

## **NNTC RESPONSE TO THE INDIGENOUS VOICE CO-DESIGN INTERIM REPORT**

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### **INTRODUCTION**

Thank you for the opportunity to provide some comments to inform the consideration of the proposed Indigenous Voice to Parliament. We commend the work to date of the Indigenous-led Co-design groups and consultation process.

The Minister for Indigenous Australians, the Hon Ken Wyatt AM, MP announced the formation of the Co-Design Senior Advisory Group for the Voice to government in November 2019. The purpose of the co-design process is to enhance local and regional decision making and provide a voice for Indigenous Australians to government. In Stage 1 the Senior Advisory Group formed a National Co-Design Group and a Local/Regional Co-Design Group to ensure broad consultation and input. One of the key roles of the Senior Advisory Group is to advise the Minister on options for the structure and membership of a national Indigenous voice to ensure that Indigenous Australians are heard at all levels of government - local, state and federal.

Stage 1 is now complete. The proposals were presented in the Indigenous Voice Co-design Interim Report to the Australian Government in late-October 2020. Stage 2 involves consulting with individuals, communities and organisations for feedback on the proposals.

This submission is a response to Stage 2 and the proposals outlined in the interim report. This submission highlights the need for the process to leverage existing structures, particularly Prescribed Bodies Corporate (PBCs) and other traditional owner corporations that are intended to exist in perpetuity.

The National Native Title Council (NNTC) is Australia's peak native title body. While our membership comprises organisations set up under the *Native Title Act 1993* (the NTA) and equivalent State legislation, our purpose includes advocating for the rights recognition of all Traditional Owner groups.

It is the view of the NNTC that PBCs and Traditional Owners groups are not simply landholding bodies but must instead be recognised and supported as individual societies and nations with systems of governance through which self-determination and nationhood is expressed. Indigenous system of laws and customs, held collectively, are recognised through the Australian common law in native title. The recognition by the Australian common law of the rights of individual Indigenous groups to self-govern through their own systems of laws and customs is consistent with the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). Native title assumes and enlivens a whole range of existing and functioning Indigenous governance arrangements. It recognises distinct Nations with rules and processes for determining such things as membership, boundaries and who can speak for people and country.

## TRADITIONAL OWNER MODEL

In a previous Discussion Paper, the NNTC advocated for the Co-Design Groups to consider a Traditional Owner led model that recognizes Traditional Owner groups as individual nations and ensures regional and national representation with cultural authority. This model did not seek to exclude First Nations people who did not live on country or were not connected, through the legacy of European colonisation, to their Traditional Owner groups, but was rather a pluralistic model that recognised the nations and sovereignty of Traditional Owner groups to be able to speak on matters to their self-determination, rights and interests in accordance with Articles 3, 4 and 5 of UNDRIP.

Further information about a Traditional Owner led model can be found in the NNTC Discussion Paper located [here](#) on the NNTC website.<sup>1</sup>

This submission is focused on how the proposals in the Interim report interact with the PBC sector and Traditional Owner groups while being inclusive for all First Nations peoples.

## LEVERAGING THE PBC SECTOR IN A NATIONAL BODY

The National Co-design Group stated a National Voice must be grounded in community and place. A strong link to the Local and Regional Voices will be critical to achieve this.<sup>2</sup> In the development of the work by the National Co-Design Group in designing proposals for a National Voice, the Joint Select Committee recommended a list of principles.<sup>3</sup> The NNTC supports these principles, in particular the strong support for local and regional structures that reflect local and regional cultural variations, equal gender representation, that the Voice should be used by all levels of government and that consideration must be given to existing Aboriginal and Torres Strait Islander organisations at both local and national level.

Leveraging existing structures in a national structure has been identified as a key element of the National Co-Design Group's work.<sup>4</sup> The NNTC argues that while it is important to consider the role of all existing First Nations organisations and structures that have local and regional representation, it is key to consider the role of PBCs who are representative, have cultural authority to speak for country, and have *in rem* rights and interests – meaning those organisations that are intended to exist in perpetuity. The NIAA report states:

Several entities have a statutory function such as Land Councils, Prescribed Bodies Corporate and the Aboriginal and Torres Strait Islander Social Justice Commissioner. The scope of the National Voice would not, and in fact cannot, impact on those statutory functions in any way.<sup>5</sup>

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<sup>1</sup> National Native Title Council, Discussion paper: regional and national representation: A Traditional Owner led model, 2020, pp.1-5.

<sup>2</sup> National Indigenous Australians Agency (NIAA), Indigenous Voice Co-design Process Interim Report to the Australian Government, October 2020, p.47.

<sup>3</sup> NIAA, Oct 2020, p. 29.

<sup>4</sup> NIAA, Oct 2020, p. 23.

