LGiU Briefings On The Uluru Statement From The Heart

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This paper represents the views and opinions of the author Dr Ed Wensing.

This paper may not necessarily represent the views of all team members at SGS Economics and Planning.

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OFFICES IN CANBERRA, HOBART, MELBOURNE, AND SYDNEY ON THE COUNTRY OF THE NGAMBRI/NGUNNAWAL/NGARIGO, MUWININA, WURUNDJERI, AND GADIGAL PEOPLES.

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THE ULURU STATEMENT FROM THE HEART: UNDERSTANDING LOCAL GOVERNMENT'S ROLE

PUBLISHED 6 JULY 2022

Summary

- In his victory speech on election night on 21 May 2022, the leader of the Australian Labor Party, Anthony Albanese, renewed the incoming government's commitment to implementing the *Uluru Statement from the Heart*. With this renewed focus, this briefing provides important background to the *Uluru Statement from the Heart* and outlines its relevance to local government.
- This briefing will be of interest to local government broadly, including Elected Members, General Managers, Aboriginal and Torres Strait Islander people in local government, Aboriginal and Torres Strait Islander advisory committees, and those working on policy development and working with Aboriginal and Torres strait Islander peoples and community organisations.

Briefing in full

There is an enduring silence in the Constitution when it comes to Aboriginal and Torres Strait Islander Peoples. In 1967, Australia's Constitution was amended to delete discriminatory references to Aboriginal people, but nothing positive was put in its place – and Torres Strait Islanders have never been mentioned in the Constitution at all.

This lack of recognition of Aboriginal and Torres Strait Islander peoples in the Constitution, Australia's founding document, has attracted national attention for decades.

As far back as Yorta Yorta elder William Cooper's letter to King George VI (1937), the Yirrkala Bark Petitions (1963), the Larrakia Petition (1972), the Barunga Statement (1988), the Eva Valley Statement (1993), the Kalgaringi Statement (1998) and the Kirribili Statement (1995), the First Peoples of Australia have sought a fair place in our country.

All Prime Ministers of the modern era were conscious of the original omission of First Peoples from our constitutional arrangements:

- Prime Minister the Hon Gough Whitlam spoke of the need for Aboriginal and Torres Strait Islander peoples to take '*their rightful place in this nation*'.
- Prime Minister the Rt Hon Malcolm Fraser established a Senate inquiry whose report, *200 Years Later: Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Feasibility of a Compact or 'Makarrata' between the Commonwealth and Aboriginal People*, was delivered after the 1983 election.
- Prime Minister the Hon Bob Hawke sought to respond to the Barunga Statement with his commitment for a treaty or compact at the bicentenary of 1988.
- In his Redfern Speech in 1991, Prime Minister the Hon Paul Keating said '*How well we recognise the fact that, complex as our contemporary identity is, it cannot be separated from Aboriginal Australia*.'
- Prime Minister the Hon John Howard committed to a referendum on the eve of the 2007 federal election, saying: *'I believe we must find room in our national life to formally recognise the special status of Aboriginal and Torres Strait Islanders as the first peoples of our nation.'*

These promising intentions never came to pass. Nevertheless, they confirm that constitutional recognition is longstanding and unfinished business for the nation.

This history, from an Aboriginal perspective, is eloquently captured by Galarrwuy Yunupingu in his essay '*Rom Watangu*':

> *What Aboriginal people ask is that the modern world now makes the sacrifices necessary to give us a real future. To relax its grip on us. To let us breathe, to let us be free of the determined control exerted on us to make us like you. And you should take that a step further and recognise us for who we are, and not who you want us to be. Let us be who we are – Aboriginal people in a modern world – and be proud of us. Acknowledge that we have survived the worst that the past had thrown at us, and we are here with our songs, our ceremonies, our land, our language and our people – our full identity. What a gift this is that we can give you, if you choose to accept us in a meaningful way.*

Action towards constitutional change

In 2010, Prime Minister the Hon Julia Gillard established an **Expert Panel on the Recognition of Aboriginal and Torres Strait Islander Peoples in the Constitution**, co-chaired by Patrick Dodson and Mark Leibler, to report on possible options to give effect to Indigenous constitutional recognition, and to advise on the level of support from Indigenous people and the broader community on each option.

The Expert Panel reported in 2012, identifying strong community support for changing the Constitution to acknowledge Aboriginal and Torres Strait Islander peoples and recommending specific options for inserting words into the Constitution, removing the remaining clauses that enable discrimination on the basis of race, and inserting a new clause to protect all people from racial discrimination. However, the government decided not to put these matters to a referendum because the political environment was not conducive to maintaining bipartisan commitment across party lines.

In 2013, the Parliament resolved to establish a **Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples**, co-chaired by Senator Ken Wyatt and Senator Nova Peris. The Committee's Final Report in June 2015 recommended that a referendum be held on the matter of recognising Aboriginal and Torres Strait Islander peoples in the Constitution.
In July 2015, 40 Aboriginal and Torres Strait Islander leaders met with the then Prime Minister, the Hon Malcolm Turnbull and the then Opposition Leader at Kirribilli, to determine the next steps towards holding a referendum to amend Australia's Constitution.

In December 2015, the Prime Minister and the Opposition Leader established the **Referendum Council**, comprising roughly equal Indigenous and non-Indigenous representation, to advance matters including settling a referendum question, the timing of a referendum, and constitutional issues.

The Referendum Council was required to consult specifically with Aboriginal and Torres Strait Islander peoples on their views of meaningful recognition. The Council therefore decided to hold a series of regional dialogues around the country and to undertake broader community consultations, culminating in the **National Constitutional Convention at Uluru in May 2017**.

This process is unprecedented in our nation's history. It was the first time a constitutional convention has been convened with and for the First Peoples of Australia, and was a significant response to the historical exclusion of First Peoples from the original process that led to the adoption of the Australian Constitution in 1901.

It is the outcomes of the First Nations Regional Dialogues and the National Constitutional Convention that are articulated in the *Uluru Statement from the Heart*.

Uluru Statement from the Heart

The *Uluru Statement* not only sets out the grievances of First Nations peoples that require Australia's attention, but also includes three key mechanisms for addressing those grievances: **Voice, Treaty, Truth**.

The sequence of these three elements is vitally important. As Hobbs (et al, 2021:9) note in their discussion of the Uluru Statement, the sequence of the three elements is also reflective of the powerlessness that Aboriginal and Torres Strait Islander peoples face in negotiating with Australian governments (Hobbs et al, 2021:9) at all levels. The concern is that without a representative body in place, the design and powers of the institution that will be responsible for developing a treaty (or treaties) and for truth telling (a Makaratta Commission) might not reflect the priorities or interests of the Aboriginal and Torres Strait Islander peoples of Australia (Hobbs et al, 2021:9).

What is significant about the *Uluru Statement* is that it was not issued to our political leaders. Rather, it was issued '*as an invitation to the people of Australia to work with First Nations peoples*' because it is the people of Australia who vote to change the Constitution (Davis and Williams, 2021:5). The final paragraph in the Statement states:

> *In 1967 we were counted, in 2017 we seek to be heard. We leave base camp and start our trek across this vast country. We invite you to walk with us in a movement of the Australian people for a better future.*

The Uluru Statement and opportunities for local governance

The three key elements of the Uluru Statement – Voice, Treaty, Truth – are just as relevant to local government as they are to the Commonwealth and the States and Territories.

Up until the recent federal election, it was the former Federal Government's position that treaties with Aboriginal and Torres Strait Islander peoples were a matter for the States and Territories. The change in federal government following the general election on 21 May 2022 has brought a change in policy in relation to the Uluru Statement. In his victory speech on election night, the leader of the Australian Labor Party, the Hon Anthony Albanese, gave an unequivocal commitment to implementing the U*luru Statement from the Heart* at the federal level – which included a commitment to implementing the three key elements of Voice, Treaty, Truth.

While the Commonwealth will take some time to work out the details of how it proposes to advance each of the three key elements, the one thing that is now abundantly clear is that there will be multiple treaties at different levels of governance in Australia.

Several jurisdictions in Australia have already embarked on treaty developments, especially Victoria and the Northern Territory. In both of those jurisdictions, it is already becoming clear that there will be scope for local treaties based on Traditional Owner boundaries, and even the possibility of localised self-governance to sit alongside the conventional forms of existing local government.

While there is much at stake, the pendulum for change in the way governments relate to the First Peoples of Australia has shifted dramatically.

At the recent National General Assembly of Local Government in Canberra, the Minister for Indigenous Australians, the Hon Linda Burney, issued local governments with an invitation to join with First Australians in hosting local meetings with members of their local communities to discuss the *Uluru Statement from the Heart*.

Also at the National General Assembly of Local Government, Mayors from across Australia voted to endorse the *Uluru Statement from the Heart* – and a motion from Inner West Council in Sydney, committed councils to a grassroots campaign to build awareness of the upcoming referendum to insert an Indigenous Voice to the Parliament into Australia's Constitution. Inner West Council's Mayor Byrne said, "the success of the referendum depends upon local government stepping up to meet this moment", and reiterated that Mayors and local Councillors from across Australia can all play a role in this historic change by building grassroots momentum for change.

Comment

Because of their place-based responsibilities, local governments are often seen as being 'closest to the people': they are therefore in a unique position to implement some structural and systemic reforms that central government cannot, and to reconfigure relationships at a local and regional scale. This can include meaningful consultations on matters that affect Aboriginal and Torres Strait Islander peoples, ensuring their representation in all relevant forums and governance bodies, and entering into place-based protocols and agreements on matters of mutual concern. Such initiatives can be particularly valuable in metropolitan areas and regional cities where most of Australia's Indigenous peoples live.

There is also scope for a 'leadership from below' or 'building block' role for local and regional action led by local government. Many municipalities have a solid track record of reaching agreements under the reconciliation agenda and native title legislation. With respect to truth-telling, local governments are often rich repositories of histories which can be re-told in partnership with Aboriginal and Torres Strait Islander communities, especially with native title-holder groups where they have been determined or have active claims in train, thus rebuilding relationships. This could be a really important starting point for regional treaties. The most significant challenge for local governments is understanding the opportunities and becoming involved from the outset and for the long term (Wensing, 2021).

