

30 October 2018

Committee Secretary
Joint Standing Committee on Constitutional Recognition Relating to Aboriginal and Torres
Strait Islander Peoples 2018
PO Box 6021
Parliament House
Canberra ACT 2600

Dear Secretary,

Thank you for the opportunity to make a submission to this inquiry on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples.

I am a PhD Candidate at the University of New South Wales, Faculty of Law. My thesis explores whether and how a First Nations Voice could empower Indigenous Australians with the capacity to have their voices heard in the processes of government.

My thesis examines two case studies in detail. I analyse whether the Aboriginal and Torres Strait Islander Commission (ATSIC) and the Swedish Sámi Parliament—a representative body for the Sámi people of Sweden—were/are effective at ensuring Indigenous peoples' interests are considered in government. These case studies highlight three central points.

1. Indigenous representative bodies often face a tension between accurately representing the interests of Indigenous people and influencing government legislation.
2. This tension can only be managed if an Indigenous representative body is regarded as legitimate and credible.
3. The structure and legal form of an Indigenous representative body cannot guarantee that it will be regarded as legitimate and credible, but it can enhance this likelihood. There are eight key issues that I have identified through my case studies as important in designing a First Nations Voice.

My submission will follow these three points.

An Inherent Tension

All Indigenous representative bodies with formal access to the processes of government face an inherent tension. On the one hand, as *representative* bodies, these institutions must accurately reflect their constituents' views and present advice to government that may conflict with existing legislation and policy. On the other hand, these organisations have a preeminent position within the formal confines of policy development and must take advantage of that position by influencing legislative drafting and policy planning. The challenge is that at times this may require providing advice to decision-makers that they can accept and accommodate. Although representatives may be able to manage this tension with a receptive government, it can become very difficult in the face of an indifferent or hostile administration.

ATSIC's experiences neatly illustrate this tension. Concern within government that the Commission was presenting advice in conflict with government priorities contributed to decisions by both Labor and Liberal-National governments to establish alternative sources of advice within the public service. These decisions undermined ATSIC's potential influence. At other times, the Commission sought to prioritise its relationship with government, seeking to influence policy and legislation. In doing so, however, some Aboriginal and Torres Strait Islander peoples questioned whether the Commission was accountable to them or whether it had been co-opted by the state. Caught between demands for authenticity and influence, ATSIC was unable to obtain nationwide community support or the political strength that it entails. Without that support, the Howard government suffered little political cost to ignoring the Commission. Without genuine engagement by government, many Indigenous peoples regarded the Commission as ineffective. As an ineffective and unrepresentative organisation, ATSIC was unable to prevent its abolition.

This central tension cannot be conclusively resolved but my analysis of ATSIC and the Swedish Sámi Parliament suggests that an institution's capacity to manage these sometimes opposing demands rests on its legitimacy and credibility. An Indigenous representative body regarded as legitimate by the Indigenous community and credible by government and the public at large will be more likely able to weather intermittent Indigenous criticism and government indifference or hostility.

Legitimacy and credibility are critical to the security, stability, and effectiveness of a First Nations Voice.

Legitimacy and Credibility

Legitimacy and credibility are largely dependent on the character and political judgement of an organisation's leaders and are influenced by state attitudes and approaches towards the body. However, careful institutional design is also critical. Examination of ATSIC and the Swedish Sámi Parliament indicates that there are eight key issues that need to be considered.

1. Design Process

The overriding challenge ATSIC and the Swedish Sámi Parliament experience(d) relate to their design. Both institutions (have) struggled to secure widespread support throughout their communities because of concerns that they are/were state-designed institutions rather than Indigenous bodies.

The only way to resolve this problem is by ensuring that the views of Indigenous Australians guide the development of a First Nations Voice. This objective can be achieved in several ways. One way is to hold a referendum that would require government establish a First Nations Voice following (and in line with) a two-stage period of consultation with Aboriginal and Torres Strait Islander people and communities across Australia.

