

Nationhood, National Identity and Democracy

Submission to Senate Legal and Constitutional Affairs

References Committee

18 September 2019

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au

Introduction

1. The ALA welcomes the opportunity to have input into the Senate Legal and Constitutional References Committee ('the Committee') inquiry into nationhood, national identity and democracy.
2. The ALA submits that Australia's nationhood, national identity and democracy can be vastly improved by accepting the invitation in the Uluru Statement from the Heart ('Uluru Statement'). The Uluru Statement clearly expresses 'with substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia's nationhood.'
3. The powerful words of the Uluru Statement clearly identify what is missing from our national identity: a First Nations Voice enshrined in the Constitution; and a process of agreement making between governments and First Nations and Truth-Telling to the nation, supervised by a Makarrata Commission.

The Referendum Council — a genuinely deliberative process with a clear recommendation

4. In its Final Report to the Prime Minister and the Leader of the Opposition in June 2017, the Referendum Council recommended:

'That a referendum be held to provide in the Australian Constitution for a representative body that gives Aboriginal and Torres Strait Islander First Nations a Voice to the Commonwealth Parliament. One of the specific functions of such a body, to be set out in legislation outside the Constitution, should include the function of monitoring the use of the heads of power in section 51 (xxvi) and section 122. The body will recognise the status of Aboriginal and Torres Strait Islander peoples as the first peoples of Australia.'
5. The Council's report followed a lengthy and comprehensive deliberative process in which it conducted 13 First Nations Regional Dialogues across Australia, with the aim of entering into a dialogue with Aboriginal and Torres Strait Islander peoples about what constitutional recognition should involve from their perspectives. The Council reported that this was the first time in our nation's history that a constitutional convention had been convened with and for

Aboriginal and Torres Strait Islander peoples. Over 1,200 Aboriginal and Torres Strait Islander people attended these dialogues. The Council took the view that there was no practical purpose to suggesting changes to the Constitution unless they were what Aboriginal and Torres Strait Islander peoples wanted. Accordingly, the dialogues were at the heart of the Council's work.

6. The Council's dialogues resulted in a final report that reflects an encompassing and genuinely representative portrayal of what Aboriginal and Torres Strait Islander peoples consider 'recognition' to mean in an Australian constitutional context. The ALA therefore submits that the first recommendation from the Council – for a referendum to amend the Constitution, to recognise a representative body that gives Aboriginal and Torres Strait Islander First Nations a Voice to the Commonwealth Parliament – is an essential element of constitutional recognition of Aboriginal and Torres Strait Islander peoples.
7. Constitutional reform to include a First Nations Voice will improve our democracy. Despite the special place that First Nations have in this nation, they were completely ignored at Federation in 1901. The effect of this for First Nations people – First Nations voicelessness – has been detrimental to our nation's social cohesion. Indigenous incarceration, suicide rates, and the significant gap in life expectancy as compared to non-Indigenous Australians, are examples of this.
8. We should heed what is sought in the Uluru Statement:

'We seek constitutional reforms to empower our people and take a rightful place in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.'

A First Nations Voice to Parliament — pragmatic and moderate

9. The Referendum Council's Report and the Uluru Statement clearly indicate the consensus position developed by Aboriginal and Torres Strait Islander peoples on the constitutional reform that they want; namely, a single constitutional amendment for a constitutionally guaranteed First Nations Voice to Parliament on the affairs that affect them.
10. The recommendation is sensible, pragmatic and legally moderate. The proposed amendment would serve a dual purpose in that it would constitutionally empower Aboriginal and Torres

Strait Islander peoples with a voice to Parliament, but at the same time would respect parliamentary supremacy and sovereignty and uphold the Constitution.

11. The clear message from the Council's deliberations with Aboriginal and Torres Strait Islander peoples was that a symbolic and minimalist amendment to the Constitution for recognition would not be acceptable. The consensus position that was articulated in the Council's final report and the Uluru Statement was that substantive constitutional reform and meaningful constitutional recognition was necessary.
12. Given that the First Nations Voice proposal provides a clearly defined model of recognition and participation that upholds the Constitution and respects parliamentary sovereignty, it also provides a higher level of legal certainty than minimalist reform involving a symbolic statement in the Constitution. A symbolic statement or preamble can be open to interpretation and/or application by the High Court in a manner that was not foreseen or intended. Moreover, a preamble can influence the interpretation of the Constitution, introducing an element of uncertainty, particularly if it contains symbolic and legally ambiguous language.²
13. Establishing a First Nations Voice in the Constitution will be the binding social fabric that brings us together. Inclusion of First Nations Voices will give us a unique cultural identity that we can be proud of – more than 60,000 years of continuous culture.
14. In reference to paragraph (f) in the Terms of Reference (i.e. the extent to which nation states balance domestic imperatives and sovereignty and international obligations), the ALA notes that Australia has signed the United Nations Declaration on the Rights of Indigenous People (UNDRIP). The proposals in the Uluru Statement will deliver on Australia's commitment under the UNDRIP.

A First Nations Voice to Parliament — what it isn't

15. The ALA considers that the First Nations Voice proposal is moderate and pragmatic. The ALA considers that descriptions of the Voice body as a 'third chamber of Parliament' or an 'additional representative assembly' are inaccurate and misleading as compared to what has been proposed by the Referendum Council and the Uluru Statement. Such descriptions are

² Craven, Greg (2017), *Australian Catholic University Submission to the Referendum Council*, 5 May 2017.

counter productive as they distort the true intent of the proposal and create fear and distrust in the broader Australian community, making it much harder to secure a genuine, meaningful and substantive recognition of Aboriginal and Torres Strait Islander peoples in the Constitution.

16. The First Nations Voice proposal is one that upholds the constitutional values of parliamentary supremacy and accountable democracy. It does not provide Aboriginal and Torres Strait Islander peoples with a veto over government policy or legislation. It provides a respectful, meaningful and representative model of engagement with Aboriginal and Torres Strait Islander peoples for our elected Parliament.
17. The ALA notes that the recommended proposal suggests that the functions of the Voice body be set out in legislation outside of the Constitution. Parliament will need to consider the definition, scope and functions of the Voice body before the proposal is put to a referendum. This indicates that the Voice proposal is consistent with the Australian constitutional principles of the supremacy of the elected Parliament.

Conclusion

18. The ALA welcomes the opportunity to provide this submission to the Committee's inquiry into nationhood, national identity and democracy.
19. The ALA strongly supports the Uluru Statement. Aboriginal and Torres Strait Islander people 'from all points of the southern sky' deserve a Voice that will be heard. A First Nations Voice will improve our social cohesion by empowering Indigenous peoples to work with government cooperatively, ensuring that the best possible policies and legislation will emerge. This is the roadmap to closing the gap. It is the roadmap to improving our democracy. It will create a new unity that will prove fundamental to a proud national identity.
20. The ALA strongly encourages the Committee to consider the Uluru Statement from the Heart in light of this inquiry's interest in the future of our nationhood, national identity and democracy.

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