A FIRST NATIONS VOICE TO PARLIAMENT: LOCAL GOVERNMENT'S ROLE

PUBLISHED 12 SEPTEMBER 2022

Summary

The *Uluru Statement from the Heart* includes three key elements for addressing Australia's failures in relation to the recognition of Australia's Aboriginal and Torres Strait Islander peoples in Australia's Constitution: Voice, Treaty, Truth. The first of these elements is the establishment of a First Nations Voice to Parliament to be enshrined in the Constitution.

On election night on 21 May, the leader of the Australian Labor Party, Anthony Albanese, began his victory speech by acknowledging the traditional owners of the land where he was speaking and committed to implementing the *Uluru Statement from the Heart* in full (ABC, 2022).

On 30 July at the Garma Festival on Yolngu Country in north-east Arnhem Land, the Prime Minister outlined the Australian Government's commitment to holding a referendum to enshrine a First Nations Voice to Parliament in Australia's Constitution.

When Ministers responsible for Indigenous Affairs from all States and Territories and the Commonwealth met on 17 August 2022, they agreed to continue backing the Australian Government's work towards a First Nations Voice to the Australian Parliament enshrined in the Constitution, as outlined in the Uluru Statement.

The call for a First Nations Voice to Parliament has a long history. This is the first of separate Policy Briefings for each of the three key elements of the Uluru Statement from the Heart. It outlines the history, why the First Nations Voice is the first of the three elements element in the Uluru Statement, and the next steps in the process.

This briefing will be of broad interest due to the forthcoming referendum.

Briefing in full

It is a fact of history that the Aboriginal and Torres Strait Islander peoples of Australia were not accorded respect and recognition when the British arrived to colonise these lands and waters in 1788. Indeed, since federation in 1901, there has been a long-running debate about the lack of recognition of Australia's First Peoples in our Constitution.

Successive generations of Aboriginal and Torres Strait Islander people and organisations have been campaigning for respect and recognition at the national level because they understood how important it is to have a voice in the federal system where the Commonwealth is dominant. Their efforts produced the Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCATSI) in 1957 to facilitate interstate co-operation for the recognition of our rights; the National Aboriginal Consultative Committee (1973-76); the National Aboriginal Conference (1977-85); the Aboriginal and Torres Strait Islander Commission (1989-2004) and the National Congress of Australia's First Peoples (2010-19).

Even though Australian governments have required a national voice when seeking input into laws and policies affecting Aboriginal and Torres Strait Islander peoples, the reality is that successive governments have routinely ignored, sidelined, repealed, and/or abolished these initiatives at a whim.

Why the Voice is the first of the three key elements in the Uluru Statement

The sequence of the three elements is deliberate, and understanding the order is central to the messages in the Uluru Statement. A treaty and truth-telling do not require constitutional amendment, at least not in the way envisaged by those involved in the Regional Dialogues and First Nations Constitutional Convention.

The First Nations Voice to Parliament is a structural reform, aimed at enabling Aboriginal and Torres Strait Islander people to be engaged in the development and implementation of laws, policies, and programs that affect them and their rights and interests. Establishing a First Nations Voice to Parliament is something that many other countries have done (i.e. Norway, Finland, and Sweden), to advise the Parliament on laws and policies relating to matters affecting Indigenous peoples.

A First Nations Voice to Parliament would ensure that the views of Aboriginal and Torres Strait Islander people are heard by lawmakers, and could help Parliament enact better and more effective laws. It will also create an institutional relationship between governments and First Nations that will compel the state to listen to Aboriginal and Torres Strait Islander peoples in policy and decision-making.

The next phase of the sequence is a process for treaty-making: the Makarrata Commission and truth-telling. A First Nations Voice to Parliament, once established, will be an enabling mechanism for First Nations people in any treaty negotiations.

The proposal enables Australia to implement a key principle of the UN Declaration on the Rights of Indigenous Peoples

Article 18 of the *United Nations Declaration on the Rights of Indigenous Peoples*, endorsed by Australia in 2009, provides that 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.

A history of inquiries and reports

The current impetus for constitutional recognition has its origins in the Howard Government's renewed commitment to a referendum in the lead-up to the federal election in 2007. The then-Leader of the Opposition, Kevin Rudd, made the same commitments. When Howard lost the 2007 election, Aboriginal and Torres Strait Islander leaders and community organisations held the incoming Rudd Government to that commitment.

Over the fifteen years since, there have been no less than six inquiries and over a dozen detailed reports, including two Parliamentary Committee inquiries and two Expert Panels, overseen by four Prime Ministers and Leaders of the Opposition.

In 2017 the *Uluru Statement from the Heart* emerged from the Regional Dialogues and First Nations Constitutional Convention that the Referendum Council was charged with undertaking by the then-Prime Minister (Malcolm Turnbull) and then-leader of the Opposition (Bill Shorten).

The *Uluru Statement from the Heart* is an invitation from First Nations to "walk with us in a movement of the Australian people for a better future." It was a call to the Australian people in May 2017 following two years of engagement and consultations with First Nations people from across the country.

Why is change necessary?

The Uluru Statement calls for this "ancient sovereignty" of First Nations to be recognised through structural reform, including constitutional change. Structural reform is needed to give First Nations peoples greater say and authority over the decisions that affect them. Structural reform means making real changes to the way decisions are made and by who, rather than simply tinkering with existing processes of decision-making and control.

The proposal for a First Nations Voice to Parliament emerged in response to the vacuum of political representation at the national level that resulted from the abolition of ATSIC in 2004. The premise of the Dialogues and the Convention was to reach a consensus on meaningful recognition. It was an act of self-determination.

Is a representative voice a new idea?

Aboriginal and Torres Strait Islander peoples and communities have consistently been calling for the recognition and protection of their rights. This includes calling for First Nations representation and empowerment in decision-making and control of their own affairs. There is an unbroken line that runs from before federation connecting this early advocacy and the contents of the Uluru Statement, which was documented in an earlier LGiU Policy Briefing.

Throughout this history, there have been consistent calls for a representative voice in decision making, the right to self-determination, treaty, and for the truth to be told about First Nations and Australian history. Aboriginal and Torres Strait Islander people and communities want to be actively involved in decisions on laws, policies and programs that affect them and their rights and interests.

Why a constitutionally enshrined voice?

The Uluru Statement calls for a Voice to Parliament to be enshrined in the Australian Constitution by way of an enabling provision.

Previous First Nations' representative bodies (such as the Aboriginal and Torres Strait Islander Commission (ATSIC)) were set up administratively or by legislation. That meant they could be, and were, easily abolished by successive governments depending on the government's priorities. Setting up and then abolishing representative bodies cuts across progress, damages working relationships, and wastes talent that could be used to solve complex problems.
In the Regional Dialogues, many Aboriginal and Torres Strait Islander people said they were frustrated with this chopping and changing, and that they wanted a long- lasting and durable Voice in policy and legislative decisions that affect them.

That is the reason the Uluru Statement calls for a Voice to Parliament to be enshrined in the Constitution. Aboriginal and Torres Strait Islander people do not want another body that can be easily abolished by legislation.

Backed by the people at a referendum, a Voice to Parliament enshrined in the Constitution can make a lasting contribution to a better future for First Nations and for all Australians.

What might the Voice look like?

There has been some commentary about the need for more details as to what the Voice to Parliament would look like before the Constitution is amended.

Considerable work has already been done on what the Voice might look like. Since 2017, there have been three key processes underway that have involved Indigenous-run dialogues, a Parliamentary inquiry and a government led consultation:

- The Regional Dialogues and the First Nations Constitutional Convention, that delivered the *Uluru Statement from the Heart*.
- The 2018 Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples.
- The 2019-2021 Indigenous Voice Co-Design Process run by the National Indigenous Australians Agency (NIAA).

The last process was overseen by the Hon. Ken Wyatt when he was the Minister for Indigenous Australians. While there are some positive elements to the model, it cannot be considered as final or suitable because it was designed as a voice to government, and not as a voice to parliament. The Albanese Government has said, however, that it will draw upon the reports produced as part of that process.

A shared set of design principles can be drawn from those three processes to inform how it might operate.

Why put the cart before the horse?

There is no need to settle on the details prior to a referendum to insert a provision for its existence into the Constitution. Legislation never precedes the power. To put it more clearly, there are no constitutionally mandated institutions where the legislation governing the institution has preceded the creation of the power in the Constitution.

Take the High Court of Australia as an example. Chapter III, covering sections 71 to 80 of the Constitution, establishes the powers of the Judicature, but the legislation governing the procedures of the High Court did not come into existence until after the Australian Parliament was established in 1901 and sat to consider the H*igh Court Procedure Act* 1903 – and subsequently replaced in 1915, 1921, 1925, 1933, and most recently in 1979.

It is a matter for the Parliament to determine the details of what the First Nations Voice to Parliament will look like after the power has been inserted into the Constitution. This respects the sovereignty of the Parliament to decide these matters. To do otherwise would be contrary to how all other institutions of government are established.

It is important to understand that pressure to legislate first arises from the fact that Ken Wyatt, as Minister for Indigenous Australians, was not able to persuade his Coalition colleagues to hold a referendum to amend the Constitution.

The Albanese Government's proposed Referendum question

On 30 July at the Garma Festival in north-east Arnhem Land, Prime Minister Anthony Albanese released the details of the proposed Referendum question.

In his speech, Mr Albanese said:

> *It's not a matter of special treatment or preferential power. It's about consulting Aboriginal and Torres Strait Islander peoples on the decisions that affect you. Nothing more – but nothing less. This is simple courtesy, it is common decency.*

and…

> *Enshrining a Voice in the Constitution gives the principles of respect and consultation, strength and status. Writing the Voice into the Constitution means a willingness to listen won't depend on who is in government or who is Prime Minister. The Voice will exist and endure outside of the ups and downs of election cycles and the weakness of short-term politics. It will be an unflinching source of advice and accountability. Not a third chamber, not a rolling veto, not a blank cheque. But a body with the perspective and the power and the platform to tell the government and the parliament the truth about what is working and what is not.*

The Prime Minister then outlined that the starting point is a recommendation to add three sentences to the Constitution, in recognition of Aboriginal and Torres Strait Islanders as the First Peoples of Australia, as follows:

Proposed Referendum Question

Do you support an alteration to the Constitution that establishes an Aboriginal and Torres Strait Islander Voice?

