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FOR  
HUMAN RIGHTS

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Dear Secretariat,

## **Submission on the Indigenous Voice Co-Design Process Interim Report to the Australian Government**

Australian Lawyers for Human Rights (**ALHR**) welcomes the opportunity to make this submission on the Indigenous Voice Co-Design Process Interim Report to the Australian Government (**Interim Report**).

### **About ALHR**

ALHR was established in 1993 and is a national network of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged national, state and territory committees as well as specialist national thematic committees. Through the provision of training, education, publications, CLE courses, conferences, seminars and mentoring, ALHR assists members to continue to develop their knowledge of human rights law and incorporate human rights principles into their areas of legal practice in Australia.

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## Introduction

### **ALHR calls for the establishment of a First Nations Voice enshrined in the Constitution.**

Australia stands apart from the vast majority of developed countries in its failure to appropriately recognise First Nations people and address a long, significant history of denying them institutional power and representation in decision-making.

*The Australian Constitution has no bill of rights or equality guarantee. There is no formal recognition of First Nations languages. There was no founding treaty. And Australia's First Nations have no dedicated voice in Australia's political and institutional arrangements.<sup>1</sup>*

ALHR acknowledges the significant work that has gone into the Co-Design Process and we welcome the Government's Interim Co-Design Report. ALHR is, however, concerned that the proposals in the Interim Report do not go far enough to achieve the proposal for a First Nations Voice called for in the 2017 Uluru Statement from the Heart and 2017 Referendum Council report.

ALHR makes this submission in the spirit of constructive contribution with guidance from and reference to the 2017 Uluru Statement from the Heart<sup>2</sup> (**Uluru Statement**), the 2017 Referendum Council Report (**2017 Report**), and submissions made by the Public Lawyers<sup>3</sup> and From the Heart<sup>4</sup>.

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<sup>1</sup> Cape York Institute, "Report to the Referendum Council" June 2017 p.21

<sup>2</sup> Uluru Statement from the Heart, 26 May 2017 available at <https://ulurustatement.org/the-statement>

<sup>3</sup> *Submission: The imperative of constitutional enshrinement* dated 20 January 2021, <https://haveyoursay.voice.niaa.gov.au/submissions/view/sbm15bd4d37275607e51b233> (**Public Lawyers' Submission**).

<sup>4</sup> From the Heart, *Interim Report to the Australian Government: Indigenous Voice Co-Design Process: From the Heart Submission No. 1*, dated January 2021 (**From the Heart Submission No 1**): <https://haveyoursay.voice.niaa.gov.au/submissions/view/sbm15b9049ee34492903763d>

## Recommendations

### ALHR makes the following recommendations:

<p>1. The National Voice should be constitutionally enshrined and legislatively controlled.</p>
<p>2. The Australian Government should honour its election commitment to a referendum once the model for the Voice has been settled.</p>
<p>3. Enabling legislation for the Voice should be passed after a referendum has been held in the next term of Parliament.</p>
<p>4. The membership model for the National Voice must be needs-based to ensure historically underrepresented populations are represented, and evidence is required to justify the membership numbers.</p>
<p>5. The National Voice should act and operate independently from the Parliament and Government.</p>
<p>6. Aboriginal and Torres Strait Islander people, through the Referendum Council Regional Dialogues, the National Constitutional Convention and the Uluru Statement from the Heart, have never suggested the Voice should be a ‘third chamber’ of the Parliament. To retain parliamentary supremacy, the enabling legislation for the Voice should ensure:</p> <ul style="list-style-type: none"><li>a. It does not have a power to veto or block the business of the Parliament;</li><li>b. It cannot introduce or debate legislation in the Parliament; and</li><li>c. Its advice is non-justiciable, which means a failure to consult and engage the National Voice would not be capable of being challenged in a court and would not affect the validity of the relevant law or policy.</li></ul>
<p>7. The National Voice’s advisory function must not be limited to matters of “critical importance.”</p>

8. The obligation on the Australian Government to consult, should be:

- a. consistent with the United Nations Declaration on the Rights of Indigenous Peoples<sup>5</sup> (**UNDRIP**); and therefore
- b. expanded to any legislation, regulations, and policies and administrative decisions that affect the rights of First Nations Peoples as set out in the UNDRIP;
- c. A failure to consult should be understood as an absence of consent and as inconsistent with Australia's endorsement of the UNDRIP.

