

26 March 2021

Dear Voice Secretariat,

Thank you for the opportunity to make a submission in response to the Indigenous Voice Discussion Paper.

My name is Lisa Billington and I am a doctoral researcher with the Faculty of Law at the University of Technology Sydney (UTS). I live in Sydney and I have spent much of the past six years researching the intersection of criminology and the right of Indigenous peoples to self-determination – in Australia, in international law and in other parts of the world. I am part of both the Criminal Justice Research Cluster and the International Law Research Cluster at UTS. I am a non-Indigenous Australian.

In 2017, the Indigenous peoples of Australia collectively expressed themselves in the Uluru Statement from the Heart, inviting non-Indigenous Australia to walk together with Indigenous Australians into a future grounded in ‘justice and self-determination’. As a key to unlocking this bright future, the Uluru Statement calls for a First Nations Voice to the Australian Parliament to be enshrined in our national constitution. As an Australian citizen, I support this call.

For generation after generation in Australia, Aboriginal and Torres Strait Islander peoples have not been permitted a decisive voice in matters which vitally affect them. In clear violation of the right of Indigenous peoples to self-determination, governments of every political persuasion and at every level have consistently placed self-interests, corporate interests, special interests and the interests of non-Indigenous Australians ahead of the interests of Aboriginal and Torres Strait Islander peoples. At the same time, the Australian Government continues to decry the ramifications of this approach, lamenting the overrepresentation of Indigenous peoples in criminal justice systems and the underrepresentation of Indigenous peoples in positions of national, state and territory leadership, in positive health outcomes and in Australian schools and higher education institutions.

Self-determination refers to the right of socially and politically distinct peoples to maintain and exercise control over their own affairs. Former UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, divides this substantive right into both *constitutive* and *ongoing* elements: the former comprising ‘episodic procedures’ which lead to the creation of, or change in, government; the latter enjoining government institutions to adhere to a form and function which allows peoples to make meaningful choices about all spheres of life on a continuous basis (Anaya 2004, p. 105).

The Australian Government is failing to respect the right of Australia’s Indigenous peoples to self-determination. Through the Uluru Statement from the Heart, Aboriginal and Torres Strait Islander peoples are collectively calling for ‘substantive constitutional change and structural

reform’ in order to ensure their voices are heard in a way that they have not been since the arrival of the First Fleet on these shores over 200 years ago. A constitutionally enshrined First Nations Voice to Parliament encompasses an important step toward the Australian Government fulfilling its obligations in respect of Aboriginal and Torres Strait Islander peoples’ right of self-determination.

In 2009 when the Australian Government finally voiced its support for the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), it referred to the rights contained therein – including the right of Indigenous peoples to self-determination – as ‘aspirational’ (Australian Human Rights Commission 2009). As we all know, aspiration without action is empty symbolism at best, and hypocrisy at worst. Aspiration devoid of action is capable of effecting no change and of charting no course toward the bright future for Australia envisaged in the Uluru Statement from the Heart.

Imagine, if you will, what the result of the Australian Government’s response to the recent (and ongoing) Covid-19 crisis would have been if it had been ‘aspirational’ rather than action-based? And yet, every day, Australians (both Indigenous and non-Indigenous) are met with the assertions of their own Government that fulfilling the fundamental right of Australia’s Indigenous peoples to self-determination is an ‘aspiration’ – that averting the profound healthcare crisis (Australian Medical Association 2018), incarceration crisis (Anthony 2020) and education crisis (McKinley 2017) facing Australia’s First Nations is an ‘aspiration’.

A national First Nations Voice to Parliament is one concrete step which the Australian Government can take toward recognising and respecting the right of Aboriginal and Torres Strait Islander peoples to self-determination. At a minimum, I call on the Australian Government to honour its election commitment to hold a referendum on the inclusion of a First Nations Voice to Parliament as soon as the model of the Voice has been determined. At a minimum, I call on the Australian Government, after the referendum, to pass the necessary enabling legislation for the National Voice as soon as possible. At a minimum, I call on the Australian Government to heed the voices of Aboriginal and Torres Strait Islander peoples by ensuring the membership model for the National Voice genuinely includes previously unheard Indigenous voices.

The Uluru Statement, however, calls for more.