Proposed Constitutional Amendments

1. There shall be a body, to be called the Aboriginal and Torres Strait Islander Voice.

2. 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.

Source: Indigenous Law Centre, UNSW.

Mr. Albanese noted that this is not the final wording and that further consultation will be necessary.

Key consideration in the lead up to a referendum

With a referendum likely to be held in the next 12-24 months or so, two prominent academics – Professor Gabrielle Appleby from UNSW and Professor Lisa Hill from the University of Adelaide – are warning that it is important to be wary of misinformation and scaremongering.

It is also important to understand that a lot of work has been done over the past decade, led by the Indigenous Steering Committee of the Referendum Council, and since May 2017 and the delivery of the *Uluru Statement* to the Australian people, by the Uluru Dialogues, a group of First Nations people and non-Indigenous supporters who are committed to pursuing the reforms of the *Uluru Statement from the Heart*. This work has been undertaken out of the Indigenous Law Centre, at the University of New South Wales, and has also engaged constitutional, public law, and Indigenous experts from across Australia and the world, as well as leading practitioners. It has also reckoned with public contributions from former Chief Justices of the High Court, parliamentary committee submissions and reports, and other aspects of the public debate on constitutional reform.

Indeed, as this Policy Briefing was being written, the Indigenous Law Centre released a series of three discussion papers addressing these critical matters in the lead-up to the referendum to constitutionally enshrine a First Nations Voice:

- Issues Paper 1: The Constitutional Amendment
- Issues Paper 2: The Referendum Question
- Issues Paper 3: Finalisation of the Voice Design

The Referendum Council reported that each of the Regional First Nations Dialogues spoke to the need for a durable and sustainable Voice to Parliament that can withstand the whims of government and the three-yearly political cycle. Frequent changes to representative bodies at the national level create distractions, damages working relationships, wastes resources, and diverts attention from addressing complex problems.

The First Nations Portfolio (FNP) at The Australian National University has also just released an Issues Paper outlining the areas where there is broad consensus, including:

- Composition – that members should be selected by Aboriginal and Torres Strait Islander people and not be appointed by government, and feature equal gender representation.
- Function – that the Voice should be able to present its views to the Parliament and the government at the Commonwealth, State/Territory and local levels on matters it deems relevant.
- Local communities – The Voice should be connected to local and regional communities that promote transparency and accountability in both directions.
- Justiciability – Parliament and the government may be required or expected to engage with the Voice on certain issues, but this would be a political requirement not subject to review by the judiciary.
- Funding – The Voice will need to be appropriately funded by the Commonwealth to fulfil its functions.

The Issues Paper also draws discusses areas where further attention to detail is required, including the relationship between the Voice and existing Indigenous organisations, the full extent of the Voice's functions, and the relationship between the Voice and the Parliament and the different levels of government.

The Aboriginal and Torres Strait Islander peoples of Australia have made it very clear they are not interested in tokenistic acts of recognition. As Professor Gabrielle Appleby, Associate Professor Sean Brennan and Professor Megan Davis from the University of New South Wales note, the participants in the Regional Dialogues in the lead-up to the National Indigenous Constitutional Convention, see the logic of a constitutionally enshrined Voice, rather than a legislative body alone, as providing reassurance and recognition that the new norm for participation and consultation in matters affecting Aboriginal and Torres Strait Islander peoples has to be different from the practices of the past. They want a commitment to genuine structural reform.

As the Prime Minister stated 'if not now, when?', pointing out that back in 1967, not a single member of Parliament voted against the referendum provisions to amend the Constitution to enable the Commonwealth to accept wider but not exclusive responsibility for Aboriginal and Torres Strait Islander matters.

Comment

Local governments are in a unique position to help spread the message and respond positively to the invitation in the *Uluru Statement from the Heart* by embracing the three key elements.

As the Uluru Statement Team based at the Indigenous Law Centre at the University of New South Wales states:

> *"Local governments are close to their communities and are experts in finding ways to effectively communicate with them. They can play a crucial role in building the grassroots support needed for a successful referendum to enshrine the First Nations Voice to Parliament in the Constitution. And of course, as the third tier of government, they are uniquely placed to answer the invitation of the Uluru Statement from the Heart, be part of the process of structural reform and, in partnership with local Indigenous communities, help lead Australia towards a better future based on justice and self-determination."*

There are several things that local governments can do, including:

1. Find more information. A good place to start is the Uluru Statement official website.
2. Tell others you support the Statement. You can propose a motion that your local government expresses its support for the Uluru Statement, publicise your local government's support for the Uluru Statement, include information about the Uluru Statement in your local government offices and service centres and libraries, use your networks to inform other local governments of the position that your local government has taken.
3. Take ongoing actions, including writing a letter of support to the Prime Minister, the Leader of the Opposition and to your Federal and State members of Parliament, encourage supporters in your local community to do the same in their personal capacity, work with local Aboriginal and Torres Strait Islander people and community-controlled organisations, provide local opportunities for supporting education, research and truth-telling programs run by Aboriginal and Torres Strait Islander people and organisations in your local area, make representations to state and national local government associations encouraging them to support the Uluru Statement and the First Nations Voice to Parliament, sponsor community events to raise awareness of the Uluru Statement and the First Nations Voice to Parliament.

The author wishes to thank Professor Megan Davis for permission to draw on her work and the work of the Uluru Dialogues team with the support of the Indigenous Law Centre at the University of New South Wales.

Declaration: Dr Ed Wensing is also a Research Fellow at the City Futures Research Centre at UNSW and an Honorary Research Fellow at the Centre for Aboriginal Economic Policy Research at the ANU.

TREATY: WHAT IS IT? WHY AUSTRALIA NEEDS IT? WHAT'S HAPPENING AROUND AUSTRALIA? HOW WILL THEY EFFECT LOCAL GOVERNMENT?

PUBLISHED 9 NOVEMBER 2022

Summary

The Uluru Statement from the Heart advocates for three key elements for improving the dialogue between Australia's First Peoples and the people of Australia: Voice, Treaty, Truth.

Since election night on 21 May 2022, the Prime Minister of Australia, Anthony Albanese, has been very clear in his government's commitment to implementing the *Uluru Statement from the Heart* in full (ABC 2022), including holding a referendum to enshrine a First Nations Voice to Parliament in Australia's Constitution.

The purpose of this policy briefing is to focus on the second of the three key elements in the Uluru Statement: Treaty (or 'Makarrata') with the First Peoples of Australia. This briefing provides an overview of what a treaty is, why we need a treaty (or treaties), an update on what is happening around Australia, and what effect Treaties may have on local government.

Briefing in full

Background

The Aboriginal and Torres Strait Islander peoples of Australia have long campaigned for structural reform of Australia's institutional framework to protect their rights (Larkin et al, 2022:35), including recognition within the nation's founding document, the Australian Constitution (Lino, 2018).

The Australian Government's initial response to the *Uluru Statement from the Heart* was that First nations treaties were a matter for the States and Territories. However, with the change in government at the federal election in May 2022, the incoming Australian Government made a very firm commitment to implementing the *Uluru Statement from the Heart in full* at the national level. As work is progressing on a referendum to insert a First Nations Voice to Parliament in the Constitution, there is also a renewed focus on a Treaty at the national level. While several States and the Northern Territory are well down the track in developing a Treaty of Treaties in their respective jurisdictions, attention is now focused on a Treaty at the national level.

The term 'Treaty' conveys a significance and distinctive standing to an agreement between Indigenous peoples and the governments of the nation state founded on the land and resources of the First Nations peoples who were here before the colonisers arrived. The main intention of a treaty is to rectify the wrongs of the past arising from colonization and to set a course for a new relationship founded on truth, mutual understanding and respect for each other.

What is a Treaty?

According to two leading academics – George Williams and Harry Hobbs (2020) – Treaties are accepted around the world as a means of resolving differences between Indigenous peoples and those who have colonised their lands. Treaties have been used in the United States of America and New Zealand, and are still being negotiated in Canada.

Despite being instructed to negotiate a treaty with 'the natives', Lt James Cook (in 1770) and Governor Arthur Phillip (in 1788), a treaty was never negotiated. When Australia became a federation in 1901, the Aboriginal and Torres Strait Islander peoples of Australia were not consulted or involved in any way.

A lot has happened since that time. In particular, Australia has endorsed the United Nations *Declaration on the Rights of Indigenous Peoples* (UNDRIP). As James Anaya, Apache and Purépecha lawyer and the former Special Rapporteur on the Rights of Indigenous Peoples, has noted the Declaration "substantially reflects Indigenous peoples' own aspirations, which after years of deliberations have come to be accepted by the international community".

The Declaration's legitimacy stems not only from the fact that it was endorsed by an overwhelming majority of UN Member States but also from the fact that it is the product of years of advocacy and negotiations by the Indigenous peoples themselves. The four nations that opposed the Declaration in 2007 (Canada, Australia, New Zealand and the United States of America) have since endorsed it, and Canada and New Zealand are in the process of developing legislation to enshrine the Declaration into domestic national law in their respective countries. Indeed, the state of British Columbia in Canada has already done so.

The principles underlying the Declaration create a framework for dialogue and negotiation between Indigenous peoples and governments and must serve as an important component of any modern treaty. Williams and Hobbs (2020:17) therefore maintain that for an agreement to be called a Treaty, it must satisfy three conditions:

- First, it must recognise Indigenous peoples as a polity, distinct from other citizens of the State on the basis of their status as prior self-governing communities.
- Second, the agreement must be reached by a fair negotiation process conducted in good faith and in a manner respectful of each participant's standing as a polity.
- Third, the agreement must settle each party's claims in order to develop an enduring partnership based on mutual recognition and sharing. This must include the State recognising or establishing some form of decision-making and control for the Indigenous people that amounts to some form of self-government

An agreement without these foundations cannot be regarded as a treaty in the contemporary context.

Why a Treaty?

A Treaty has been an ambition of many First Nations peoples of Australia for many decades. Whether Australia was 'settled' or 'invaded', there is no denying that the colonisation of Australia has had, and continues to have, disproportionate impacts on the First Nations peoples of Australia and that these matters have never been resolved (Referendum Council, 2017).

