

APPENDIX K: URBIS ANALYSIS OF SUBMISSIONS RECEIVED

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Executive Summary

In May 2017, Urbis was commissioned by the Referendum Council (the Council) to undertake an analysis of public submissions on constitutional recognition of Aboriginal and Torres Strait Islander peoples. A total of 1,111 submissions were received, including 1,057 submissions via a structured online survey (structured submissions) and 54 submissions taking the form of an email, letter or other document (free form submissions).

This report outlines Urbis' findings on the level of support for constitutional recognition, the level of support for key proposals for recognition as outlined in the Council's Discussion Paper, other key concerns and considerations for recognition, the profile of submission respondents and an exploration of alternative options for recognition suggested.

All submissions received were analysed according to an analytical frame, which ensured the levels of support, the various themes and other suggestions raised in the submissions were captured and categorised in a structured and methodically robust manner.

Levels of support for constitutional recognition

A very strong level of support for constitutional recognition of Aboriginal and Torres Strait Islander peoples was found, with nine out of ten submissions in favour. Only 8% indicated they did not support the move, while 2% of submissions were unsure of their position.

The strong support for recognition was based on a desire to see Aboriginal and Torres Strait Islander peoples acknowledged as Australia's First Peoples, with an ongoing set of rights based on that legacy. In addition to recognising Aboriginal and Torres Strait Islander peoples in the Constitution, there was also hope the recognition process would meet a broader need for modernising the Constitution – to remove outdated and prejudicial concepts, to stop racial discrimination and to remove redundant sections.

The highest level of support was for amendment of the existing Constitution, rather than a new constitution or recognition in normal law. Regarding the nature of the change, a wide range of responses were received, from the symbolic to the substantive. The strongest call was for substantive over symbolic change.

Two key reasons for opposition to recognition arose. Firstly, some argued constitutional recognition is a mistake in an environment where sovereignty remains unceded. This view was most common among those who demanded substantive change in the lives and rights of Aboriginal and Torres Strait Islander peoples, not just in relation to their treatment in the Constitution. Secondly, the singling out of Aboriginal and Torres Strait Islander peoples in the Constitution was seen by others as undermining efforts to achieve equality in Australia.

Support for the Council's key proposals

The Council's Discussion Paper outlined five key proposals for constitutional reform, and all submissions were invited to express their support for or opposition to these measures.

The key proposals included:

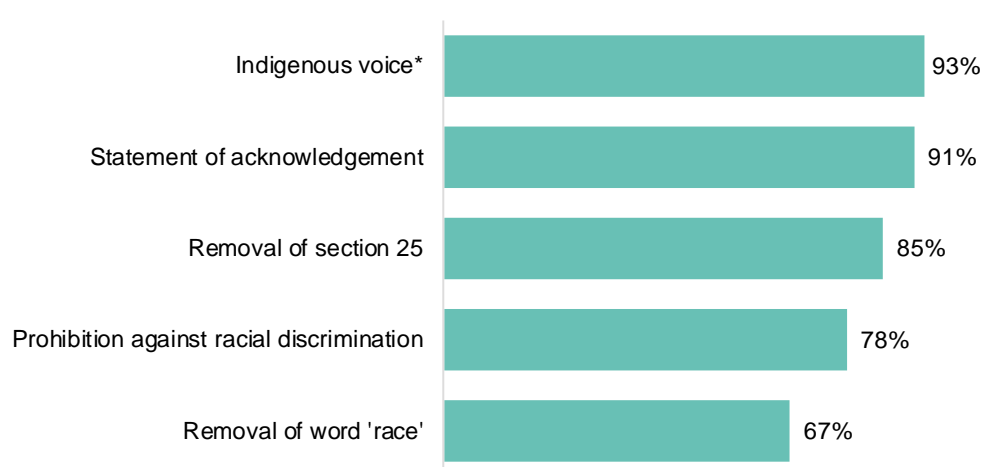
- inserting a statement acknowledging Aboriginal and Torres Strait Islander peoples as the First Australians, either inside or outside the Constitution
- amending or deleting the 'race power', section 51 (xxvi), and replacing it with a new head of power
- inserting a constitutional prohibition against racial discrimination
- providing for an Indigenous voice to be heard by Parliament, and for the voice to be consulted on legislation and policy that affects Aboriginal and Torres Strait Islander peoples
- deleting section 25.

A large majority of submissions supported all five of these key proposals. With strongest support, more than nine in ten (93%) backed the inclusion of an Indigenous voice when Parliament and government make laws and policies about Indigenous affairs. A total of 77% supported the creation of a group providing this voice under the Constitution.

