

Redfern Legal Centre



National Indigenous Australians Agency
Voice Secretariat
PO Box 2191
Canberra ACT 2600

30 April 2021

Attention: Voice Co-Design Senior Advisory Group

Please find attached our policy submission to the Voice Co-Design Senior Advisory Group in response to the *Interim Report to the Australian Government on Indigenous Voice Co-Design Process*.

If you wish to discuss our submission, please contact us at info@rlc.org.au.

Yours faithfully,

Redfern Legal Centre

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Redfern Legal Centre



SUBMISSION:

INTERIM REPORT TO THE AUSTRALIAN GOVERNMENT ON THE INDIGENOUS VOICE CO-
DESIGN PROCESS

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DATE: 29 April 2021

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1. Introduction: Redfern Legal Centre

Redfern Legal Centre ('RLC') is an independent community legal centre providing access to justice for disadvantaged individuals in the Redfern area and across NSW. RLC has a particular focus on human rights and social justice, with specialised practices in domestic violence, tenancy, credit and debt, employment, discrimination and complaints about police and other governmental agencies.

Through our exposure to vulnerable clients across this range of legal practice areas, RLC has unique insight into common legal difficulties and the value of potential reform. We work collaboratively with key partners to promote awareness of legal issues and legal rights within the community.

The RLC office is located on the land of the Gadigal People of the Eora Nation.

2. RLC's work with Aboriginal and Torres Strait Islander clients

RLC has a priority access policy for Aboriginal and Torres Strait Islander clients. The policy recognises the historic issues for Aboriginal and Torres Strait Islander communities in accessing justice. As a result of this policy, Aboriginal and Torres Strait Islander clients can, in most instances, be referred to the solicitor on duty if they drop-in to the service.

In the 2019-2020 financial year, 23% of the clients RLC assisted identified as Aboriginal and/or Torres Strait Islander.

In October 2019, RLC welcomed a dedicated Aboriginal and Torres Strait Islander Legal Access Worker, Maureen Randall. Maureen is a proud Bundjalung woman from the Northern Rivers region of NSW who has extensive experience working across the government and community legal sectors. As well as supporting vulnerable clients on the frontline, Maureen plays a pivotal role in supporting service access for First Nations people across the organisation, working to ensure that RLC's legal services are accessible and culturally safe.

In March 2021, RLC welcomed Tara Ellevsen who works part-time at RLC as an administrative assistant while completing her studies in law. Tara is a proud Wiradjuri woman who grew up on the Northern Beaches in Sydney.

RLC thanks Maureen and Tara for their valuable input into this submission.

3. RLC's view in summary

RLC welcomes the opportunity to comment on the 'Interim Report to the Australian Government on the Indigenous Voice Co-Design Process' ('Interim Report').

RLC strongly supports the establishment of a First Nations Voice enshrined in the Australian Constitution, as called for in the Uluru Statement from the Heart ('Uluru Statement') and recommended by the Referendum Council.¹

Further, RLC recommends that:

- a. The Government must honour its election commitment to a referendum once a model for the Voice has been settled;
- b. Enabling legislation for the Voice must be passed after a referendum has been held in the next term of Parliament; and
- c. The membership model for the National Voice must ensure previously unheard Aboriginal and Torres Strait Islander people have the same chance of being selected as established leadership figures.

4. Constitutional enshrinement

Through the Regional Dialogues and the Uluru Statement, Aboriginal and Torres Strait Islander people from across Australia came together, in an unprecedented process, to articulate their vision for meaningful constitutional recognition: namely, the 'establishment of a First Nations Voice enshrined in the Constitution' and 'a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history'.²

RLC supports the consensus position that a Voice to Parliament must be constitutionally enshrined. Not only will this provide the legitimacy and stability needed for the Voice to fulfil its functions, but more importantly, it is how Aboriginal and Torres Strait Islander peoples seek to be recognised in the Constitution.