Under this approach, a first stage of meaningful consultation designed and led by Indigenous peoples could be undertaken with Indigenous communities across the country. This stage could focus on developing and articulating key themes and principles underlying a representative body and might loosely be based on the Victorian model or the approach undertaken by the Referendum Council.

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

2. *Governance*

Indigenous leaders must undertake their responsibilities with probity. As ATSIC found, an organisation that fails to meet standards of integrity will not be regarded as credible and will be ineffective at realising its key role: influencing legislation and policy.

Good governance is not simply a matter of applying a common set of accountability mechanisms. The appropriate mechanisms will depend upon the status and role of the body. As an Indigenous representative institution, governance mechanisms should primarily be determined by the Indigenous community who are entitled to decide upon the framework that ensures their leaders are accountable. However, as the institution is intended to play a formal role in policy development and will be publicly financed to realise its responsibilities, the state will insist on exercising some supervisory functions. That is appropriate, but it should not overstep what is required for good public administration and interfere with internal self-governance or inhibit the institution's capacity to meet the demands of its constituents.

3. *Representativeness*

A First Nations Voice must accurately reflect Aboriginal and Torres Strait Islander peoples' voices in all their diversity. Mechanisms should exist to encourage all people, including women, young people, Stolen Generations, and Torres Strait Islanders to contribute, though of course Indigenous peoples and communities themselves are entitled to determine the precise structure and design of those mechanisms. It may well be that different communities have different priorities. The key point is that each community should determine for itself its preferred arrangement. The entire structure must be flexible.

4. *Funding*

A First Nations Voice must be financed appropriately to effectively realise its responsibilities.¹ Adequate financing is particularly important in Australia. Representatives must be able to travel throughout their constituencies to understand community concerns, relay them to relevant decision-makers and feed those discussions back to community.

The precise quantum of funding will depend on the breadth of the body's functions, including, for example, whether it provides advice to state, territory, and local governments or monitors Aboriginal affairs expenditure, but it must be sufficient to meet several minimum responsibilities. The institution must be able to hire a secretariat and policy staff to ensure representatives are well briefed when providing advice or consulting with the executive or individual Parliamentarians. It must also be sufficient to ensure representatives are able to develop their own policy positions. Office-holders should also be remunerated appropriately to reflect the body's status and draw qualified individuals to the role.²

¹ Referendum Council, *Final Report of the Referendum Council* (2017) 30-31; Technical Advisers, Submission No 206 to Parliamentary Joint Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, *Interim Report*, 11 June 2018, 8.

² ATSIC office-holders were provided with remuneration and allowances as determined by the Remuneration Tribunal or as determined by the Minister: *ATSIC Act* (Cth) s 194(1).

5. *Scope*

Aboriginal and Torres Strait Islander peoples are entitled to be heard in any decision that may affect them. As the preeminent Indigenous representative body, a First Nations Voice could be empowered to provide advice on any matter it considers relevant.

The formulation employed by ATSIC and the Swedish Sámi Parliament may be a useful starting point for consideration. These bodies were/are empowered to advise decision-makers on ‘matters relating to Aboriginal and Torres Strait Islander affairs’ and/or provide information on ‘Sámi conditions’. Consistent with the principles enunciated in the UN *Declaration on the Rights of Indigenous Peoples*, this expansive approach allows a representative body to decide itself which Bills or policy proposals it will focus attention on, including on issues debated by state and local governments. Concerns over the volume of advice proffered are unpersuasive. In practice, a representative body will prioritise its work.

6. *Decision-Makers*

Aboriginal and Torres Strait Islander peoples are entitled to be heard in any decision that may affect them. In Australia, the division of constitutional responsibilities means that all levels of government may develop legislation and policy that affects Indigenous communities. Consequently, a First Nations Voice could be empowered to participate in legislative and policy development at federal, state and territory, and local levels.³ It could also be permitted to engage in international forums.⁴ If this approach is taken, clear structural links need to be established.