It is worth noting that the Uluru Statement uses the Aboriginal concept of 'Makarrata' rather than the term 'Treaty'. 'Makarrata' is a Yolngu word from north-eastern Arnhem Land which is sometimes translated as 'things are alright again after a conflict' or 'coming together after a struggle' (Hiatt, 1987:140). The Uluru Statement called for the establishment of a Makarrata Commission with the function of supervising agreement-making and facilitating a process of local and regional truth telling.

A Makarrata or Treaty is intended to capture First Nations peoples' aspirations for a fair and honest relationship with government and for a better future for First Nations peoples based on justice and self-determination (Davis and Williams, 2021:184).

Pursuing a treaty or treaties was strongly supported in the Regional Dialogues and at the National Constitutional Convention at Uluru in 2017 because this course of action has always been seen as an important path to reconciliation.

The reason behind establishing a Makarrata Commission is to bring substance to the idea of reconciliation by overseeing a process of truth telling, and that acknowledging the adverse impacts of colonialism is preliminary to developing agreements which will enable First Nations peoples and the post-settler communities to 'come together after a struggle'.

What will the Treaty be about?

Ultimately, the terms of a Treaty will be what the parties can agree on. While there are no treaties between First Nations peoples and the governments of Australia, we can draw some instructive lessons from other common law countries, such as Canada and New Zealand. Dominic O'Sullivan (2021:75) notes they are not a panacea for all the injustices committed against First Nations peoples, but they offer opportunities for renegotiating the terms of the settler presence on their lands and waters. O'Sullivan also notes that Treaties are "relational instruments, framing Indigenous nations' conceptions of justice and its pursuit".

Treaties with Indigenous peoples in Canada and New Zealand typically include, but are not limited to, the following key elements:

- recognition of the original status of First Nations as sovereign, self-governing, political communities.
- restoration of the First Nation's right to self-determination and a meaningful degree of self-government within the State or Territory.
- restoration of traditional lands and interests in natural resources.
- material reparation for irrecoverable historical losses.
- financial and material resources to enable economic independence.
- standing and negotiation procedures based on equality and good faith.

The Northern Territory Treaty Commissioner (2020) notes they are about the "recognition of the unique status of Australia's First Nations peoples and the chance to define, for the first time, the terms of our relationship with the colonisers", and that they "provide an opportunity for a renewed relationship based on sound principle and practicality to correct the flaw and fill the vacuum" in Australia's history.

What's currently happening around Australia?

While the path toward a Treaty or Treaties at the national level in Australia has been long, complicated, and difficult, there is considerable movement in several jurisdictions, including Victoria, the Northern Territory, Queensland, Tasmania, and South Australia:

Victoria

Victorian Traditional Owners maintain that their sovereignty has never been ceded and have called for a Treaty process that delivers self-determination for Victoria's First Peoples. Hence, for generations, the First Peoples communities and leaders of Victoria have been calling for a Treaty to acknowledge the sovereignty of First Nations and to improve the lives of First Peoples in Victoria.

In early 2016, the Victorian Government entered into discussions with the Aboriginal peoples of Victoria, with more than 400 people attending a state-wide forum and hundreds more attending forums across regional Victoria. At the conclusion of these forums, the Victorian Government committed to advancing self-determination for Aboriginal Victorians by establishing a Treaty Interim Working Group. Since that time, several steps have been taken (as depicted in the image overleaf) including the following key elements:

- An Aboriginal Treaty Working Group was established (2016).
- The Victorian Treaty Advancement Commission was established under the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) (Treaty Act), as Australia's first-ever Treaty legislation (2018).
- A Statewide election was held to establish the First Peoples Assembly of Victoria to represent the voice of First Peoples in the Treaty process. (2019). A truth and justice commission – the Yoorrook Justice Commission – has been established (2021).
- A Treaty Authority is in the process of being established under the *Treaty Authority and Other Treaty Elements Act 2022* (Vic) (August 2022).
- A Treaty Negotiation Framework (October 2022).

The *Treaty Authority and Other Treaty Elements Act* 2022 (Vic) (Treaty Authority Act) followed a historic agreement reached between the Government and the First Peoples' Assembly of Victoria in early June 2022. The Treaty Authority Act establishes a Treaty Authority as an 'independent umpire' to oversee negotiations between the Government and Aboriginal Victorians to ensure a fair treaty process that can realise positive outcomes for all Victorians, and gives the Treaty Authority the necessary legal powers to facilitate treaty negotiations and resolve any disputes between parties.

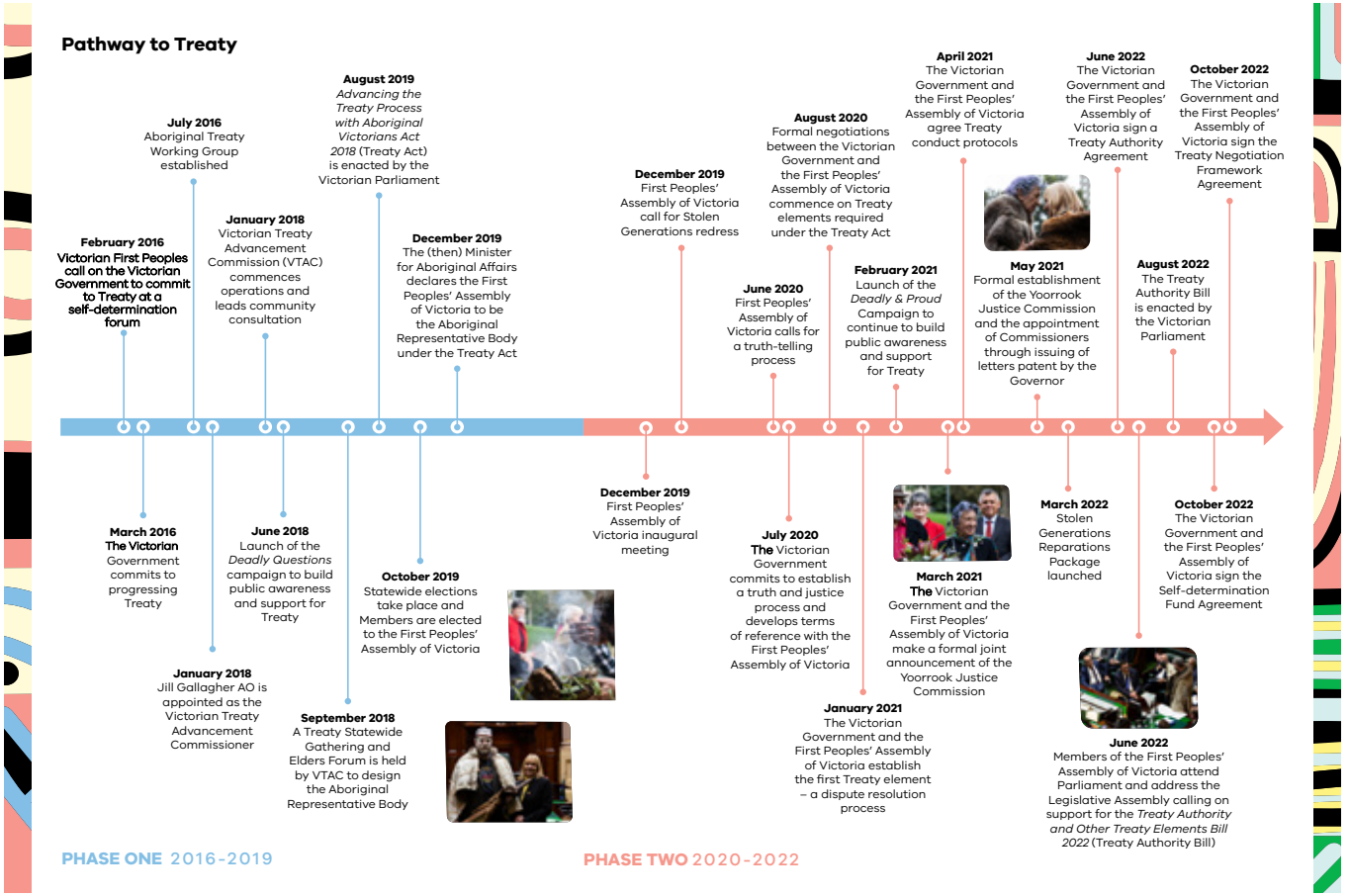
A Treaty Negotiation Framework between the First Peoples Assembly of Victoria and the State of Victoria was signed on 20 October 2022.

The Treaty Negotiation Framework sets out the principles that will guide Treaty- making in Victoria. It recognises Aboriginal Lore, law, and cultural authority, and provides Traditional Owner groups with the ability to choose their own pathways and timelines for negotiating Treaties that reflect their priorities, needs, and aspirations. The Framework explains the criteria and standards that groups need to meet if they want to enter Treaty negotiations and how they can be supported – with resourcing from the Self-Determination Fund and guidance from the Treaty Authority – to enter negotiations on more equal footing with the Government of Victoria.

The Framework also provides a basis for the First Peoples Assembly of Victoria to negotiate a state-wide Treaty to deliver structural change which will enable the Aboriginal peoples of Victoria to have a stronger voice in decision-making in matters that affect their lives and livelihoods.

Interestingly, Clause 25.1 of the Framework states: "There are no matters that cannot or must not be agreed in the course of Treaty negotiation." In other words, parties to a treaty can bring any matters to the table for negotiation.

Pathway to Treaty – Timeline from 2016 to 2022



Source: Treaty in Victoria

Northern Territory

In 2018, the Northern Territory (NT) Government and the four Aboriginal Land Councils signed a Memorandum of Understanding – also known as the Barunga Agreement – paving the way for consultations to begin with Aboriginal people of the NT about a Treaty, to agree on a consultation process to inform the development of an agreed framework to negotiate a Northern Territory Treaty or Treaties.

The treaty consultation process adopted in the NT rests on the NT Government's express acceptance of the following foundational propositions:

- That Aboriginal people, the First Nations, were the prior owners and occupiers of the land, seas, and waters that are now called the Northern Territory of Australia.
- The First Nations of the Northern Territory were self-governing in accordance with their traditional laws and custom.
- First Nations peoples of the Northern Territory never ceded sovereignty of their land, seas and waters.

A Treaty Commissioner was appointed in 2019 who produced an Interim Report (March 2020), a Discussion Paper (June 2020), a report on Truth Telling (Feb 2021), and a Final Report (June 2022).