<sup>5</sup> NIAA, Oct 2020, p. 133.

PBCs have specific statutory functions under the NTA including the right to speak for country. For the Voice not to encroach on the statutory functions set out under the NTA, PBCs must be included in the Voice design so they can provide advice about matters pertaining to land, waters and resources.

The Voice national body and the existing structures involved in the design, such as PBCs and Traditional Owner groups, need to be properly resourced to be able to participate in the process.

### SCOPE OF A NATIONAL BODY

The NNTC supports the proposed scope of the National Voice, that it will be an advisory body to both the Parliament and the Australian Government, and that this would be a two-way interaction.<sup>6</sup>

In advising on matters of critical importance to the social, spiritual and economic well-being of First Nations, the NNTC requests that consideration be given to a system of advisors for the National Voice when the matters of critical importance relate to lands and waters that include the native title sector. The interim report currently suggests a committee function for Traditional Owners.<sup>7</sup>

A non-mandated committee is not sufficient to ensure that the statutory obligations of PBCs to speak for and protect country will not be compromised by the national Voice body. A better approach would be two-fold:

- 1) That PBCs/Traditional Owner groups (via the NNTC or another mechanism) are a mandated advisory committee to the Voice national body for all matters relating to land and waters.
- 2) That local and regional bodies are inclusive of PBCs and Traditional Owner voices in their own jurisdictions.

For example, the National Voice may approach local and regional PBC structures or the NNTC for advice on specific matters as part of a formally recognised relationship, building on the principle that the National Voice would work effectively with other bodies and stakeholders and draw on relevant expertise to inform the development of its formal advice.<sup>8</sup> This may be done as a Memorandum of Understanding or similar to an *amicus curiae* (Friends of the Court) system, such as the one in place for the Human Rights Commission in Australia.

### MEMBERSHIP OF A NATIONAL BODY

There are two alternative core models for the membership of the National Voice:

1. Structurally linked through membership, with members drawn from the Local and Regional Voices level to the National Voice.
2. Directly elected to represent the state, territory or Torres Strait Islands on the National Voice.

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<sup>6</sup> NIAA, Oct 2020, p.32.

<sup>7</sup> NIAA, Oct 2020, p.56.

<sup>8</sup> NIAA, Oct 2020, p.32.

Both models provide for between 16 and 18 members to be selected from states, territories and the Torres Strait Islands with gender balance, youth and disability structurally ensured.<sup>9</sup>

The NNTC notes that while the National Voice needs to be workable for making decisions about the provision of specific advice, it also needs to be large enough to ensure fair representation of First Nations peoples and this may be a number greater than the 16-18 proposed. It may be more appropriate to have a hybrid system where the numbers from each state or territory are proportional to the First Nations population in that state/territory.

The NNTC notes that there are advantages and disadvantages to both models.

### **1. Structurally linked to local and regional voices**

The advantage of this model is that it provides a direct relationship between the local, regional and national structures which means that lines of communication can be maintained throughout the process. This model means that National members are directly accountable to the regional and local communities.

In regions of Australia that have formal recognition, such as native title, this model can easily incorporate existing PBCs and traditional owner groups into the process.

A potential issue with this model is that membership on the national body means that the local or regional member is representing nationally – not for their own local group or regional jurisdiction. It may be difficult to separate local/regional political roles and obligations from a national role on the Voice.

### **2. Directly elected by the individual**

The advantage of a direct election model is that it works for all jurisdictions, including those, for example, that do not have formal recognition and subsequent structures in place.

If model 2 was chosen, the NNTC supports option 1, being the direct election of members to the National Voice by an election held in each state, territory and the Torres Strait Islands.<sup>10</sup> This option adheres to UN principles of democracy and could be efficiently done with electronic voting.

The risk of this model is that elected individuals may not have a strong relationship with existing local and regional structures or a vested interest in maintaining communication with and seeking advice from local structures, which may affect the legitimacy of the National Voice.

Additionally, this model involves a very detailed and potentially overly manufactured process for the election of two people on an advisory body. A detailed state election process is more typical for a Government officer or full-time position.

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<sup>9</sup> NIAA, Oct 2020, p.32.

<sup>10</sup> NIAA, Oct 2020, p.34.

## **GOVERNANCE AND FUNCTION OF A NATIONAL BODY**

The mandated role of the Voice will be crucial to its success. The NNTC supports the principles of governance of a national body outlined in the report.<sup>11</sup> The NNTC notes that the Parliament and Australian Government should be obliged to consult and engage the National Voice on all matters in Australia, as all matters affect Aboriginal and Torres Strait Islander peoples and occur on their country. However, this would be an unrealistic burden to place on the National Voice as the structure is currently being determined; two people per jurisdiction on a part time basis could not realistically manage the workload.

