



public interest
ADVOCACY CENTRE

Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples

Submission to the Joint Select Committee on Constitutional Recognition
Relating to Aboriginal and Torres Strait Islander People

11 June 2018

About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal centre based in Sydney.

Established in 1982, PIAC tackles barriers to justice and fairness experienced by people who are vulnerable or facing disadvantage. We ensure basic rights are enjoyed across the community through legal assistance and strategic litigation, public policy development, communication and training.

Our work addresses issues such as:

- Reducing homelessness, through the Homeless Persons' Legal Service
- Access for people with disability to basic services like public transport, financial services, media and digital technologies
- Justice for Aboriginal and Torres Strait Islander people, through our Indigenous Justice Project and Indigenous Child Protection Project
- Access to affordable energy and water (the Energy and Water Consumers Advocacy Program)
- Fair use of police powers
- Rights of people in detention, including equal access to health care for asylum seekers (the Asylum Seeker Health Rights Project)
- Transitional justice
- Government accountability.

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The Public Interest Advocacy Centre office is located on the land of the Gadigal of the Eora Nation.

Introduction

PIAC is pleased to have the opportunity to make a submission to this Inquiry. We do so to express our strong support for the Uluru Statement for the Heart and to urge the Committee to endorse the Uluru Statement as the basis for constitutional change and complementary legislative measures.

As this inquiry's terms of reference note, there have been a number of recent reports and processes that have considered the issue of recognition of Aboriginal and Torres Strait Islander Peoples in the Australian constitution.

These have led us to the Uluru Statement from the Heart which in turn has been endorsed by the Referendum Council.

Powerful and profound, the Uluru Statement is the product of an unprecedented process, through which Indigenous Australians have come together to articulate their vision for how the Australian Constitution should now recognise them and how meaningful reconciliation ('the coming together after a struggle') can be achieved.

PIAC welcomes the generous invitation contained in the Uluru Statement to participate in the movement towards genuine reconciliation, and a better future for all Australians.

We respectfully urge the Committee to focus the attention of this Inquiry on how the vision set out in the Uluru Statement can now be realised.

The criteria for referendum success

As the Committee will be aware, the Uluru Statement calls for:

1. Voice: a First Nations Voice to Parliament enshrined in the Constitution.
2. Treaty: a process for agreement making.
3. Truth: truth-telling about our history.

The processes of agreement-making and truth-telling are to be supervised by a Makarrata Commission.

We submit that each of these proposals satisfy the four criteria of referendum success set out in the Final Report of the Expert Panel on Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution, namely that they

- i. contribute to a more unified and reconciled nation;
- ii. be of benefit to and 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.

Unity and reconciliation

The Uluru Statement from the Heart provides a path to unity and reconciliation for our nation.

Its invitation to all Australians to walk with Aboriginal and Torres Strait Islander people goes beyond the ‘journey’ to implement the changes proposed in the Uluru Statement. The Uluru Statement seeks to re-cast the relationship between Australia and its First Nations, to achieve ‘a fuller expression of Australia’s nationhood’.

It does this both symbolically and practically, through a constitutionally enshrined Voice to Parliament; a process for agreement making that respects the coexisting sovereignty of Aboriginal and Torres Strait Islander peoples; and truth telling as a basis for reconciliation.

These are the foundations of the road upon which all Australians can walk together.

Of benefit to and according with the wishes of Aboriginal and Torres Strait Islander peoples

The proposals in the Uluru Statement are demonstrably of benefit to Aboriginal and Torres Strait Islander peoples, addressing the structural nature of the disadvantage that continues to be faced by Aboriginal and Torres Strait Islander people. We cannot hope to ‘close the gap’ over a chasm of structural powerlessness.

Resulting from an unprecedented process of deliberative decision-making led by Aboriginal and Torres Strait Islander people, the Uluru Statement from the Heart is also the only option that can be said to accord with the wishes of Aboriginal and Torres Strait Islander peoples.

