



***Submission to Joint Select Committee on Constitutional
Recognition relating to Aboriginal and Torres Strait Islander
Peoples***

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About ANTaR

ANTaR is a national advocacy organisation working for Justice, Rights and Respect for Australia's First Peoples. We do this primarily through campaigns, advocacy and lobbying.

Our current national campaigns include:

- Constitutional Recognition and Equality – for Constitutional change to recognise Australia's First Peoples and remove discriminatory elements from our founding document; and
- Justice - for action to reduce imprisonment rates and end deaths in custody.

We also engage in national advocacy across a range of policy and social justice issues affecting Aboriginal and Torres Strait Islander communities, including native title, languages and cultures, economic and community development, remote communities services and infrastructure, health and human rights.

ANTaR is a foundational member of the Close the Gap Campaign Steering Committee, the Change the Record Campaign Steering Committee and the Redfern Statement Alliance.

ANTaR has been working with Aboriginal and Torres Strait Islander communities, organisations and leaders on rights and reconciliation issues since 1997. ANTaR is a non-government, not-for-profit, community-based organisation.

'It is shocking to me that in 2014 we are still a country that has ties to our racist past, of the darker periods in our nation's history, such as the White Australia Policy that had at its core the destruction of Aboriginal and Torres Strait Islander families, communities and culture. Australia no longer stands for these attitudes. By recognising Aboriginal and Torres Strait Islander Peoples and removing discrimination, we are sending a powerful message about the way we wish to see ourselves as a nation, as Australians.

We are saying that we truly believe in equality, in a fair go and in non-discrimination for all Australians. We are saying that we truly respect and honour the 60,000 years of Aboriginal and Torres Strait Islander history that is currently missing from our nation's founding document.'

Mick Gooda, 2014ⁱ

Introduction

Thank you for the opportunity to provide some comments to inform the consideration of this *Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples* (The JSC).

This JSC is the second such Committee in the last 5 years (following the 2015 Committee Chaired by Ken Wyatt and Nova Peris) and it also follows the work of the Expert Panel (2012) and now the work of the Referendum Council (2017).

Australia has been waiting for a long time now to have this issue addressed. The First Nations Peoples have been waiting for recognition for 230 years. After a long wait, and countless efforts to bring this issue to the fore, the Gillard Labor Government, with bipartisan support, introduced the *Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012* which made some acknowledgement in legislation and set in law a time limit of two years to determine the way forward for constitutional recognition.ⁱⁱ That deadline has now come and gone.

The process that the Referendum Council, led by Pat Anderson AO and Julian Leeser AC, was commissioned to undertake with bipartisan support was to very directly seek and understand what Australia's First Nations Peoples wanted in terms of constitutional recognition.ⁱⁱⁱ The culmination of that process was the *Uluru Statement from the Heart*^{iv} and the accompanying *Referendum Council Final Report (2017)*^v. It is just over 12-months since First Nations Peoples from around Australia gathered in the red centre of the country to declare the Uluru Statement from the Heart.

The Uluru Statement was a powerful and unique statement of consensus from the many First Nations represented, and it is now time to heed their calls and address how Australia's founding document appropriately acknowledges First Nations People.

Via the Referendum Council, we asked Aboriginal and Torres Strait Islander peoples what they wanted for recognition, and the Uluru Statement was the outcome. How can we now ignore this generous articulation of what First Nations Peoples want for recognition?

The declaration of the Uluru Statement was a proud day for Australia's First People after a long and difficult process, and must be the catalyst for reconciliation. The Uluru Statement clearly showed that symbolic recognition alone will not suffice or be acceptable to Aboriginal and Torres Strait Islander people.

'With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia's nationhood.'^{vi}

Uluru Statement from the Heart

Rather, accompanying the specific and necessary changes required to existing sections of the Constitution (regarding Section 25 and parts of Section 51), First Nations Peoples have stated their preference for a constitutionally inscribed 'Voice' that will oblige the Australian Parliament to listen to them.

Complementing the 'Voice', a Makarata Commission that supports a truth telling process and a working mechanism for treaty building – First Nations Peoples have given us a powerful blueprint to recognition and ultimately, reconciliation.

ANTaR firmly believes that true recognition of Aboriginal and Torres Strait Islander peoples is as necessary for non-Indigenous Australians as it is for the First Peoples of this ancient continent. We all need reconciliation.