A compromise is for the Parliament and Australian Government to be obliged to consult and engage the National Voice on a broad range of matters that significantly affect Aboriginal and Torres Strait Islander peoples.

Additionally, the Voice should be free to initiate its own advice process for legislative or policy matters it deems relevant and the Parliament and Government should be obliged to consider it.

## **NATIONAL VOICE TERMS**

There were two options put forward for term lengths:

- Option 1: Four years, with staggered terms, making half the membership positions vacant every two years.
- Option 2: Three years, with all membership positions made vacant at the end of every term.

There would be a limit of two consecutive terms for National Voice members for both options.

The NNTC supports option 1, as it has the advantage of consistency over time and retainment of knowledge and stability in leadership. The longer term would also provide for an established membership with continuity of policy and advice development, to brief incoming Parliaments and Australian Governments, which are on shorter election cycles.<sup>12</sup>

## **LEVERAGING THE PBC SECTOR IN LOCAL AND REGIONAL BODIES**

The NNTC supports a principles approach to local and regional design for the Voice and agrees that applying a specific, uniform model across the country undermines local cultural jurisdictions, decision-making and self-determination. Self-determination means that local and regional groups need to have the flexibility and autonomy to determine which model works best for them.

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<sup>11</sup> NIAA, Oct 2020, p.32.

<sup>12</sup> NIAA, Oct 2020, p.39.

## SCOPE OF LOCAL AND REGIONAL ENGAGEMENT

Community engagement, advice to government and potentially shared decision-making would underpin all aspects of work undertaken by a Local and Regional Voice.<sup>13</sup> In regions of Australia with native title or another system of formal recognition, there are PBCs and Traditional Owner groups in place, that already have processes for engaging with community (common law holders) on native title and related decisions. However, not all PBCs and Traditional Owner groups are sufficiently funded or have sufficient income to be able to regularly engage community into relevant decision-making or advisory processes. For the Voice to be successful at local and regional levels, PBCs and other bodies need to have sufficient funding.

## LOCAL AND REGIONAL PRINCIPLES

The NNTC supports the nine key principles that the Local & Regional Co-design Group developed to guide both the formation and operation of the Local and Regional Voices, and government arrangements for engaging with voices (the partnership interface).<sup>14</sup>

While having guiding principles are important, it is just as, if not more crucial for the culture, operational and resourcing of the Design's local and regional process.

### **Empowerment**

The principle of empowerment is recognised in the interim report as: Aboriginal and Torres Strait Islander peoples have greater control and voice in their own affairs: a self-determination approach. Governments shift to an enabling role.<sup>15</sup>

Empowerment embodies autonomy, which is at the heart of self-determination, and these principles are necessary for the success of any model. However, empowerment within a colonial context, such as Australia, cannot happen without sufficient support and resourcing from the Commonwealth. The NNTC calls on the Commonwealth to ensure that local and regional bodies, particularly PBCs and Traditional Owner groups are resourced to have autonomous decision-making processes and carry out their own aspirations. Without sufficient resourcing, the principle of empowerment becomes a burden of expectation for local and regional bodies to carry out additional work of the Commonwealth within already stretched capacity.

### **Inclusive participation**

The NNTC supports the principle of inclusive participation as outlined in our previous discussion paper.<sup>16</sup> All First Nations peoples are Traditional Owners; however due to historical and contemporary colonial processes, such as Stolen Generations, the development of missions, and other forced relocations, as well as choosing to move to cities or other areas for education, employment or other reasons, many First Nations peoples do not reside on their own country. Rather, they live on the country of others, in some circumstances for many generations.

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<sup>13</sup> NIAA, Oct 2020, p.71.

<sup>14</sup> NIAA, Oct 2020, p.73.

<sup>15</sup> NIAA, Oct 2020, p.75.

<sup>16</sup> NNTC discussion paper, 2020, p.1-2.

First Nations people living off country can find themselves being excluded, completely or partially from political processes.

Leveraging existing Traditional Owner bodies, such as PBCs, into the Voice process does not mean that ‘historical residents’ need be excluded from the process.<sup>17</sup> There are ways in which all people can be included. For example, ‘each region could vote in Traditional Owners along with other residents or other nominees from other longstanding community organisations, discussed below in the multiple structures section. A further option is for First Nations residents to be appointed to a national body, as raised in the appointments section.’<sup>18</sup>

In some jurisdictions, such as in the Northern Territory, there is already a history of pluralism in governance with both traditional owners and other First Nations peoples. In those regions, for example, they may choose to nominate one person each from existing organisations and then put those nominations to a broader vote.

### **Cultural leadership**

The principle of cultural leadership is for ‘Local and regional voice arrangements [to] strongly connect to those with responsibility for upholding and maintaining cultural law/lore and customs, in a way that is appropriate for each community and region.’<sup>19</sup> In regions with formal recognition, the inclusion of PBCs and other traditional owner groups into local models is a straightforward way to ensure that cultural leadership and governance is included.