The Northern Territory Treaty Commissioner in his Final Report considered the possible outcomes for Aboriginal peoples of the NT under a treaty, noting that self-government features prominently as a future goal for First Nations in the NT.

> *The focus on localised governance that reflects traditional decision making, is a uniquely Territory response borne of a very successful land rights regime and lengthy experience in self-governance in community councils prior to the introduction of 'super shires' in 2008. The strength of First Nations desire for more direct and localised government is deep and persistent. It is also very achievable in the non-municipal areas of the NT where almost the entirety of the shire councillors are First Nations people. (NT Treaty Commissioner: 2022:7-8).*

The Treaty Commissioner's Final Report is still being considered by the NT Government.

Queensland

The Path to Treaty in Queensland began in 2019 with the release of a Statement of Commitment to reframe the relationship between the Queensland Government and Aboriginal Peoples and Torres Strait Islander Peoples and an Eminent Panel of experts and a Treaty Working Group were established to report on the way forward. The Eminent Panel's Advice and Recommendations were formally handed to the Queensland Government in February 2020.

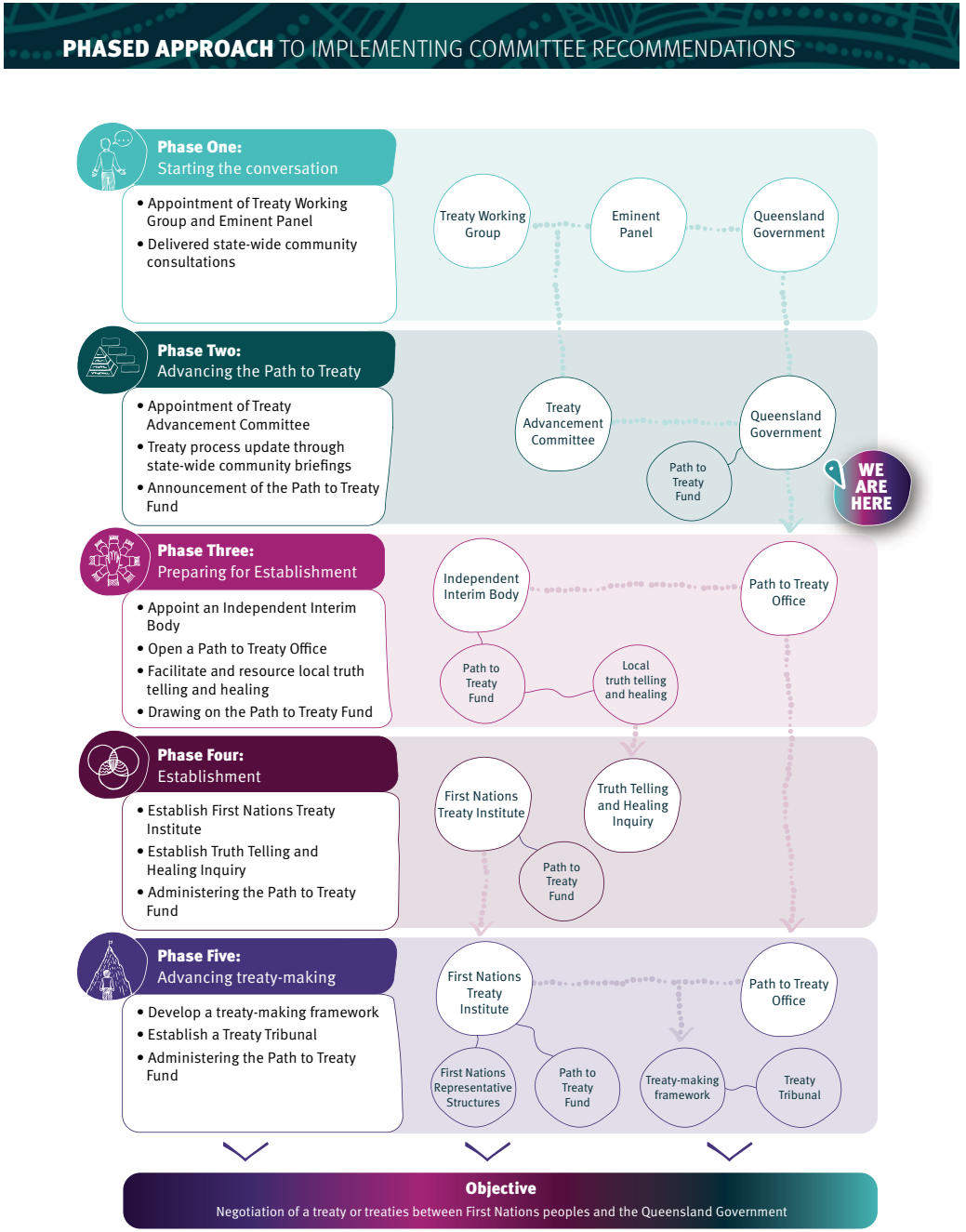
A Treaty Advancement Committee was established in February 2021 to inform the next steps along the Path to Treaty. The Committee's Report was formally handed to the Queensland Government on 12 October 2021. The Treaty Advancement Committee made 24 recommendations, including the establishment of First Nations Treaty Institute as a facilitating and enabling the body to advance the work to make Queensland treaty-ready, the need for truth telling and healing, the establishment of a Path to Treaty Fund and a Path to Treaty Office within the Queensland government and the establishment of an Independent Interim Body to work with the government and First Nations to have input to the drafting of the necessary legislation and the bodies recommended above.

In August 2022, the Queensland Government released its response to the Treaty Advancement Committee's Report, stating that it has accepted 18 of the Committee's recommendations in full, including those involving co-design, and accepted four in-principle as further policy development is required.

On 16 August 2022, the Queensland Government, First Nations people, and non- Indigenous Queenslanders participated in the signing of the Queensland's Path to Treaty Commitment. In signing the Commitment, the Queensland Government stated:

> *This Path to Treaty is a journey, not for the timid, but for those who are courageous to confront our uncomfortable past, the curious who long to find out and live with the truth, and the optimists who dream of the possibilities of a future where we live comfortably with the past, free of blame and rancour because we commit to not repeating those things that shame us. This journey together will enrich the lives of all Queenslanders and provide for greater recognition, celebration and learning from First Nations peoples.*

The Path to Treaty in Queensland has five phases (figure to the right), and with the release of the Queensland Government's response to the Treaty Advancement Committee's report, Phase Two has effectively been completed.



Source: Treatment Advancement Committee Report (Page 8).

Tasmania

On opening the first session of the fiftieth Parliament of Tasmania in June 2021, Her Excellency the Governor, Barbara Baker, indicated that Professor Kate Warner AC and Professor Tim McCormack would lead a process to understand directly from Aboriginal people themselves how best to take Tasmania's next steps towards reconciliation.

On 25 November 2021, the Premier, Hon. Peter Gutwein MP, tabled the report: Pathway to Truth-Telling and Treaty. The report explores options for an agreed way forward towards reconciliation, as well as the view of First Nations people on a truth telling process and pathway to Treaty in Tasmania.

In March 2022, the Premier announced that the Tasmanian Government will establish an Aboriginal Advisory body that can, through co-design, work with the Government to establish the two processes of Truth Telling and Treaty.

The Premier also announced that to support the new Aboriginal Advisory body, the Government will establish an Aboriginal Affairs whole-of-Government Division within the Department of Premier and Cabinet (DPAC), comprising the Office of Aboriginal Affairs and Aboriginal Heritage Tasmania, as well as staff from other Departments, such as Health and Education. The new Division in DPAC will be tasked to oversee and coordinate the Government's significant Aboriginal Affairs agenda, informed by the views of Aboriginal people, which includes the Truth-telling and Treaty processes, as well as Closing the Gap, a new Aboriginal Heritage Act, and finalising the Model for Returning Land.

South Australia

In South Australia, in 2016 the State Government saw Treaty negotiations as a significant step forward in South Australia's Reconciliation journey and critical to strengthening the relationship between the government and Aboriginal South Australians, including formally recognising the enduring cultural authority of Aboriginal groups and the opportunity for Aboriginal people to be involved in decision-making that impacts their lives.

In February 2017, the South Australian Government appointed a Treaty Commissioner to lead Treaty discussions across the state. The Treaty Commissioner travelled across the State conducting extensive engagement with the South Australian Aboriginal community. In February 2018, the South Australian Government signed an agreement with the Narungga Nation, as a significant milestone towards Treaty (the Buthera Agreement). Negotiations also occurred with two other Aboriginal nations in 2017-2018, the Adnyamathanha and Ngarrindjeri Nations. Following a State election in March 2018, the incoming government announced that further Treaty negotiations will no longer proceed.

However, following the State election in May 2022, the incoming Premier, Peter Malinauskas, pledged to implement a state-based Indigenous Voice to Parliament, as well as restarting treaty talks and a commitment to greater investment in Aboriginal affairs in South Australia. In July 2022, the South Australian Government appointed the state's first Commissioner for First Nations Voice to lead consultations with Aboriginal groups to lay the foundations for the state-based implementation of the *Uluru Statement from the Heart*.

How will these Treaty developments affect local government?

Four states and the Northern Territory have formally commenced efforts to negotiate Treaties. Three States (Victoria, the Northern Territory, and Queensland) have indicated they are willing to consider treaties at the Aboriginal language group or regional level, based on affiliations between Traditional Owner groupings or native title determinations that have established connections to the Country. This is the path that South Australia was pursuing before the change in government in 2018, and which the newly elected Government in SA has committed to resuming.

How these different Treaty developments across Australia will affect local government remains largely unclear at this stage.

However, local governments can make a decisive contribution to local and regional outcomes, and they can have a direct impact on reconciling their communities with the original owners of the lands they now inhabit through their place-based functions and close connections with communities.

Local governments are often seen as being closest to the people because of their place-based responsibilities. Local governments are therefore in a unique position to implement some structural and systemic reforms that central governments cannot, and to reconfigure relationships at a local and regional scale, bridging gaps in culture and governance, advancing mutual respect, and ensuring just outcomes.

Actions can include meaningful consultations on matters that affect First Nations peoples, ensuring their representation in all relevant forums and governance bodies, and entering into place-based protocols and agreements on matters of mutual concern. Such initiatives can be particularly valuable in metropolitan areas and regional cities where most of Australia's First Nations peoples live (Wensing, 2021a and 2021b).