Further, RLC submits that constitutional enshrinement of the Voice must come before legislative enactment. A 'hybrid' approach which involves the establishment of a Voice via legislation first risks derailing the positive momentum for constitutional reform and may prevent it from occurring in the future.

5. A First Nations Voice

RLC is of the view that a First Nations Voice would contribute to the meaningful development of law and policy reform and lead to improved outcomes for Aboriginal and Torres Strait Islander communities.

Below are just a few examples which demonstrate the myriad of ways in which the legal system disadvantages and discriminates against Aboriginal and Torres Strait Islander people, highlighting the need for a First Nations Voice.

- Bail laws
 - A study of bail decisions between 2015 and 2019 found that Aboriginal defendants were 20.4% more likely to be refused bail by police than non-Aboriginal defendants in similar cases.³
 - If granted, bail conditions can often be unrealistic, arbitrary, and onerous, making it more difficult for the defendant to comply and more likely that they will be imprisoned for breach of bail.⁴
 - Stringent policing of bail conditions has the effect of putting those on bail back behind bars for conduct that is not itself a criminal offence or for offences that would not ordinarily warrant a term of imprisonment.

Case Study: Leigh

While on bail and subject to reporting conditions, Leigh became ill. Leigh's mother contacted Police to advise that he was home ill and unable to attend to report. Police noted his illness in the COPS database but told Leigh's mother that she would need to provide a medical certificate on the next reporting date. Leigh was unable to provide a medical certificate and when he attended the police station to report on the next occasion, he was arrested for the prior breach and detained in juvenile detention over the weekend.

- Strip search powers
 - The report 'Rethinking Strip Searches by NSW Police' revealed that between 2016 and 2018, Aboriginal and Torres Strait Islander people accounted for 10% of all recorded

- strip searches in the field and 22% of all recorded strip searches in custody.⁵
- New data obtained by RLC via state freedom of information laws revealed that the proportion of searches carried out on Aboriginal and Torres Strait Islander people of all ages rose from 9% to 13% between 2018-19 and 2019-20. In Dubbo, Aboriginal and Torres Strait Islander people accounted for two-thirds of the total number of strip searches carried out despite only representing about 20% of the population.
 - Aboriginal and Torres Strait Islander people are being strip searched in circumstances where there is an absence of the necessity for the search and of serious and urgent circumstances and that they routinely experience searches, including strip searches, in public places.⁶
 - Searches often fail to result in charges being laid and are not challenged in court or otherwise placed on the public record.⁷

Case Study: Drew

Drew was on parole when he came to RLC for help with ongoing police intimidation and harassment, including repeatedly being approached by police officers in the street and questioned unnecessarily about future court appearances. Drew was told by police that he was on the Suspect Target Management Program. Drew was stopped on suspicion of drug possession outside a Centrelink office and was told “if you don't stop, we'll lock you up”. Drew was ordered to turn out his pockets, take his shoes off and turn his socks inside out. When this search produced nothing, he was ordered to remove all of his clothes and asked to spread his buttocks. Drew complied with the search, afraid of the consequences if he failed to do so. The strip search occurred in view of members of the public, including school children, who were waiting at a nearby bus stop. Drew was taken into police custody and released without charge.

- Public order offences
 - Aboriginal and Torres Strait Islander people are significantly over-represented in offensive language cases. Many offences are committed using language directed only at police and it has been argued that the provisions are part of an ‘oppressive mechanism of control’.⁸ This is particularly so when police employ their power of arrest which can be the precursor to a number of other more serious charges.
 - In 2019, for offences such as offensive language, offensive conduct, or failure to move on, 19% of Aboriginal and Torres Strait Islander offenders received a custodial sentence, compared to 6% of non-Indigenous offenders.⁹

Case Study: George

George was walking along a quiet residential street in Sydney. George usually takes this road to TAFE in order to avoid the busy streets. George was wearing a black backpack and a black hoodie. Two police officers - conducting patrols in the area at the time - stopped George. Without giving George any reason for being stopped and questioned, the police officers insisted that George explain why he was in the area. George eventually answered by saying “none of your fucking business”. George was immediately placed under arrest for offensive language. A few moments later, the police officer himself used the word “fucking”.

