Interim Report, Indigenous Voice Co-Design Process

Submission by Arnold Bloch Leibler, March 2021

Opening statement by Senior Partner Mark Leibler AC

For more than a decade, Australia has been telling its First Peoples that the nation is ready to recognise them in our founding document – the Australian Constitution.

There have been multiple formal processes aimed at identifying, considering and debating options for how this might be done in a way that is likely to succeed at a referendum and, most importantly, that accords with the wishes of Aboriginal and Torres Strait Islander peoples.

In May 2017, the proposal for a constitutionally enshrined advisory Voice to Parliament was unanimously supported by Aboriginal and Torres Strait Islander delegates to the historic National Constitutional Convention at Uluru. The Uluru Statement from the Heart, which includes the advisory Voice as its central recommendation, was the culmination of the most proportionally representative consultation process ever undertaken with Indigenous Australians.

However, to succeed at a referendum, the proposal must be broadly accepted by politicians and other influencers across the political spectrum. It was in this real-world context, and in line with a recommendation of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, that the Indigenous Voice co-design process was established in late 2019 by the Minister for Indigenous Australians, Ken Wyatt.

While the senior advisory group overseeing the process, and the national and local & regional co-design groups who work alongside it, are specifically precluded from making recommendations on constitutional recognition, I am confident that their Interim Report has advanced the cause of a constitutionally enshrined advisory Voice for Indigenous Australians in a number of important ways.

At the time the groups were established, and more recently in his 2020 Closing the Gap Statement, the Prime Minister said a decision on the "legal form" of the Voice would be made after the co-design process was completed.

Despite the Prime Minister's previous commitment, it is concerning that in recent days he has indicated that giving the advisory body constitutional validity is not the government's position.

I know and respect the Prime Minister for his pragmatism and remain confident that he will be persuaded by the momentum of community support for a constitutionally enshrined Indigenous Voice.

Having co-chaired both the Expert Panel and Referendum Council, I remain of the view that it is the most reasonable and achievable option for constitutional recognition that has emerged over the last decade.

I am pleased to lodge this submission on behalf of the partners and staff of Arnold Bloch Leibler. The credibility of our perspective is founded on the firm's long history of working in partnership with Aboriginal people and organisations as clients, and taking their instruction on a range of matters that go to the heart of their determination to be the architects of their own futures.

We view the Interim Report into how the nation might give effect to the Voice proposal as an astute next step on the path towards the outcome I have no doubt our nation will ultimately achieve – constitutional recognition of Aboriginal and Torres Strait Islander Australians in the manner and form they have nominated.

Introduction

1 For nearly 30 years, Arnold Bloch Leibler has worked with Aboriginal and Torres Strait Islander communities, organisations and individuals, often pro bono, on a vast range of matters and issues, including native title, organisational governance, business innovation and intellectual property.

2 Over this period, we have assumed a responsibility to share our experiences and learnings across the legal and business community, and with policy makers. As a high-profile law firm, we use our very best efforts to model how to effectively work in partnership with Aboriginal and Torres Strait Islander peoples to realise economic, cultural and social aspirations, and overcome persistent barriers.

3 The firm's advocacy of the Uluru Statement from the Heart and its central recommendation for a constitutionally validated Indigenous Voice to federal parliament is borne of our multi-layered experience working with Indigenous peoples and organisations.

4 We also use our very best efforts to ensure that the decisions and instructions conveyed to us by Aboriginal and Torres Strait Islander clients are based on their free, prior and informed consent, and that traditional decision-making processes are respected and supported at all times.

5 Central to this cross-cultural exchange, we do not patronise and we consciously avoid paternalism. Our entire approach was founded and is always practised on the basis of establishing, nurturing and maintaining true and equal partnerships.

6 The Uluru Statement from the Heart and its central recommendation for an Indigenous Voice delivers an invitation to the Australian people to embrace this very same principle for the benefit of the nation as a whole.