There is also scope for a 'leadership from below' or 'building block' role for local and regional action led by local government. Many municipalities have a solid track record of reaching agreements under the reconciliation agenda and native title legislation.

With respect to truth-telling, local governments are often rich repositories of histories which can be retold in partnership with Aboriginal and Torres Strait Islander communities, especially with native titleholder groups where they have been determined or have active claims in train, thus rebuilding relationships. This could be a really important starting point for regional treaties. The most significant challenge for local governments is understanding the opportunities and becoming involved from the outset and for the long term (Wensing, 2021b).

Comment

What stands out from this analysis is that the States and Territories have embarked on treaty developments without the involvement of the Commonwealth. This has occurred while the Commonwealth was actively refusing to implement the *Uluru Statement from the Heart* in full (Larkin et al, 2022:57).

What also stands out is that the level of commitment to treaty and truth telling is not necessarily consistent across the jurisdictions. While Victoria and the Northern Territory are showing a strong commitment to self determination and self government, three jurisdictions are yet to show the same level of commitment to those ideals – and three other jurisdictions that have not yet embarked on treaty developments.

While some States and the Northern Territory are currently showing the lead, it must be remembered that the allocation of Constitutional responsibilities for Aboriginal and Torres Strait Islander matters in the federation means that the Commonwealth also needs to show some leadership. And with the change in government at the federal level in May this year, that has finally happened.

There are many different ways of addressing the longstanding lack of recognition of First Nations peoples' prior ownership and occupation of the lands that comprise Australia, but history shows that such measures cannot be imposed: they must be negotiated. The challenge is for treaty negotiations to be based on parity between the parties, mutual respect and justice, rather than on exploitation and domination by one or another party (Wensing, 2021b).

Nevertheless, negotiations between state and territory governments and First Nations peoples need to reflect and embrace the interests and potential contributions of the more than 500 local governments established and supervised under state and Northern Territory laws. Across the Northern Territory, northern Western Australia, northern Queensland and the Torres Strait, a substantial number of those local governments are primarily Aboriginal or Torres Strait Islander.

Local governments would be well advised to keep informed as this space develops.

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TRUTH TELLING: WHAT IS IT, AND WHAT ROLE CAN LOCAL GOVERNMENT PLAY?

PUBLISHED 23 JANUARY 2023

Summary

The *Uluru Statement from the Heart* advocates for three key elements for improving the dialogue between Australia's First Peoples and the people of Australia: Voice, Treaty, Truth.

Since election night on 21 May 2022, Australian Prime Minister Anthony Albanese has been very clear in his government's commitment to implementing the *Uluru Statement from the Heart* in full, including holding a referendum to enshrine a First Nations Voice to Parliament in Australia's Constitution.

The purpose of this policy briefing is to focus on the third of the three key elements in the Uluru Statement: Truth Telling. This briefing provides an overview of what Truth Telling is about, why Truth Telling is necessary, the role of Truth Telling Commissions, and Australian experiences with Truth Telling. It also provides an update on what is happening in Victoria and the Northern Territory, and what we can learn from this.

What is Truth Telling?

Truth Telling is a process of dealing with the 'unfinished business' of our colonial past and its ongoing impacts on First Nations Australians. Every Australian must know of our shared history of dispossession and denial toward First Nations peoples, and collectively we must consider how to come to terms with unresolved and legitimate grievances of Aboriginal and Torres Strait Islander peoples arising from colonisation and its ongoing consequences (Dodson, 2021:207, 2010).

The Yoorrook Justice Commission established by the Victorian Government in 2021 (discussed below), defines Truth Telling as "speaking and listening to truth after periods of conflict, so that relationships can be rebuilt on justice and human rights. Yoorrook is inquiring into injustice that happened in the past and is still happening now."

The Northern Territory Treaty Commission (2021:7) defines Truth Telling as "providing opportunities for Aboriginal and Torres Strait Islander Australians to tell their stories, to share their experiences, for other Australians to listen to and acknowledge them, for all Australians to create a shared history in order to move and begin the process of healing from the past."

The NT Treaty Commission emphasises that engagement with non-Aboriginal people is just as important as engaging with the Aboriginal people, as the non- Aboriginal people must 'bear witness' to the uncomfortable truth and atrocities that were committed against Aboriginal people (NT Treaty Commission, 2021:10).

Why is Truth Telling necessary?

There is widespread agreement among many First Nations people that genuine, durable reconciliation cannot occur until non-Aboriginal Australians confront and acknowledge the past and its ongoing consequences. While Truth Telling and treaty making are quite separate actions, Truth Telling is necessary before treaty relationships can be developed and strengthened (Wood, 2021:78), and Truth Telling should not have to wait for a treaty or treaty making for it to begin (NT Treaty Commission, 2021:4).

Although Truth Telling was not an option for reform that was put to the Regional Dialogues held as part of the lead-up to the National Indigenous Constitutional Convention in 2017, each region spoke about their history and its place in Australia's

story before they spoke about Constitutional reform. As Professors Megan Davis and George Williams (2021:166) note, many of the participants in the Regional Dialogues made the point "that you cannot recognise that which you do not know", and that "the need for people to know more about Australian and Aboriginal history was repeatedly raised in the Dialogues".

What emerged from the Regional Dialogues was a clear desire in each community for much greater emphasis on Truth Telling, and that's why it became one of the three key elements in the *Uluru Statement From the Heart*.

The importance of Truth Telling as a guiding principle draws on previous statements, such as the ATSIC report for the Social Justice Package (ATSIC, 1995) as part of the federal Government's response to the High Court of Australia's landmark decision in *Mabo* (No. 2), and the Eva Valley Statement (ATNS, 2005), both of which stated that a lasting settlement process must recognise and address historical truths.

Truth Telling is also embedded in several of the Preambular paragraphs and Articles in the United Nations *Declaration on the Rights of Indigenous Peoples* (Preambular paragraphs 3, 4, 8, 15 and 21; Articles 5, 15, 37 and 40) (UN, 2007), and in the United Nations General Assembly resolution on the basic principles on the right to truth in the event of violations of international human rights law and humanitarian law (UN, 2005). While the *Declaration on the Rights of Indigenous Peoples* may not be legally binding, it nevertheless carries considerable weight and legitimacy because it was compiled in consultation with, and with the support of, Indigenous peoples worldwide (including the Aboriginal and Torres Strait Islander peoples of Australia) (Wensing, 2021a), and it reflects "*an important level of consensus at the global level about the content of Indigenous peoples' rights*" (UN 2013:16).

Truth Telling Commissions

The United Nations Human Rights Commissioner has stated that:

> *When a period characterized by widespread or systematic human rights abuses comes to an end, people who suffered under the old regime find themselves able to assert their rights and to begin dealing with their past. As they exercise their newly freed voices, they are likely to make four types of demands of the transitional State, namely demands for truth, justice, reparations and institutional reforms to prevent a recurrence of violence. (UN, 2009:3).*

Globally, many Truth Commissions have been established in recent times, including after conflict as a way of acknowledging and redressing the pain and suffering that a community has endured. For example, in South Africa (1995-2002), Peru (2001-2003) and Timor-Leste (2002-2005). Truth Commissions have also been established in circumstances where there has not been a transition in governance following conflict, and people have continued to suffer. This is particularly the case with Truth Commissions established in Canada (2008-2015) and Mauritius (2009-2011) for example.

Each Truth Commission is unique because each place and its history is unique. What we can learn from the experiences of other nations is that while the process must be tailored to suit local circumstances, the object of establishing a separate commission is to give it a gravitas that it might otherwise not have had, and to ensure that it is adequately resourced to undertake the tasks it has been assigned (Warner and McCormack, 2021:8).

Australian experiences with Truth Telling

While Victoria is the only jurisdiction so far to have established a formal Truth Telling process (discussed below), Truth Telling has occurred as part of various other initiatives or inquiries. In particular, the following:

- As part of the land rights claims process under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). In order to lodge claim their traditional lands, the 'traditional Aboriginal owners' must identify the local descent group's common spiritual affiliations and a primary spiritual responsibility for the land in question.
- The *Royal Commission into Aboriginal Deaths in Custody* (1987-1991) which examined both the individual and broader structural circumstances surrounding Aboriginal deaths in custody that occurred between 1980 and 1989, and which made recommendations to prevent similar tragedies in the future.
- The *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1995-1997) investigated government policies and actions that resulted in the forcible removal of Aboriginal and Torres Strait Islander children from their families. The Inquiry explored potential reparations and examined current laws and policies that affect both past survivors and Aboriginal children in the present. The Inquiry's final report documented numerous personal testimonies of Stolen Generations survivors and included 54 recommendations, including a national apology and compensation for the victims.
- The *Royal Commission into Institutional Responses to Child Sex Abuse* (2013-2017) was the largest Royal Commission Australia has ever held. A unique aspect of this Commission was its ability to follow up on recommendations through a series of final review hearings, which required institutions to detail their current policies and practices to demonstrate how they would prevent future abuse. Aboriginal and Torres Strait Islander people were among the survivors giving testimony. While the Commission concluded in 2017, the redress scheme will continue until 2028. The Commission's website remains live, enabling the continued sharing of survivor stories, as well as access to its documentation, research and reports.
- The *Royal Commission into the Protection and Detention of Children in the Northern Territory* (2016-2017) investigated numerous human rights abuses occurring in the Northern Territory's youth justice system. The Commission established special rules for taking evidence and protecting the privacy and identity of witnesses. The Commission's final report is available online, including a succinct and easy-to-read overview and summary of findings in plain English and seventeen additional Aboriginal and Kriol languages.

The NT Treaty Commissioner (2021:26) notes that analysing the methodologies adopted by these processes, and how they went about searching and accessing historical materials and their documented experiences, should help inform the Truth Telling processes that now need to occur as an integral part of any treaty developments in the various jurisdictions.

Truth Telling at the national level

Until the federal election in May 2022, the Australian Government had let the States and Territories take the lead on treaty and Truth Telling. Now that the Australian Government has committed to implementing the *Uluru Statement from the Heart* in full, details of how the Truth Telling component of the Statement is to be implemented is still under development.

