

APPENDIX F: EXECUTIVE SUMMARIES FROM PREVIOUS REPORTS

F.1 *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel (2012)*

Executive summary

Current multiparty support has created a historic opportunity to recognise Aboriginal and Torres Strait Islander peoples as the first peoples of Australia, to affirm their full and equal citizenship, and to remove the last vestiges of racial discrimination from the Constitution.

The Expert Panel was tasked to report to the Government on possible options for constitutional change to give effect to indigenous constitutional recognition, including advice as to the level of support from indigenous people and the broader community for these options. This executive summary sets out the Panel's conclusions and recommendations.

Methodology

The **introduction** sets out the background to the Panel's work and its methodology.

In formulating its recommendations, the Panel adopted four principles to guide its assessment of proposals for constitutional recognition of Aboriginal and Torres Strait Islander peoples, namely that each proposal must:

- contribute to a more unified and reconciled nation;
- be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples;
- be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums; and
- be technically and legally sound.

Between May and October 2011, the Panel conducted a broad national consultation and community engagement program to raise awareness about the question of constitutional recognition of Aboriginal and Torres Strait Islander peoples. The program included public consultation meetings, individual discussions with high-level stakeholders, presentations at festivals and other events, a website, and a formal public submissions process. To ascertain the views of a wider spectrum of the community, and to help build an understanding of the likely levels of support within the community for different options for constitutional recognition, the Panel commissioned Newspoll to undertake quantitative and qualitative research between February and November 2011.

The Panel placed a strong emphasis upon ensuring that its consultation program enabled it to capture the views of as many Aboriginal and Torres Strait Islander people and communities as possible within the available timeframes. It also sought legal advice from leading practitioners of constitutional law on options for, and issues arising in relation to, constitutional recognition to ensure that its proposals were technically and legally sound.

Historical background

The Panel examined the history of the Australian Constitution and law and policy relating to Aboriginal and Torres Strait Islander peoples since Federation in order to fully address its terms of reference. **Chapter 1** details the most relevant aspects of that history, which have

informed the Panel's consideration of the substantive matters in this report. This chapter chronicles the history of racial discrimination and non-recognition of Aboriginal and Torres Strait Islander peoples within the Constitution, and the use of the fiction of *terra nullius* to justify the taking and occupation of their lands.

The Panel's consultations revealed limited understanding among Australians generally of our constitutional history, especially in relation to the exclusion of Aboriginal and Torres Strait Islander people from full citizenship. During the consultation process, many people were surprised or embarrassed to learn that the Constitution still provides a head of power that permits the Commonwealth Parliament to make laws that discriminate on the basis of 'race'. While Australians are justifiably proud of the modern nation whose foundation is the Constitution, they are increasingly aware of the blemish on our nationhood caused by two of its sections, section 25 and the 'race power' in section 51(xxvi).

Comparative and international recognition

Chapter 2 surveys comparative and international experience with recognition of indigenous peoples. The countries considered include the settler states Canada, the United States and Aotearoa/New Zealand, which have similar constitutional and common law traditions to those of Australia. Also considered are Finland, Norway, Sweden, Denmark, the Russian Federation, Bolivia, Brazil, Colombia, Ecuador, Mexico, the Philippines and South Africa, all of which have pursued constitutional reform in recent decades to provide recognition of indigenous peoples. The example of comparative jurisdictions provides encouragement that such recognition can be successfully achieved with the support of a majority of the population.

The national conversation: Themes from the consultation program

Chapter 3 outlines the key themes that emerged from consultations, submissions and research, other ideas for change provided during consultations and in submissions, and the views of some who were not supportive of the ideas in the Panel's discussion paper of May 2011. In the discussion paper, the Panel set out seven ideas for constitutional recognition of Aboriginal and Torres Strait Islander peoples and invited the views of the community on these ideas. The ideas for change were as follows:

Statements of recognition/values

- Idea 1. Statement of recognition in a preamble
- Idea 2. Statement of recognition in the body of the Constitution
- Idea 3. Statement of recognition and statement of values in a preamble
- Idea 4. Statement of recognition and statement of values in the body of the Constitution

Equality and non-discrimination

- Idea 5. Repeal or amend the 'race power'
- Idea 6. Repeal section 25

Constitutional agreements

- Idea 7. Agreement-making power.