The depth and breadth of the engagement undertaken through the First Nations Regional Dialogues culminating in the National Constitutional Convention in Uluru is set out in the report of the Referendum Council. This was a process based on inclusion and undertaken with integrity; designed and led by Aboriginal and Torres Strait Islander people.

PIAC submits, with respect, that the Committee should not reopen these issues. For the first time in our history, Australia’s First Peoples have had a real opportunity to speak collectively on their recognition in the Constitution. Their expectations have been made very clear.

Indeed, PIAC urges the Committee to consider the grave risk to reconciliation and unity that a failure to take up the invitation of the Uluru Statement would pose. Professor Megan Davis has observed:

[The Barunga Statement] heavily influenced Uluru. It was part of the guiding principles. It was alive in the discussions about treaty, broken promises and unfinished business.

The political response to Barunga was still very alive in the dialogues. It fed the cynicism of everyone participating in the process. It fuelled the fatigue, and the disappointment, and the anger at us when we rocked up. ‘They will not listen. Why are you wasting our time?’ Is what we heard over and over again.

We had to urge people to suspend their cynicism. We had to urge them to suspend their disbelief that the Australian political and legal system can't change itself to better accommodate their interests. I used to say to them like Hilary Charlesworth taught me, that law reform is about imagination. So you have to imagine that the world can change. You have to imagine that things can be better.¹

This collective act of imagination allowed Aboriginal and Torres Strait Islander people to produce the Uluru Statement from the Heart, and offer it to the Australian community. If we reject it, we must expect to amplify cynicism, fatigue, disappointment, and anger.

Capable of broad support

The Uluru Statement from the Heart is also capable of being supported by an overwhelming majority of Australians from across the political and social spectrums.

The constitutional change it proposes is, as noted by the Referendum Council, both modest and substantive. Substantive, in that enshrines in our Constitution a role for the First Peoples of Australia to speak to the Parliament and the nation about the laws and policies that concern them. Modest, in that the Voice respects parliamentary supremacy: it is not a 'third chamber' with a power of veto; and the details of its structure and function are left to Parliament to resolve, in consultation with Aboriginal and Torres Strait Islander peoples.

By crafting a proposal that is both modest and substantive, it is capable of achieving the support of those from the conservative, as well as progressive, political spectrums. It is an approach that respects our political institutions, while identifying how they can operate more inclusively and justly.

It is also important to recognise that the Uluru Statement favours the pro-active Voice to Parliament over the inclusion of a racial non-discrimination clause. This approach not only avoids the controversy attending a non-discrimination clause, but the choice of a model of empowerment, participation and consultation over prohibition and litigation speaks clearly to the unifying drive contained in the Uluru Statement.

Technically and legally sound

PIAC sees no reason why the proposals in the Uluru Statement cannot be implemented in a way that is both technically and legally sound. Indeed the Uluru Statement was drafted with the input of numerous constitutional law scholars and has attracted the support of many eminent constitutional lawyers.

¹ Professor Megan Davis, 'National Reconciliation Week Lecture', Speech delivered at Australian Parliament House, 31 May 2018, from 52:30, https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/Vis/vis1718

Conclusion

We therefore urge the Joint Select Committee to endorse the Uluru Statement from the Heart as the starting point for the process of constitutional recognition.

The Reconciliation Council's report recognises the political and electoral challenges that giving effect to the Uluru Statement will face, along with the goodwill and hard work required for success. This is unsurprising – substantive, rather than merely symbolic, reform will never be simple.

PIAC urges the Committee to focus its attention on, and direct its recommendations to, what practical steps should be taken to build the consensus required to bring about these changes. Clearly enough, working closely with, and ensuring the necessary resources are made available to, Aboriginal and Torres Strait Islander people will be critical to success.

In doing so, the Committee can help Parliament and the people of Australia seize an historic opportunity to achieve 'a fuller expression of Australia's nationhood'.