Truth Telling in Victoria

In July 2020, the Victorian Government committed to establishing a truth and justice process, and commenced developing its terms of reference with the First Peoples' Assembly of Victoria. In March 2021, the Victorian Government and the First Peoples' Assembly of Victoria jointly announced their intention to establish a truth and justice commission, and in May 2021, the Yoorrook Justice Commission was formally established through the issuing of letters patent and the appointment of Commissioners by the State Governor.

The Yoorrook Commission is the first formal Truth Telling process into past and ongoing injustices experienced by First Peoples in Victoria as a result of colonisation. The Yoorrook Commission's goals are understanding, truth and transformation. To achieve these goals, the Yoorrook Commission will:

- establish an official public record of the impact of colonisation on First Peoples in Victoria
- develop a shared understanding among all Victorians on the impact of colonisation, as well as the diversity, strength and resilience of First Peoples' cultures
- make recommendations for healing, system reform and practical changes to laws, policy and education, as well as matters to be included in future treaties.

The Yoorrook Commission has also committed to the importance of using the strengths, resilience, and connectedness of First Peoples and communities to provide a safe, supportive, and culturally appropriate forum for First Peoples to exercise their right to truth and justice with dignity and to demonstrate their cultural resilience and survival.

In June 2022, the Yoorrook Commission delivered its Interim Report providing an overview of progress to date; the Commission's approach to analysing the information it receives; the Commission's research tools and how it will determine relevant rights, responsibility and accountability; and the Commission's next steps. A critical issues report is expected by mid-2023 and the Commission's final report is expected by mid-2024, although an extension of time has been requested for submission of its final report to mid-2026.

The Northern Territory, Queensland, and Tasmania have also made commitments to pursuing Truth Telling as an integral part of their commitments to developing a treaty or treaties with First Nations peoples in their respective jurisdictions. At this point in time, they have not made any announcements as to how they will be proceeding.

Truth Telling in the Northern Territory

The Northern Territory Treaty Commission examined Truth Telling processes in other countries and identified the following parameters for Truth Telling in the NT:

- Focus not only on the past, but also on understanding the ways in which past events have continuing effects on the lives of Aboriginal people in the NT. Investigate patterns of colonisation and institutional racism, linking experiences from severe human rights abuses such as massacres, to everyday experiences of racism and repression.
- The Aboriginal people of the Territory must be involved in the design of the process and setting its terms, and this may involve different methodologies depending on the group, area and issues under investigation.
- The process must centre on Aboriginal peoples' stories if the truth of the past is to be honoured and acknowledged.
- The length of time required for Truth Telling will depend on a number of factors, but it should at least involve a two-phase process of information and evidence gathering, the production of interim reports, and the completion of a final report to help publicise the findings and recommendations, leading to a greater understanding of the past and its effects on present generations of Aboriginal people of the Territory.
- The process must have the full legislative backing of the government (and the opposition), adequate financial resources, and unrestricted access to archival materials in order for it to have a higher chance of its recommendations being implemented.

What we can learn from others

The NT Treaty Commission's report on Towards Truth Telling notes that some key lessons can be drawn from other experiences with Truth Telling form around the globe. In particular, that:

- There must be strong legislative support for the process with adequate resourcing.
- Expectations need to be carefully managed.
- The processes of Truth Telling ought foreground and celebrate cultural identity. The wellbeing of participants needs to be protected.
- Documenting, preserving, storing, and providing ongoing access to materials, both before, during and after a Truth Telling exercise has been completed, is essential to its ongoing effectiveness. For example, the collection of stories and information can form a 'library', which can then be used by participants, their families, researchers, teachers, and others.
- The process acknowledges the resilience of Aboriginal and Torres Strait Islander people who, despite everything, have persevered, and the potential for this to be at the heart of the Australian story.
- The process must engage with the wider public so they can 'bear witness' to overcome past injustices and generate public support for future Truth Telling exercises and treaties to build a different national narrative.
- The publication and dissemination of reports and other documents about Truth Telling be adapted to different audiences.

Comment

The momentum for Truth Telling at all levels is increasing across Australia, as several jurisdictions have either commenced such processes or have made strong commitments to doing so.

I agree with my colleague Adjunct Professor Graham Sansom from the UTS Institute for Public Policy and Governance, as discussed in this earlier briefing, that Australian local government needs a constructive, credible, sector-wide response to the quickening pace of advancing relationships with First Nations peoples.

Professors Megan Davis and George Williams (2021, p. 170) note that local governments have been the 'heavy lifters' in the Federation on truth and reconciliation. Indeed, Local government has a long and well-established record of working with Aboriginal and Torres Strait Islander peoples on matters of common concern. During the term of the Council for Aboriginal Reconciliation from 1992-2001, local governments hosted many local reconciliation circles in their local communities across Australia. Following the High Court of Australia's landmark decision in Mabo (No. 2), local government teamed up with key federal agencies to develop key resources to assist local governments with their responsibilities under the *Native Title Act* 1993 (Cth).

The Australian Local Government Association is a signatory to the Closing the Gap National Agreement and local government features strongly in the Closing the Gap Implementation Plans prepared by States and the NT Governments.

As I have previously said, there is also scope for a 'leadership from below' or 'building block' role for local and regional action led by local government. Many local governments have a solid track record of reaching agreements under the reconciliation agenda and native title legislation.

With respect to Truth Telling, local governments are often rich repositories of histories which can be re-told in partnership with Aboriginal and Torres Strait Islander communities, especially with native title-holder groups where they have been determined or have active claims in train, thus rebuilding relationships. This might well be a crucial starting point for regional treaties.

The most significant challenge for local governments is understanding the opportunities and becoming involved from the outset and for the long term.

THE INDIGENOUS VOICE CO-DESIGN PROCESS REPORT: WHAT THEY RECOMMEND

PUBLISHED 14 FEBRUARY 2023

Summary

In 2019, the presiding Australian Government set up a process to establish a legislated Indigenous Voice to Government, and not the Parliament. This process undertook a large volume of work that the present Australian Government has said it will consider in designing a constitutionally-enshrined Indigenous Voice to Parliament.

Provided to the Australian Government in late July 2021, the Indigenous Voice Co-Design Final Report builds on proposals from the Interim Report (2020).

This co-design process was premised on the then Australian Government's commitment to establishing the Voice via legislation and not enshrining it in the Constitution, in contrast to what the Uluru Statement from the Heart called for.

In this Briefing, LGiU Associate, Dr Ed Wensing, provides an overview of the Co-Design Process Final Report. More detail on the voice proposals can be found in this earlier Briefing.

As the discussion around the level of detail required for an informed referendum becomes more vocal, this overview is particularly valuable. This briefing will be of interest to local government broadly, including Aboriginal and Torres Strait Islander and community development officers, members of Aboriginal and Torres Strait Islander advisory committees, and those working on policy development and working with Aboriginal and Torres Strait Islander communities and associations.

Briefing in full

Background

Announced in October 2019 by the then Minister for Indigenous Australians, the Hon Ken Wyatt AM MP, the Indigenous Voice co-design process comprised of two stages.

Stage 1 comprised of three groups: of two Indigenous Voice co-design groups, a **Local & Regional Co-Design Group** and a **National Co-Design Group**, along with a **Senior Advisory Group**. The Local & Regional Co-design Group's role was to articulate effective regional mechanisms for improved local and regional decision-making by Aboriginal and Torres Strait Islander people in partnership with governments, including building on what is already working well in regions across Australia. The National Co-Design Group's role was to develop models for a National Voice, including how it should link to Local & Regional Voices. The Senior Advisory Group's role was to guide the process, including the public consultation process and to provide advice to the co-design groups as they developed the proposals.

Collectively, three groups comprised 52 members from around the country, will work together to develop the detail of what an Indigenous Voice could look like and how it could operate, co-chaired by Professor Dr Marcia Langton AM, with Professor Tom Calma AO appointed to assist, guide and oversee the co-design process. The Indigenous Voice Co-Design Process Interim Report was submitted to the Australian Government in October 2020 and released for comment in January 2021.

Following this, stage 2 comprised a series of extensive consultations and engagements around Australia, with over 9400 people and organisations participating in a consultation process led by co-design members. The consultation marks one of the most significant engagements with the Australian community on Aboriginal and Torres Strait Islander affairs in recent history. The final report was then released in October 2021.

The Co-Design Process's final report

The Final Report built on the proposals in the Indigenous Voice Co-Design Process Interim Report to the Australian Government.

- The preliminary sections include the Foreword, Executive Summary, and visual guides to the key elements of the final proposals.
- Chapters 1 and 2 detail the proposals for a principles-based framework for Local & Regional Voices and a National Voice, respectively. These chapters explore how stage two feedback influenced the final proposals and explain the intersections the National Voice and Local & Regional Voices would have with each other and with a range of stakeholders and existing arrangements.
- Chapter 3 details the stage two consultation and engagement process, including detailed statistical information and broad insights. This chapter also explains the process undertaken by the co-design groups to consider feedback and addresses additional themes that emerged from consultation and engagement.
- Chapter 4 details a range of transition and implementation considerations, including the potential pathways to new arrangements, includes the Senior Advisory Group's reflections on the co-design process and describes the recommendations.

Origin of the Indigenous Voice to Parliament

Aboriginal and Torres Strait Islander peoples have long called for a greater say on the services, policies, and laws that affect their lives to overcome their present level of exclusion from decision making about the matters that affect them (Co-Design Process Final Report, 2021:9).

It is important to recall that the Referendum Council was charged by the then-Prime Minister and Leader of the Opposition in 2015 to advise them on the next steps toward a successful referendum to recognise Aboriginal and Torres Strait Islander peoples in the Constitution. The Referendum Council then led a process of national consultations and community engagement which included a concurrent series of Indigenous-led Regional Dialogues around the country. The Regional Dialogues were carefully designed to capture local and regional views about what constitutional recognition might look like (Referendum_Council_Final_Report 2017).

As a consequence of the Regional Dialogues, the Referendum Council came to the conclusion 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, with the structure and functions of the body to be defined by Parliament (Co-Design Process Final Report, 2021:2).

It is also important to note that the Indigenous Voice Co-Design Process Final Report to the Australian Government was the culmination of a robust and contested process to design the details of an Indigenous Voice, as recommended by the 2018 Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples.