Forms of recognition

Chapter 4 addresses the following issues, which emerged at consultations and in submissions in relation to statements of recognition or values:

- recognition in the preamble to the Imperial Act (4.1);
- recognition in a new preamble or in a new section of the Constitution (4.2);
- placing a statement of recognition, together with a new head of power (4.3);
- recognition in a new preamble, accompanied by a statement of values (4.4);
- the content of a statement of recognition (4.5); and
- recognition of Aboriginal and Torres Strait Islander cultures, languages and heritage in the Constitution (4.6).

Among the Panel's principles for assessing proposals for constitutional recognition were that they must 'contribute to a more unified and reconciled nation' and 'be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums'. During consultations with the community and in submissions, a number of questions were raised with respect to recognising Aboriginal and Torres Strait Islander peoples in a preamble at the beginning of the Constitution. The Panel concluded that there is too much uncertainty in having two preambles—the preamble to the Imperial Commonwealth of Australia Constitution Act 1900, by which the Parliament at Westminster enacted the Constitution in 1900, and a new preamble. The Panel found there are too many unintended consequences from the potential use of a new preamble in interpreting other provisions of the Constitution and there was next to no community support for a 'no legal effect' clause to accompany a preamble. The Panel has concluded, however, that a statement of recognition of Aboriginal and Torres Strait Islander peoples in the body of the Constitution would be consistent with both principles.

Another principle was that a proposal must 'be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples'. The Panel has concluded that a majority of Aboriginal and Torres Strait Islander people would support a proposal for constitutional recognition. Such support, however, would depend upon the form of recognition and whether such recognition was also accompanied by a change to the body of the Constitution. The Panel has concluded that the option which would best conform with the principle of being 'technically and legally sound' would be a new grant of legislative power with its own introductory and explanatory preamble to replace section 51 (xxvi).

The Panel has further concluded that a declaratory languages provision affirming that English is the national language of the Commonwealth of Australia, and declaring that Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage, would be consistent with each of its four principles.

The ‘race’ provisions

In **Chapter 5** the so-called ‘race’ provisions of the Constitution are addressed. At its early meetings, the Panel came to the view that, in order to recognise Aboriginal and Torres Strait Islander peoples in the Constitution, there was a case for removing the two provisions that contemplate discrimination against them (as well as against people of any so-called ‘race’). The Panel’s discussion paper therefore raised a number of ideas for change in relation to the two so-called ‘race’ provisions: section 25 and the race power in section 51(xxvi).

In relation to section 25, which contemplates the possibility of State laws disqualifying people of a particular race from voting at State elections, the discussion paper identified the option of repeal.

In relation to section 51(xxvi), the discussion paper identified a number of options, including:

- repealing the provision altogether;
- amending it so that it can only be used to make laws for the benefit of Aboriginal and Torres Strait Islander peoples or other racial groups;
- creating a new head of power to make laws with respect to Aboriginal and Torres Strait Islander peoples; and
- inserting a new guarantee of racial non-discrimination and equality for all Australians in the Constitution.

The Panel’s consultations and submissions to the Panel overwhelmingly supported the repeal of section 25 and, in relation to section 51(xxvi), a large majority supported change.

Racial non-discrimination

The Panel came to the view that there is a case for moving on from the history of constitutional non-recognition of Aboriginal and Torres Strait Islander peoples and racial discrimination and for affirming that racially discriminatory laws and executive action have no place in contemporary Australia. **Chapter 6** addresses the possibility of a new racial non-discrimination provision in the Constitution to strengthen protection against discrimination for Australians of all ethnic backgrounds. The Panel was, however, clear from the outset that any discussion of a bill or statement of rights was well outside its remit.

The submissions to the Panel overwhelmingly supported a racial non-discrimination provision and argued in favour of the principle of racial equality.

The Panel concluded that a constitutional prohibition of racially discriminatory laws and executive action would be consistent with each of the four principles identified in its discussion paper to guide assessment of proposals for recognition.

The Panel carefully considered the relationship between a racial non-discrimination provision, the race power in section 51(xxvi), and the proposed replacement power, ‘section 51A’. The Panel is conscious that there would be less need to qualify the preamble to the proposed replacement power in ‘section 51A’ with a word like ‘advancement’ if a racial non-discrimination provision with a special measures exception were to be included as part

of the constitutional amendments. In order to minimise the risk of invalidating current and future Commonwealth laws with respect to Aboriginal and Torres Strait Islander peoples, the proposed racial non-discrimination provision needs to be qualified so that the following laws and actions are secure:

- laws and measures adopted to overcome disadvantage and ameliorate the effects of past discrimination; and
- laws and measures adopted to protect the cultures, languages or heritage of any group.