Several proposals to extend and strengthen ATSIC’s relationship with state and local governments could be considered for a contemporary institution. Considering the role and rationale of a First Nations Voice, it may be appropriate that the Chair serve as a full member of the Ministerial Council on Aboriginal and Torres Strait Islander Affairs. The Chair could also sit on (or at least be provided with observer status at) the Council of Australian Governments, enhancing opportunities for both formal and informal discussion.

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

7. *Timing*

A First Nations Voice needs to be able to provide advice at a period in policy development when their intervention has a real potential to influence proposals. Legislative and policy proposals are usually developed within the executive and then presented to Parliament. Once a Bill is introduced, government is often reluctant to change course.⁵ Advice provided at this stage will therefore likely prove unable to produce substantive amendments but merely refine

³ There was some discussion on this point in the Referendum Council: Technical Advisers, above n 1, 8.

⁴ Technical Advisers, above n 1, 8; Evidence to Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, Dubbo, 2 July 2018, 16 (Des Jones)

⁵ George Williams, ‘Constitutional Recognition by Way of an Indigenous Advisory Body?’ (2015) 8(19) *Indigenous Law Bulletin* 12, 13.

already defined policy proposals. This means the body must be empowered to provide advice in executive processes as well as the Parliament.

This can be realised relatively easily by adapting existing notification and comment provisions. For example, a provision modelled on s 17 of the *Legislation Act 2003* (Cth) could require rule-makers to consult with the national body before making legislative instruments.⁶ Similarly, a convention could develop whereby the public service and relevant Ministers notify the body when developing legislation or policy that relates to Aboriginal and Torres Strait Islander affairs, inviting it to discuss and provide comment on proposals.

These examples are both reliant on the executive contacting the body. Consistent with the principles of self-determination, a First Nations Voice should also be empowered to take a more proactive role, including by designing its own proposals for legislative reform and, as suggested in the Referendum Council Dialogues, ‘reviewing, monitoring and overseeing funding coming into communities; and auditing and evaluating service delivery in Aboriginal and Torres Strait Islander affairs’.⁷ This will necessarily expand the body’s remit, requiring a larger secretariat and budget, further emphasising the importance of financial capacity.

8. *Dialogue*

A First Nations Voice will not have veto powers.⁸ Consistent with Australia’s constitutional framework, any comments or recommendations provided by an Indigenous representative body will be advisory only. This raises a key challenge: how can institutional design promote or encourage respectful dialogue, let alone ensure that consultation occurs? The experiences of ATSIC and the Swedish Sámi Parliament reveal that clear procedures for consultation are required to ensure that consultation occurs. In this light, it is sensible that an obligation to consider advice provided by the body be imposed on relevant decision-makers. This could either be a political requirement,⁹ or a justiciable duty.¹⁰

Delegates at the Referendum Council Regional Dialogues did not support a justiciable obligation.¹¹ Although this may lead to weaker legal protection, this decision should be respected. The most critical element in the design of a First Nations Voice is that its structure and powers reflect the views of Aboriginal and Torres Strait Islander peoples. Alternative measures aimed at promoting respectful conversation and encouraging government to meaningfully listen to the representative body must be developed.

Political consultative obligations are effective to the extent they engender a moral obligation or extract a political cost to ignoring Indigenous voices. This could be imposed via the process of the body’s establishment. In the Uluru Statement, delegates called for a First Nations Voice to be constitutionally enshrined. This desire is informed by the experiences of ATSIC and earlier

⁶ Cape York Institute, *A First Nations Voice in the Constitution: Design Issues* (Report to the Referendum Council, June 2017) 48-49.

⁷ Technical Advisers, above n 1, 8.

⁸ Referendum Council, above n 1, 36.

⁹ Anne Twomey, *An Indigenous Advisory Body: Addressing the Concerns About Justiciability and Parliamentary Sovereignty* (2015) 8(19) *Indigenous Law Bulletin* 6.

¹⁰ Megan Davis and Rosalind Dixon, ‘Constitutional Recognition Through a (Justiciable) Duty to Consult? Towards Entrenched and Judicially Enforceable Norms of Indigenous Consultation’ (2015) 27 *Public Law Review* 249.

