



Background Briefing Paper
Aboriginal and Torres Strait Islander Voice
to Parliament

5 December 2022

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Introduction

The purpose of this background briefing paper is to provide the National Rural Women’s Coalition with a short commentary on the proposal to enshrine the Voice of Aboriginal and Torres Strait Islander people to parliament in the Constitution.

In May 2022, in his acceptance speech, Prime Minister Anthony Albanese confirmed that the Labor government will fulfill its election promise of enshrining an Indigenous Voice to Parliament in the constitution through a referendum. The Prime Minister also committed to the Uluru Statement From The Heart in full. The Uluru Statement From the Heart has three components to it- voice, treaty, truth, as such, enshrining the Voice to parliament is one of three components. The process of moving towards a referendum has commenced and now questions are being asked regarding what the Voice is and the details required for a Referendum.

This paper will provide an overview of:

- The Uluru Statement From the Heart (which is the genesis of the Voice concept).
- An analysis of how the Voice is being described.
- The Referendum to enshrine the Voice in the Constitution; and
- A summary of criticism opposing the proposal.

The Uluru Statement From The Heart

In May 2017, over 250 Aboriginal and Torres Strait Islander Delegates put their signatures on the Uluru Statement From the Heart (see Figure 1). The Uluru Statement From the Heart is a call for the establishment of a ‘First Nations Voice’ in the Australian Constitution and a ‘Makarrata* Commission’ to supervise a process of ‘agreement-making’ and ‘truth-telling’ between governments and Aboriginal and Torres Strait Islander peoples¹.

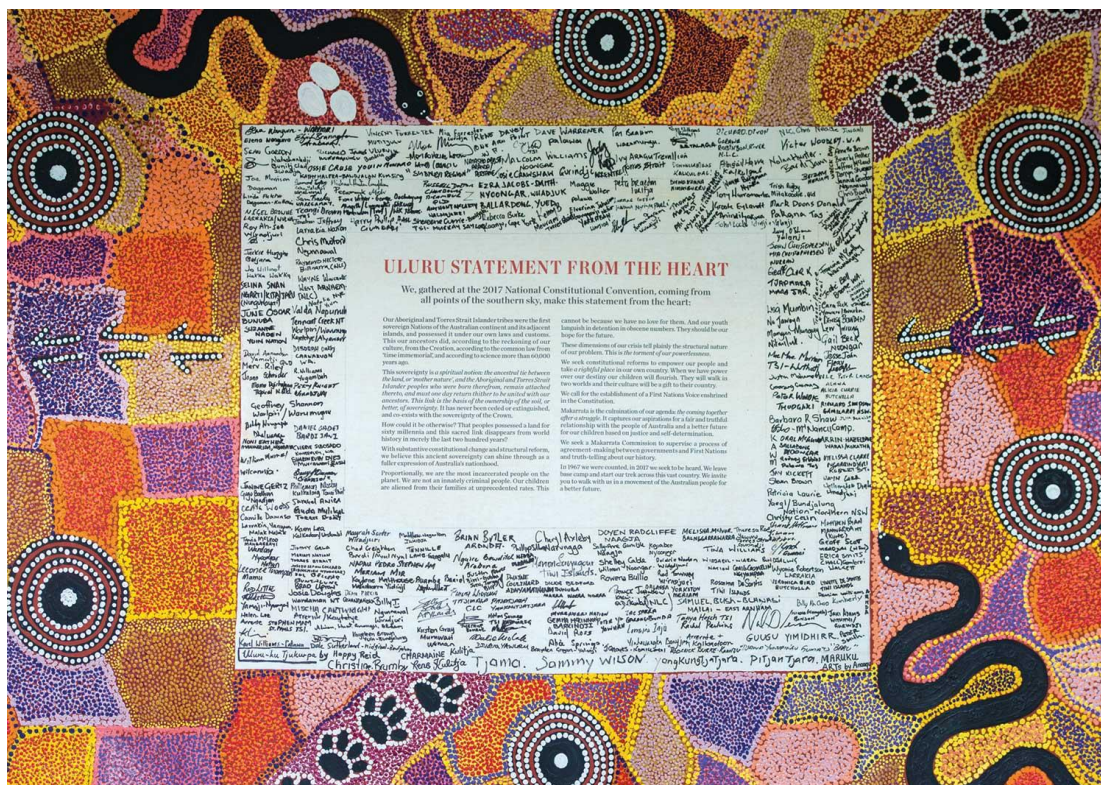


Figure 1The Uluru Statement from the Heart, with signatures of those who attended the National Convention Source: National Museum Australia <https://www.nma.gov.au/defining-moments/resources/uluru-statement-heart>

* Noel Pearson’s definition of Makarrata- “The Yolngu concept of Makarrata captures the idea of two parties coming together after a struggle, healing the divisions of the past. It is about acknowledging that something has been done wrong, and it seeks to make things right”.

https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/UluruStatement

Components of the Uluru Statement From the Heart – voice, treaty, truth

The Uluru Statement From the Heart has three components to it- voice, treaty, and truth.

