



Community
Legal Centres
NSW

21 June 2018

Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples
PO Box 6021
Parliament House
Canberra ACT 2600

By email: jscqr@aph.gov.au

Dear Committee,

Submission to the Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples

Kingsford Legal Centre (KLC) and Community Legal Centres NSW (CLCNSW) welcome the opportunity to make this submission to the Joint Select Committee.

Summary of recommendations

KLC and CLCNSW recommend that:

1. The Government supports Voice, Treaty, Truth, as articulated in the Statement from the Heart and the Referendum Council's recommendations;
2. All recommendations for constitutional reform should respect Aboriginal and Torres Strait Islander peoples' right to self-determination;
3. A referendum should be held to constitutionally enshrine a First Nations Voice to parliament;
4. Enabling legislation for the design, composition and operation of the First Nations Voice should be co-designed between Parliament and Aboriginal and Torres Strait Islander people, after extensive community-led consultation;
5. Enabling legislation for the First Nations Voice should be accompanied by appropriations to adequately fund the First Nations Voice to perform its required functions, and to ensure its efficient and ongoing operation;

6. A Treaty Commission should be established to supervise the agreement-making process between government and First Nation parties and to facilitate truth-telling processes; and
7. Legislation to establish a Treaty Commission should be developed in extensive consultation and co-design with Aboriginal and Torres Strait Islander people and organisations. Such legislation should be accompanied by appropriations to adequately fund a Treaty Commission to perform the functions of supervising agreement-making between government and First Nation parties and facilitating truth-telling processes.

About KLC and CLCNSW

Kingsford Legal Centre

KLC is a community legal centre which has been providing legal advice and advocacy to people in need of legal assistance in the Randwick and Botany Local Government areas since 1981. KLC provides general advice on a wide range of legal issues, including discrimination and other human rights issues.

KLC has a specialist discrimination law service (NSW wide), a specialist employment law service, and an Aboriginal Access Program. In addition to this work, KLC also undertakes law reform and policy work in areas where the operation and effectiveness of the law could be improved.

Community Legal Centres NSW

Community Legal Centres NSW (CLCNSW) is the peak representative body, covering over 40 community legal centres (CLCs) across NSW. Our team aims to provide access to legal services to people across NSW, and ensure justice for the public, through supporting, representing and advocating for our members, and the legal assistance sector more broadly.

Community legal centres are a group of independent non-government organisations which provide free legal services to individuals and communities. All CLCs are here to help at times when help is needed most, especially people whom are facing economic disadvantage, hardship, and adversity.

CLCNSW represents the views of CLCs to the government and broader community. CLCNSW also advocates on key law reform and policy issues, and supports CLCs to improve the efficiency and quality of services they deliver to the community.

Self-determination under international human rights law

The right to self-determination is enshrined in Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, to which Australia is a party.¹ Under these treaties, the right to self-determination is defined as the right to freely determine one's political status and freely pursue economic, social and cultural development. Under the right to self-determination, Aboriginal and Torres Strait Islander people have the right to have a voice in the development and implementation of laws and policies that affect them.

The UN Declaration on the Rights of Indigenous Peoples (**UNDRIP**) provides further guidance on the right to self-determination. For example, Article 18 of UNDRIP provides:

“Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions”.²

Article 19 of UNDRIP provides:

“States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free,

¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 1; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 1.

² UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples, resolution adopted by the General Assembly* (2 October 2007), A/RES/61/295 <http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf> ('UNDRIP'), art 18.

prior and informed consent before adopting and implementing legislative or administrative measures that may affect them”.³

The right to self-determination is very important for to Aboriginal and Torres Strait Islander people, to enable individuals to overcome the established and ongoing impacts, disadvantages, and issues that stem from colonisation. Any constitutional reform needs to respect the right to self-determination. The aspirations of Aboriginal and Torres Strait Islander people as outlined in the Statement from the Heart should be encouraged as well as supported by government. Constitutionally enshrining a First Nations Voice to parliament would represent a significant and overdue recognition of Aboriginal and Torres Strait Islander people’s right to self-determination.

Recommendations

KLC and CLCNSW recommend that:

- The Government supports Voice, Treaty, Truth, as articulated in the Statement from the Heart and the Referendum Council’s recommendations; and
- Any recommendations for constitutional reform should respect Aboriginal and Torres Strait Islander peoples’ right to self-determination.

The Statement from the Heart

KLC and CLCNSW strongly support the Statement from the Heart.⁴ The Statement from the Heart was the product of an extensive, community-led consultation process with Aboriginal and Torres Strait Islander people across Australia. The First Nations Regional Dialogues held in 2016-17 in twelve locations around Australia were a deliberative process designed and led by Aboriginal and Torres Strait Islander people. At the national convention in Uluru in May 2017, delegates from the regional dialogues released the Statement from the Heart.