9. The National Voice should have an international role.

10. In the event that there are issues which transcend local or regional areas, and where:

- there are no appropriate State or Territory bodies that can deal with issues at that level; and
- the Local and Regional Voices, require assistance with providing advice at the State or Territory Level,

it may be appropriate to establish a mechanism for the National Voice to be called on to assist the Local and Regional Voices with preparing and providing advice on such issues.

11. The National Voice should not deliver programs or services such that its resources may be committed in full to the provision of consultation and free, prior, informed consent on matters of law and policy affecting First Nations People. If any Local and Regional Voices which are set up and observed as running well over a period of time, and at a later stage, they desire to manage

<sup>5</sup> UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295, available at: <https://www.refworld.org/docid/471355a82.html> [accessed 22 March 2021]

funds and implement programs to benefit local communities, it may be appropriate to permit this.

12. The National Voice should have the capacity to independently commission its own policy and legal advice, including from governments, Aboriginal and Torres Strait Islander peak organisations and service providers, and other experts.

13. While broad consultation with the Australian population is required for the success of any referendum to constitutionally enshrine a First Nations Voice, the next phase of consultation on the detail of the Voices on matters such as structure, function, impact, scope of the National Voice and Local and Regional Voices, should be targeted to First Nations People, and particularly those who have been historically underrepresented, such as regional and remote communities.

14. The Australian Government should develop a national program to implement the UNDRIP and schedule it to the definition of human rights in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

## Constitutional Enshrinement

**ALHR emphatically calls for a First Nations Voice to be enshrined in the Australian Constitution and for a referendum as a priority.**

The proposal has been described in the Public Lawyers' submission.<sup>6</sup> ALHR agrees that Constitutional enshrinement is essential for the four reasons set out in that submission.

**ALHR submits that enabling legislation for the Voice should be passed after a referendum has been held in the next term of Parliament. For the avoidance of doubt, the National Voice must not be legislated or otherwise implemented before a referendum is held.**

### Two-Stage Process

ALHR supports a two-stage process to establish the Voice as described in the From the Heart submission. There should be a separate, structured process to consider the constitutional, legislative and executive options to enact the National Voice following the completion of the Voice Co-Design Final Report. This process will result in:

- An exposure draft bill for the Voice as per the final Co-Design report to give the Australian public a comprehensive look at the details of the Voice before a referendum is held;
- A draft constitutional amendment for a new provision for a Voice that will then be put to the Australian people for a vote in a referendum; and A pathway to a referendum in the next term of Parliament.

### United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

**ALHR notes that the UNDRIP sets the standard of achievement to be pursued in a spirit of partnership and mutual respect between Indigenous peoples and non-Indigenous peoples.** Australia endorsed the UNDRIP in 2009. Since then, in international forums, Australia has committed to take actions to implement the UNDRIP and promote Indigenous people's enjoyment of rights on an equal basis.<sup>7</sup> The UNDRIP should guide and inspire new

<sup>6</sup> *Submission: The imperative of constitutional enshrinement* dated 20 January 2021, <https://haveyoursay.voice.niaa.gov.au/submissions/view/sbm15bd4d37275607e51b233>.

<sup>7</sup> Australian Human Rights Commission Fact Sheet Australia's Third UPR 2021

legislation and new mechanisms for dialogue with Indigenous peoples, including the constitutional enshrinement of the National Voice here in Australia. As Ms June Oscar AO, Aboriginal and Torres Strait Islander Social Justice Commissioner, said in 2019, constitutional reform is one of the next logical steps on the journey of implementing the UNDRIP.<sup>8</sup>

Relevantly, Articles 3 and 4 of the UNDRIP state that Indigenous peoples have the right to self-determination, and in exercising that right, have the right to autonomy or self-government in matters relating to their internal and local affairs. While establishing a Voice in the Constitution would be a far cry from self-government, it would go some way to partnering with, and respecting, Indigenous peoples. As eloquently phrased in the Public Lawyers' submission, *"[c]onstitutional recognition is the highest expression our political system can give to an Australian identity based on an increasingly respectful relationship between First Nations and the Australian polity."*

ALHR notes that the right of self-determination of peoples is also enshrined in binding international law via the Charter of the United Nations (**UN Charter**)<sup>9</sup>, The International Covenant on Civil and Political Rights (**ICCPR**)<sup>10</sup>, and The International Covenant on Economic, Social and Cultural Rights (**ICESCR**).<sup>11</sup>

The UNDRIP and other relevant international human rights standards are discussed further throughout the remainder of this submission below.

