

*Submission on Senate Legal and Constitutional Affairs
Reference Committee's inquiry:*

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With thanks:

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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
- Advocating for treaty and agreement-making processes across Australia.

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.

'Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under our own laws and customs. This our ancestors did, according to the reckoning of our culture, from the Creation, according to the common law from 'time immemorial', and according to science more than 60,000 years ago.

This sovereignty is a spiritual notion: the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.'

The Uluru Statement from the Heart, 2017¹

¹ Uluru Statement from the Heart (2017) - <https://www.1voiceuluru.org/>

Introduction

Thank you for the invitation to contribute to the Senate Committee's considerations regarding Australian 'nationhood, national identity and democracy' in the 21st Century. ANTaR welcomes the opportunity to provide this submission and we are keen to discuss our thoughts further with the Senate Committee throughout your deliberations.

This submission will seek to address each of the areas raised in the Discussion Paper provided and you will appreciate that ANTaR's area of passion, work and expertise is in relation to Aboriginal and Torres Strait Islander affairs. We work closely with Aboriginal and Torres Strait Islander leaders, partner organisations and communities and we seek to reflect the views they have voiced consistently on these issues.

This submission will cover the issues of sovereignty, identity, nation building, treaty and self-government.

We note that the Discussion Paper covers a wide range of issues that have huge implications for the future of Australia. The questions around nationhood, national identity and the future of our democratic processes will need to also consider public policy issues that incorporate the cultural, social and economic.

Understandably, the Discussion Paper only scratched the surface of the issues related to the headline topics and we encourage the Senate Committee to look closely at the implications for:

- The continuing and growing support across Australia for the Uluru Statement from the Heart
- The momentum that is building in a number of states and territories for treaty making processes with the First Nations people of those jurisdictions
- The social and cultural determinants of health of all Australians and particularly the most vulnerable, including Aboriginal and Torres Strait Islander peoples
- The right to self-determination and self-government for Indigenous peoples.

We think that the exploration of these issues (as raised by the Senate Committee in the Discussion Paper) are timely, and a clearer consensus on how to address some of these issues will be to the benefit of Australian society in the coming decades.

Addressing reconciliation between the First Nations peoples of Australia with all of us that have come since is a core priority for any consideration of shared nationhood and identity.

Reconciliation is necessary for all Australians and getting it right will help us collectively be a more confident and inclusive society.

Sustaining democracy

Australia's democratic culture, having been built, evolved and honed since Federation, is internationally recognised as one of the most stable and inclusive in the world. However, for much of that development, the democratic culture of Australia has been developed by and for the franchise of the white (mostly Anglo-Saxon and male) inheritors of the colonising forces that invaded the continent from 1788 onwards.

It took 66 years for the Federated Commonwealth of Australia to ensure the franchise of Aboriginal and Torres Strait Islander peoples in the constitution, via the 1967 referendum. The Commonwealth government then had constitutional responsibility for Aboriginal and Torres Strait Islander peoples and guaranteed their inclusion in the electoral process. The evolution of Australian democracy has been a slow and staggered process, rather than sustaining democracy that was born with a mature state of franchise and recognition.

The democracy is sustained and energised when the citizens are given agency to participate. However, for many Aboriginal and Torres Strait Islander peoples and communities – systemic racism presents a formidable and continuing barrier to participation. Australia is a signatory to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)² where we have obligated ourselves to fulfilling the commitments articulated in the Declaration, including an obligation under Article 3 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.

² United Nations Declaration on the Rights of Indigenous Peoples - https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf

Our democracy must have space and facility to meet the obligations that we have committed to under International agreement and give agency through a Voice for Aboriginal and Torres Strait Islander peoples in Australia.

The Uluru Statement from the Heart, alongside the calls for a constitutionally enshrined voice and a process for agreement-making, called for Truth-Telling to be central to our journey to reconciliation and understanding of our shared history. An appreciation of our democratic systems, processes and institutions should be grounded in truth-telling about how these same systems, processes and institutions have served to include (or otherwise) Aboriginal and Torres Strait Islander peoples. Educating all Australians about the historical and enduring impact of colonisation through intergenerational trauma, dislocation and loss of culture for too many First Nations peoples is necessary for genuine discussions about how we shape our democracy for the future.

Nationhood and the nation state

Australia has a fundamental problem with its foundation that must be rectified in order to have a conversation about national identity and the legitimacy of Australia as a nation-state in the international community.