A statement of acknowledgement of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia also received significant backing, with 91% supporting this measure – 86% in favour of a statement within the Constitution and 5% in favour of a statement in normal Australian law.

Changes to the ‘race provisions’, section 25 and section 51 (xxvi), also received strong support with 85% of submissions supporting the removal of section 25 and more than two in three (67%) supporting removal of the word ‘race’ from the Constitution. A further 78% supported the insertion of a constitutional prohibition against racial discrimination.

Figure 1 – Preferred proposals for recognition



*Indicative of support for an Indigenous voice in general, rather than creation of a group under the Constitution

Alternative options for recognition

The proposal for a Treaty or an agreement-making power was not put forward as a specific reform proposal for comment. Nonetheless, calls for a Treaty, Treaties, or an agreement-making power frequently emerged as a preferred option for reform. There was strong support for a Treaty to provide certainty for Aboriginal and Torres Strait Islander peoples moving forward, and for a Treaty to acknowledge past injustices.

Few submissions provided specific comment on what a Treaty would look like or what form it would take. However, several referenced international jurisdictions with existing Treaty arrangements with their Indigenous populations, such as New Zealand, Canada and the United States of America as models for Australia to emulate.

There was also some support for constitutional change to reflect Australia’s commitments under international law. The United Nations Declaration on the Rights of Indigenous Peoples (the UN Declaration) was the international instrument referenced most frequently. Some proposed the principles of the UN Declaration should underpin the process of constitutional recognition. Others called for the specific rights afforded to Indigenous persons within the UN Declaration to be incorporated into the Australian Constitution.

Prerequisites for recognition

Finally, submissions also outlined some overall considerations regarding the process for achieving constitutional recognition. These included:

- the critical importance of consultation with Aboriginal and Torres Strait Islander peoples
- a strong desire to see substantive rather than symbolic change
- consideration of the chances of success at referendum
- accommodating the diversity of Aboriginal and Torres Strait Islander peoples
- prioritising fairness and equality, including acknowledging Aboriginal and Torres Strait Islander peoples.

We thank the Referendum Council for the opportunity of working on this important project, and look forward to the Council's full report.

1. Introduction

In May 2017, Urbis was commissioned by the Referendum Council (the Council) to undertake an analysis of public submissions on constitutional recognition of Aboriginal and Torres Strait Islander peoples. This section provides background information, an outline of the project and a description of the methodology used.

1.1 Background

The Australian Government has made a commitment to holding a referendum on constitutional recognition of Aboriginal and Torres Strait Islander peoples. Significant work has been completed to understand what form constitutional recognition may take, including:

- in 2011 – appointment of the Expert Panel on Recognising Aboriginal and Torres Strait Islander peoples in the Constitution (the Expert Panel) to consult throughout Australia (with the submission of its final report and recommendations in 2012)
- in 2013 – appointment of the Parliamentary Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (the Joint Select Committee) to review work undertaken by the Expert Panel, to undertake consultation with key organisations and to review the Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012 (with the submissions of its final report and recommendations in 2015)
- in December 2015 – appointment of a 16-member Referendum Council by the Prime Minister and the Leader of the Opposition to consult widely throughout Australia and advise on next steps. Consultation has included 12 First Nations Regional Dialogues, culminating in a National Indigenous Constitutional Convention in May 2017; as well as an invitation for public submissions based on the Council's Discussion Paper.

1.2 This project

Urbis was commissioned to undertake an analysis of public submissions to the Referendum Council on Constitutional Recognition. Submissions were received during the period December 2016 to May 2017. A total of 1,111 submissions were received, including 1,057 submissions via a structured online survey (structured submissions) and 54 submissions taking the form of an email, letter or other document (free form submissions).