Summary of recommendations

7 We have identified two critical issues arising from the Interim Report that deserve further attention in the final version:

- The appropriate timeframe for developing legislation associated with the Voice; and
- The scope of issues on which the government and/or federal parliament would be required to consult the advisory Voice.

8 Further explanation of these issues is provided below in the section headed "Critical issues explained".

9 On these and related matters, we offer the following recommendations:

- Notwithstanding the government's commitment to wait until the co-design process is completed before considering legislative, executive and constitutional options to establish the Voice, the current senior advisory and co-design groups (who are precluded from addressing these issues) must now be instructed to explore and explain these options.

- As part of the final phase of the co-design process, an exposure draft Bill for the Voice should now be developed, as well as options for the wording of a possible constitutional amendment. As a purely legislated Voice would be highly unlikely to attract support from Aboriginal and Torres Strait Islander peoples, and therefore unlikely to attract support from the wider community, enabling legislation should only be passed subsequent to a successful referendum.

- The government's consideration of the legal form of the Voice should also be informed by comprehensive national polling to test community support for the advisory Voice, conducted after the final phase of co-design and on the basis of an accurate description of what is proposed.

- Contrary to the approach canvassed by the senior advisory group,[1] we recommend that policy makers should be obliged, rather than purely expected, to consult the advisory Voice on a scope of matters described by the national co-design group as "proposed laws and policies of general application which particularly affect, or which have a disproportionate or substantial impact on Aboriginal and Torres Strait Islander peoples"[2]. Given that the advice provided by the Voice, in any event, would be non-justiciable, we view any demarcation between the "obligatory" and "expected" areas of consultation as a false divide.

- In recommending the framework for the next phase of consultations,[3] the senior advisory group has highlighted the critical importance of "getting it right", particularly among Aboriginal and Torres Strait Islander peoples. We strongly support this recommendation and emphasise that the consultation process that will shape the Final Report should be carefully, respectfully and transparently mapped out to ensure free, prior and informed consent of the kind that underpins the ongoing legitimacy of the Uluru Statement from the Heart.

- We also support the recommendation[4] that the federal government should bolster community engagement in the next phase of consultations by expeditiously confirming its commitment to the establishment of an Indigenous Voice.

Positive trajectory

10 We commend the senior advisory and co-design groups for advancing the national discussion of an Indigenous Voice in a number of important ways.

11 At a high level, the Interim Report has clarified much about how a truly representative Voice, respected across the diversity of Aboriginal and Torres Strait Islander peoples,

[1] National Indigenous Australians Agency, Parliament of Australia, *Indigenous Voice Co-Design Process: Interim Report to the Australian Government* (Interim Report, October 2020) 32.
[2] Ibid 53.
[3] Ibid 141.
[4] Ibid 158.

can improve policy outcomes for people on the ground and get a far better "bang for the buck" for Australian taxpayers.

12 On a more granular level, the Interim Report offers valuable thinking on how membership of the Indigenous Voice and associated local/regional bodies might be determined, what the body(ies) might look like and how they might function.

13 The group has also clarified – specifically and unambiguously - what the Voice would not be and was never intended to be:[5]

- It would **not** have the power to veto laws made by the parliament nor decisions made by the government;
- It would **not** be in a position to obstruct or delay the workings of the parliament or the government; and
- As such it would most certainly **not** constitute a third chamber.

14 Many of the advisory/representative proposals in the Interim Report are reminiscent of the best aspects of former Aboriginal and Torres Strait Islander peak advisory bodies like the Aboriginal and Torres Strait Islander Commission (ATSIC), particularly those that focus on 'ground-up' mechanisms to give Aboriginal and Torres Strait Islander peoples an unfiltered voice to parliament and the government of the day on policies that impact their lives.

15 The co-design groups have wisely rejected any notion that the Voice should be handballed responsibility to deliver government services as ATSIC was, seeding inevitable conflicts of interest and corruption.[6]

16 The fact that an institution like ATSIC, including its best features, was completely dismantled by the government of the day to overcome its worst features, without genuinely consulting affected communities, illustrates why constitutional status for the Voice is so important to those communities.