1. **Voice** refers to a First Nations Voice, guaranteed by the Constitution, to provide a permanent platform for Aboriginal and Torres Strait Islander voices to be heard by Parliament. Its role is to amplify the voice of First Nations opinions, enshrined in the constitution through a referendum.
2. **A Treaty** is an agreement between First Nations peoples and State and Federal Governments of Australia. The call for Treaty aims to set in motion both national acknowledgement of, and legal protection for, the rights and interests of First Nations peoples. A number of state Treaty processes are already underway. Australia is the only Commonwealth nation yet to sign a treaty with First Nations peoples
3. **Truth telling:** Aboriginal and Torres Strait Islander Peoples have long called for a comprehensive process of truth telling about Australia's history that acknowledges both the periods of colonial conflict and dispossession and the strength and resilience of First Nations peoples and cultures².

What led to the Uluru Statement From The Heart?

When the British began colonising Australia in 1788, Australia was described as 'terra nullius' (land belonging to nobody). However, Australia was and still is occupied by Aboriginal and Torres Strait Islander people, who have for 60, 000 years and more, been custodians of the land. Aboriginal and Torres Strait Islander peoples did not cede their sovereignty to the British and a Treaty unlike in some Commonwealth Nations (such as Canada and New Zealand) have never been entered into.

As of 30 June 2021, there were 984,000 Aboriginal and Torres Strait Islander people, representing 3.8% of the total Australian population³. Aboriginal and Torres Strait Islander people are the most socially disadvantaged groups in Australia. They have a lower life expectancy compared to other Australians, higher rates of a range of chronic illnesses (such as type 2 diabetes), have lower education attainment rates, higher unemployment rates and higher rates of incarceration. Dispossession from country, language, culture, kin, lore and spiritual connection to land and water, intergenerational trauma and racism are significant contributors to these inequities.

As a minority group Aboriginal and Torres Strait Islander peoples have difficulty in having their voice heard and as a result many government decisions are made, and legislation and programs initiated, that directly impact Aboriginal and Torres Strait Islander People without having had their input or advice. However, the best results for closing the gap between the social and health inequities between Aboriginal and non- Aboriginal people have been seen when Aboriginal and Torres Strait Islander people design, lead and are actively engaged in the implementation of a program or service. There have been many government policies and departments that have sought to address social and health inequities, but these gaps persist. The Uluru Statement From the Heart was created as a way to change the status quo for Aboriginal and Torres Strait Islander people through the establishment of a First Nations Voice enshrined in the Constitution to address this inequity and recognise Aboriginal and Torres Strait Islander people's rightful place in Australia's identity and history.

What is the Voice?

The Aboriginal and Torres Strait Islander Voice will be an independent, representative advisory body for First Nations people. It will provide a permanent means to advise the Australian Parliament and Government on the views of First Nations people on matters that affect them⁴. It will enhance shared decision making at the local and regional level. It will ensure we as a people are heard at all levels, because no one level of government has sole responsibility for delivery of the programs, tools or funding that are needed to improve the lives of Aboriginal and Torres Strait Islander peoples⁵.

Whatever wording will eventually be used to describe the Voice it is a mechanism to propose some kind of a duty of the Parliament (and Government) to consult with First Nations people on matters specially affecting those peoples⁶. Geoffrey Lindell from Australian Public Law describes it this way:

A is required to notify and seek advice from B on matters likely to affect B.

B is authorised to provide advice to A on these matters, whether or not that advice is sought by A⁷.

The Voice has been likened to other government advisory bodies such as the Attorney General, the Law Reform Commission, the Human Rights Commission and the National Audit Office. The Voice will be another body like these. The key difference being it will specifically focus on the Aboriginal and Torres Strait Islander perspectives and provide advice and input on decisions, laws, policies, programs and services that are important to Aboriginal and Torres Strait Islander people.

It has been proposed that the Voice will be made up of two parts, Local and Regional *Voices* and a National *Voice*. Local and Regional *Voices* and the National *Voice* will work together to share information, consult and provide advice^{8,9}. This information has been published in two reports that were presented to the previous Federal Government. To date the current Federal government, although signalling their support for the Uluru Statement From the Heart and progressing work on the referendum, have not indicated which model or design of the Voice/ *Voices* they will support.