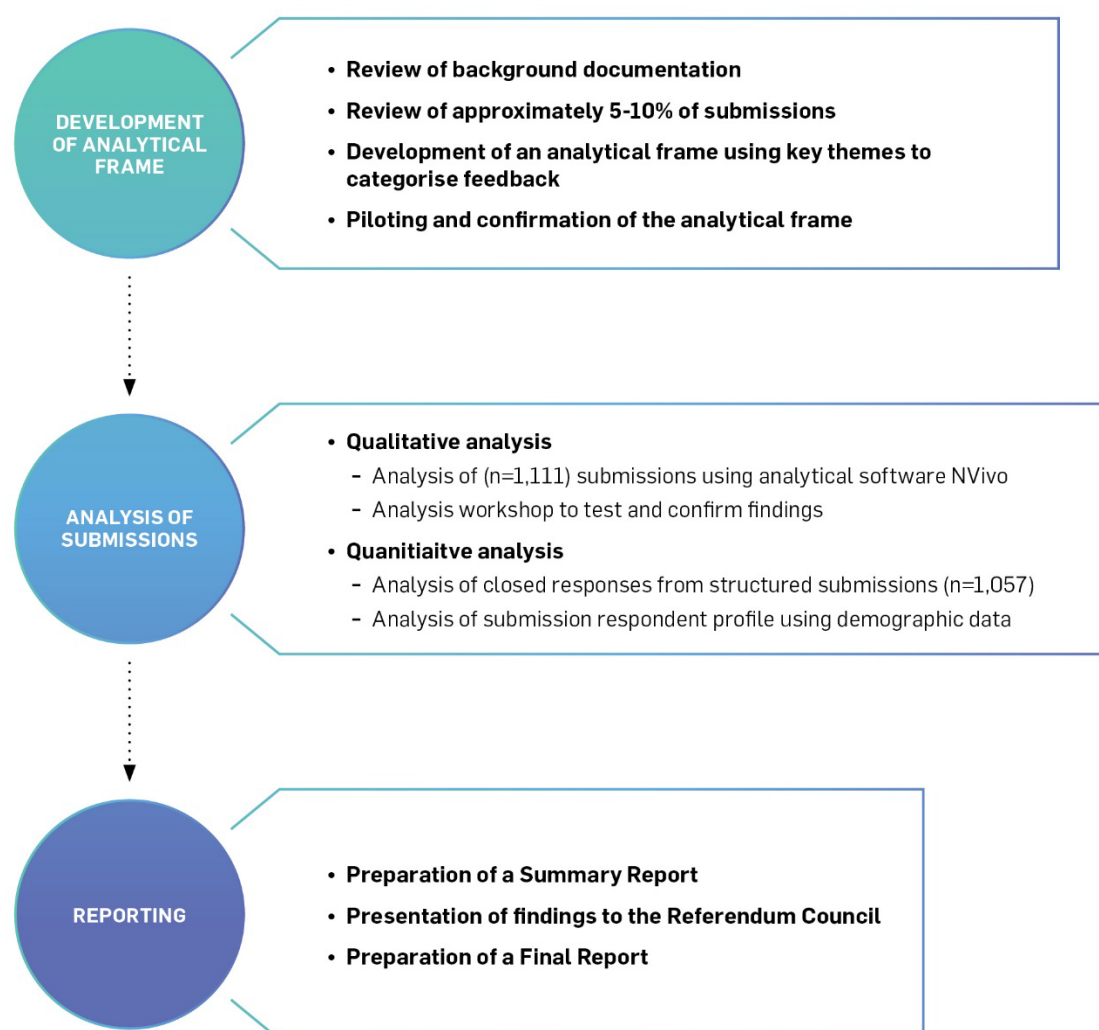
This report outlines Urbis' findings on:

- the level of support for constitutional recognition
- the level of support for key proposals for recognition
- key considerations for recognition
- the profile of submission respondents.

1.3 Methodology

Our methodological approach has involved a three step process as outlined below.

Figure 2 – Summary of methodology



1.3.1 Development of analytical frame

An analytical frame creates a structure around which to group key concepts and themes across large volumes of qualitative data. In developing the analytical frame for this project, Urbis undertook a review of background documentation (including the Referendum Council's Discussion Paper) and a high level review of a sample of submissions. The analytical frame took the form of a hierarchy of themes and sub-themes grouped under each question of the structured online survey. This was first built in Excel, then

piloted and refined, and built in the software NVivo. A number of overarching themes were created (e.g. 'other relevant content') to allow analysis of concepts which did not fit within a specific theme.

1.3.2 Analysis of submissions

Qualitative analysis

The qualitative analysis of submissions involved categorising phrases and concepts from the n=1,111 submissions against relevant themes in the analytical frame. This process was undertaken in NVivo and is referred to as 'coding'. Consistency in the coding process across the Urbis research team was ensured via the development of a coding dictionary (defining a consistent interpretation of the theme labels).

Once the coding process was complete, reports for each theme and sub-theme were generated in NVivo to allow collated content to be reviewed in detail. Urbis research team members then met for a workshop to consider the findings – focusing the discussion around the overall level of support for constitutional recognition, the level of support for key proposals for recognition, as well as key considerations for recognition overall.

Quantitative analysis

The quantitative analysis of submissions involved analysing descriptive statistics of on the demographic data from both the structured and free form submissions to develop an overall profile of respondents; as well as on the closed (yes/no) question data (from the structured submissions only) to understand support for key proposals for recognition. Cross-tabulations were also performed on the closed responses to understand differences in respondent profiles between those who were supportive and unsupportive of the different proposals. Table 1 below outlines which demographic characteristics were available for analysis by submission type.

