

WOMEN for an Australian Republic

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Submission to Indigenous Voice Co-Design – Stage 2 Consultation

“A successful referendum to enshrine a Voice will be a historic and unifying moment for our nation.” (1)

“Constitutional recognition of Indigenous Australians is not a project of woke identity politics, it is Australia’s longest standing and unresolved project for justice and inclusion.” (2)

Introduction

Women for an Australian Republic (WfaAR) has continuously campaigned for an Australian Republic since 1999. WfaAR was the only republican group with an official YES/YES recommendation to voters in 1999: YES for the proposed rewording of the Preamble to the Constitution because it was the only statement of Indigenous Recognition on offer at the time and YES for the Republic.

WfaAR has maintained a close interest in the outcomes of councils, parliamentary committees and processes taking steps towards Indigenous Recognition.

Since 2006, republicans from all campaigning groups have acquired a deeper understanding of how Indigenous Recognition supports nation-building and reconstruction. In fact, it is an integral component of both (3).

We consider the Uluru Statement from the Heart to be the most significant constitutional document produced since Federation. It is a patient request from Indigenous people themselves: a moving lament, the product of a comprehensive consultative process. Its demands are modest, the language (Australian English) is calm and clear.

For once, the Australian Government and non-Indigenous Australians should listen to Indigenous people and work with them to give them the response they seek: The Voice (their voices) enshrined in the Constitution - as well as Treaty and Truth.

The Voice and the Australian Republic

Creating the Australian Republic cannot proceed to referendum unless Indigenous Recognition has been thoroughly considered by all voters and resolved. Republicans are now well aware that the country was not ready for “government by the people” in 1999 because not “all the people” were included, respected as equals and able to bring their perspectives to the table.

In 1999, the Australian people were not sufficiently united in one significant respect to take on the business of governing themselves. The most important component of

our population because it was here first, numerically small though it is, was neither consulted nor invited to express an opinion about a Republic as a new way to govern their country; to join the new Republic or help to formulate a new, republican constitution. At that stage, Indigenous people were relegated to the Preamble.

Constitutional Enshrinement of a First Nations' Voice

WfaAR supports constitutional enshrinement of The Voice. This will create a more unified nation as well as provide meaningful, symbolic recognition.

In our view, constitutional enshrinement of The Voice will form the bedrock of the Republic and allow it to be created on the basis of equal participation by all groups, nations and tribes that make up Australia. This will allow Indigenous people to not only be invited into the process of creating the Republic but also to participate in and, where they desire, to lead the deliberations and the campaign.

The Constitution is the only foundation document that Australians have. It must be a foundation document of our own with our own innovations and style. It cannot be constrained by the pronouncements of Justice Antonin Scalia about the Constitution of the United States :“no room for emotion” referred to by both Senator Amanda Stoker in additional comments to the Final Report of Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples (JSC) (4) and Uphold and Recognise/PM Glynn Institute (5). It must be Australian and unique: recognising our land and our circumstances; our origins; our cultures; our First Nations and our aspirations.

WfaAR supports the reasons for constitutional enshrinement of The Voice set out in the “Public Lawyers” submission:

- a) it is the only form of constitutional recognition that has been endorsed by First Nations people as the result of an extensive consultative process
- b) it provides The Voice the best possible chance of being effective because it gives it legitimacy
- c) it gives The Voice the best possible chance of being effective because it gives it stability and certainty while allowing for flexibility in (legislated) design
- d) it is the highest expression our political system can give to an Australian identity based on an increasingly respectful relationship between First Nations and the Australian polity. (6)

WfaAR believes the Australian Government must honour its commitment to hold a referendum once the form and operations for The Voice *can be neatly and clearly summarised* so that there is widespread understanding among all voters, particularly Indigenous voters, about what is proposed.

Following Constitutional Enshrinement of The Voice

After a referendum, enabling legislation for The Voice must be passed in the next term of the Australian Parliament with complementary legislation passed at State and Territory level if required.

All forms of The Voice must ensure that all Aboriginal and Torres Strait Islander people have the same opportunity to be selected as representatives on the body, not just established/known leaders.

Potential for Division Fuelling a NO Vote

Essentially what is proposed in the Co-design process is a series of advisory bodies to all levels of government superimposed on a plethora of existing consultative, advisory, peak and local bodies, and groups advising on another extensive array of topics and concerns. The new proposals are enmeshed in a bewildering array of options for membership and eligibility; policy and role, legal basis and linkages complete with complex diagrams and flow charts that form the basis of the Stage 2 consultation with input invited to assist resolve the substantial, consequential issues and make decisions about preferred options.

This is not a difficult proposition but can be made a difficult proposition. This is not an unusual process. There are coordinated, cooperative consultative and advisory systems in place between parliaments and First Nations in Canada, the United States and New Zealand while the Sami peoples of northern Scandinavia have their own parliaments. But it can be made unnecessarily complex and confusing.