The many thousands of ANTaR supporters, both Aboriginal, Torres Strait Islander and non-Indigenous Australians, are ready and waiting to see this happen.

The Referendum of 1967 has been rightly celebrated and acknowledged as a milestone moment for Aboriginal and Torres Strait Islander affairs in Australia. With over 90 per cent support for the Constitutional change, it was an emphatic result that signaled a change in the way the First Nations Peoples of Australia should be considered and respected. However, the changes wrought from 1967 were only partial in effect.

Clearly something must change. The ongoing life expectancy gap and significant health disparities between Aboriginal and Torres Strait Islander peoples and Non-Indigenous peoples; the shameful rates of incarceration; and, the tragedy of child-removal rates that are higher now than at the time of the Apology in 2008 – the wrongs of the past continue to haunt our collective present and blight our brighter future together.

It is now time to complete what began in 1967. ANTaR is confident that a bipartisan campaign for constitutional change based on the Uluru Statement will receive the overwhelming support of the Australian people. It is time for this generation to address the gaping hole in our founding document. The First Nations Peoples that gathered on the red dirt of Uluru have invited us all to walk together 'in a movement of the Australian people for a better future'.^{vii}

The Voice

History shows that Aboriginal and Torres Strait Islander institutions that offer a self-determined voice on policies regarding First Nations Peoples have been created and extinguished at the whim of Government. The closing down of the Aboriginal and Torres Strait Islander Commission (ATSIC) in 2005, without consultation with, or regard to, Aboriginal and Torres Strait Islander peoples is one example of how governments can too easily terminate institutions that facilitate self-determination.

Unless Aboriginal and Torres Strait Islander peoples, their leaders and organisations are at the centre of the discussion about the issues that affect them, and the development of solutions – we are destined to continue the status quo. Self-determination cannot be retrofitted, but rather, must be at the core of recognition.

At his first Closing the Gap Report launch in 2016, Prime Minister Turnbull made a public commitment to ‘do things with Aboriginal people, not do things to’ Aboriginal people.^{viii} The ‘Voice’ proposed by First Nations Peoples in the Uluru Statement offers a principled way for the Prime Minister, his Government and future parliaments, to fulfil this commitment without ceding the sovereignty of the Parliament – its sole power to make and change laws for the Commonwealth.

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)^{ix} was adopted by the General Assembly in 2008 and the Australian Federal Government announced its support for the Declaration in 2009.^x Article 3 of the Declaration states that:

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.^{xi}

Australia is yet to reconcile how it delivers on its commitment to Aboriginal and Torres Strait Islander peoples, as per its support for UNDRIP. The Voice, as articulated by the Referendum Council Final Report, is not proposed as a third chamber of Parliament or of having any legislative power to make, change or veto the laws instituted by Parliament. However, a constitutionally enshrined body provides an authoritative voice for Aboriginal and Torres Strait Islander peoples to provide counsel to Parliament about the laws that regard them. Having such a body embedded in the Constitution removes the easy option of governments silencing the self-determined position of Australia’s First Peoples.

It is well established and understood that many similarly colonised nations have reached treaty or agreement with their First Peoples. Australia has been offered a reasonable, constitutionally conservative proposal to bring us closer to these similar nations.

Finally, the details of what a constitutional body or ‘Voice’ will look like has been left to Parliament, in consultation with Aboriginal and Torres Strait Islander people, to determine. ANTaR strongly recommends that bipartisan support be given to a referendum that proposes a constitutional body for Australia’s First Nations Peoples.

Constitutional Clauses

There have been a number of sensible proposals to solve the existing issues contained in the Constitution, particularly in relation to Sections 25 and parts of Section 51.

ANTaR supports the recommendations made in the Referendum Council Final Report that a Constitutionally enshrined 'Voice' or body '*...should include the function of monitoring the use of the heads of power in section 51 (xxvi) and section 122.*'^{xii} This is the power of a self-determining Voice that can provide a check, although limited to providing advice only, on what legislation looks like based on the existing heads of power sections of the Constitution.

The 2012 Expert Panel proposal to remove Section 25 is still an essential improvement to the Constitution.^{xiii} However, beyond its removal, any further changes must be acceptable to Aboriginal and Torres Strait Islander peoples and the evident lack of specific changes suggested via the Uluru Statement and the accompanying Referendum Council Final Report suggests that unless real change is facilitated through the introduction of a Voice, there is no consensus support for tinkering with the Constitution.

A more profound reform is required.

