally affiliated, provided they only stand in one area.

- May require consideration of technology to allow Indigenous people resident outside a particular community to stand for or participate in choosing representatives in another community with which they are culturally connected.
- May require consideration of how each First Nations community determines whether an person residing away from their community is legitimately culturally connected with the community, so as to justify participation in choosing representatives or standing as a representative (the standard three-part definition may be useful, requiring community acceptance from the relevant community as evidenced by verification by an appropriate local First Nations organisation).

3. One Indigenous or non-Indigenous representative for each First Nations community

Under this model, any Australian would be able stand as a representative for a First Nations community within which they are resident, or by invitation from a community with which they have ties,¹¹⁷ and Indigenous people would choose or elect a representative either in the community within which they are resident, or the community with which they are culturally connected.

- **Pros:**

- Allows communities a greater breadth of choice in choosing the best representatives – based on the argument that Indigenous people should be able to choose whoever they want to represent them, with no imposed restrictions on this choice.
- Inclusive: enables any Australian to stand for election, therefore effectively counters arguments that this proposal is divisive or separatist, while still enabling a legitimate First Nations Voice that is chosen by the First Nations.
- Removes potential controversy about whether Indigenous representatives are legitimately Indigenous or not – all that matters is whether the person

¹¹⁷ *Maori Community Development Act 1962 (NZ)* takes this approach by allowing non Maori individuals to stand for election to the Maori Council. Section 19(4) provides: “Any person of or over the age of 20 years, whether or not he is a Maori, ordinarily resident in the Maori Committee area shall be eligible for election:provided that any person not ordinarily resident in the area shall be eligible for election if he has marae affiliations in the area; but no person shall be entitled to be a member of more than 1 Maori Committee at any one time.”

has been chosen by the First Nations community (though the legitimacy of Indigenous voters/choosers may still be questioned).

- **Cons:**

- Consultations so far indicate that First Nations will likely prefer that only Indigenous people to be able to stand as representatives – this needs to be tested through further consultation.

4. One Indigenous ‘recognition’ representative, one Indigenous ‘empowerment’ representative, and one non-Indigenous ‘reconciliation’ representative for each First Nations community

Residents elect or choose three representatives for their First Nations community:

- I. an Indigenous ‘recognition’ representative: Indigenous people choose an Indigenous traditional owner of the area to represent them in cultural matters and provide traditional and cultural leadership.
- II. an Indigenous ‘empowerment’ representative: Indigenous people choose an Indigenous person to represent them in matters related to social and economic empowerment and development.
- III. a non-Indigenous ‘reconciliation’ representative: All Australians (Indigenous and non-Indigenous) resident within the First Nations community boundary choose a non-Indigenous person to provide leadership in reconciliation, and to promote harmonious relationships between Indigenous and non-Indigenous people.

- **Pros:**

- Inclusive: this model includes all the diverse elements of Australian communities, which in reality are very mixed rather than segregated, and also incorporates a role for non-Indigenous Australians, which may assist in making this proposal inclusive and accepted by all Australians.
- Successfully counters the arguments that a First Nations body would be separatist or divisive, by including non-Indigenous Australians.
- Culturally legitimate and contemporary: maintains a role for traditional owners of the land in leading and maintaining cultural connections, knowledge and wisdom, while also acknowledging the importance of place-based residency in consultation on Indigenous laws and policies.
- Acknowledges three fundamental facets of Indigenous affairs policy:
 - culture, language, heritage and tradition
 - empowerment and development

- reconciliation with wider Australia.
- **Cons:**
 - Triples the number of representatives for each First Nations community, which may increase the cost and complexity of this structure. (However if these local positions are not full time, paid positions then this may not be a detracting factor.)¹¹⁸
 - This approach may cause divisions or perceived hierarchies, as representatives are divided into three groups. However, incorporating three distinct roles for representatives reduces the potential for hierarchies or divisions – these should be three roles of equal importance.
 - The three roles may be overlapping (e.g. many policies and issues interact both with Indigenous cultural issues as well as economic development issues), but this is to be expected and the representatives should be encouraged to work with each other while also consulting and working with the broader community.

5. Gender balance

Indigenous people resident in or culturally connected to the First Nations community would choose both a male representative and a female Indigenous representative for that community.

- **Pros:**
 - Ensures gender equity
- **Cons:**
 - Doubles the number of representatives, which adds complexity and potentially cost, though this can be countered if the positions are part-time, casual or voluntary in nature.

6. Government appointed

Government appoints a First Nations representative, either for each First Nations community, or for each State/Territory, or a set of national representatives not representative of any particular location or group.

- **Pros:**

¹¹⁸ In some of the Saami Parliaments, some of the local representative roles are voluntary or part-time positions, and ATSIC Commissioners were all part-time with a full-time chairman.

