Submission to the Referendum Council

Fiona Jose

I make this submission in my capacity as a delegate at the Cairns dialogue and as the Executive General Manager of Cape Operations at Cape York Partnership.

Constitutional recognition must be more than mere symbolism. Any minimalist model will be strongly opposed by Indigenous Australians. The model must also come from the people; it must not be imposed by politicians. The model must arise out of a genuine negotiated agreement between Indigenous peoples and the Australian government.

Substantive constitutional recognition must address the voicelessness and powerlessness of First Nations peoples. It must empower us to exercise authority and take responsibility in our affairs.

Being only 3% of the population, our voices mostly go unheard, even on matters directly concerning us. Parliaments have never been good at listening to Indigenous people. Government makes policies and laws affecting our rights and intending to benefit us, without our proactive involvement and without proper consultation.

Cape York people know all too well what it feels like to be voiceless. It leads to unfair discrimination against us, time and time again.

In the 1970s, Premier Joh Bjelke-Petersen tried to legislate away Wik land rights, through a policy to prevent Indigenous people from purchasing large tracts of land. The Wik people of Cape York had obtained funds to purchase the Archer River cattle station, part of their traditional lands. After years of protracted court battles, in 1988 the court held in favour of John Koowarta. They found that Bjelke-Petersen's policy was in breach of the *Racial Discrimination Act 1975 (Cth)*.

It was a great legal and moral victory for Cape York Indigenous people. But the Queensland Parliament acted swiftly to get around the court's decision. It declared the Archer River station a national park, which meant it could not be purchased. Years of legal battling, proved ultimately ineffective in preventing discrimination against us. Parliament found another way to strip us of our rights.

Cape York people also spent years fighting the Queensland government's Wild Rivers environmental legislation, which prevented economic development of Indigenous land. This fight was again led by the Koowartas, the plaintiff being Martha Koowarta, widow of the late John Koowarta. Finally, the court held that the Queensland government's decision to impose strict development prohibitions on Indigenous land was made without the proper consultation of the Indigenous traditional owners. It was a great moral and legal victory.

But yet again, the Queensland government legislated around the court's legal finding, and the government has re-enacted the Wild Rivers prohibitions under legislation of a different name.

Parliament does not listen to our concerns and aspirations. This is true at all levels of government. This is why Indigenous people should be guaranteed a say in Parliament's laws and policies that affect us. This is why I agree with the proposal for a constitutionally mandated First Nations voice to Parliament, to ensure government hears our voices before making decisions about us.

The UN Declaration on the Rights of Indigenous Peoples enshrines our right to self-determination as peoples. Part of the right to self-determination is the right of Indigenous peoples to participate in government decisions that affect our interests, and to be properly consulted in the government decisions that affect us.

Australian law does not currently provide ways for this to happen in a fair way. Constitutional reform needs to address this problem. This is why there should be an Indigenous body in the Constitution to consult with and advise Parliament on laws and policies that affect Indigenous rights and interests.

The representative structure should be bottom up, not top down. It should give voice to local, First Nations communities. And importantly, the institution should be enshrined in the Constitution, so it cannot be easily abolished like legislated bodies of the past. We want this body to be a formal and permanent part of Australia's constitutional and institutional architecture.

The case for an Indigenous representative body is justifiable and makes sense. Our people occupy a unique place within the Commonwealth that is legally, politically and historically different to other citizens. We are the only group that was dispossessed and displaced by British settlement. We were uniquely discriminated against by the constitutional arrangements of 1901. We are the only group requiring legislative responses and solutions to this unique history (Native Title, Indigenous heritage protection laws etc.). It is sensible and just that we should be guaranteed a say in these legislative responses affecting our interests. We should have a say in our own lives, and in the government actions that affect us.

It is not just about what's fair, it is also about making good policy and achieving good outcomes. Ensuring First Nations voices are heard, would help ensure that laws and policies for Indigenous affairs are more effective and better accepted by communities. If the Constitution ensured that Parliament listened more effectively to Indigenous voices, this would significantly improve Indigenous lives in a real and practical way.

Symbolic recognition is important too, but this can happen outside the Constitution, in a Declaration. Practical recognition should happen within the Constitution. We should think of this as a package of reforms.

The nation needs to change the way it does business in Indigenous affairs. Constitutional recognition is the opportunity to do this.

Yours sincerely,

Fiona Jose