- Fines and licensing
 - The disadvantage experienced by many Aboriginal and Torres Strait Islander people results in the fines system having disproportionate impacts upon them.
 - In 2013, the NSW Auditor-General reported that Aboriginal and Torres Strait Islander peoples were suspended for fine default in NSW at over three times the rate of non-Indigenous people.¹⁰
 - In 2016, Aboriginal and Torres Strait Islander people constituted 31% of all people imprisoned for driving while suspended or disqualified.¹¹

Case Study: Sally

Sally suffers from a serious mental illness and is a very vulnerable woman. Sally came to see us having been issued with \$1,100.00 of fines. What started with an infringement notice for smoking in public, culminated in the issue of three separate infringement notices: one for smoking in a public place and two for offensive language (each occurring 50 minutes apart). Sally told RLC that she had told the police officers to “fuck off” on both occasions. Sally decided not to challenge the infringements notices in Court. The State Debt Recovery Office (now Revenue NSW) commenced enforcement action by garnishing funds from her Centrelink payments.

- Care and protection
 - Aboriginal and Torres Strait Islander children continue to be separated from their families and communities at alarmingly high rates.
 - At 30 June 2019, 21,900 Aboriginal and Torres Strait Islander were on care and protection orders.¹²
 - Aboriginal and Torres Strait Islander children are 9.7 times more likely to be removed from their families than non-Indigenous children.¹³

Care and protection matters continued to be a major focus of RLC’s Health Justice Partnership (HJP) at RPA Hospital. We prioritise early intervention advising mothers and pregnant women about their rights and obligations. Our primary aim is to keep or restore children to family care. We do this with the aid of committed social workers. This work includes helping families understand the NSW Department of Families & Community Services’ (FACS) role, responsibilities and legal processes. We also provide assistance preparing for case planning and Family Group Conferencing, facilitating access to the support services to address FACS’ child welfare concerns, and providing help identifying alternative actions they can take to prevent child removals (for example through the Family Court).

For example, RLC assisted a vulnerable Aboriginal mother of eight in maintaining primary care of her eighth child in circumstances where five of her children are in out of home placement. RLC continue to assist this client with restoration of these children.

Across these areas of concern, government-led responses have failed to address the entrenched inequality and poor outcomes experienced by Aboriginal and Torres Strait Islander peoples. A constitutionally protected Voice to Parliament would be best placed to advise the government on how

to improve laws and policies and ensure that reforms recognise and address the specific issues faced by Aboriginal and Torres Strait Islander communities.

6. Membership and structure of the Voice

RLC shares the view that the membership and structure of the Voice should ensure that previously unheard, community-based voices from all regions of the country have the opportunity of contributing to the work the Voice.

RLC expresses concern about the proposal that candidates for the National Voice meet ‘objective eligibility requirements’ and/or be vetted against a ‘broader character test’.¹⁴ Eligibility criteria involving questions about criminal history and bankruptcy risks excluding appropriate candidates. RLC therefore agrees with the recommendation in the Public Interest Advocacy Centre’s submission that any objective eligibility criteria, including conduct issues, should be ‘carefully defined and applied in a way that takes into account individual circumstances, to avoid unfairly excluding categories of people who may otherwise be able to make a significant contribution to the work of the Voice’.¹⁵

RLC also expresses concern about the proposal to include in the Voice up to two ministerially appointed members ‘to fill skill gaps and resolve issues of demographic balance’.¹⁶ RLC is of the view that this contradicts the principle of self-determination and could compromise the legitimacy and credibility of the Voice, and that skill gaps or demographic imbalances, should they arise, could be addressed through measures such as capacity-building rather than by ministerial appointment.

