



public interest
ADVOCACY CENTRE

Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples

17 September 2018

About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal centre based in Sydney.

Established in 1982, PIAC tackles barriers to justice and fairness experienced by people who are vulnerable or facing disadvantage. We ensure basic rights are enjoyed across the community through legal assistance and strategic litigation, public policy development, communication and training.

Our work addresses issues such as:

- Reducing homelessness, through the Homeless Persons' Legal Service
- Access for people with disability to basic services like public transport, financial services, media and digital technologies
- Justice for Aboriginal and Torres Strait Islander people, through our Indigenous Justice Project and Indigenous Child Protection Project
- Access to affordable energy and water (the Energy and Water Consumers Advocacy Program)
- Fair use of police powers
- Rights of people in detention, including equal access to health care for asylum seekers (the Asylum Seeker Health Rights Project)
- Transitional justice
- Government accountability.

Contact

Jonathon Hunyor
Public Interest Advocacy Centre
Level 5, 175 Liverpool St
Sydney NSW 2000

T: 02 8898 6500

E: jhunyor@piac.asn.au

Website: www.piac.asn.au



Public Interest Advocacy Centre



@PIACnews

The Public Interest Advocacy Centre office is located on the land of the Gadigal of the Eora Nation.

Introduction

PIAC is pleased to have the opportunity to provide an additional submission on the important issue of constitutional recognition of Aboriginal and Torres Strait Islander peoples.

In our initial submission we expressed strong support for the Uluru Statement from the Heart, and its three calls for:

1. Voice: a First Nations Voice to Parliament enshrined in the Constitution
2. Treaty: a process for agreement making, and
3. Truth: truth-telling about our history.

We welcome the Joint Select Committee's Interim Report and its focus on the Voice to Parliament. We believe that the Voice should be the primary goal of any efforts to amend the Australian Constitution with respect to Aboriginal and Torres Strait Islander peoples, rather than any of the alternative proposals that have been considered (see 'Voice is the Priority', below).

The Interim Report poses a large number of questions about the Voice to Parliament, its function and operation, structure and membership (and equivalent questions in relation to local and/or regional voices).

PIAC limits its submission to four discrete issues: process, constitutional enshrinement of the Voice, ensuring the Voice is the priority for reform, and truth.

Process

In PIAC's view, many of the questions posed by the Interim Report are best resolved through a regional dialogue process, based on that adopted by the Referendum Council in the lead-up to the Uluru Statement itself. This should be fully funded by the government and, most importantly led by Aboriginal and Torres Strait Islander people.

As articulated by Dr Shayne Bellingham, a descendent of the Wotjobaluk people in Victoria:

The Voice to Parliament should be designed through a 'bottom up' process, just like the Uluru Statement was. This should be through [a] series of Regional Dialogues to seek Aboriginal and Torres Strait Islander people input into and feedback on draft legislative proposals.¹

We acknowledge that the Joint Select Committee is open to this possibility, with co-chairs Senator Patrick Dodson and Mr Julian Leeser MP in the foreword, foreseeing:

a process of deep consultations between the Australian Government and Aboriginal and Torres Strait Islander peoples in every community across the country, in order to ensure that the detail of The Voice and related proposals are authentic for each community across Australia.²

This is also reflected in this comment by the Committee:

¹ Interim Report, 57.

² Interim Report, vii.

The Committee feels strongly that, to meet these objectives [that The Voice is both legitimate and effective], the design of The Voice, as well as any amendments that might be put to a referendum, should be informed by the two parties that it seeks to bring together – Aboriginal and Torres Strait Islander peoples and the Parliament.³

PIAC supports the process of Regional Dialogues as best practice, and defers to the views of Aboriginal and Torres Strait Islander peoples expressed through that process to meaningfully answer the questions about the Voice, its function and operation, structure and membership.

Recommendation 1

The process for answering the Interim Report's question about the function, operation, structure and membership of the Voice should involve Regional Dialogues based on the process used by the Referendum Council in the lead-up to the Uluru Statement from the Heart.