### Exclusion of constitutional enshrinement from terms of reference

ALHR notes that the question of constitutional enshrinement was deliberately excluded in the terms of reference for the Interim Report as it has been reported as "a separate matter for government".<sup>12</sup> ALHR acknowledges that one reason there may be a preference for the

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<sup>8</sup> 10th Anniversary of the UN General Assembly adopting the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) ACT Human Rights Commission, <https://humanrights.gov.au/about/news/speeches/10th-anniversary-un-general-assembly-adopting-un-declaration-rights-indigenous>.

<sup>9</sup> United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available at: <https://www.refworld.org/docid/3ae6b3930.html> [accessed 23 March 2021]

<sup>10</sup> Article 1, UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <https://www.refworld.org/docid/3ae6b3aa0.html> [accessed 23 March 2021]

<sup>11</sup> Article 1, UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <https://www.refworld.org/docid/3ae6b36c0.html> [accessed 23 March 2021]

<sup>12</sup>

<https://www.smh.com.au/politics/federal/indigenous-leaders-barred-from-discussing-constitutional-reform-20200211-p53zrw.html>.



passing of legislation to establish a Voice, rather than constitutional enshrinement is the historic e limited success of prior referendums in Australia.<sup>13</sup>

**However, ALHR disagrees with the Federal Government’s decision in setting the terms of reference for the Interim Report to dissect the idea of the First Nations Voice and constitutional enshrinement. The concept of a First Nations Voice was proposed in the Uluru Statement and described in the 2017 Report as being one that is constitutionally enshrined, not merely established through legislation.**

This was the form of recognition of the unique place of our First Nations peoples, historically, and in modern society that was called for by the Uluru Statement.

**Accordingly, ALHR submits that constitutional enshrinement to ensure enduring and meaningful protection of the First Nations Voice is the most fundamental element of the First Nations Voice. It is not therefore appropriate to decouple the First Nations Voice from constitutional enshrinement.**

Further, ALHR is concerned that the establishment of a Voice through legislation,<sup>14</sup> presents a critical risk to the success of the Voice as it allows for subsequent abolition through legislation. We have observed this previously, such as with the abolishment of the Aboriginal and Torres Strait Islander Commission (**ATSIC**), which had been a significant Indigenous representative body within Australian political institutions.

**The National Voice seeks to establish meaningful representative recognition and participation of First Nations people in government processes that impact them. It should not be able to be legislated out of existence.**

As stated in the Public Lawyers’ submission, a Voice that is only established by legislation would be continuously faced with the “*on-going possibility of abolition, would be restricted in its capacity to speak necessary truths to government and parliament and to properly represent the views of [First Nations peoples]*”. Further, ALHR is concerned it may leave open the possibility of it being ignored by Parliament.

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<https://www.abc.net.au/news/2020-11-15/ken-wyatt-wants-indigenous-voice-laws-to-pass-before-election/12885306>

<sup>14</sup>

<https://www.abc.net.au/news/2020-11-15/ken-wyatt-wants-indigenous-voice-laws-to-pass-before-election/12885306>

## Conclusion

The First Nations Voice proposal has been described by the former Chief Justice of the High Court of Australia, the Hon. Murray Gleeson AC QC, as a model that would be “constitutionally entrenched but legislatively controlled”.<sup>15</sup> The proposal has been described in the Public Lawyers’ submission.<sup>16</sup>

This is a historic and once-in-a-generation opportunity for meaningful constitutional reform as called for by First Nations people.

**ALHR strongly submits that, rather than abandon constitutional enshrinement, the Australian Government should:**

- 1. honour its election commitment to a referendum once the model for the Voice has been settled;**
- 2. pass enabling legislation for the Voice after a referendum has been held in the next term of Parliament;**
- 3. invest in a national bipartisan campaign supporting constitutional reform.**

## Representation and Structure of Membership Models

The Interim Report proposes two models for the National Voice.

The first model involves a ‘structurally linked’ membership model where National Voice members are sourced from the Local and Regional Voice structures.

Alternatively, the second model would require National Voice members to be directly elected and sourced from each state, territory, and Torres Strait Island.