It is also important to note that the Voice to parliament will have no power to overturn policy or prevent laws coming into force, only to provide advice and act as a sounding board for new policy and legislation that may impact positively or negatively the lives of Aboriginal and Torres Strait Islander People.

Process of enshrining the Voice to parliament- and the need for a Referendum

In his acceptance speech in May 2022, Prime Minister Anthony Albanese confirmed the government will commit to the Uluru Statement From The Heart in full and will progress the Uluru Statement (an election promise) by committing to enshrining an Indigenous Voice to Parliament in the constitution through a referendum.

Although the Uluru Statement From The Heart does call for constitutional change and structural reform, it does not refer to a referendum or specify the detail of any proposed changes to the Constitution in it. The proposal for a referendum has evolved through the development of the Indigenous Voice to Parliament narrative and the co-design process as cited above.

The first step in the process of enacting the Uluru Statement in full is to enshrine the Voice in the Constitution. The Constitution may be altered only by a law passed by the Commonwealth Parliament following a referendum (s 128)¹⁰. Because it will require an amendment to the Australian Constitution, a referendum must be held to ask the Australian people if they support the Voice to Parliament. For a referendum to be successful it requires a majority of voters across the nation and a majority of voters in a majority of states—this is known as a double majority.

Although the referendum question is still being debated the Prime Minister at the Garma Festival in July, made the announcement that the new provision in the constitution would have three sentences:

1. There shall be a body, to be called the Aboriginal and Torres Strait Islander Voice
2. The Aboriginal and Torres Strait Islander Voice may make representations to Parliament and the Executive government on matters relating to Aboriginal and Torres Strait Islander Peoples
3. The Parliament shall, subject to this Constitution, have power to make laws with respect to the composition, functions, powers and procedures of the Aboriginal and Torres Strait Islander Voice.

Perhaps the best way to understand the concept of the referendum for the Voice is to use Indigenous lawyer and academic, Noel Pearson's explanation from his recent Boyer lecture. Pearson used the metaphor of a bridge².

The people will vote on the principle, should indigenous peoples be guaranteed a fairer say in laws and policies made about them, and parliament will legislate the detail...

"The government [is] effectively asking Australians 'do we need a bridge across the Sydney Harbour? Yes or no?' With the parliament then to decide how many lanes it will have and its design."

It is the Australian people who are responsible for recognition, through their vote in a referendum.

It is the elected parliamentary representatives who design and enact the details in law.¹¹

² Pearson refers to Chris O'Keefe's (TV reporter's Channel 9) metaphor for the referendum being a bridge.

Questions have been asked as to why Constitutional change is required. Noel Pearson summed it up as this “Constitutional recognition will endure but the legislative details can be changed by the parliament, if and when it chooses to do so”¹².

A Bill for an Act to amend the law relating to referendums, and for related purposes was presented for its first reading in the House of Representatives on 1st December¹³.

Criticism of the proposal

The Voice to Parliament is receiving some criticism. Below are examples of some comments and criticism surrounding the Voice proposal.

The National Party perspective

On Monday 29th November 2022 the Leader of the National Party David Littleproud announced that the National Party will not be supporting the Voice to Parliament. This announcement has started a cascade of debate in the media and in political circles. The National Party announcement came as a surprise to their Coalition partners in the Liberal Party and not all National Party politicians support the view. Andrew Gee for example was not in the party room when the matter was discussed. He was visiting flood impacted communities in his electorate. He has subsequently been quoted in the media as saying, “While I respect the opinions of my colleagues, I’m still a supporter [of the voice],”¹⁴.

The National Party perspective of the Voice to Parliament are that:

- It would be “another layer of bureaucracy here in Canberra”,
- That it will be symbolic and not practical reconciliation.
- It wouldn’t be “a Voice for regional, rural and remote Australians” and “This is one for those who live in Redfern.”
- It wouldn’t “shift the dial” on Closing the Gap;
- There is concern about the lack of detail, and vague wording surrounding the responsibilities of the Voice.