Using the proposals in the Interim Report as a foundation, the co-design groups developed the final proposals for Local & Regional Voices and a National Voice with careful deliberation, allowing the views of all members to be raised, discussed and considered. Co-design members led the public consultation and engagement process on the proposals and considered feedback as it emerged throughout the process. T**he final proposals represent either the unanimous or clear majority view of the co-design groups** (Co-Design Process Final Report, 2021:9).

Local and regional Voices & the role for local government

The approach for Local & Regional Voices presented in the Interim Report was strongly supported throughout the consultation and engagement process. **The flexibility to tailor Local & Regional Voices to local circumstances, guided by a principles-based framework, was seen as essential to ensure that Local & Regional Voice arrangements** can respond to the great diversity of Aboriginal and Torres Strait Islander cultures and communities across Australia.

The need for all levels of government, including local government, to participate in Local & Regional Voice arrangements was emphasised throughout consultation. As the policies, programs, and services of all levels of government affect communities and they all need to be engaged in Local & Regional Voice arrangements.

A principles-based framework was developed for the Local & Regional Voices across Australia, which is predicated on recognising that the enhanced arrangements for local and regional decision-making and regional governance would be the key to the success of the Indigenous Voice proposal overall. The nine guiding principles are:

- *Empowerment*
- *Inclusive Participation*
- *Cultural Leadership*
- *Community-led Design*
- *Non-duplication and Links with Existing Bodies*
- *Respectful Long-term Partnerships*
- *Transparency and Accountability*
- *Capability Driven*
- *Data and Evidence-based Decision Making.*

The intention is that the Local and Regional Voices will build on existing arrangements across Australia, be community-led, community-designed and community-run, and also be flexible to accommodate the diversity of Aboriginal and Torres Strait Islander cultures and communities.

The a summary of the Principles-based framework for Local & Regional Voice can be found at pages 16 and 17 of the Final Report.

National Voice

The proposal for a National Voice was strongly supported during the consultation and engagement process. Key considerations raised included how membership for the National Voice would be determined, the number of members on the National Voice, and the link between the Local & Regional Voices and the National Voice.

The final proposal for the National Voice is for a small national body of Aboriginal and Torres Strait Islander members tasked to advise the Australian Parliament and Government. The dual advice function reflects the different roles of the Parliament and the Government in making laws and policies, which would enable engagement with policy of different kinds and at different stages of development.

The National Voice would provide the mechanism to ensure Aboriginal and Torres Strait Islander peoples have a direct say on any national laws, policies, and programs affecting them. It was envisaged that the relationship between the Australian Parliament and Government and the National Voice would be a two-way interaction, with each able to initiate advice or commence discussion around relevant policy matters. Early engagement was seen as key to the success of the role of the National Voice in terms of influencing outcomes.

Careful deliberation was given to the composition of the National Voice.

The final proposal for a National Voice was for a 24-member model including five members representing remote regions, and one member representing the significant number of Torres Strait Islanders living on the mainland. This is a critical refinement from the proposal in the Interim Report wherein each state and the Northern Territory would have two members, and the Australian Capital Territory and the Torres Strait Islands each have one or two members, for a maximum of 18 members. In both the interim and final proposals, there is also an option for the joint appointment of up to two additional members if a particular skillset is required and this is agreed upon between the National Voice members and the Minister for Indigenous Australians.

The National Voice membership would be structurally linked to Local & Regional Voices. Members of the Local & Regional Voices within each state and territory would collectively determine National Voice members from their respective jurisdictions. This membership model draws on the strength, legitimacy, and authority of Local & Regional Voices, particularly as developed under the principles of Inclusive Participation and Cultural Leadership.

The summary of the National Voice Overview can be found at Pages 18 and 19 of the Final Report.

An Indigenous Voice as an integrated system

While the final proposals include models for both Local & Regional Voices and a National Voice, the co-design groups recognised that an Indigenous Voice must be an integrated system in which Aboriginal and Torres Strait Islander peoples' perspectives are appropriately heard at all levels. Consultation feedback demonstrated that local communities want their distinct voices heard by the Australian Parliament and Government, which confirmed the need for such an integrated approach.

The design of the process is deliberately intended to be a two-way formal advice link between Local & Regional Voices and the National Voice, and between the National Voice and the Australian Parliament and Government, as depicted in the Figure below.

Source: Co-Design Process Final Report, 2021:149.

Working with existing bodies

Feedback from the consultation process, particularly the submissions and community consultation sessions, suggested that an Indigenous Voice should not duplicate or usurp existing bodies. However, it was noted that **there is an absence of existing opportunity for all members of a community to be represented or participate and there are also areas where existing arrangements could improve and evolve with the implementation of an Indigenous Voice**. The final proposals in the Co-Design Final Report underline the importance of these relationships and highlight how an Indigenous Voice would work with existing structures, and also consult with people who are not members of any Aboriginal and Torres Strait Islander organisations to gain their perspective. It was anticipated that as the Indigenous Voice arrangements mature, their alignment with existing arrangements would also evolve.

Key themes from the consultations and engagement

Engaging more than 9400 people and organisations over 4 months, the consultation and engagement process sought to build an understanding of the co-design process and the proposals for both the Local & Regional Voices and a National Voice and seek feedback on how the proposals could work in practice and be improved.

The feedback directly influenced the design of the final proposals to the Australian Government detailed in the Co-Design Process Final Report.

What also emerged was a sense of momentum and urgency, and a need to move quickly; a desire for consultation and co-design to continue through implementation; validation of the core proposals put forward by the co-design groups; and calls for security and longevity for an Indigenous Voice. Although the purpose of the co-design process was to design the details of an Indigenous Voice that was only proposed to be legislated, throughout the consultation and engagement phase there was strong support for the enshrinement of the Indigenous Voice in the Australian Constitution. This was particularly important considering the history of Indigenous advisory bodies at the national level. Previous national Indigenous advisory bodies have lacked constitutional protection, leaving them vulnerable to the whims of government, and limiting their ability to drive long term change, as shown in the Table to the right.

Name of National-level Advisory Body	Year Established	Year Abolished	Years Active
Federal Council for the Advancement of Aboriginal & Torres Strait Islanders	1957	1978	21
National Aboriginal Consultative Committee	1972	1977	5
National Aboriginal Conference	1977	1985	8
Aboriginal and Torres Strait Islander Commission	1989	2005	16
National Indigenous Council	2004	2007	3
National Congress of Australia's First Peoples	2010	2019	9
Prime Minister's Indigenous Advisory Council	2013	2017	4
Prime Minister's Indigenous Advisory Council	2017	2021	4

Source: Co-Design Process Interim Report, 2020:119 and PM&C website

Comment

While the work initiated by the previous Government in terms of a co-design process for a legislated Voice to Government, most of the submissions to the co-design process supported constitutional enshrinement because that was the only way a Voice to Parliament could be established with the stability, independence, and authority that it needs.

We know that legislated and non-legislated bodies have been tried in the past, and they have all failed, principally because their very existence depended on the whims of the government of the day. The prevailing views from the consultations and engagement by the co-design process was that for a national Indigenous advisory body to be successful, it requires stability and security about its existence and certainty about the scope of its roles and functions.

We already know a lot about what we are going to be voting on later in the year. In a recent article in The Conversation, UNSW Law Professor Gabrielle Appleby summarised the following points:

- The forthcoming referendum is about recognising Aboriginal and Torres Strait Islander peoples as the First Nations peoples of Australia and providing a structural change to the Constitution that will enable them to speak to Parliament and to Government in order to improve laws and policies that affect them.
- In July 2022, at the Garma Festival on Yolngu Country in Arnhem land in the Northern Territory, the Prime Minister gave a version of words that the Australian people are going to be asked to vote on later this year to enshrine an Indigenous Voice to the Parliament in the Constitution.
- It is not about giving Aboriginal and Torres Strait Islander people any special rights, just providing them with an opportunity to provide input when laws and policies are being made which will affect them. This is consistent with Articles 18 and 19 in the United Nations *Declaration on the Rights of Indigenous Peoples*.
- The Voice to Parliament will not have a veto power and will not be responsible for allocating funds or making decisions about programs.
- Establishing a Voice to Parliament in the Constitution will not cede the sovereignty of Aboriginal and Torres Strait Islander people.

Two groups are currently working with Government on the next steps to a referendum to enshrine an Aboriginal and Torres Strait Islander Voice in the Constitution.

The First Nations Referendum Working Group, co-chaired by Minister Linda Burney and Special Envoy Senator Patrick Dodson, includes a broad cross-section of representatives from First Nations communities across Australia, to provide advice to the Government on how best to ensure a successful Referendum and focus on the key questions that need to be considered in the coming months, including:

- the timing to conduct a successful referendum
- refining the proposed constitutional amendment and question
- the information on the Voice necessary for a successful referendum.

The First Nations Referendum Engagement Group has also been established. Its membership includes those on the Referendum Working Group as well as additional people from the across the country including representatives from land councils, local governments, and community-controlled organisations.

A Constitutional Expert Group has also been established to provide the Referendum Working Group with legal support on constitutional matters relating to the referendum. This includes advice on the draft referendum question and constitutional amendments proposed by the Prime Minister in his address to the Garma Festival. Its members include some of Australia's leading legal and constitutional experts.

The Referendum Working Group is expected to finalise its recommendations to the government, and the constitutional amendment Bill is expected to be tabled in the Parliament in March. The Bill will need to pass both houses of Parliament with an absolute majority before the question can be put to a referendum to be held within two to six months thereafter. Further Briefings will be provided as these developments occur.

Local governments have a role to play both in guiding their communities in the lead up to the referendum, and beyond. Local government minister Kristy McBain, in late 2022, told a meeting of Victorian mayors, councillors, CEOs, executives, and senior officers that she hoped local government would play a role in moves to enshrine a voice for First Nation's people in the constitution. In December 2022, 38 mayors from across Australia issued a joint statement in support of the upcoming referendum for constitutional recognition of Indigenous Australians. As an example, Bayside Council (NSW) unanimously adopted a Mayoral Minute to formally support the Uluru Statement from the Heart and Voice to Parliament in November 2022, and just recently announced that they will embark on a community education and awareness program to support the upcoming referendum include a Voice to Parliament (the Voice) in the constitution.

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