The similarities between the divisions of the Republic referendum, both pre- and post-vote, and the conflicts inherent in the hoped-for outcomes of the Co-design process are striking. WfaAR observes that the building blocks are being put in place to sink constitutional enshrinement of The Voice by means of:

- conflict between the enshriners and the legislators; between the purists/theorists and political strategists/campaigners
- conflict between the Voicers and those seeking “Recognition” by another means, eg statement only in the body of the Constitution, or only in the Preamble
- disagreements over the many options proposed for the “models”
- disputation about how to select representatives/members for different versions of The Voice – among Indigenous people themselves and between Indigenous people and others
- losing sight of principle in favour of extensive detail in sub-issues thereby opening up the possibility of disagreement and entrenched opposing views
- emphasising important points of difference/principle to fracture any referendum vote and lay the groundwork for a NO case – and a NO vote
- weariness on the part of all governments and the people, that is: the people have already moved on ahead of the politics
- lack of continuity as governments – and Prime Ministers – change (already evident since 2007).

The weight of the failed Republic referendum in 1999 hangs heavily over this whole process, not only in the options set out in the Co-design proposals but also reflected in an openly expressed fear of failure and timidity on the part of government to act, let alone lead.

WfaAR is particularly concerned that the final JSC report steered what was supposed to be “Constitutional Recognition” down a path ripe for disputation, specifically in the many variations proposed in the Co-design of The Voice. That could not have been the intention of the Uluru Statement from the Heart. For republicans, the venture-ending possibility of disputation over “models” brings distressing feelings of deja-vu as well as heavy hearts.

The final JSC report made no recommendations on its most critical terms of reference (1c and 1d) about how to achieve constitutional recognition of Indigenous people building on the extensive work done since 2012. At the conclusion of its deliberations, the Committee wrote that it was dealing with 18 proposals for amendments/additions but could not determine how to proceed (7). No doubt by now, and even as part of this consultative process, there are more on the table.

Comments on the National Voice Proposal

There are questions and options posed about:

- scope of operations and coordination with other forms of The Voice at local and regional level
- representatives from each State and Territory based on two core models for selection or election (one is even labelled Direct Election) with five sub-options including separate arrangements for Torres Strait Islander representation
- numbers of members (two options)
- gender balance
- Ministerial appointments
- length of terms (two options)
- criteria for eligibility (two options)
- removal of members (two options)
- separate youth and disability advisory groups plus other sub- committees
- legal structure (two options)
- international role
- support functions: a panel of experts: an independent policy body; provision of advice on probity, ethics and governance (two options)

The proposals run to 37 pages in the Interim Report. They are complex. There is also attention to formal linkages sought between the different iterations of The Voice, potential for overlapping membership and roles.

The criteria listed above are almost identical to the ones used for selection of the Head of State in an Australian Republic and how that position would operate, how nominations could be made and the like. The only elements that appear to be missing are options for campaign funding and limits on campaigning in Core Model Two. Trying to obtain political and community agreement to the proposed criteria for selection and operation of the Head of State position bedevilled the republican movement in 1999 and has done since because of the difficulty in finding agreement/compromise on the detail even if high level agreement is possible.

WfaAR makes four comments on this design:

- the scope of the National Voice should be as broad as possible and unconstrained; it must be a two-way process between The Voice and federal Parliament/Government and also between federal Parliament/Government and The Voice
- that instead of gender balance (presumably 50/50), the Senior Advisory Group might consider a 40:40:20 composition for The Voice: 40 percent each of women and men with 20 percent reserved to be filled as desired eg LGBTIQ+, youth or other; also provides flexibility to include meritorious appointed or elected representatives. This ratio is being increasingly used to ensure appropriate gender representation in the corporate sector
- that women have as much chance to participate in and be selected for the Voice/s as men
- it should be simplified and streamlined for public presentation.

The design for the Local and Regional Voice running to 42 pages is as meticulously detailed but has not been considered by WfaAR either in its own right or how it is proposed to dovetail with the National Voice.

WfaAR considers that the method and fine distinctions set out in the Interim Report are commendable and, no doubt, the product of much painstaking work. They demonstrate how much effort needs to be put in to introduce new systems in already complex environments with political and geographical histories of their own. Republicans can, properly, be guided by our Indigenous peoples on how to go about large-scale community consultation as a way to win over support for their case.

If the Senior Advisory Committee does not receive enough feedback from this consultative process to settle on preferred options, it has the evidence of the public consultations and submissions to the JSC to refer to (we note that this has already occurred). WfaAR was impressed with the level of detail and issues raised by community members demonstrating how groups, even small groups, of active and engaged citizens can come together to seek clarification, suggest improvements and work towards a common goal. This bodes well for future engagement in the political process, including other referendums, by our First Nations peoples.

Where to From Here?

WfaAR notes that there is as yet no published process or timetable for Stage 3 of the process after the Senior Advisory Group has made its final report to Government between June and August 2021 apart from some references to the Australian Government selecting some models for “testing”. It is hoped that the extra time will allow for additional public consultations outside the eastern States as a result of Covid travel restrictions during 2020.

WfaAR noted the proposal put forward by Noel Pearson in a speech at the National Museum of Australia in Canberra on 17 March 2021 (see Note 2).