Comments about National Party’s announcement:

- The proposal for the Voice is to act as an advisory body this would be akin to the Human Rights Commission or National Audit Office. As there has been no further development since the release of the Indigenous Voice Co-design Process Interim Report and the Indigenous Voice Co-design Process Final Report on what the Voice will eventually look like, it is difficult to say if it will be another layer of red tape. Uluru campaigners argue the voice was designed to cut through the layers of bureaucracy and not add to it.
- “practical”/“symbolic” this a type of framing used by right wing groups to short-circuit pursuing a proposal and use “evidence-based policy” as inaction often benefiting the powerful¹⁵ thus reinforcing the status quo. A quote in Crikey by Bernard Keane is that the Voice is based on co-design principles “The evidence base for years of Indigenous policy across health, education and economic engagement is that what works — i.e. the precious practical benefits — is what is co-designed and co-implemented with and by Indigenous communities”¹⁶. This co-design approach is what will underpin the way in which the Voice (whatever it turns out to look like) will operate.
- Lack of detail- Details have been published about the proposed design of the Voice. They have been outlined in the Indigenous Voice Co-design Process Interim Report¹⁷ and the Indigenous Voice Co-design Process Final Report¹⁸. Former Indigenous Australians minister, Ken Wyatt, Wyatt told ABC Radio National Breakfast that when he was minister under the Morrison government, he’d taken a detailed plan for the voice to cabinet – twice¹⁹. Details have not been published around the preferred model/ design for the Voice.

Michelle Grattan on Radio National reported that it is important for the government to signal which model of the Voice it does support and to articulate how the regional bodies will fit in to it. There is a view that the government does not want to create confusion and talk in more detail about the model for fear it will lose votes in the Referendum. However, there is also an argument that if things are perceived to be vague and people are looking for details, this might lead voters to say No if they do not understand what is being proposed. Grattan suggests the government provide more details as other governments have in the past e.g., on the Referendum for a Republic²⁰.

- Rural regional and remote- The proposed model is to be made up of two parts – Local and Regional Voices (i.e., representing rural, regional and remote) and a National Voice. Local and Regional Voices and the National Voice could work together to share information, consult and provide advice²¹. The national Indigenous voice would be made up of either 16 or 18 members, either directly elected or drawn from regional and local bodies. Those local voice bodies will also inform the national voice²². The model recognises that some States and Territories already have localised voices in place. These local and regional ‘voices’ are already exploring whether they will remain as is or put something else in place in order for them to participate as a local / regional voice²³. Former Indigenous Australians minister, Ken Wyatt, has previously stated that the co-design approach needs to come from the community focus first and this was important in getting the structures, functions and design right. Getting input from Aboriginal and Torres Strait Islander’s collective experience wherever they are located is essential.
- That the Voice will not Close the Gap – One response has been “How do they [the Nationals] know?” Given that the last 9 years of the Coalition has seen little shifting of the dial from Coalition policy. This is backed up by the latest Closing the Gap report that shows that five targets are not on course including: children being developmentally on track when they commence school, out-of-home care rates, adult imprisonment, deaths by suicide and sea country rights and interests²⁴.

“Third chamber of parliament” - There are suggestions that the Voice to parliament would be a “third chamber of parliament” i.e., on par with the House of Representatives and the Senate. However, the proposal for the Voice is that it would not have any of the powers or responsibilities that the House of Representatives and the Senate have. It will be an advisory body that makes representations to parliament about matters involving Indigenous peoples. It would not have powers to veto or make decisions on legislation. The Voice would not be able to “initiate, debate, pass or defeat bills Nor would it hold the executive to account”²⁵.

The need for a Treaty not a referendum - Victorian Greens senator Lidia Thorpe wants to see the government move towards a treaty stating that “We don’t need a referendum to have a treaty in this country and the treaty is what our people have been fighting for [for] decades and decades,”²⁶. Although the Uluru Statement From the Heart has Treaty as one of its elements, the Voice is seen as the first step in progressing to Treaty and Truth telling which is why the narrative has been framed on this.

Why are changes to the Constitution required. There is concern that the Voice and the proposed changes to the Constitution will be ‘locking in future generations’ if it’s not successful. Enshrining a voice in the constitution means it cannot be removed by the government of the day. But how this will be enacted in every other aspect of its operation *would be* for the parliament of the day to decide²⁷.

There is a perception that there are risks in creating a “separate race-based representative body” in the constitution²⁸. Comments in response to this from Dean Parkin include “The proposal is not about race. It’s about Indigeneity. It’s about that long-standing connection to country”²⁹.

Marcia Langton on Radio National gave this example in response to Senator Jacinta Price (who identifies as a Walpiri-Celtic woman) who made similar comments about the proposed structure being based on race.

“Walpiri people see themselves as a people because they speak Walpiiri language, and they have Walpiri Traditions. They don’t see themselves as a race. Many of the Walpiri people I have spoken to believe the Voice is a very necessary part of our legal and political system and that they would welcome it very much”³⁰

Four Reasons to Reject referendum Council Recommendations- Institute of Public Affairs.