Governance and political participation

Chapter 7 discusses the historical exclusion of Aboriginal and Torres Strait Islander peoples from participation in the processes of government in Australia—nationally, in the States and Territories, and in local government—and the perceived lack of accountability of the institutions of government to Aboriginal and Torres Strait Islander people, who constitute 2.5 per cent of the population.

Specifically, this chapter addresses:

- participation and representation of Aboriginal and Torres Strait Islander people in Australian parliaments and public life;
- autonomous Aboriginal and Torres Strait Islander representative institutions; and
- how governments interact with Aboriginal and Torres Strait Islander communities.

The Panel welcomes the increasing participation of Aboriginal and Torres Strait Islander people in Australian parliaments and public life, as well as moves to autonomous Aboriginal and Torres Strait Islander representative structures and institutions. At this time, however, the Panel does not recommend further consideration of dedicated or reserved seats in federal Parliament for Aboriginal and Torres Strait Islander peoples.

In relation to the way governments deal with Aboriginal and Torres Strait Islander communities and the economic and social disempowerment of many of these communities, raised so frequently and with such anguish, hurt and anger at consultations, the Panel recognises that these matters require attention beyond amendment of the Constitution. The Panel has concluded, however, that it would be remiss not to comment on the often cited failures of Australian governments at all levels to deliver better outcomes for Aboriginal and Torres Strait Islander peoples. While it is clear that constitutional recognition would not directly address many of the issues that are of concern to communities and governments, many of those consulted by the Panel supported the idea that constitutional recognition could provide a more positive framework within which the issues collected under the heading ‘closing the gap’ could be addressed more successfully.

Agreement-making

Chapter 8 addresses another of the key themes to emerge at consultations and in submissions to the Panel: the aspirations of many Aboriginal and Torres Strait Islander peoples in relation to agreement-making. It was apparent that there is also strong support among the non-indigenous community for forms of binding agreements between Aboriginal and Torres Strait Islander communities and governmental and non-governmental parties.

Those who referred to agreement-making identified a number of different forms that agreements with indigenous peoples can take:

- treaties entered into on a sovereign-to-sovereign basis;
- agreements with constitutional backing;
- agreements that are enforceable as contracts; and
- agreements with statutory backing.

While calls for an amendment to confer constitutional backing to such agreements are likely to continue, the Panel does not consider that these questions can be resolved or advanced at this time by inclusion in a constitutional referendum proposal. However, the Panel was interested in a mechanism for conferring constitutional backing to an agreement or agreements with Aboriginal and Torres Strait Islander peoples that might be negotiated with them in the future.

Like the Constitutional Commission in 1988, the Panel was not persuaded that any alteration to the Constitution should be attempted until such agreement or agreements had been negotiated in a process involving Aboriginal and Torres Strait Islander peoples, the Commonwealth and the States and Territories. The Panel considered that no proposal for an agreement should be taken to the Australian people at referendum until they were in a position to know what they were being asked to approve. This is a challenge for the future.

The question of sovereignty

At consultations and in submissions to the Panel, there were numerous calls for a reappraisal of currently accepted perceptions of the historical relationship between indigenous and non-indigenous Australians from the time of European settlement. **Chapter 9** discusses one of the significant issues to have emerged during the consultation process: the aspiration of some Aboriginal and Torres Strait Islander peoples for recognition of their sovereign status.

The Panel has concluded that any proposal relating to constitutional recognition of the sovereign status of Aboriginal and Torres Strait Islander peoples would be highly contested by many Australians, and likely to jeopardise broad public support for the Panel's recommendations. Such a proposal would not therefore satisfy at least two of the Panel's principles for assessment of proposals, namely 'contribute to a more unified and reconciled nation', and 'be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums'. While questions relating to sovereignty are likely to continue to be the subject of debate in the community, including among Aboriginal and Torres Strait Islander people, the Panel does not consider that these questions can be resolved or advanced at this time by inclusion in a constitutional referendum proposal.

Approaches to the referendum

The Panel has concluded that the options for constitutional recognition of Aboriginal and Torres Strait Islander peoples recommended in chapters 4, 5 and 6 are capable of succeeding at a referendum. The success of the 1967 referendum, at which a record high of 90 per cent support was secured, is a reminder that constitutional change in relation to Aboriginal and Torres Strait Islander peoples can gain the support of a significant majority of Australians. At the same time, the Panel is conscious of the record of unsuccessful referendum proposals in Australia. **Chapter 10** addresses the three issues most frequently raised with the Panel in relation to the referendum: the need for simplicity of proposals for recognition, the timing of the referendum and the general lack of public knowledge about the Constitution.