Pursuing a successful Referendum

ANTaR is confident that the proposed changes to the Constitution will help facilitate a more unified and reconciled nation. In fact, the reforms proposed in the Uluru Statement meet the listed principles of the 2012 Expert Panel that change must:

- i. contribute to a more unified and reconciled nation;
- ii. be of benefit to and in accord with the wishes of Aboriginal and Torres Strait Islander Peoples;
- iii. be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums; and
- iv. be technically and legally sound.^{xiv}

Fundamentally, unless the reforms that are captured in a referendum question have the support of the First Nations Peoples – there is no point going ahead.

The Uluru Statement is the articulation of the changes required by Aboriginal and Torres Strait Islander peoples. As in 1967, we are confident that bipartisan support from the two major parties of the Federal Parliament, coupled with a coordinated information campaign that outlines the qualities of the proposals, will be supported by the overwhelming majority of Australians across the country. ANTaR is ready and willing to contribute to this campaign, to finish what was only partially achieved in 1967. The Voice is a conservative approach to Constitutional reform, as outlined by numerous constitutional experts – including a number of Parliamentarians on all sides.

Finally, and as stated previously, reconciliation is as necessary for non-Indigenous Australians as it is for First Nations Peoples of this continent. The Uluru Statement offers us, collectively, an opportunity to correct the Constitution, for a more just and equitable Australia that we can all be proud of.

Conclusion

Thank you again for the opportunity to comment. We look forward to further conversations with the Joint Select Committee and all members of Parliament to ensure Constitutional Recognition is progressed as a matter of high priority in the national Parliament

ANTaR offers our ongoing support to a process that meets the expectations of Aboriginal and Torres Strait Islander peoples and we are ready to mobilise our supporters to campaign in support of a bipartisan approach that meets those expectations.

We would also welcome the opportunity to meet with the Joint Select Committee to discuss any of the points raised in this submission.

Finally, as proposed by the Referendum Council in their Final Report, ANTaR supports the recommendation *'That an extra-constitutional Declaration of Recognition be enacted by legislation passed by all Australian Parliaments, ideally on the same day, to articulate a symbolic statement of recognition to unify Australians.'*^{xv}

We agree that such a declaration, covering the three parts identified by the Referendum Council, would be a powerful demonstration of our collective desire and commitment to the ongoing process of reconciliation in Australia. This would put us on a more sure footing as we tackle the priority issues of closing the gap in health inequality, life-expectancy disparities, shameful world-leading incarceration rates and the work required to avoid creating a new stolen generation through state-managed child removal.

The priority now must be to achieve cross-party agreement on a timetable and model of reform, negotiated with the Aboriginal and Torres Strait Islander leadership, which includes the substantive elements outlined in the Uluru Statement, to deliver real and meaningful change.

References:

- ⁱ Mick Gooda (2014) Nulungu Reconciliation Lecture - <https://www.humanrights.gov.au/news/speeches/nulungu-reconciliation-lecture>
- ⁱⁱ Aboriginal and Torres Strait Islander Peoples Recognition Bill (2012) - https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r4943
- ⁱⁱⁱ Referendum Council - <https://www.referendumcouncil.org.au/council>
- ^{iv} Uluru Statement from the Heart (2017) - https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart_0.PDF
- ^v Referendum Council Final Report (2017) - <https://www.referendumcouncil.org.au/final-report>
- ^{vi} Uluru Statement.
- ^{vii} Ibid.
- ^{viii} The Hon Malcolm Turnbull MP, *Speech to Parliament on the 2016 Closing the Gap Report* (Speech delivered at the House of Representatives, Canberra, 10 February 2016) <<http://www.malcolmturnbull.com.au/media/speech-to-parliament-on-the-2016-closing-the-gap-report>
- ^{ix} Australian Human Rights Commission - UN Declaration on the Rights of Indigenous Australians - <https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/projects/un-declaration-rights>
- ^x United Nations Declaration on the Rights of Indigenous Peoples - <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>
- ^{xi} Ibid
- ^{xii} Referendum Council Final Report (2017).
- ^{xiii} Expert Panel on Constitutional Recognition - Final Report (2012) – *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* - https://www.pmc.gov.au/sites/default/files/publications/Recognising-Aboriginal-and-Torres-Strait-Islander-Peoples-in-the-constitution-report-of-the-expert-panel_0.pdf
- ^{xiv} Ibid.
- ^{xv} Referendum Council Final Report (2017).