17 It's commendable also that the co-design groups have charted a parallel course for the Voice to advise federal government along with the parliament so it might influence and advise on proposed laws and policies in the early stages of their development.[7]

Critical issues explained

Timeframe for legislation

18 The government formally accepted the recommendation of the Joint Select Committee that: "following a process of co-design, the Australian Government consider, in a deliberate and timely manner, legislative, executive and constitutional options to establish the Voice."[8]

[5] Ibid 32.
[6] Ibid.
[7] Ibid 50.
[8] Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Final Report* (Final Report, 2018) xviii.

19 As the Terms of Reference for the co-design groups preclude them from canvassing the legal form the Voice might ultimately take,[9] making good on the government's commitment will require further work to be done to explore these options.

20 We completely agree with the approach put forward in the submission lodged by From the Heart[10] that the final stage of the co-design process should include the development of an exposure draft bill and drafting options for a constitutional amendment. Similarly, Noel Pearson, in his address at the National Museum on March 17, 2021, powerfully articulated that it ought to be constitutional recognition that "empowers parliament to legislate the voice to parliament"[11].

21 If the government were to attempt to pass enabling legislation as part of the co-design process, it would be viewed as reneging on the Prime Minister's original commitment to allow the process to run its course before determining the government's position on the preferred legal form of the Voice.

22 While we understand and respect the position taken by the co-chairs of the senior advisory group, Marcia Langton and Tom Calma, that taking the proposal to a referendum before it was legislated in effect "risked scuppering the entire reform"[12], we maintain that a purely legislated Voice, likely to be rejected by Aboriginal and Torres Strait Islander peoples, would render the body illegitimate and ineffective. We strongly submit that enabling legislation should be developed now but only passed <u>subsequent</u> to a successful referendum.

23 From the Heart made the compelling point that, in any case, parliament would have the power to amend legislation developed around a constitutionally enshrined Indigenous Voice at any time, rendering it premature, unnecessary and incongruous "to steer constitutional recognition into a legislative cul-de-sac."[13]

<u>Obligation vs expectation to consult</u>

24 In our view, the Interim Report creates a false divide between issues on which the government and parliament should be **obliged** to consult and those around which this would be an **expectation.**[14]

25 To limit the obligation to laws pertaining to race - laws under section 51(xxvi) of the Constitution, special measures or laws which seek to suspend the Racial Discrimination Act, and laws under section 122 (the territories power) - is both arbitrary and reinforces the negative prism through which Indigenous policy and people have been viewed for too long.

26 There would be no legitimate basis for concern in widening the obligation to consult to include areas described in the Interim Report as "proposed laws and policies of general application which particularly affect, or which have a disproportionate or substantial impact on Aboriginal and Torres Strait Islander peoples".[15]

---

[9] Senior Advisory Group, National Indigenous Australians Agency (Cth), 'Terms of Reference'; National Co-Design Group, National Indigenous Australians Agency (Cth), 'Terms of Reference'; Local & Regional Co-Design Group, National Indigenous Australians Agency (Cth), 'Terms of Reference'.

[10] From the Heart, Submission No 1 to National Indigenous Australians Agency, Parliament of Australia, *Indigenous Voice Co-Design Process* (21 January 2021), 3.

[11] Noel Pearson, *Its Time for true Constitutional Recognition*, National Museum of Australia, 17 March 2021.

[12] Greg Brown, *Indigenous Voice co-chairs reject Noel Pearson call*, The Australian, March 19, 2021.

[13] Ibid 14.

[14] National Indigenous Australians Agency (n 1) 51.

[15] Ibid 53.

27 Failure to consult, irrespective of whether consultation was obligatory or expected, may have political ramifications but would be non-justiciable and could have no legal consequences. The processes of the parliament and/or the government could neither be interfered with nor delayed.