The Institute of Public Affairs (IPA) argues that an Indigenous Voice to parliament is “radical”, “divisive and undemocratic”, and “vague”. These words have been repeated by the National Party and the Liberal Party in various media releases and speeches. The IPA argument is framed around four points as follows:

1. Indigenous Australians already have a voice to parliament- Every citizen is already given that opportunity because we each have a vote.
2. A voice to parliament for one race is divisive and undemocratic – we are all equal. Granting a special constitutional privilege to one segment of our community is undemocratic.
3. The voice to parliament is vague - very little detail about the structure and functions of the proposed voice to parliament. It fails to make recommendations about the particular features of the proposal.
4. The constitution is a rulebook – this change is radical - The constitution is a rulebook for the nation. It is not a place for the changing values of the day³¹.

Campaigners for the Uluru Statement From The Heart would agree that the Constitution is the rulebook for the Nation. This why they want to see the Voice to Parliament enshrined in it. The very reason that the Voice is being proposed is because Aboriginal and Torres Strait Islanders, although they may have a vote and therefore a say in what government to elect, they are a small minority of the Australian population (3.8%) with very little power to influence change. The proposal is for a mechanism for Aboriginal and Torres Strait Islander People to have a voice on issues that affect them to address the long term effects of social disadvantage, racism and structural inequities and intergenerational trauma.

Centre for Independent Studies (the CIS) have made comments that the Voice to Parliament cannot be a single Voice for Indigenous Australia based on the following points:

- Aboriginal people are not one nation, but many.
- Concerns that the Voice and Makarrata Commission will undermine traditional owner approval and governance processes and be infiltrated by activists in their campaigns against major projects.
- No other Western constitution provides for an Indigenous “Voice”. Canada’s Constitution includes a simple statement that “the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed”.
- Treaties are how indigenous peoples have always engaged with colonising powers. In New Zealand, Maori peoples are not expressly mentioned in the Constitution, but the Treaty of Waitangi Act binds the Crown and gave the Treaty of Waitangi recognition in New Zealand law.
- The Voice will be a centralised bureaucracy over the top of treaty and native title negotiations across the nation, brokering them like some kind of middleman or telling parliaments and governments what traditional owner groups think about projects. Traditional owners can do that themselves³².
- There is also a view that the Voice to Parliament is a bureaucratic power grab to give Indigenous Australians rights they already have stating that Aboriginal and Torres Strait Islander people already have a voice to Parliament and that Constitutional amendments are unnecessary. This is based on the view that the Constitution is amended usually to give the Commonwealth some power it doesn’t already have and needs. But the CIS view is that the Federal Government already has the power to create an Indigenous ‘voice’ — or numerous voices and does not see why this new power (the Voice to Parliament) need to be added at all.³³

The Indigenous voice is a co-design process and the joint select committee on constitutional recognition’s final report propose a two level approach to the Voice reiterated this. It is proposed that there will be Local and regional Voices and National Voice. This is to allow for local voices to be heard and listen. More work and more consultation is required before the details can be outlined on what the final model for the Voices/ Voices looks like. However, Tom Calma and Marcia Langton co-authors of the Final Report do not think that the

recommendations outlined in the final report will be changed. With regards to the governance process being infiltrated by activists in their campaigns against major projects, the author could not find any details to back this claim at the time of writing this briefing note.

Conclusion

The Voice to Parliament has evolved from the Uluru Statement From the Heart. The Uluru Statement From the Heart supported by 250 Aboriginal and Torres Strait Islander leaders. It is a one page document that calls for voice, treaty truth, starting with constitutional change and a Voice to Parliament.

A model and design have been proposed in two key documents. The Indigenous Voice Co-design Process Interim Report and the Indigenous Voice Co-design Process Final Report. The current Federal Government have committed to the Uluru Statement From The Heart in full, but this will require constitutional change and thus a referendum is required. The government have started work on the referendum. However, the government is yet to articulate which model for the Voice to Parliament they will be supporting and provide details to the Australian public and confirm what they will be asking them to vote Yes or No on.

Criticism around the proposal include that the proposal is vague, is creating more red tape, that it will not close the gap between Indigenous and non-Indigenous Australians and that changing the Constitution (the Nations rulebook) is a radical move and unnecessary as Aboriginal and Torres Strait Islander people already have a vote as do all other Australian citizens.

Ultimately, the Voice to Parliament is about improving the lives of Aboriginal and Torres Strait Islander people. *“It is a bridge to unite at long last the First Peoples with our British institutional inheritance and our multicultural achievement under the constitution”*³⁴.

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