**Regardless of the model, ALHR submits that:**

1. It is integral that the National Voice meets the standards set out in the UNDRIP and the core international human rights treaties.<sup>17</sup>

<sup>15</sup> Murray Gleeson, ‘Recognition in Keeping with the Constitution: A Worthwhile Strategy’ (Uphold and Recognise, 2019).

<sup>16</sup> <https://haveyoursay.voice.niaa.gov.au/submissions/view/sbm15bd4d37275607e51b233>.

<sup>17</sup> The [International Covenant on Civil and Political Rights](#) (ICCPR); the [International Covenant on Economic, Social and Cultural Rights](#) (ICESCR); the [International Convention on the Elimination of All Forms of Racial Discrimination](#) (CERD); the [Convention on the Elimination of All Forms of Discrimination against Women](#) (CEDAW); the [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#) (CAT); the [Convention on the Rights of the Child](#) (CRC); the [Convention on the Rights of Persons with Disabilities](#) (CRPD).

2. First Nations communities must be able to select members, and hold them directly accountable, according to their own law and custom, systems and structures. Anything less would detract from the effectiveness and legitimacy of the National Voice. In this regard, there must also be evidence-based justification behind the number and representation of National Voice membership.
3. The National Voice must contain safeguards to preserve the diversity of First Nations opinions and prevent the over-concentration of authority in recurrent, established individuals. ALHR supports the call in the *From the Heart Submission No. 1* for a need-based model. There must be opportunities for previously unheard, community-based voices to contribute to the national discussion. Specifically, the needs of historically under-represented communities, for example those living in regional and remote areas of Western Australia, Queensland and Northern Territory, must be better addressed. In regard to the quantum of core membership numbers, it is not presently clear whether 16 or 18 will be sufficient to address the varying needs of First Nations communities. For the reasons stated in *From the Heart Submission No. 1*,<sup>18</sup> this will require careful consideration in balancing between popular representation and needs-based representation. Further, as noted in that submission, evidence is required to demonstrate why either 16 or 18 members will produce optimal outcomes for First Nations peoples, particularly people from regional and remote communities, and how it will not be a continuation of the historical under-representation of those populations.
4. Finally, ALHR has a number of concerns with the proposed character tests in determining the eligibility of members. The character tests include questions surrounding a candidate's criminal history and bankruptcy, which are arguably inappropriate in light of the fact that First Nations peoples are one of the most incarcerated populations globally and face significant ongoing systemic barriers in education and socio-economic status that prevent the attainment of financial literacy on an equal footing with non-Indigenous Australians.

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<sup>18</sup> <https://haveyoursay.voice.niaa.gov.au/submissions/view/sbm15b9049ee34492903763d>.

## Legitimacy

The National Voice must be capable of attracting support and credibility from First Nations communities, as well as the majority of Australians. To ensure this, transparency, consultation and shared outcomes should be embedded into the National Voice's functions. This is an opportunity to leverage the value of local knowledge and enhance Federal law and policy.

Moreover, enshrining a First Nations Voice in the Constitution is likely to give it greater legitimacy, from the perspective of both Indigenous and non-Indigenous Australians. ALHR is concerned that establishing a Voice through legislation only will diminish the credibility and significance of the Voice from the perspectives of both Indigenous and non-Indigenous Australians, and reduce it to symbolic or tokenistic functions. This outcome will be unacceptable in the context of international human rights standards and moreover, the ongoing issues facing our First Nations people, the historical lack of institutional power and representation in decision-making and the systemic discrimination and racism against First Nations peoples.

## Scope of Function

### **Free, prior and informed consent of Indigenous Peoples at international law**

ALHR submits that international standards and norms should inform the structure, scope and role of the National Voice and the way in which the Parliament interacts with it. This is particularly important in relation to the obligation to consult and the expectations of consultation.

The United Nations Office for the High Commissioner of Human Rights (**OHCHR**), notes that the principle of free, prior and informed consent is linked to binding treaty norms, including the right to self-determination affirmed in common Article 1 of the ICCPR and ICESCR. "When affirming that the requirement flows from other rights, including the right to develop and maintain cultures, under article 27 of the ICCPR and article 15 of the ICESCR, the treaty bodies have increasingly framed the requirement also in light of the right to self-determination."