28 So why not oblige policy makers to take advice on the scope of matters of concern to Indigenous Australians? If the overarching objective of establishing the Voice is to achieve better outcomes than we have to date (a very low bar), we should view the availability of this advice not as a burden but as a resource.

Revisiting concerns about an Indigenous Voice

29 The co-design process has been of great value in clarifying the proposal for an Indigenous Voice and has thereby advanced the cause of constitutional recognition in the form advocated by Aboriginal and Torres Strait Islander Australians in the Uluru Statement from the Heart.

30 Nonetheless, it is worth revisiting and addressing persistent, unfounded concerns that continue to be aired by a small number of politicians and commentators:

- that the advisory body would inevitably be seen as a third chamber of parliament;
- that it is contrary to the principles of equality of citizenship in Australia; and
- that it has no realistic prospect of being supported by a majority of Australians in a majority of States.

31 We will not address another two concerns, which have been superseded by the co-design process: that there was insufficient detail available on the Voice proposal; and that it was a new idea, not previously raised in the national discussion around recognition.

32 We address the others one by one in this section of this submission.

<u>'Third chamber'</u>

33 Any perception that the Voice to Parliament would represent a third chamber is of course entirely misconceived. Whatever the source of this misconception, it is imperative that this myth be dispelled once and for all to build cross-party and community support.

34 The 'third chamber' criticism is not one that can be reasonably maintained. All proponents of the Voice agree that the body would have no power of veto on proposed legislation and its advice would not be binding on either House of Parliament.

35 Instead, the advisory body would be dependent on the genuine engagement and political will of the government and the parliament to consult effectively.

36 Proponents of the Voice, including vastly experienced lawyers from different ends of the political spectrum, have also emphasised that because it will be up to the parliament to determine the roles, composition and powers of the advisory body, there is no risk that it would undermine current parliamentary processes. It would create the opportunity for a dialogue with Parliament but leave parliamentary sovereignty completely and utterly undiminished.

37 It should be remembered that the membership of the Referendum Council that oversaw the consultation process that resulted in the Uluru Statement from the Heart included five lawyers, including a former Chief Justice of the High Court, as well as former federal and state politicians. With one exception, members of the Referendum Council were united in their belief that the type of advisory body called for in the Uluru Statement could be established with no adverse consequences to the smooth operation of the parliament, including in relation to questions of justiciability.

38 Quite the contrary, it would provide governments and parliamentarians with valuable input to help ensure that laws and public policy decisions concerning Aboriginal and Torres Strait Islander Australians yield better outcomes than has been the case to date.

Unequal citizenship

39 It is claimed by some that to establish a national advisory body for Aboriginal and Torres Strait Islander peoples with constitutional validity would be contrary to the principles of equality of citizenship in Australia.

40 This argument was most eloquently dismissed in an address by the former Chief Justice of the High Court, Murray Gleeson, who also served as a member of the Referendum Council.

41 Chief Justice Gleeson pointed out that the Australian Constitution already treats Indigenous people differently from other citizens.

42 “The race power, by its very existence, calls into question the assumption of equality,” [16] he said.

43 “At present, by virtue of a widely applauded amendment made last century, the Constitution empowers the Federal Parliament to make special laws about Indigenous people. That is an important power that has been exercised on several occasions, sometimes controversially.”[17]

44 “It has been suggested that it is divisive to treat Indigenous people in a special way,” he goes on to say. “The division between Indigenous people and others in this land was made in 1788. It was not made by the Indigenous people. The race power in the Constitution is now used in practice to make special laws for them. The object of the proposal is to provide a response to the consequences of that division.”[18]

Impossible to achieve at referendum

45 Another persistent argument against taking the proposal to a referendum is that the proposal would be rejected by the Australian people.

46 When this argument was mounted by the former Prime Minister in his response to the Referendum Council’s final report, it was based on the findings of private polling. The legitimacy of this ongoing presumption by some is not clear without knowing what people were asked.