The Panel has further concluded that the Government and the Parliament should carefully consider whether the circumstances in which any referendum will be held are conducive to its success. Factors that should be taken into consideration include:

- whether there is strong support for the proposals to be put at referendum across the political spectrum;
- whether the referendum proposals are likely to be vigorously opposed by significant and influential groups;
- the likelihood of opposition to the referendum proposals from one or more State governments;
- whether the Government has done all it can to lay the groundwork for public support for the referendum proposals;
- whether there would be sufficient time to build public awareness and support for the referendum proposals;
- whether the referendum would be conducted in a political environment conducive to sympathetic consideration by the electorate of the referendum proposals; and
- whether the referendum proposals would be seen by electors as genuine and meaningful so as to avoid the risk of rejection on the basis that they represent an inadequate or ‘tokenistic’ response to the profound questions raised by constitutional recognition of Aboriginal and Torres Strait Islander peoples.

For many Australians, the failure of a referendum on recognition of Aboriginal and Torres Strait Islander peoples would result in confusion about the nation’s values, commitment to racial non-discrimination, and sense of national identity. The negative impact on Aboriginal and Torres Strait Islander peoples would be profound.

In the Panel’s view, achieving a successful referendum outcome should be the primary consideration of the Government and Parliament. It has therefore proposed a number of recommendations in relation to the process for the referendum.

Chapter 11 puts forward a draft Bill for an Act to alter the Constitution to recognise Aboriginal and Torres Strait Islander peoples and to replace current racially discriminatory provisions with a racial non-discrimination provision.

Recommendations

Recommendations for changes to the Constitution

The Panel recommends:

- 1 That section 25 be repealed.
- 2 That section 51(xxvi) be repealed.
- 3 That a new 'section 51A' be inserted, along the following lines:

Section 51A Recognition of Aboriginal and Torres Strait Islander peoples

Recognising that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

Acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;

Respecting the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;

Acknowledging the need to secure the advancement of Aboriginal and Torres Strait Islander peoples;

the Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples.

The Panel further recommends that the repeal of section 51(xxvi) and the insertion of the new 'section 51A' be proposed together.

- 4 That a new 'section 116A' be inserted, along the following lines:

Section 116A Prohibition of racial discrimination

- (1) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.
- (2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group.

- 5 That a new 'section 127A' be inserted, along the following lines:

Section 127A Recognition of languages

- (1) The national language of the Commonwealth of Australia is English.
- (2) The Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage.

Recommendations on the process for the referendum

- a. In the interests of simplicity, there should be a single referendum question in relation to the package of proposals on constitutional recognition of Aboriginal and Torres Strait Islander peoples set out in the draft Bill (Chapter 11).
- b. Before making a decision to proceed to a referendum, the Government should consult with the Opposition, the Greens and the independent members of Parliament, and with State and Territory governments and oppositions, in relation to the timing of the referendum and the content of the proposals.
- c. The referendum should only proceed when it is likely to be supported by all major political parties, and a majority of State governments.
- d. The referendum should not be held at the same time as a referendum on constitutional recognition of local government.
- e. Before the referendum is held, there should be a properly resourced public education and awareness program. If necessary, legislative change should occur to allow adequate funding of such a program.
- f. The Government should take steps, including through commitment of adequate financial resources, to maintain the momentum for recognition, including the widespread public support established through the *YouMeUnity* website, and to educate Australians about the Constitution and the importance of constitutional recognition of Aboriginal and Torres Strait Islander peoples. Reconciliation Australia could be involved in this process.
- g. If the Government decides to put to referendum a proposal for constitutional recognition of Aboriginal and Torres Strait Islander peoples other than the proposals recommended by the Panel, it should consult further with Aboriginal and Torres Strait Islander peoples and their representative organisations to ascertain their views in relation to any such alternative proposal.
- h. Immediately after the Panel's report is presented to the Prime Minister, copies should be made available to the leader of the Opposition, the leader of the Greens, and the independent members of Parliament. The report should be released publicly as soon as practicable after it is presented to the Prime Minister.