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<sup>19</sup> United Nations Office of the High Commissioner for Human Rights, "Free, Prior and Informed Consent of Indigenous Peoples", Prepared by: Indigenous Peoples and Minorities Section, OHCHR Rule of Law, Equality and Non-Discrimination Branch. September 2013 p.1

The United Nations Human Rights Committee (**UNHRC**) has stated that with regard to the cultures of indigenous peoples and the use of their traditional lands and resources, Article 27 of the ICCPR includes the **positive duty** of the State to “*ensure the effective participation of members of minority communities in decisions which affect them.*”<sup>20</sup> Further, in numerous of its concluding observations,<sup>21</sup> the UNHRC has consistently called on States Parties to respect their duty to “consult with indigenous peoples prior to any economic development or granting of any resource concessions within their traditional lands or territories.”<sup>22</sup>

Further, the United Nations Committee on the Elimination of Racial Discrimination (**CERD**), has:

- called on States Parties to “respect the principle of free, prior, and informed consent of indigenous peoples in all matters covered by their specific rights;<sup>23</sup>
- called on States Parties to “obtain free and informed prior consent when the preservation of (Indigenous) cultural resources, especially those associated with way of life and cultural expression, are at risk.”<sup>24</sup>
- called on States parties to ensure that Indigenous peoples have equal rights to participate in public life and stresses that no decisions relating directly to indigenous peoples are to be taken without their informed consent<sup>25</sup>; and
- highlighted the obligation of States to ensure that the right of indigenous peoples to free, prior and informed consent is respected in the planning and implementation of projects affecting the use of their lands and resources.<sup>26</sup>

Article 18 of the UNDRIP states that Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by

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<sup>20</sup> UN Human Rights Committee (HRC), CCPR General Comment No. 23: Article 27 (Rights of Minorities), 8 April 1994, CCPR/C/21/Rev.1/Add.5, available at: <https://www.refworld.org/docid/453883fc0.html> [accessed 24 March 2021]

<sup>21</sup> See for instance: See, e.g., U.N. High Comm’r. for Human Rights, Concluding observations of the Human Rights Committee: Chile, ¶ 19, U.N. Doc. CCPR/C/CHL/CO/5 (March 12-30, 2007); U.N. High Comm’r. for Human Rights, Concluding observations of the Human Rights Committee: Panama, ¶ 21, U.N. Doc. CCPR/C/PAN/CO/3 (Apr. 17, 2008); U.N. High Comm’r. for Human Rights, Concluding observations of the Human Rights Committee: Nicaragua, ¶ 21, U.N. Doc. CCPR/C/NIC/CO/3 (Dec. 12, 2008).

<sup>22</sup> Tara Ward “The Right to Free, Prior, and Informed Consent: Indigenous Peoples’ Participation Rights within International Law” *Northwestern Journal of International Human Rights*, Volume 10 Issue 2 Winter 2011 p. 56

<sup>23</sup> CESCR, General comment No. 21 Right of everyone to take part in cultural life (art. 15, ¶ 1 (a), of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/GC/21 (Dec. 21, 2009)

<sup>24</sup> *Ibid.*

<sup>25</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 23: Political and Public Life, 1997, A/52/38, available at: <https://www.refworld.org/docid/453882a622.html> [accessed 23 March 2021]

and see OHCHR Op. Cit. p.1

<sup>26</sup> *Ibid.*

themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions. Further, Article 19 provides that national governments shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Pursuant to Articles 19 and 32 of the UNDRIP respectively, States must have consent as the objective of consultation before acting to adopt legislation or administrative policies that affect indigenous peoples or undertaking of projects that affect indigenous peoples' rights to land, territory and resources, including mining and other utilisation or exploitation of resources. Further, in certain circumstances, there is an obligation to **obtain** the consent of the indigenous peoples concerned, beyond the general obligation to have consent as the objective of consultations.<sup>27</sup>

### Interim Report and consultation

The Interim Report proposes that the Australian Government would only be **obliged** to engage and consult with the First Nations Voice on a very narrow range of matters, and the Australian Government would be **expected** to consult on a broader range of matters that “significantly affect Aboriginal and Torres Strait Islander peoples”.

#### **ALHR disagrees with the obligation to consult being limited to:**

- laws that use the race power (section 51(xxvi)) in the Australian Constitution;
- laws which are special measures under or seek to suspend the *Racial Discrimination Act 1975* (Cth); and
- laws using the territories power (section 122) the Australian Constitution.

ALHR is concerned that the National Voice is only *expected* to be consulted on matters that “significantly affect Aboriginal and Torres Strait Islander peoples” . The example given in the Interim Report (p 53) as a matter that the Australian Government would only be “expected” to consult on is any laws or policies for the development of the Community Development Program which was not a special measure under the *Racial Discrimination Act 1975* (Cth) and did not rely on the race power in the Australian Constitution.