Please note – where quantitative data is used throughout the report this references data from the structured submissions only, with the exception of reporting on Aboriginal and Torres Strait Islander status and individual/organisation status (as shown below).

Table 1 – Summary of available demographic data

Demographic characteristic	Submission type	
	Structured submissions	Free form submissions
Individual or organisation	X	X
Aboriginal and Torres Strait Islander status	X	X
Location – state/territory	X	
Location – remoteness	X	
Gender	X	
Age	X	

Finally, analysis was performed on the closed (yes/no) question data (from the structured submissions only) to understand whether there were common levels of support across different combinations of proposals for recognition. This was undertaken in an attempt to understand patterns of support across the spectrum of symbolic (e.g. a statement of acknowledgment) to substantive (e.g. an Indigenous voice in parliament) change.

1.3.3 Reporting

Following the analysis phase, a Summary Report was produced and presented to the Referendum Council. The Summary Report provided a snapshot of the respondent profile, and an outline of key themes from the submissions. This report (the Final Report) accompanies the Summary Report and provides greater detail.

A note on terminology

Both this Final Report and the Summary Report adopt the terminology ‘strong voice’, ‘weak voice’ etc. to indicate the level of support for each concept when discussing qualitative findings. In line with the methodological approach taken, these are qualitative terminologies used to provide an indication of the level of support across all n=1,111 submissions only. On the other hand, quantitative findings are expressed using numbers and proportions (%) throughout the reports, with charts and infographics applied to visualise results.

1.3.4 Limitations

There are a number of limitations associated with this analysis of submissions. They include:

- Submissions processes generally attract those who are keenly following an issue and respondents are therefore likely to hold either a strongly supportive or a strongly opposed view. The views expressed in the submissions can therefore not be considered to be representative of the Australian public as a whole.
- The proposals for constitutional change required some knowledge of legal concepts to be fully grasped. It was evident in the quality of the content that many respondents did not have an adequate understanding of legal concepts to respond meaningfully to many of the questions. While the Referendum Council’s Discussion Paper simplified the legal concepts well, there was no guarantee people had read the Paper, and there was no introductory text provided in the form itself to remind respondents of the legal concepts or issue behind each question.
- The structured online submission form asked respondents to indicate their support for each proposal for constitutional recognition separately, rather than asking people to consider combinations of reform options. This means there is a lack of insight into reasons for support or lack of support in the qualitative data.
- The structured online submission form didn’t explicitly invite considerations of the potential risks associated with each proposal for recognition. This is likely to have led to a bias in favour of supportive views.
- The structured online submission form focussed questions around specific proposals for constitutional change, rather than inviting respondents to consider other options. For example, the Indigenous voice topic was largely framed around a specific proposal for an Indigenous group to be set up under the Constitution to advise Parliament or block laws. This narrow focus has limited the opportunity for respondents to comment on alternative mechanisms, such as, in the example of the Indigenous voice, dedicated seats in Parliament.