Landing on the east coast of Australia in 1870, Captain James Cook had instructions from the Crown to claim the continent that come to be known as Australia, with the ‘Consent of the Natives’.³ No consent was sought or given.

Eighteen years later, under the command of Arthur Phillip, the ‘First Fleet’ of colonisers and convicts arrived to take possession. No treaty was sought. Under both British and International law, the claim of sovereignty over this continent was illegal and this has never subsequently been addressed.

The Mabo High Court decision in 1992 showed the fallacy of the basis of Australia’s claim of sovereignty, however, the High Court could not go further and directly recognise the sovereignty of the First Nations as it cannot recognise any sovereignty other than that which has given it authority.⁴ The question of sovereignty and ownership has remained in a state of

³ James Cook’s ‘Secret Instructions’, National Library of Australia - <https://www.nla.gov.au/content/secret>

⁴ Mabo High Court Decision (1992) - <https://aiatsis.gov.au/explore/articles/mabo-case>

limbo ever since. Despite the subsequent Native Title Act 1993⁵ which set out the framework for the recognition of Native Title, the original question of what is the legal basis for British and now Australian sovereignty has not been addressed.

The solution? Australia must finally enter into a negotiated settlement or treaty with the First Nations peoples to truly reconcile the last 230 years of shared history. A number of States and Territories (Victoria, Queensland and the Northern Territory) have already begun treaty processes in their jurisdictions and we expect other states and territories to follow soon.

Following the Uluru Statement from the Heart, the Federal Government must show leadership in this by backing in the formation of a Makarrata Commission that will facilitate and support agreement making across Australia. We are already centuries behind those colonising nations we most closely associate with. Canada, the USA and New Zealand all have treaties with their First Nations peoples and, while not perfect, the treaties frameworks in place have been the mechanism for ongoing dialogue and agreement.

If we can truly settle the genesis of the modern Australian state and reconcile the Australia that has been formed since 1788 with the First Nations that have occupied the continent for at least 60 millennia, then we can talk about a shared national identity.

According to Reconciliation Australian, one of the key goals in reconciliation is that ‘Aboriginal and Torres Strait Islander histories, cultures and rights are a valued and recognised part of a shared national identity and, as a result, there is national unity.’⁶ Increasingly, our society is embracing Aboriginal and Torres Strait Islander cultures, histories and experience. First Nations knowledge, skill and experience has impacted land care, conservation of our natural resources, bushfire mitigation and nation leading primary health services through their Community-Controlled organisations to mention a few. The full potential of our nation will be unlocked as we more fully incorporate Truth Telling and the Aboriginal and Torres Strait Islander experience into our national identity.

⁵ Native Title Act 1993 - <https://www.legislation.gov.au/Details/C2017C00178>

⁶ Reconciliation Australia – ‘What is Reconciliation?’ - <https://www.reconciliation.org.au/what-is-reconciliation/>

Social cohesion and cultural identity

As already mentioned above, truth-telling and honesty about Australia's past over the previous 60,000 years is essential to social cohesion and a fuller understanding of our cultural identities. We live in a plural society where a multitude of political, social and religious beliefs are accommodated and respected. This is only possible when we are honest about our history, in its entirety.

There has already been so much mythologising about Australian values of 'mateship', 'a fair-go', celebrated 'larrikinism' and a supposed anti-authoritarian streak – and a suggestion that these are the unifying cultural identity of Australia. However, the myth never lives up to reality and the fact that our multicultural society is far more nuanced.

Do we have, or should we have a shared cultural identity? How do we recognise Aboriginal and Torres Strait Islander peoples and their cultures that are the oldest continuing cultures in human history, and their influence on how we collectively see ourselves?

The questions raised in the Discussion paper around economic inequality, employment, geography, political divisions and civic engagement are indicative of the angst that arises when the stated values don't equate with the lived reality facing many Australians.

For Aboriginal and Torres Strait Islander people, the health disparities, child removal rates, incarceration rates, third-world housing standards and systemic racism in our public institutions are all barriers to social cohesion.

Many non-Indigenous Australians have joined their voices with the voices of their fellow Aboriginal and Torres Strait Islander citizens in demanding that governments across Australia address these inequalities. ANTaR hopes that the Senate Committee evaluates our stated national values against how well First Nations peoples are able to enjoy the same living standards as everyone else.