As noted in the Joint NGO Submission to Australia’s Third Universal Periodic Review:

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<sup>27</sup> Articles 19 and 29 UNDRIP, Op. cit.

*The Community Development Program racially targets, with 85% of 35,000 participants being Aboriginal and Torres Strait Islander Peoples. It requires remote participants to work for welfare payments, with additional onerous obligations. It has applied financial penalties disproportionately, giving 350,000 penalties over two years, resulting in cuts to payments, causing hunger.<sup>28</sup>*

A similar scheme to the Community Development Program, should not be allowed to be implemented. To ensure that this does not occur, it is not sufficient nor consistent with the above outlined international standards for the Australian Government only to be “expected” to consult on any laws or policies for the development of similar schemes.

**ALHR strongly submits that the Australian Government should consult the National Voice on:**

- **any legislation, regulation or policy which affects the rights of First Nations peoples, as set out in the UNDRIP; and**
- **any other matters that significantly affect Aboriginal and Torres Strait Islander peoples.**

ALHR submits that the following should be understood as the absence of free, prior and informed consent:

- an express statement by the National Voice that it does not consent to any matter that it has been engaged with and consulted on;
- failure by the Australian Government to engage with and consult the National Voice on matters within its scope.

The Interim Report seeks to limit the function of the Voice to providing advice only on matters of so-called “critical importance”. ALHR submits that this is inconsistent with the UNDRIP framework endorsed by Australia in 2009. ALHR reiterates the expression of support in the From the Heart Submission for the following position of the National Co-Design Group:

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<sup>28</sup> Australia’s 3rd Universal Periodic Review, Joint NGO Submission on behalf of the Australian NGO Coalition, dated April 2020, <https://awava.org.au/wp-content/uploads/2020/07/UPR-Australian-NGO-Coalition-Submission-domestic-release-with-forward.pdf>

*Further, legislative and policy processes cannot be separated and generally the best opportunity to influence and advise on proposed laws and policies is in the early stages of policy development. The National Co-design Group stated the National Voice should be involved, where appropriate, in the legislative and policy processes from the beginning to the end, at multiple points. This would necessarily require providing advice to both the Parliament and Australian Government.<sup>29</sup>*

ALHR notes that, pursuant to Articles 19 and 32, the UNDRIP requires States to consult and cooperate in good faith with the Indigenous peoples through their own representative institutions in order to obtain their **free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them**<sup>30</sup>

Indeed, the UNDRIP specifically establishes that States **must** have consent as the objective of consultation before any of the following actions are taken:

- the adoption of **legislation or administrative policies that affect indigenous peoples**,<sup>31</sup> and
- the undertaking of projects that affect indigenous peoples' rights to land, territory and resources, including mining and other utilisation or exploitation of resources<sup>32</sup>.

ALHR submits that the function of the Voice should be consistent with Articles 19 and 32 of the UNDRIP as well as the overall aim and spirit of the UNDRIP's principles in respect of self-determination, free, prior and informed consent and consultation. It is imperative that the National Voice must be able to advise on a sufficiently wide range of matters that pertain to Indigenous affairs.

ALHR therefore has strongly held concerns that the limitation on the proposed scope of the National Voice's advisory function to matters of "critical importance":

- infringes upon the national Voice's efficacy; and
- fails to meet the standards established under the UNDRIP - standards that Australia has committed to implement.

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<sup>29</sup> From The Heart Submission Op. cit.p.7 and see National Indigenous Australians Agency (2020). Indigenous Voice Co-Design Process: Interim Report to the Australian Government. [online] Indigenous Voice: Resources, p.46. Available at: <https://voice.niaa.gov.au/sites/default/files/2021-01/indigenous-voice-codesignprocess-interim-report-2020.pdf> [Accessed 10 Jan. 2021]

<sup>30</sup> Article 19 United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295

<sup>31</sup> Ibid, Article 19

<sup>32</sup> Ibid Article 32



In order to properly protect and respect the human rights of First Nations peoples, particularly in light of Australia's past failures to address First Nations people's lack of institutional power and representation in decision-making, , ALHR submits that the National Voice should be empowered with the scope to advise on any legislation, regulation, policy or administrative measure which affects the rights of First Nations Peoples as set out in the UNDRIP.