47 The most recent research of which we are aware was conducted by C/T Group (formerly Crosby Textor), in June 2020. It found that 56 percent of Australian voters

[16] Murray Gleeson, *Recognition in Keeping with the Constitution A Worthwhile Project* Pamphlet *Uphold and Recognise* Monograph Series (2019) 12.
[17] Ibid.
[18] Ibid.

would vote "Yes" if a referendum were held on a constitutionally enshrined Voice to Parliament. Just 17 percent of respondents said they would vote no.[19]

48 We have recommended that comprehensive polling should be conducted after the co-design process is finalised, based on an accurate description of the proposal that would be taken to a referendum.

49 What is blatantly clear from all of the research conducted on this issue is that if the government chose to pursue a model of recognition that is inconsistent with the wishes of Aboriginal and Torres Strait Islander peoples – the peoples we seek to recognise – it would have *no* chance of success at a referendum.

Making it real

50 There are many examples of how mutually respectful partnerships between government and Indigenous communities have resulted in mutually beneficial outcomes. We conclude this submission by offering two such examples.

Indigenous response to COVID

51 A good deal of attention has been given to the extraordinary success of Aboriginal and Torres Strait Islander communities in avoiding the potentially devasting impact that COVID-19, particularly in remote parts of Australia.

52 Writing in The Australian newspaper (*Covid has shown us what an Indigenous voice to parliament would look like,* 13 March 2021) Dr Fiona Stanley and Prof. James Ward highlighted that despite the higher risk experienced by Aboriginal and Torres Strait Islander Australians, given patterns of excess acute and chronic diseases, poor social circumstances, poor housing and homelessness, substance abuse, their self-determined response to the pandemic has proven "the best of any Indigenous group in the world". And it was achieved by setting up trusted collaborations with relevant state, territory and federal government departments.

53 The authors make a strong case for recommending that "enshrining a First Nations voice in the Australian constitution will mean that their (Indigenous communities') response to the pandemic is not a one-off historical moment but rather normal business for governments and how they work with Aboriginal people and organisations."

Yorta Yorta cooperative management agreement with the Victorian Government

54 The Yorta Yorta Nation Aboriginal Corporation and the Victorian Government have worked in partnership through a Cooperative Management Agreement since 2004. The Agreement was reached outside the native title process to create a forum for the Yorta Yorta peoples to co-manage parts of their traditional country.

55 In effect, the Agreement works as a localised "voice to government", with its preamble speaking of a partnership based on "recognition, mutual respect and agreed goals".

56 Under the Agreement, an eight-member committee is established, known as the Yorta Yorta Joint Body. The Joint Body's Terms of Reference set out its function in providing advice and making recommendations to the Minister or Secretary (as applicable) concerning the management of the designated areas. When making a decision

[19] From the Heart, 'Poll Shows Strong Rise in Support for Constitutional Change to Create Indigenous Voice to Parliament' (Press Release, 15 July 2020).

regarding the management of these areas, the government is required to take this advice into account.

57 While the Agreement provides a valuable mechanism by which the Yorta Yorta can influence government decision-making, the Agreement makes clear that ultimate responsibility for remains with the Minister.

58 Some 15 years have passed since the Agreement was signed and, despite obvious limitations, it continues to operate successfully and remains a stunning example of what can be achieved when the voice of Aboriginal peoples is heard respectfully and utilised in policy development and democratic processes.

Conclusion

59 These are just two illustrative examples of how mutually respectful partnerships between government and Indigenous communities can benefit Australian civil society. There are countless other examples, historically and presently, of exactly the same 'two way' beneficial processes.

60 A constitutionally enshrined advisory Voice for Indigenous Australians, in the respectful manner and form nominated by Aboriginal and Torres Strait Islander peoples in the Uluru Statement from the Heart, will be the ultimate expression of this powerful and enriching nation building dynamic.