F.2 Final Report of the Aboriginal and Torres Strait Islander Act of Recognition Review Panel (2014)

Executive Summary

“I suppose to some extent I see this as nation building. We have now matured as a nation and our Constitution needs to recognise that.”¹

The recognition of Aboriginal and Torres Strait Islander peoples in our country’s founding document is a matter of profound importance. We cannot afford to get it wrong. Since 1967, when over 90% of Australians supported the inclusion of Indigenous Australians in the national census and a new Commonwealth responsibility for Indigenous policy matters, no other referendum has come close in its significance or impact on Australia’s national psyche.

Constitutional recognition embodies the strong spirit of reconciliation across Australia, signalling the next important step in our maturity as a nation. Non-Indigenous Australians who have not been subject to racism need to understand the debilitating effect it has on those who regularly experience it.

Most Australians know of the existence of the Constitution in broad terms and see it as the rulebook that ensures ‘fair play’ for all. Against that backdrop it is only logical that many Indigenous Australians feel that the Constitution not only fails to acknowledge their unique place in the country’s history, but also, that it has let them down. In fact, it is more often the case that when discrimination happens it is because we have failed to uphold the intent and inherent values of the Constitution.

It is readily apparent from the research that most Australians want to ensure that the Constitution reflects what it means to be Australian in the 21st century. We have a landmark opportunity to recognise our first peoples and ensure the Constitution never again allows for the omissions and inequalities that have happened in the past. It would allow us to protect what is uniquely Australian and acknowledge over 40,000 years of history. It ensures our Constitution reflects our values and recognises the equal worth and dignity of each citizen.

As a principle, there is broad support for the recognition and acknowledgement of our nation’s first peoples in the Constitution. Indeed, in the current climate, few issues have such a solid base of public support. However, it is also clear that levels of awareness and understanding of why change is needed, and what it would mean, are still low.

¹ Evidence to Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Senate, Halls Creek, 22 July 2014, p. 16. (Mr Ian Trust, Chairman and Executive Director, Wunan Foundation).

Despite the issue of constitutional recognition being on the national agenda since 2006, there is evidence that we are losing momentum and awareness is drifting. Over the past year public awareness levels on the referendum have dropped to less than 40% across the country. Encouragingly, support remains steady across both Indigenous and non-Indigenous people but this is at risk of declining if there isn't a clear path to a referendum.

We have not yet reached a point where we can proceed immediately to a referendum on the issue. To give the greatest chance of success, a number of pre-conditions need to be met. Fundamentally, this rests on a number of interdependent elements: agreeing a final proposal that can win the support of Indigenous Australians, parliaments and the people; setting a clear timeframe to show renewed commitment and urgency; and significantly raising the profile and understanding of constitutional recognition across the population. Our report reflects on each of these matters.

We are ready to take the next step on the path to a referendum. A 'circuit-breaker' is needed to move the debate forward. The time for clarity of intention and action is now.

First and foremost, the Panel has found that there is an **immediate imperative to remove any sense of ambiguity** around the intention to proceed to a referendum. The process to date has been challenging, with many moving parts, unclear timelines and a lack of certainty about next steps. This has led to unrealistic expectations on several fronts, leading to ambiguity and a sense of frustration among key groups. In our consultations we consistently heard the need for a clear public re-commitment to constitutional recognition. Indeed, there is a need for strong public commitment from all sides of politics, from state and territory governments, and from a wide range of Aboriginal and Torres Strait Islander people. This must be accompanied by a clear pathway forward, articulating the steps to get the country to a point of readiness and delivery of a referendum.

As noted above, awareness levels are flagging. **Raising awareness of why** we should pursue a referendum is a relatively straightforward matter, but efforts to promote this understanding need to be ramped up in the near future as investment in a wide-scale national campaign has been limited. The campaign will require new investment and a focus on the place our first Australians held in this nation before European settlement together with the valuable ongoing contribution of Aboriginal and Torres Strait Islander peoples and cultures to modern Australia. There is also a very real need for strong political leadership in explaining the place and role of our Constitution.

Crystallising the question to be put to the Australian voters lies at the heart of the referendum. Indeed, shaping a final proposition is by far the most complex matter on the path to a referendum. Definitively assessing the country's readiness for a referendum is difficult in the absence of the final proposal to be put to a vote.