¹¹ Referendum Council, above n 1, 38.

national Indigenous representative bodies in Australia,¹² but it also reflects their view that the legitimacy and credibility of the institution may be enhanced by its legal form.

On this view, constitutional entrenchment will not only strengthen the institution's independence, but, by conferring democratic legitimacy through a national referendum, will 'express Indigenous peoples' foundational importance to the polity',¹³ insert the body 'into the public life and imagination of the nation',¹⁴ and potentially ground a convention that government either follows the body's advice or publicly justifies its reasons not to.¹⁵

However, a grassroots popular campaign leading to successful constitutional reform could build the requisite moral and political pressure, but it may not necessarily do so. Although the 1967 referendum is popularly remembered for galvanising cultural change, that culture relied on a receptive government taking power five years later and has not prevented subsequent governments from enacting discriminatory legislation.

While the process of the body's establishment is important then, it cannot guarantee a constructive dialogue develops or endures. Institutional design is also valuable.

A political cost may be imposed by enhancing visibility within the process of conferral and receipt of advice, as this would allow the public to gauge the volume and standard of consultation. Several features could be considered. For instance, the Cabinet Secretariat could report annually on the body's involvement in the Cabinet process, including by noting the number of draft Cabinet documents the body is consulted on, or provides comments on. This measure could be complemented by adapting the obligation under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) to require a Minister introducing relevant legislation to explain how Indigenous views have influenced the Bill,¹⁶ or why those views have not been adopted.¹⁷ Similarly, the Chair of the First Nations Voice could be provided with observer status, allowing them to speak to either House on bills affecting Indigenous interests and deliver an annual report to the nation on Indigenous affairs.¹⁸ Advice may also be tabled in Parliament, allowing all Australians to see whether the advice materially affected proposed legislation.¹⁹

Conclusion

The questions for consideration posed in the Committee's *Interim Report* are important but they cannot be conclusively answered. The challenge – and the opportunity – is that no one knows the detail of what a First Nations Voice will look like. We will begin to have a better idea after genuine consultation is undertaken with Indigenous peoples and communities across

¹² Technical Advisers, above n 1, 7.

¹³ Dylan Lino, *Constitutional Recognition: First Peoples and the Australian Settler State* (Federation Press, 2018) 117.

¹⁴ Fergal Davis, 'The Problem of Authority and the Proposal for an Indigenous Advisory Body' (2015) 8(19) *Indigenous Law Bulletin* 23, 24.

¹⁵ Davis and Dixon, above n 10, 258.

¹⁶ This is not always effective. Rosalind Dixon suggests a more informal and flexible arrangement may work better: Evidence to the Parliamentary Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, Sydney, 4 July 2018, 15-17.

¹⁷ John Chesterman, 'National Policy-Making in Indigenous Affairs: Blueprint for an Indigenous Review Council' (2008) 67 *The Australian Journal of Public Administration* 419, 424.

¹⁸ Council for Aboriginal Reconciliation, *Going Forward: Social Justice for the First Australians* (1996) 156.

¹⁹ Anne Twomey, 'Putting Words to the Tune of Constitutional Recognition', *The Conversation*, 20 May 2015 <<https://theconversation.com/putting-words-to-the-tune-of-indigenous-constitutional-recognition-42038>>.

Australia. We do know, however, that a First Nations Voice will only be effective if it is regarded as legitimate by the Aboriginal and Torres Strait Islander community and credible by government and the Australian public at large. The design elements discussed in this submission cannot guarantee that an Indigenous representative body will be effective in the face of a hostile or indifferent government, but they are critical to developing productive relationships with governments and ensuring an Indigenous representative body can manage the central tension between authenticity and influence, thereby setting it up with the strongest possibility of success.

For this to occur, the first step is ensuring that the design is led by Indigenous peoples. The design of a First Nations Voice should follow a two-stage period of consultation with Aboriginal and Torres Strait Islander people and communities across Australia.

Yours sincerely

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