The *Australian Constitution* has more references to lighthouses than it does to the country’s First Peoples (Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples 2015, p. v). This must be remedied. The recently released Indigenous Peoples’ Rights in Constitutions Assessment Tool (Cats-Baril 2020) – co-designed by IDEA International and the International Work Group for Indigenous Affairs (IWGIA) – notes that, as the supreme legal instrument of the nation state, national constitutions provide some of the most robust legal protections available for recognising and respecting the rights of Indigenous peoples (Cats-Baril 2020, p. 9).

Each year, the Australian Government receives the National Closing the Gap Report; and, year after year as the Australian public, we hear that Aboriginal and Torres Strait Islander peoples are continuing to experience lower standards of health and welfare when compared with non-Indigenous Australians. In 2021, as part of addressing this ongoing crisis, the Government's own Close the Gap Committee explicitly called on the Australian Government to '*fully implement the Uluru Statement from the Heart and a constitutionally enshrined First Nations voice*' (Lowitja Institute 2021, Rec. 1 [emphasis added]).

I recognise that constitutional enshrinement of the First Nations Voice has been determined by the Australian Government to be beyond the terms of reference for the current enquiry. I urge the Government to reconsider. By already rejecting a key feature of the Voice to Parliament, as expressed in the Uluru Statement from the Heart, the Australian Government has severely undermined the possibility of good faith negotiations with Australia's First Nations. As cogently expressed by Professor Irene Watson (2015, p. 91):

In the effort to maintain their boundaries, regardless of the injustices to the humanity of First Nations Peoples, states have given approval to a limited right to self-determination, exercised within the jurisdiction and construct of the dominant state. This form of self-determination is subservient to the rules of the state. This is not self-determination at all.

Aboriginal and Torres Strait Islander peoples must have meaningful recognition and representation in matters which affect them. This is both a legal and a moral imperative. This is a cornerstone of democracy. I therefore call on the Australian Government to accept the invitation to *Makarrata*: the holistic pathway laid out in the Uluru Statement from the Heart which maps out a bright future for *all* Australians, based on justice and self-determination.

Sincerely,

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#### **References:**

Anaya, James S., 2004. *Indigenous Peoples in International Law* (Oxford University Press, 2nd ed).

Anthony, Thalia, 2020. 'Indigenous Prison Rates Can Fall Fast: Here's the Proof', *Sydney Morning Herald* (Online, 7 August) <<https://www.smh.com.au/national/indigenous-prison-rates-can-fall-fast-here-s-the-proof-20200805-p55in2.html>>.

Australian Human Rights Commission, 2009. 'Questions and Answers on the UN Declaration on the Rights of Indigenous Peoples' <<https://humanrights.gov.au/our-work/questions-and-answers-un-declaration-rights-indigenous-peoples-2009>>.

Australian Medical Association, 2018. *2018 AMA Report Card on Indigenous Health, Rebuilding the Closing the Gap Health Strategy: And a Review of the 2016 and 2017 AMA Indigenous Health Report Card Recommendations* <<https://ama.com.au/article/2018-ama-report-card-indigenous-health-rebuilding-closing-gap-health-strategy-and-review>>.

Cats-Baril, Amanda, 2020. *Indigenous Peoples' Rights in Constitutions Assessment Tool* (International Institute for Democracy and Electoral Assistance) <<https://www.idea.int/sites/default/files/publications/indigenous-peoples-rights-in-constitutions-assessment-tool.pdf>>.

Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, 2015. *Final Report* <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/2015\\_Constitutional\\_Recognition\\_of\\_Aboriginal\\_and\\_Torres\\_Strait\\_Islander\\_Peoples/Constitutional\\_Recognition/Final\\_Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/2015_Constitutional_Recognition_of_Aboriginal_and_Torres_Strait_Islander_Peoples/Constitutional_Recognition/Final_Report)>.

Lowitja Institute, 2021. *Close the Gap, Leadership and Legacy Through Crisis: Keeping Our Mob Safe* (Report, Close the Gap Campaign Steering Committee) <<https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/close-gap-2021>>.

McKinley, Elizabeth, 2017. 'Stop Focusing on 'the Problem' in Indigenous Education, and Start Looking at Learning Opportunities', *The Conversation* (Online, 9 February) <<https://theconversation.com/stop-focusing-on-the-problem-in-indigenous-education-and-start-looking-at-learning-opportunities-71994>>.

Watson, Irene, 2015. *Raw Law: Aboriginal Peoples, Colonialism and International Law* (Routledge).