The work of the Coalition of Peaks⁷ and many other Aboriginal and Torres Strait Islander peak organisations and their allies is crucial to addressing the structural inequalities and it is our hope that Australia's national identity becomes intrinsic with a fair go for all Australians – not just those that win the lottery of being born with the right gender or skin colour.

⁷ Coalition of Peaks - <https://www.naccho.org.au/programmes/coalition-of-peaks/>

Governing in democracy

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.'

Uluru Statement from the Heart

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.⁸

Unless Aboriginal and Torres Strait Islander peoples, their leaders and organisations are at the centre of the discussion about the issues that effect 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.

Again, our commitments under the UNDRIP includes (Article 4):

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.⁹

A framework under Treaty (or a series of treaties) that embeds and protects the right to self-government for Aboriginal and Torres Strait Islander peoples will be a crucial step forward for Australia. Community-controlled services in health and justice are already sector leading

⁸ ANTaR Submission (2018) - Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples

⁹ UNDRIP 2009

examples of how Aboriginal and Torres Strait Islander communities are far more able than mainstream counterparts to deliver quality, culturally safe public services to, and for, themselves.

Australia governments have been, often with good intentions, failing Aboriginal and Torres Strait Islander peoples for 230 years. As current NT Treaty Commissioner, Professor Mick Dodson has said: "*Treaties have the potential to finally fix the relationship between our colonisers and us. It is something that should have been done 230 years ago*".¹⁰

Australia already operates with 3 levels of government across 9 Federal, State and Territory jurisdictions in our federated democracy. We can handle the additional layer and complexity that comes with self-government for First Nations peoples. The right to self-determination should be supported by a confident Australian democracy that gives agency to its citizens.

Public debate

Australia's political class are dragging the quality of public debate down. The growing partisanship of some elements of the media are exacerbating this by amplifying the divisions within the parliaments of Australia.

Only 8 of 44 referenda proposed to change the Australian constitution have been successful since Federation in 1901. The 2012 Expert Panel on Constitutional Recognition outlined in their final report that for constitutional change to be achieved through referendum, 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.¹¹

¹⁰ <https://www.sbs.com.au/news/australia-s-relationship-with-its-indigenous-peoples-should-have-been-fixed-230-years-ago?fbclid=IwAR0Alz2bm4id5nHnuCG-ctaBm4HfipXNeqPToaoMzJdtCSL-PGAFDydRTMg>

¹¹ 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

While we think the changes proposed by the Referendum Council in 2017 and the First Nations representatives that helped produce the Statement from the Heart in Uluru, meet the criteria for success listed above – we have very little confidence that Parliament can lead the necessary advocacy across the Australian public.

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. And unless there is bipartisan support from the two major parties (Labor and Liberal), genuine, good-faith and informative public debate will not be possible.

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.

The appointment of the Hon. Ken Wyatt as Minister for Indigenous Australians after the May 2019 Federal election, the first Aboriginal man to hold that portfolio, was a historic occasion to be celebrated. Minister Wyatt's early comments that he would support a referendum that would pose the constitutional enshrinement of a First Nations Voice to Parliament, were very quickly undermined by the Prime Minister and his fellow cabinet colleagues. A proposed consultation process on these issues where the core request is denied prior to dialogue, cannot qualify as consultation. This is the state of public debate in Australia when it comes to Aboriginal and Torres Strait Islander peoples.

More than just the 3 per cent of Australians that are Aboriginal and Torres Strait Islander, many Australians want to see bold leadership from our politicians – from all major parties – to honour the invitation to us all that is embodied in the Statement from the Heart.

Conclusion

There is much to celebrate in Australia, what has been built and achieved since 1901. Society has evolved and adapted. The dismantling of the 'White Australia policies', the opening up of our immigration program to welcome peoples from all over the globe that would become citizens and many other developments that have contributed to Australia becoming an open, multicultural society.

The Apology to the Stolen Generations in 2008 and the persistently high levels of support from Australians for reconciliation, closing the gap and constitutional reform indicate that the majority of Australians are ready to do more.

The project of Australia, the creation of a single nationhood that can be enjoyed by First Australians, descendants of British and Irish colonisers and the generations of different ethnicities that have also made Australia home over the last century – is dependant upon correcting the foundations. We are a big country with room for many cultures, identities and beliefs that can be synthesised by and complementary with a national identity that is inclusive, just and fiercely committed to a real fair go. Reconciliation through negotiated settlement between the First Nations and all who have come to Australia since 1788 is the first essential step towards realising the promise of our shared Australian nationhood.