### Power to withhold consent

ALHR notes that Aboriginal and Torres Strait Islander people, through the Referendum Council Regional Dialogues, the National Constitutional Convention and the Uluru Statement from the Heart, have never suggested the Voice should be a 'third chamber' of the Parliament.<sup>33</sup> ALHR notes the position outlined within From the Heart's submission that "*to retain parliamentary supremacy, the enabling legislation for the Voice should ensure:*

- a. *It does not have a power to veto or block the business of the Parliament;*
- b. *It cannot introduce or debate legislation in the Parliament; and*
- c. *Its advice is non-justiciable, which means a failure to consult and engage the National Voice would not be capable of being challenged in a court and would not affect the validity of the relevant law or policy.*<sup>34</sup>

ALHR takes this opportunity to note that in order for the National Voice to fully comply with the framework Australia has agreed to adopt under the UNDRIP, there are specific circumstances in which the explicit consent of First Nations voices should be obtained, namely: laws which provide for the relocation of indigenous peoples from their lands or territories (Article 10 UNDRIP); and

- The storage or disposal of hazardous materials on indigenous peoples' lands or territories (Article 29 UNDRIP).

ALHR further submits that the explicit consent of First Nations voices should be a requirement in respect of:

- laws which are special measures under the *Racial Discrimination Act 1975* (Cth); and
- laws which propose to suspend the *Racial Discrimination Act 1975* (Cth) or which seek to suspend that Act.

<sup>33</sup> From The Heart Submission Op. cit. P.7

<sup>34</sup> From the Heart Submission Op. cit. p.7

## Power to independently commission policy and legal advice

ALHR submits that in order to function as an effective voice and provide value for both the Parliament and Government, and to Aboriginal and Torres Strait Islander people, the National Voice should have “the capacity to independently commission and manage its own policy and legal advice, including from governments, Aboriginal and Torres Strait Islander peak organisations and service providers, and other experts.”<sup>35</sup>

## International role

ALHR strongly supports the suggestion in the Interim Report that the National Voice might have an international role, consistent with the Indigenous voices in other countries. We note the work currently underway internationally toward establishing an Enhanced Indigenous Peoples’ Participation at the United Nations.<sup>36</sup>

ALHR notes the valuable historic contributions made at the international level by ATSIC, particularly its 1992 contributions to the 10th session of the United Nations Working Group on Indigenous Populations, which was developing the draft Declaration of the Rights of Indigenous Peoples.<sup>37</sup> ALHR likewise notes that ATSIC’s status from 1995 until its abolition as an accredited non government organisation (NGO) in the United Nations, gave it access to international forums independent of the Australian Government.

ALHR submits that establishing an international role for the National Voice would give the Australian Government an opportunity to show United Nations Member States and the Australian people that its long history of disenfranchising First Nations People is at an end. When Australia appeared before the UN Human Rights Council for its Universal Periodic Review (UPR) in Geneva on January 20, 2021 numerous countries raised their significant concerns with respect to the severe inequality and systemic racism that continues to be experienced by Australia’s First Nations people, a pattern reaching back decades in the context of Australia’s engagement with the United Nations.<sup>38</sup>

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<sup>35</sup> From the Heart Submission Op. cit. p.7

<sup>36</sup> See:

<https://www.un.org/development/desa/indigenouspeoples/participation-of-indigenous-peoples-at-the-united-nations.html>

<sup>37</sup> Will Sanders, “Missing ATSIC: Australia’s need for a strong Indigenous representative body p115 available at <http://press-files.anu.edu.au/downloads/press/n4300/pdf/ch06.pdf>

<sup>38</sup> See for example, United Nations General Assembly, Human Rights Council Working Group on the Universal Periodic Review Thirty-seventh session 18-29 January 2021, *Compilation on Australia Report of the Office of the*

## Local and Regional Voices

### Scope

ALHR agrees with the proposal for Local and Regional Voices:

- with the scope of undertaking community engagement, providing advice to governments and other stakeholders, undertaking and facilitating shared decision-making with governments and engaging with the National Voice; and
- with the breadth of functions within the scope to be decided by each Local and Regional Voice and expected to evolve over time.

As with the National Voice, ALHR supports the proposal that the Local and Regional Voices are not tasked with managing any funds or implementing any programs, when initially set up.