It is clear that there is a thirst for change that is both symbolic and substantial. History confirms that to vote 'yes', Australians must be convinced that the proposed change to the Constitution is worth the investment. Consultations and research show that the change must be more than symbolic to win both Indigenous support and that of the wider public. The broader population also want to know that the final proposal is one that is wanted by the majority of Aboriginal and Torres Strait Islander Australians before they will support it. There are a range of diverse views on wording of the final proposition. Finding the 'sweet spot' that meets the test of meaningful change without significantly increasing the risk of uncertainty and judicial activism is challenging but possible.

Our report provides some observations around the issues that will need to be confronted when settling on a final model. Research shows that there is strong support for changes that recognise the place and history of Indigenous Australians and the removal of references to race. Australians want to address inequality in our Constitution but are wary of 'special treatment' for one group of people on the basis of race. The scope of the final proposition is narrowing and centres on:

- the placement of a statement of recognition;
- removal of section 25, which currently envisages the ability of state governments to disqualify a group of people from voting based on race; and
- re-formulation of the race power (section 51(xxvi)) to avoid the potential for perverse outcomes while retaining the Commonwealth's responsibility for Indigenous affairs.

It is worth noting that the 1967 referendum changes were arguably not as substantial as the modern public narrative indicates – yet the moral force of the changes have been tremendous. While not of itself sufficient, the importance of symbolic change through a statement of recognition should not be understated, and the strength of unity and goodwill accompanying such changes will be a landmark moment in our nation.

The current debate lends itself to more substantial changes – changes which will amend the Constitution so that it reflects our values. Section 25 of the Constitution is out-dated and indeed reflective of a time long past – where our leaders could restrict, on the basis of race, access to the most fundamental democratic right, the right to vote. The Panel considers that the Australian people are ready for this change.

Changes beyond these have become the real focus of the debate. This centres on the way in which the Commonwealth can exercise its powers under the Constitution and discharge its responsibilities in Indigenous affairs without the risk of perverse outcomes. These changes elicit the most polarised opinions.

As noted above, the Panel found a significant divergence of perspectives on what the final proposition should look like, and what the rightful role of the Constitution is in recognising Indigenous Australians. Importantly the Panel is optimistic that a strong proposition can be agreed – one which balances symbolism, while also ensuring there is substance to the change.

The work of the Expert Panel on the Constitutional Recognition of Indigenous Australians and more recently the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples has been invaluable in exploring the options and building multi-party support. Ultimately, however, the referendum rests on finalising a set of words that can be widely supported by Aboriginal and Torres Strait Islander people and the wider public. Political leadership is needed to break through the ongoing cycle of deliberations. There are a number of ways to achieve this, but any mechanism must have legitimacy, trust across the political spectrum, the direct involvement of Indigenous people and be above the challenges of day to day politics. It requires dedicated commitment, leadership and focus to bring about a truly multi-partisan approach – one where Indigenous Australians are full and respected partners in the change.

The **timing of a referendum** also needs to be settled quickly to give renewed certainty that we are progressing to a vote and to build momentum. The complex and hard work of finalising a model does not get any easier with delays or deferral. There are mixed views on when to hold a referendum and whether to hold it with an election or as a standalone vote. Holding a referendum within this term of government is ambitious but possible if all the pre-conditions are met. This hinges on gaining agreement to a final set of words and building sufficient understanding and support for the change. All efforts must be highly synchronised and coordinated.

The Panel heard views that holding a referendum at the time of the next election is possible, and in some cases desirable, principally to reduce cost. This needs to be balanced with the risks associated with holding a referendum that is designed to unite the nation, and which needs unwavering multi-partisan support, at a time of inevitable political tension. Others were of the strong view that the imperative to ‘get it right’ justifies holding a referendum after the next election. The Panel also heard that many

Aboriginal and Torres Strait Islander people were increasingly concerned about the ability to deliver constitutional change if the timeframe lingers.

However, almost all of the people we spoke to made it clear that reaching agreement on a final proposition to put to a referendum will ultimately determine the timeframe.

The Panel is of the view that an end-date must be identified – to remove ambiguity and achieve a sense of focus. The Panel suggests that a referendum should be held no later than the first half of 2017, within a fifty year window of the 1967 referendum. If the pre-conditions outlined in this report can be met earlier, including widespread support for an agreed proposition, then there remains a case for an earlier referendum. However, above all else, the Panel recognises that such a referendum is a most fundamental step for our nation. Getting it right and achieving success must be the overriding imperative.

Recommendations:

On the basis of the evidence before it, the Panel recommends:

1. A ‘circuit breaker’ needs to be rapidly identified to settle the final form of words and draw debate on the model to a conclusion. This will build a sense of national urgency and provide renewed certainty that the country will proceed to a referendum. Delivering on the commitment to form a special committee to guide the referendum, a Referendum Council of trusted national figures is recommended.