### **Community led design**

In accordance with Articles 3, 4 and 5 of the UNDRIP, the NNTC supports the right of First Nations communities to adopt their own laws, customs and practices in determining their own model of a local voice and how those local groups will interact with regional and national bodies.

### **Non-duplication and links with existing bodies**

The NNTC agrees that it is vital to build on existing structures, such as PBCs and other local bodies. Leveraging and developing existing structures is key to local self-determination as it builds local capacity through increased resourcing and support.

The interim report specifically states that local and regional bodies should not ‘encroach on, or undermine, the mandate of existing bodies with statutory roles or specific functions, but provide appropriate links for their involvement in the Voice.’<sup>20</sup> As introduced above, PBCs have specific statutory functions under the NTA including the right to speak for country. For the Voice not to encroach on the statutory functions set out under the NTA, PBCs must be included in some way in local and regional bodies so they can provide advice and make decisions about matters pertaining to land, waters and resources.

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<sup>17</sup> ‘Historical residents’ is the terminology employed in the interim report: NIAA, Oct 2020, p.76.

<sup>18</sup> NNTC discussion paper, 2020, p.3.

<sup>19</sup> NIAA, Oct 2020, p.77.

<sup>20</sup> NIAA, Oct 2020, p.79.

## **Respectful Long-term Partnerships**

The NNTC agrees that respectful long-term partnerships between Governments and local and regional bodies need to be based on principles of mutual respect, good faith, trust and transparency.<sup>21</sup> However, the most important aspect of respectful partnerships is power: ensuring that both parties to the partnership are as equal as possible. For principles of equality and good faith to apply to local partnerships, both parties need to have sufficient resourcing to participate in the partnership on equal footing. The implication of that for some jurisdictions, is that local and regional bodies will require additional funding and resourcing to participate in the partnership.

## **Transparency and accountability**

The NNTC supports the principle: Governments and local and regional voice structures adhere to clear protocols and share responsibility and accountability, including downwards to communities.<sup>22</sup>

## **Capability driven**

This principle recognises that communities will be at various stages of 'Voice readiness' and capability and will need capability support from governments.<sup>23</sup> While regional networking options and sharing knowledge and best practice are important,<sup>24</sup> local groups need the opportunity to develop their governance and be able to participate in the process in a meaningful way. For some communities, for example those without formal recognition or have existing underfunded structures, like small PBCs, this will require additional funding.

## **Data and Evidence-based Decision Making**

The NNTC supports the principle that Data is shared between governments and communities to enable evidence-based advice and shared decision making. Communities are supported to collect and manage their own data,<sup>25</sup> adhering to principles of and complimenting Indigenous Data Sovereignty.<sup>26</sup>

## **REGIONS**

The interim report suggests that the regions for regional voice structures should be determined by drawing on lessons learned from previous and existing arrangements and that there will be between 25-35 regions nationally with a proposed number of regions by jurisdiction provided.<sup>27</sup> It is not clear from the report what the rationale was in determining each of the proposed set of numbers for each jurisdiction. For example, for 35 regions, South Australia has 3 while New South Wales has 7 and the Northern Territory has 6. These numbers do not represent the numbers of PBCs or cultural groups; therefore, the rationale for how the numbers were determined needs to be clarified.

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<sup>21</sup> NIAA, Oct 2020, p. 80.

<sup>22</sup> NIAA, Oct 2020, p. 81.

<sup>23</sup> NIAA, Oct 2020, p. 82.

<sup>24</sup> NIAA, Oct 2020, p. 82.

<sup>25</sup> NIAA, Oct 2020, p. 83.

<sup>26</sup> For further information on Indigenous Data Sovereignty, see the [Maiam nayri wingara website](#).

<sup>27</sup> NIAA, Oct 2020, p. 89-90.



As suggested in the Discussion Paper, the NNTC supports local and regional First Nations communities to define their own boundaries for nation-building and other political processes, rather than using existing non-Indigenous boundaries, such as States and Territories. Where there is not an existing process of cultural regionalisation, the Voice co-design committees will need to consider how regional boundaries might be developed and negotiated locally. It is important that the regional boundaries are not arbitrary or rushed for convenience, rather based on existing cultural and political nations.<sup>28</sup>

An alternative method may be to seek advice from local Native Title Representative Bodies or Service Providers (NTRB/SPs) about the contemporary cultural and political regions in their jurisdictions.

NTRB/SPs could also provide advice about potential transitional groups to be established for the Voice process in areas where there are limited or no formal recognition processes and suitable existing arrangements.

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<sup>28</sup> NNTC discussion paper, p.4.