- Low complexity.
- **Cons:**
 - For the purposes of the proposed Consultative Committee, this method would likely lack legitimacy in the eyes of the First Nations and other Australians, however government appointed leaders may be more suitable for the Reconciliation Roundtable function.

Other options for National Council of First Nations

1. It is made up of one First Nations representative chosen by First Nations representatives, from among First Nations representatives in each State/Territory (excluding ACT which would be included in NSW), creating seven representatives in total.

- **Pros:**

- Small number of representatives on the advisory committee, so low in complexity and easy to manage. The small number is appropriate, given the committee members' roles are to facilitate and support First Nations communities to be heard in matters affecting them, with the help and support of local First Nations representatives.
- Has cultural legitimacy because members would be chosen by First Nations community representatives and members are therefore more likely to give independent advice without being hindered by worries about being vetoed by government.

- **Cons:**

- Wide variation in population numbers represented – though this is in keeping with the variation that exists in the federal system.
- Does not reflect the diversity of remote, regional, or urban voices.

2. It is made up of three 'recognition', 'empowerment' and 'reconciliation' representatives for each of the States and Territories, selected by the First Nations representatives in each of the States and Territories, (excluding the ACT which would be included in NSW). This would include one Indigenous 'recognition' representative, one Indigenous 'empowerment' representative, and one non-Indigenous 'reconciliation' representative (selected by the general non-Indigenous population in each State and Territory) for each of the seven States and Territories included. Each State/Territory would therefore choose three types of representatives, creating 21 representatives on the national advisory committee: 14 Indigenous and seven non-Indigenous.

- **Pros:**
 - Enables different roles on the advisory committee and incorporates a leadership role for non-Indigenous ‘reconciliation’ representatives, helping create a sense of inclusivity and collaboration across cultural and ethnic divides.
 - Helps counter arguments of separatism by incorporating a specific role for non-Indigenous Australians.
 - **Cons:**
 - Higher number of representatives, adding to complexity and potentially cost.
 - High complexity selection process and types of representative.
 - Wide variation in population represented in each State – however this is in keeping with the variation in the federal system.
 - Does not ensure geographical spread across State/Territories – e.g. in theory all three State representatives chosen for Queensland could be Kabi Kabi representatives.
3. It is made up of three ‘remote’, ‘regional’ and ‘urban’ representatives for each of the States and Territories, selected by the First Nations representatives in each of the States and Territories (excluding the ACT which would be included in NSW). This would include one ‘urban’ representative, one ‘regional’ representative and one ‘remote’ representative for each State and Territory, making 21 altogether. First Nations communities nominated as remote would choose a representative to sit on the advisory committee, the communities nominated as regional would choose a representative for advisory committee, and the First Nations nominated as urban would choose a representative for the advisory committee. E.g. in Queensland, the Wik and Wik Way peoples representative might be chosen by other remote Queensland First Nations communities to sit on the advisory committee, along with the Kabi Kabi representative as the regional representative and the Jagera representative as the urban representative for Brisbane.

First Nations community status as remote, regional or urban could be imposed in the first instance, with request for variation of classification allowed and managed by an overseeing First Nations board (appointed by government in the first instance, and managed by the advisory committee once it is operational.)

- **Pros:**

- ensures geographic spread which is important in national leadership to ensure remote, regional and urban interests are equally heard – this is important because remote community needs may be very different to those in urban areas, and communication, cultural and language styles may also be very different. It may help to ensure that there are diverse representatives from different regions in each State/Territory, to facilitate and support First Nations communities to be heard.
 - **Cons:**
 - urban representatives will be representing a greater population and will have less competition for their positions, because urban areas are likely to incorporate fewer First Nations geographical communities. However, given urban First Nations representatives would be representing a higher proportion of Indigenous people, this may be justified, and this approach would also be in keeping with the population variation allowed under Australia’s federal representative system.
4. It is made up seven First Nations representatives, one for each State/Territory (excluding ACT which would be included in NSW), who are jointly appointed by government and the First Nations representatives. The First Nations representatives would choose a shortlist of nominated representatives from within their State/Territory to sit on the advisory committee, and government would similarly choose a shortlist of First Nations representatives for each State/Territory. The First Nations representatives in each State/Territory, together with government, would then go through a jury selection style veto process, to select a First Nations representative for each State/Territory, to sit on the advisory committee.
- **Pros:**
 - This would ensure that representatives are chosen by First Nations in the first instance, but would allow government collaborative input into deciding who sits on the advisory committee, thereby effecting a partnership approach.
 - It is a compromise solution, balancing Indigenous choice of representatives with government management.
 - **Cons:**
 - If government play a role in choosing First Nations representatives to fulfil the consultative and advisory function on the advisory committee, this could potentially diminish the effectiveness of an independent First Nations Voice that is capable of strongly holding government to account: representatives

may be less likely to express robust critiques of government policy if they are concerned about being vetoed by government in the future.