The Referendum Council would:

- a. Have legitimacy in the eyes of the nation, be seen as apolitical and include both Indigenous and non-Indigenous members.
 - b. Advise on the final proposition and gain agreement to it from Indigenous peoples, constitutional experts, parliaments and the wider public.
 - c. Draw on the work of this report and the Joint Select Committee.
 - d. Ensure that the final proposition is legally sound, clear, easily understood and does not significantly increase constitutional uncertainty.
2. The Parliament, state and territory governments and Aboriginal and Torres Strait Islander peoples publicly re-declare their commitment to constitutional recognition and working in collaboration towards a referendum.
 3. Timing parameters for a referendum should be settled as soon as possible to provide certainty and focus. A referendum should be held no later than the first

half of 2017. If the pre-conditions outlined in this report can be met earlier, including widespread support for an agreed proposition, then there remains a case for an earlier referendum.

4. The Government should continue to support and resource Recognise, and its partner organisations, to finalise an increased public awareness strategy that builds a better understanding of why recognition is important in the wider community. This strategy should:
 - a. include a focus on the enduring contributions of Aboriginal and Torres Strait Islander peoples and cultures on the life of the nation;
 - b. focus on real Australians telling real stories;
 - c. draw on social research and historical facts;
 - d. target a wide audience, but with a focus on those groups that have the lowest levels of awareness;
 - e. ensure Aboriginal and Torres Strait Islander peoples are engaged in community education activities as broadly as possible; and
 - f. be educational in nature and include raising awareness of the role of the Constitution.

5. The Parliament should amend the *Aboriginal and Torres Strait Islander Recognition Act 2013* to demonstrate continuing commitment and ensure the Act does not sunset in March 2015. The Act should be extended for no more than three years, to align with the timing of the referendum (as per Recommendation 3 above).²

² Note: in this report the term 'Indigenous people/s' refers to both the Aboriginal and Torres Strait Islander peoples of Australia.

F.3 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples: Final Report (2015)

Executive summary

The committee recommends that a referendum be held on the matter of recognising Aboriginal and Torres Strait Islander peoples in the Australian Constitution, and that it be held at a time when it has the highest chance of success.

The committee recommends that a referendum be held on the matter of recognising Aboriginal and Torres Strait Islander peoples in the Australian Constitution (paragraph 9.32).

The committee recommends that the referendum on constitutional recognition be held when it has the highest chance of success (paragraph 2.40).

The committee has considered mechanisms for engagement on the topic of constitutional recognition, and recommends that conventions consisting of Aboriginal and Torres Strait Islander delegates as well as delegates from the broader Australian community be held to build support for a referendum and to engage a wide cross-section of the community (paragraphs 8.49-8.50).

The committee puts forward three options which it considers would meet the dual objectives of achieving constitutional recognition and protecting Aboriginal and Torres Strait Islander peoples from racial discrimination (paragraphs 4.88-4.94).

The committee recommends that section 25 of the Constitution be repealed, and that section 51 (xxvi) be replaced, with the retention of a persons power so that the Commonwealth government may legislate for Aboriginal and Torres Strait Islander peoples as per the 1967 referendum result (paragraphs 3.19-3.20).

During the inquiry, the committee formed the view that amending the *Human Rights (Parliamentary Scrutiny) Act 2011* to include scrutiny of the United Nations Declaration on the Rights of Indigenous Peoples would act as an enhancement to the existing parliamentary scrutiny framework (paragraph 6.18).

The committee has achieved its objective of building a secure strong multi-partisan parliamentary consensus around the timing, specific content and wording of referendum proposals for Indigenous constitutional recognition.

The committee recommends that each House of Parliament set aside a full day of sitting to debate concurrently the recommendations of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, with a view to achieving near-unanimous support for and build momentum towards a referendum to recognise Aboriginal and Torres Strait Islander peoples (paragraph 2.32).

As a mechanism to focus engagement on this important debate, the committee recommends that a parliamentary process be established to oversight progress towards a successful referendum (paragraph 9.33).

Recommendations

Recommendation 1

2.32 The committee recommends that each House of Parliament set aside a full day of sitting to debate concurrently the recommendations of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, with a view to achieving near-unanimous support for and build momentum towards a referendum to recognise Aboriginal and Torres Strait Islander peoples.