The Statement declares that:

³ UNDRIP, art 19.

⁴ Statement from the Heart, First Nations National Constitutional Convention (26 May 2017) <https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart.PDF>.

- Aboriginal and Torres Strait Islander peoples were at all times and remain sovereign;
- calls for recognition of Aboriginal and Torres Strait Islander peoples in a constitutionally-enshrined voice to parliament; and
- seeks the establishment of a Truth and Justice Commission, separate to the Referendum process, to supervise agreement-making between governments and First Nations and to facilitate a truth-telling process.

We note that the Referendum Council, an apolitical, government-appointed body tasked with advising the Prime Minister and the Leader of the Opposition on progress and next steps towards a successful referendum to recognise Aboriginal and Torres Strait Islander peoples in the Constitution, has recommended that the Australian Government hold a referendum to establish a First Nations Voice to parliament.⁵

The Statement from the Heart is a powerful document that sets out Aboriginal and Torres Strait Islander peoples' solutions for constitutional reform. Both the regional dialogues and Statement from the Heart demonstrate Aboriginal and Torres Strait Islander people seek substantive, rather than symbolic recognition in the Constitution. Substantive recognition in the form of a First Nations Voice to parliament will facilitate structural reform through empowering Aboriginal and Torres Strait Islander people and communities to express their views on government decision-making processes that affect them and their communities. KLC and CLCNSW encourage and support Aboriginal and Torres Strait Islander community-led and designed solutions.

KLC and CLCNSW submit that the First Nations Voice should be constitutionally enshrined, as recommended in the Statement from the Heart and by the Referendum Council. We believe that constitutional enshrinement is necessary to ensure the independence and security of the First Nations Voice. We note that a statutory advisory body would be vulnerable to being abolished through repealing legislation and that this has been the experience of previous statutory advisory bodies such as the Aboriginal and Torres Strait Islander Commission (ATSIC).

It is extremely disappointing that the Federal Government dismissed the Statement from the Heart and the Referendum Council's recommendations. We note that the Government's stated reasons for rejecting the First Nations Voice include:

- The First Nations Voice would not win acceptance at a referendum;
- That the First Nations Voice would be seen as a 'third chamber of Parliament'; and
- That the Referendum Council provided no guidance on how the First Nations Voice would be elected or how the diversity of Indigenous people would be fairly represented.⁶

The Government's rejection of the Statement from the Heart and Referendum Council's recommendations fails to respect the expertise of Aboriginal and Torres Strait Islander people and the support of Australians for the First Nations Voice. The Government's rejection of the Statement from the Heart also fails to respect Aboriginal and Torres Strait Islander people's right to self-determination.

There is strong support in the Australian community for a First Nations Voice

We note that a poll in October 2017 found that 60.7% of Australians broadly supported a proposal to "change the constitution to set up a representative Indigenous body to advise the parliament on laws and policies affecting Indigenous people".⁷ This polling indicates that the First Nations Voice has strong support within the community that could be built on for a successful outcome at a referendum. The government's lack of an evidence-based approach in this area was demonstrated by the Minister for Indigenous Affairs, Nigel Scullion, stating that the government did not have any evidence to support their view that the First Nations

⁵ Referendum Council, *Final Report of the Referendum Council* (30 June 2017) <<https://www.referendumcouncil.org.au/final-report>>.

⁶ Joint Media Statement, *Response to Referendum Council's Report on Constitutional Recognition* (26 October 2017) <<https://www.pm.gov.au/media/response-referendum-council%E2%80%99s-report-constitutional-recognition>>

⁷ UNSW Gilbert and Tobin Centre of Public Law and Griffith University Centre for Governance and Public Policy, *Australian Constitutional Values Survey 2017* (October 2017) <<https://app.secure.griffith.edu.au/news/wp-content/uploads/2017/10/Griffith-University-UNSW-Australian-Constitutional-Values-Survey-Sept-2017-Results-2.pdf>>

Voice would not win acceptance at a referendum, but that it was the government's judgment that "if this notion of a voice was put to a referendum, it would certainly fail".⁸

The First Nations Voice is not a 'Third Chamber of Parliament'

The Government has mischaracterised the First Nations Voice as a 'Third Chamber of Parliament'. We submit that the First Nations Voice is clearly not a third chamber of parliament – a First Nations Voice would act as an advisory body to Parliament on legislation and policy that affects Aboriginal and Torres Strait Islander people. The First Nations Voice would not have the power to introduce bills, vote on bills or veto bills - the powers that a chamber of parliament traditionally holds. Additionally, the Australian government frequently relies on advisory bodies for guidance on policy and legislative development, including the Australian Law Reform Commission, the Australian Human Rights Commission and the Productivity Commission. We note that these bodies have not been mischaracterised as third chambers of parliament.