However, ALHR submits that if any Local and Regional Voices which are set up and observed as running well over a period of time, and at a later stage, those Local and Regional Voices desire to manage funds and implement programs to benefit local communities, then it may be appropriate to permit this.

### Principles and minimum standards

ALHR supports the 9 principles described in the Interim Report which will be developed to guide the formation and operation of the Local and Regional Voices and government arrangements for engaging with those Voices.

ALHR supports the proposal that Local and Regional Voices should be expected to meet minimum standards.

### Establishment of Local and Regional Voices

The Interim Report states that for transparency, the “process for recognition should be included in legislation”. ALHR submits that the concept of the First Nations Voice, comprised of both the National Voice and the Local and Regional Voices, should be enshrined in the Australian Constitution.

As stated in the Public Lawyers' submission, what is meant by "constitutionally enshrined" is that the existence and core function of the First Nations Voice should be included in the written text of the Constitution, alongside a power enabling the Commonwealth Parliament to determine its composition, additional functions, powers and procedures in legislation.

### **Linkage with National Voice**

ALHR supports the proposal that the Local and Regional Voices would be permitted to submit advice on the following matters to the National Voice:

- systemic issues associated with national policies and programs;
- the development of national policies and programs; and
- matters that impact Aboriginal and Torres Strait Islander communities to a significant degree and would benefit from a national, coordinated response.

ALHR agrees that the National Voice should not be called on for dealing with purely local or regional issues to ensure that it continues to have the capacity to deal with issues that need to be dealt with at the national level.

However, ALHR notes that in the event that there are issues which transcend local or regional areas, and where:

- there are no appropriate State or Territory bodies that can deal with issues at that level; and
- the Local and Regional Voices, require assistance with providing advice at the State or Territory Level,

it may be appropriate to establish a mechanism for the National Voice to be called on to assist the Local and Regional Voices with preparing and providing advice on such issues.

### **Scope of Future Consultation toward the National Voice**

ALHR submits that the next steps in consultation on the details of the proposals for the National Voice should be focused on prioritising a comprehensive consultation process with First Nations people and their communities regarding detail such as the structure, function, scope and membership of the National Voice and Local and Regional Voices.. This process should take particular care to engage with First Nations people who have been historically underrepresented, such as regional and remote communities.

ALHR acknowledges that it understands that Australia-wide consultation will be a fundamental element in ensuring the success of any referendum, and in seeking nationwide support for the establishment of a First Nations Voice. ALHR submits that broader Australia-wide consultation should not take place until after a comprehensive process of consultation on the structure, function, scope and membership of a National Voice has been completed with First Nations people. This is consistent with the principles of self-determination and free, prior, informed consent whereby procedures and institutions should be determined by indigenous peoples themselves.

## Conclusion

As currently proposed, ALHR is concerned that the National Voice and Local and Regional Voices will not give sufficient institutional power to First Nations peoples to influence the creation of laws, regulations, policies or administrative decisions that affect them.

**ALHR submits that the Voice,, must be constitutionally enshrined in order to be consistent with the First Nations Voice called for in the Uluru Statement and the 2017 Report.**

*“The [Regional] Dialogues engaged 1200 Aboriginal and Torres Strait Islander delegates – an average of 100 delegates from each Dialogue – out of a population of approximately 600,000 people nationally. This is the most proportionately significant consultation process that has ever been undertaken with First Peoples. Indeed, it engaged a greater proportion of the relevant population than the constitutional convention debates of the 1800s, from which First Peoples were excluded.”<sup>39</sup>*

Further, evidence is required in relation to how the membership model proposed for the National Voice will address the historical underrepresentation of regional and remote populations.

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<sup>39</sup> Referendum Council (2017). Final Report of the Referendum Council. [online] Available at: [https://www.referendumcouncil.org.au/sites/default/files/report\\_attachments/Referendum\\_Council\\_Final\\_Report.pdf](https://www.referendumcouncil.org.au/sites/default/files/report_attachments/Referendum_Council_Final_Report.pdf)

If you would like to discuss any aspect of this submission, please contact me at [president@alhr.org.au](mailto:president@alhr.org.au)

Australian Lawyers for Human Rights would likewise be very happy to provide any further in person or written submission that may be of assistance.

Yours faithfully



Kerry Weste,

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*Any information provided in this submission is not intended to constitute legal advice, to be a comprehensive review of all developments in the law and practice, or to cover all aspects of the matters referred to. Readers should take their own legal advice before applying any information provided in this document to specific issues or situations.*