Recommendation 2

2.40 The committee recommends that the referendum on constitutional recognition be held when it has the highest chance of success.

Recommendation 3

3.19 The committee recommends that section 25 of the Constitution be repealed.

Recommendation 4

3.20 The committee recommends the repeal of section 51(xxvi) and the retention of a persons power so that the Commonwealth government may legislate for Aboriginal and Torres Strait Islander peoples as per the 1967 referendum result.

Recommendation 5

4.88 The committee recommends that the three options, which would retain the persons power, set out as proposed new sections 60A, 80A and 51A & 116A, be considered for referendum.

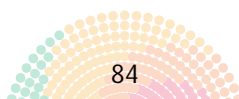
4.89 The first option the committee recommends for consideration is its amended proposed new section 51A, and proposed new section 116A, reported as option 1 in the committee's Progress Report:

51A Recognition of Aboriginal and Torres Strait Islander Peoples

Recognising that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

Acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;

Respecting the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;



The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples.

116A Prohibition of racial discrimination

(1) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.

(2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group;

4.90 The committee considers that this proposal:

- is legally and technically sound;
- retains a persons power as per the 1967 referendum result;
- contains a special measures provision;
- limits the constitutional capacity of the Commonwealth, states and territories to discriminate;
- offers a protection for all Australians;
- is a broad option;
- had the overwhelming support of Aboriginal and Torres Strait Islander peoples and non-Aboriginal and Torres Strait Islander peoples during the inquiry; and
- accords with the recommendation of the Expert Panel.

4.91 The second option was proposed by Mr Henry Burmester AO QC, Professor Megan Davis and Mr Glenn Ferguson after their consultation process:

CHAPTER IIIA

Aboriginal and Torres Strait Islander Peoples

Section 80A

(1) **Recognising** that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

Acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;

Respecting the continuing cultures and heritage of Aboriginal and Torres Strait Islander peoples;

Acknowledging that Aboriginal and Torres Strait Islander languages are the original Australian languages and a part of our national heritage;

the Parliament shall, subject to this Constitution, have power to make laws with respect to Aboriginal and Torres Strait Islander peoples, but so as not to discriminate against them.

(2) This section provides the sole power for the Commonwealth to make special laws for Aboriginal and Torres Strait Islander peoples.

4.92 The committee considers that this proposal:

- is legally and technically sound;
- retains a persons power as per the 1967 referendum result;
- is clear in meaning;
- limits the capacity of the Commonwealth only with regard to discrimination, so states and territories are not affected by constitutional change;
- is a narrow option; and
- offers constitutional protection from racial discrimination for Aboriginal and Torres Strait Islander peoples.

4.93 The third option which would retain the persons power is the proposal from the Public Law and Policy Research Unit at the University of Adelaide:

60A Recognition of Aboriginal and Torres Strait Islander Peoples

Recognising that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

Acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;

Respecting the continuing cultures and heritage of Aboriginal and Torres Strait Islander peoples;

Acknowledging that Aboriginal and Torres Strait Islander languages are the original Australian languages and a part of our national heritage;

(1) The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples.

(2) A law of the Commonwealth, a State or a Territory must not discriminate adversely against Aboriginal and Torres Strait Islander peoples.

4.94 The committee considers that this proposal:

- is legally and technically sound;
- retains a persons power as per the 1967 referendum result;
- is clear in meaning;
- is both a narrow and a broad option;
- limits the 'adverse discrimination' provision to Aboriginal and Torres Strait Islander peoples; and
- limits the capacity of the Commonwealth, states and territories constitutionally to discriminate.

Recommendation 6

6.18 The committee recommends that the *Human Rights (Parliamentary Scrutiny) Act 2011* be amended to include the United Nations Declaration on the Rights of Indigenous Peoples in the list of international instruments which comprise the definition of human rights under the Act.

Recommendation 7

8.49 The committee recommends that the government hold constitutional conventions as a mechanism for building support for a referendum and engaging a broad cross-section of the community while focussing the debate.

Recommendation 8

8.50 The committee further recommends that conventions made up of Aboriginal and Torres Strait Islander delegates be held, with a certain number of those delegates then selected to participate in national conventions.

Recommendation 9

9.32 The committee recommends that a referendum be held on the matter of recognising Aboriginal and Torres Strait Islander peoples in the Australian Constitution.

Recommendation 10

9.33 The committee recommends that a parliamentary process be established to oversight progress towards a successful referendum.