Further, RLC supports the recommendation in the ‘From the Heart’ submission for a needs-based model for the Voice, which ensures ‘there is adequate membership provision for frontline and community-focused people to be selected/elected’ and gives ‘greater proportional Voice to Aboriginal and Torres Strait Islander people living in Remote and Regional areas’.¹⁷

7. Conclusion

RLC thanks the members of the three co-design groups for the significant work undertaken in partnership with Aboriginal and Torres Strait Islander people to design a model for the First Nations Voice.

RLC believes that the membership model of the Voice must accord with the wishes and needs of Aboriginal and Torres Strait Islander people, communities and organisations. RLC therefore defers to their views regarding what model the Voice should take.

RLC strongly supports the constitutional enshrinement of the First Nations Voice and urges the Australian Government to uphold its promise to hold a referendum once the Voice Co-Design process has been finalised.

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- ¹ Referendum Council, *Final Report of the Referendum Council*, 30 June 2017
<https://www.referendumcouncil.org.au/sites/default/files/report_attachments/Referendum_Council_Final_Report.pdf>.
- ² Statement from the Heart, First Nations National Constitutional Convention (26 May 2017)
<https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart.PDF>.
- ³ NSW Bureau of Crime Statistics and Research, *What Factors Influence Police and Court Bail Decisions?* (March 2021)
<<https://www.bocsar.nsw.gov.au/Publications/CJB/2021-Report-What-factors-influence-police-and-court-bail-decisions-CJB236.pdf>>.
- ⁴ Lisa Stone, *A Better Approach to NSW Bail Laws for Aboriginal and Torres Strait Islander People* (August 2016) 3
<https://criminalcpd.net.au/wp-content/uploads/2016/09/A_Better_Approach_to_NSW_Bail_Laws_Aboriginal_And_Torres_Strait_Islander_Peoples_Lisa_Stone_Aug16.pdf>.
- ⁵ Dr Michael Grewcock and Dr Vicki Sentas, *Rethinking Strip Searches by NSW Police* (2019) 5
<<https://rlc.org.au/sites/default/files/attachments/Rethinking-strip-searches-by-NSW-Police-web.pdf>>.
- ⁶ Ibid.
- ⁷ Ibid.
- ⁸ Royal Commission into Aboriginal Deaths in Custody, *Regional Report of Inquiry in New South Wales, Victoria and Tasmania* (1991) 145.
- ⁹ NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2019* (June 2020) tables 5, 14.
- ¹⁰ New South Wales Auditor-General, *Improving Legal and Safe Driving among Aboriginal People* (19 December 2013) 3
<https://www.audit.nsw.gov.au/sites/default/files/pdf-downloads/2013_Dec_Report_Improving_Legal_and_Safe_Driving_Among_Aboriginal_People.pdf>.
- ¹¹ NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2016* (2017) tables 5, 14.
- ¹² Australian Institute of Health and Welfare, *Child Protection Australia 2018–19* (18 March 2020)
<<https://www.aihw.gov.au/reports/child-protection/child-protection-australia-2018-19/summary>>.
- ¹³ Family Matters, *The Family Matters Report 2020* (16 November 2020) 12 <https://www.familymatters.org.au/wp-content/uploads/2020/11/FamilyMattersReport2020_LR.pdf>.
- ¹⁴ National Indigenous Australians Agency, *Indigenous Voice Co-Design Process: Interim Report to the Australian Government* (October 2020) 41 <<https://voice.niaa.gov.au/sites/default/files/2021-02/indigenous-voice-codesign-process-interim-report-2020.pdf>> ('Interim Report').
- ¹⁵ Public Interest Advocacy Centre, Submission No 442 to the Voice Co-Design Senior Advisory Group, *Interim Report to the Australian Government: Indigenous Voice Co-Design Process* (19 March 2021) 6.
- ¹⁶ Interim Report (October 2020) 39 <<https://voice.niaa.gov.au/sites/default/files/2021-02/indigenous-voice-codesign-process-interim-report-2020.pdf>>.
- ¹⁷ From the Heart, Submission No 19 to the Voice Co-Design Senior Advisory Group, *Interim Report to the Australian Government: Indigenous Voice Co-Design Process* (21 January 2021) 6.