At the end of his speech, Pearson sets out how he sees the process ahead:

- complete the legislative design of The Voice; produce an exposure draft of the bill, then set it aside
- settle on the words of constitutional amendment that recognises Indigenous Australians and upholds the Constitution (8)
- put the amendment to a referendum of the Australian people at the next, best opportunity.

WfaAR comments on the above proposal as follows:

- there is enough detail about roles, structures and operations, of The Voice already contained in the Senior Advisory Committee’s Interim Report to inform voters about how it will likely operate in practice. This lends itself to digestible and readily understandable summaries. An exposure draft of a bill would be useful for lawyers and others who want micro-detail tied down and/or defined but may not be required for the general public. It may bear little resemblance to final bill/s in any event and its production could cause significant disputation and delays in its own right
- it would be preferable to press ahead with constitutional amendments first to recognise Indigenous people, then finalise the operating elements of The Voice through plebiscite/s, if required, in which only Indigenous Australians can vote before legislating (9)
- constitutional amendments should include repeal of section 25; consideration of section 51(xxvi) with a view to repeal, amend or replace (both sections contain “race” provisions); review of section 122 as well as a new provision to recognise Indigenous languages as languages of Australia (10)
- the referendum should not be held at the same time as an election.

In short, agreeing with Noel Pearson, we should not lose sight of the principal objective – Indigenous Recognition in the Constitution now understood to be realised by enshrining The Voice - through disagreement about options for how The Voice is to operate. This could undermine the entire undertaking by providing rich nutrient for the NO vote.

Comments on Other JSC Recommendations

WfaAR considers it essential not to lose sight of other elements of the Uluru Statement from the Heart in the many options for The Voice and in the complexities of the Co-design process and its aftermath, particularly the establishment of a Makarrata Commission to supervise a process of agreement-making between governments and First Nations, and truth-telling.

WfaAR would also like to see that Recommendation 4 of the JSC Final Report – for a National Resting Place for Aboriginal and Torres Strait Islander remains that cannot be returned to country – is also not overlooked. This is intended to be a place of commemoration, healing and reflection. Recognition in the Constitution, crucially important as it is, is not the only action required at national level. Extensive

consultation with Indigenous people will be required to implement this recommendation. Australian Government funding required – in the order of \$20m – is minimal in the context of the federal Budget.

This submission can be made public.

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Notes

- (1) Statement on homepage of www.fromtheheart.com.au
- (2) Quote from speech given by Noel Pearson at the National Museum of Australia, 17 March 2021, www.capeyorkpartnership.org.au/speeches/its_time_for_true_constitutional_recognition, accessed 18 March 2021
- (3) Professor Larissa Behrendt gave the National Republican Lecture in 2005 and also addressed a meeting of republican leaders in Canberra in 2006. “This Country, A Reconciled Republic?”, Mark McKenna with paintings by Garry Shead, UNSW Press, Sydney 2004 was also influential in republican leaders’ rethinking of the task ahead of them.
- (4) Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples. Interim Report June 2018; Final Report November 2018, Parliament of Australia, Canberra.
- (5) Submissions by Uphold and Recognise, including jointly with the PM Glynn Institute, feature prominently in both reports of the JSC. The Select Committee’s Co-chair, Julian Leaser, MHR for Berowra NSW, is a co-founder of Uphold and Recognise: “a non-profit organisation that promotes discussion of how we can recognise Indigenous Australians without disturbing the way that the Constitution operates” (www.upholdandrecognise.com). In January 2021, Uphold and Recognise made public a proposal for a single constitutional amendment that does not mention “The Voice” and maintains “parliamentary supremacy” – www.theaustralian.com.au/nation/new-voice-proposal-by-uphold-recognise-to-placate-both-sides/news-story 22 January 2021 accessed 26 April 2021. The PM Glynn Institute is the Australian Catholic University’s public policy think tank based in North Sydney, www.acu.edu.au/about-acu/institutes-academies-and-centres/pm-glynn-institute holding seminars and producing a series of papers on Indigenous Recognition in 2018 and 2019. Advisors to the PM Glynn Institute on Indigenous Recognition papers and legislative proposals include Noel Pearson, Professor Megan Davis and Professor Marcia Langton.
- (6) Submission #38 to the Co-design Report Stage 2 consultation made by a group of 45 academics working in constitutional law and other areas of public law known as the “Public Lawyers” submission of 20 January 2021.
- (7) We know from the Minority Report in the final JSC report authored by Senator Rachel Siewert of The Australian Greens that this situation arose was because the members of the Committee could not agree. The recommendations for constitutional amendment/s to enact Indigenous Recognition were abandoned and the focus shifted to the Co-design process as the preferred outcome from the Uluru Statement from the Heart.
- (8) This wording is familiar, see Note (5)
- (9) The preference to proceed to referendum as a priority before settling the characteristics of The Voice was also expressed in The Australian Greens minority report to the final report of the JSC in late 2018.
- (10) A new section 127A in the Constitution, A Recognition of languages, was proposed by the Expert Panel on Constitution Recognition of Indigenous Australians in 2012. This, and all other recommendations for amendments and additions to the Constitution for Indigenous Recognition, are included in Appendix C of the final JSC report.