The operation and composition of the First Nations Voice

The Statement from the Heart and the Referendum Council's recommendation appropriately left the design, composition and operation of the First Nations Voice open for Parliament to determine. Criticism of the lack of guidance provided on this is misconceived. The history of referendums in Australia indicates that referendums posing questions with too much detail are likely to fail. It is appropriate that if the First Nations Voice receives support at referendum as a first step, then the detail of the design, composition and operation of a First Nations Voice be dealt with through enabling legislation. KLC and CLCNSW emphasise that this enabling legislation should be the product of extensive community-led consultation, and co-design between Parliament and Aboriginal and Torres Strait Islander people and organisations. Such legislation should be accompanied by appropriations to adequately fund the First Nations Voice to perform its functions and to ensure its efficient and ongoing operation.

⁸ Calla Walquist, 'Most Australians support Indigenous voice to parliament plan that Turnbull rejected', *The Guardian* (30 October 2017) < <https://www.theguardian.com/australia-news/2017/oct/30/most-australians-support-indigenous-voice-to-parliament-plan-that-turnbull-rejected>>.

Recommendations

KLC and CLCNSW recommend that:

- A referendum should be held to constitutionally enshrine a First Nations Voice to parliament;
- Enabling legislation for the design, composition and operation of the First Nations Voice should be co-designed between Parliament and Aboriginal and Torres Strait Islander people, after extensive community-led consultation; and
- Enabling legislation for the First Nations Voice should be accompanied by appropriations to adequately fund the First Nations Voice to perform its functions, and to ensure its efficient and ongoing operation.

A Treaty Commission

KLC and CLCNSW support the establishment of a Treaty Commission to supervise agreement-making between governments and First Nations and to facilitate a truth-telling process, as outlined in the Statement from the Heart.

Article 37 of UNDRIP provides:

“Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.”⁹

KLC and CLCNSW support agreement-making between First Nations and governments, supervised by a Treaty Commission as provided by the Statement from the Heart. Unlike other similar states including New Zealand, Canada and the United States, which have all formed treaties with their Indigenous Peoples, Australia continues to remain far behind in this area. We note developments in treaty-making are occurring in Western Australia, Victoria, South Australia and the Northern Territory, where state and territory governments

⁹ UNDRIP, Art 37.

have begun treaty discussions with Aboriginal and Torres Strait Islander nations.¹⁰

However, we emphasise the importance of agreement-making being supervised by a Commission as outlined in the Statement from the Heart.

KLC and CLCNSW support a truth-telling process facilitated by a Treaty Commission as provided by the Statement from the Heart. Truth-telling will provide an opportunity for Aboriginal and Torres Strait Islander voices to not only speak, but to speak and be heard. This is an important measure given that Aboriginal and Torres Strait Islander people will speak on issues that may still affect or be affecting them, both directly and indirectly. Generations of trauma which is quite often passed down, stems from colonisation, dispossession, genocide, the Stolen Generations, Stolen Wages, over-incarceration, removal of children to out-of-home care, prevalent discrimination and other human rights violations experienced by Aboriginal and Torres Strait Islander people. A truth-telling process has the potential to provide a form of restorative justice, educate the Australian community and provide a path forward for reconciliation.

KLC and CLCNSW note a Treaty Commission can be established by legislation rather than constitutional reform. We recommend that legislation to establish a Treaty Commission be developed in extensive community-led consultation and co-design with Aboriginal and Torres Strait Islander people and organisations. Such legislation should be accompanied by appropriations to adequately fund a Treaty Commission to perform the functions of supervising agreement-making and facilitating truth-telling.

Recommendations

KLC and CLCNSW recommend that:

- A Treaty Commission should be established to supervise the agreement-making process between government and First Nation parties and to facilitate truth-telling processes; and
- Legislation to establish a Treaty Commission should be developed in extensive consultation and co-design with Aboriginal and Torres Strait Islander people and

¹⁰ Harry Hobbs and George Williams, 'Australia's First Treaty', AUSPUBLAW (16 April 2018) <<https://auspublaw.org/2018/04/australias-first-treaty/>>

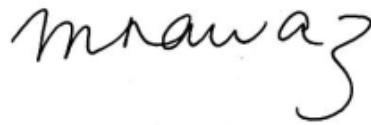
organisations. Such legislation should be accompanied by appropriations to adequately fund a Treaty Commission to perform the functions of supervising agreement-making between government and First Nation parties and facilitating truth-telling processes.

If you wish to discuss our submission, please contact us at legal@unsw.edu.au and clcnsw@clcnsw.org.au.

Yours faithfully,
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