Constitution Not Legislation

The Interim Report asks

- Should the national voice be in the Constitution? (p 120); and
- Should the Voice (local, regional, or national) be constitutionally entrenched, enacted by legislation, both, or either? Why? (p 122).

PIAC strongly supports the view, expressed by Aboriginal and Torres Strait Islander people through the Regional Dialogue process, that the Voice should be enshrined in the Constitution. Indeed, the Uluru Statement from the Heart includes an explicit 'call for the establishment of a First Nations Voice *enshrined in the Constitution*' (emphasis added).

The question of whether the Voice should be legislated or inserted into the Constitution via referendum has already been debated at length, and answered, by Aboriginal and Torres Strait Islander people.

They have expressed their legitimately-held concerns that any legislated body would be vulnerable to repeal, based on the history of Indigenous-led consultative bodies. As noted in the Interim Report:

The Committee also considered suggestions that enshrining a Voice in the Constitution could provide stability and longevity that had not been achieved by previous statutory representative bodies for Aboriginal and Torres Strait Islander peoples, such as ATSIC.⁴

PIAC notes and supports the consensus reflected in the Interim Report that 'detail on the structure and responsibilities of any resultant representative body' should be deferred to the Australian Parliament. This is important to allow for flexibility in the design Voice and deal with challenges that may arise in its operation (as are inevitable with any new and transformative

³ Interim Report, 117.

⁴ Interim Report, 49.

initiative), while ensuring a Constitutional underpinning so the commitment to the Voice is steadfast.

PIAC submits that this is, with respect, preferable to a hybrid approach in which a legislative approach is taken as an 'initial step' towards constitutional enshrinement.

PIAC accordingly calls on the Committee, Government and Parliament to work towards a referendum to enshrine the Voice in the Constitution.

Recommendation 2

The Voice to Parliament should be enshrined in the Constitution, rather than legislated.

Voice is the Priority

A third and final question PIAC wishes to address is: 'What is the most appropriate and effective means for constitutional recognition of Aboriginal and Torres Strait Islander peoples?' (p 122).

Other than a Voice to Parliament, these proposals include a statement of recognition in the Constitution, as well as possible amendments in relation to section 25 and section 51(xxvi).

PIAC notes that all of these options were actively considered by Aboriginal and Torres Strait Islander peoples through the Regional Dialogue process, and all were either rejected outright or not considered a priority for reform.

For example, the inclusion of a statement of recognition or acknowledgement in the Constitution was rejected, at least in part because of possible implications in terms of the sovereignty of Aboriginal and Torres Strait Islander peoples.

In relation to section 25, the Referendum Council stated that it:

did not feature because it is a dead letter addressed to past historical circumstances that are unlikely to be replicated in the future... any attempt on the part of a state or territory to deny the vote to certain races today would fall foul of the *Racial Discrimination Act 1975*. Delegates therefore understood that the removal of section 25 would confer no substantive benefit on Aboriginal and Torres Strait Islander peoples.⁵

Similarly, the Referendum Council observed that:

Section 51 (xxvi) is the essential achievement of the 1967 referendum. Delegates to the First Nations Regional Dialogues were conscious of this. Many expressed the view that, as archaic as the term 'race' might be according to contemporary standards the triumph of 1967 and the mostly beneficial legislation that has flowed from it, argues against the deletion of this historically important provision.⁶

As a result, the Referendum Council concluded:

⁵ Referendum Council, *Final Report of the Referendum Council*, 30 June 2017, 12.

⁶ Ibid.

In consequence of the First Nations Regional Dialogues, the Council is of the view that the only option for a referendum proposal that accords with the wishes of Aboriginal and Torres Strait Islander peoples is that which has been described as providing, in the Constitution, for a Voice to Parliament.⁷

PIAC strongly supports this view, and calls on the Committee, Government and Parliament to focus on the Voice as the priority instead of alternative proposals for constitutional reform.

Recommendation 3

Based on the Regional Dialogue process and the Uluru Statement from the Heart, the Voice to Parliament should be the priority for Constitutional reform rather than alternatives including a Statement of Recognition or amendments to sections 25 or 51(xxvi) respectively.

Truth

PIAC supports the Committee's interest in seeking a fuller understanding of what Makarrata means, its cultural context and how it might operate to promote truth-telling and support agreement-making.

PIAC has developed expertise in the field of transitional justice over a number of years.⁸ When mass human rights violations have occurred, transitional justice measures are often implemented because the regular justice system is unable to provide a suitable response to the volume and seriousness of the offences. Truth commissions, or truth-seeking processes, are a key pillar of transitional justice. A number of truth commissions have been established in other contexts to address recent violence, or are instituted by states who have overcome repressive regimes.⁹

There is also an emerging trend of indigenous truth telling processes being established in other contexts to address long term, historical violence and serious grievances.¹⁰ There are important lessons that should be considered from international experiences of truth commissions that can help inform a Makarrata commission in Australia. It is also worth considering where a truth-telling process for Aboriginal and Torres Strait Islander people might differ from other types of truth commissions.

A key consideration for indigenous truth commissions generally is how to ensure indigenous involvement and consultation in all aspects of the process. Meaningful, ongoing consultations are considered as important as the outcome, even where this is challenging.¹¹ The mandate of an indigenous truth commission should ideally look at both individual violations and collective ones, and cover a wide timeframe, not just the recent past.¹² This is different to the majority of previous truth commissions which have typically looked at a period of recent violence and have generally focused on individual violations. Indigenous truth commissions should make oral testimonies and

⁷ Ibid, 2.

⁸ PIAC's Conflict Mapping and Archive Project is supporting transitional justice in Sri Lanka following its civil war, building on the previous work of our International Crimes Evidence Project.

⁹ Some of the many examples include South Africa, Peru, Timor-Leste, Solomon Islands, and Sierra Leone.

¹⁰ See for example the Canadian Truth and Reconciliation Commission whose mandate is to learn about what happened in residential schools and inform all Canadians about what happened in the schools (<http://www.trc.ca/websites/trcinstitution/index.php?p=4>). Another example is the recent discussions in Finland about establishing a truth commission on the relationships between the Finnish state and the Sámi people.

¹¹ International Center for Transitional Justice, *Strengthening Indigenous Rights through Truth Commissions*, A Practitioner's Resource, 2012, 5.

¹² Ibid, 12-14.

sources integral to the process.¹³ This is important for cultures with oral traditions, and can also be a way for the State to acknowledge and support these traditions. Furthermore, it can be seen as an opportunity to document and preserve important oral histories. This is particularly relevant in the Australian context.

Educating the public is an important role for a truth commission, an example of which can be found in the Canadian commission. A truth commission also provides scope to understand current structural inequalities and to provide recommendations for redress. While a truth commission cannot right all the wrongs of the past, it is an important step towards healing and open dialogue.

A Makarrata commission will only be successfully implemented with the full support of Aboriginal and Torres Strait Islander peoples in its design and implementation. PIAC suggests that the process will also be usefully informed by examining other contexts in which truth commissions have played a role in promoting reconciliation. This will create the best chance of having a process that is participatory, thoughtful, engaging, meaningful, and brings about real understanding and change.

PIAC submits that the Committee should recommend the government supports the development of a Makarrata Commission, with such a process to be led by Aboriginal and Torres Strait Islander peoples and informed, where relevant, by the experience of truth commissions internationally.

Conclusion

The ongoing work of the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples is to be welcomed.

The recognition and proper inclusion of First Nations peoples in the Constitution goes to the heart of Australian democracy. PIAC believes the *Uluru Statement from the Heart* provides answers to some of the foundational questions raised in the Interim Report.

PIAC urges the Committee to recommend:

- The Voice to Parliament should be enshrined in the Constitution, rather than legislated.
- The Voice to Parliament should be the priority for Constitutional reform rather than alternatives such as a statement of recognition of amendments to sections 25 or 51(xxvi).
- A process of Regional Dialogues led by Aboriginal and Torres Strait Islander peoples should be adopted to resolve the function, operation, structure and membership of the Voice.
- The government should provide support for the development of a Makarrata Commission, to be led by Aboriginal and Torres Strait Islander peoples and informed, where relevant, by the experience of truth commissions internationally.

¹³ Ibid, 4.