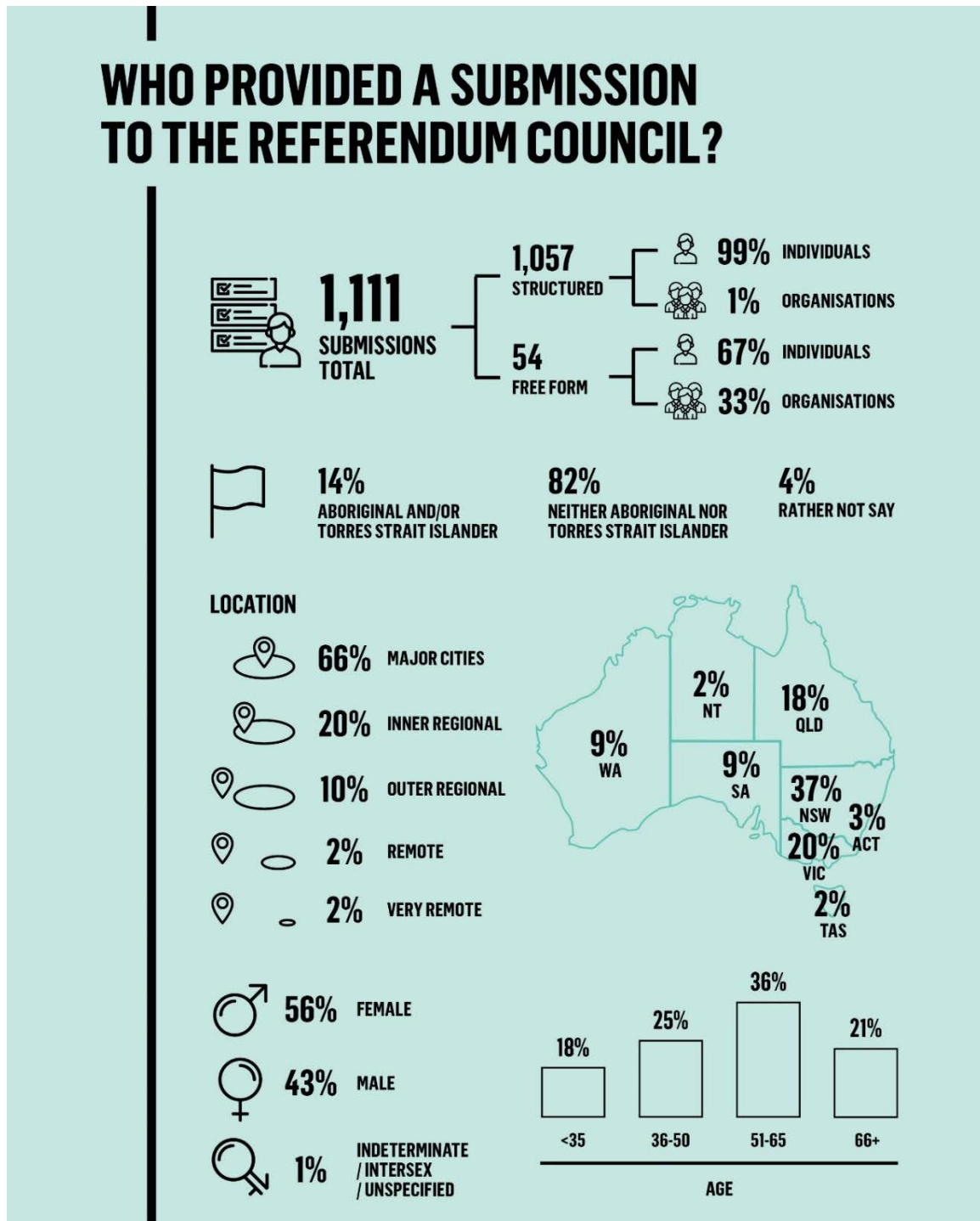
2. Overview of respondents

The following provides an overview of the demographic characteristics of respondents who provided a submission to the Referendum Council.¹ This profile of submissions represents an overrepresentation of

¹ Please note demographic figures relate to structured submissions only, with the exception of Aboriginal and Torres Strait Islander status. Where free form submissions from organisations identified themselves as Aboriginal and Torres Strait Islander, they have been included in the quantitative analysis.

Aboriginal and Torres Strait Islander peoples, females, people aged 36+ and people living in New South Wales compared to the total Australian population.

Figure 3 – Overview of respondents



3. Support for constitutional recognition

Before providing feedback on the five specific proposals for reform, all respondents were asked their general level of support for “some form” of constitutional recognition, and what form that recognition should take.

A very strong level of support for constitutional recognition of Aboriginal and Torres Strait Islander peoples was found, with nine out of ten submissions in favour. Only 8% indicated they did not support the move, while 2% of submissions were unsure of their position.

The strong support for recognition was based on a desire to see Aboriginal and Torres Strait Islander peoples acknowledged as Australia's First Peoples, with an ongoing set of rights based on that legacy. In addition to recognising Aboriginal and Torres Strait Islander peoples in the Constitution, there was also hope the recognition process would meet a broader need for modernising the Constitution – to remove outdated and prejudicial concepts, to stop racial discrimination and to remove redundant sections.

We have no acknowledgement of the first peoples of this land in our Constitution...it's the symbolic thing that should happen. It's a very important step on the long road to reconciliation. It's a change that on one level is symbolic, in seeking to address historic elements of our Constitution which reflect racism. Symbols are important in politics. (Casse Australia)

The Constitution must be changed, deleting any section that is racist or prejudiced against any people, specifically the First Peoples. (Individual)

There were no demographic differences of note when considering overall support for recognition.

The highest level of support was for amendment of the existing Constitution, rather than a new constitution or recognition in normal law. Regarding the nature of the change, a wide range of responses were received, from the symbolic to the substantive. The strongest call was for substantive over symbolic change.

The powerful symbolism of recognising Aboriginal and Torres Strait Islander peoples in the Constitution must be accompanied by substantive changes to the legislative power of the Commonwealth to prohibit discrimination and make laws for the benefit of Aboriginal and Torres Strait Islander peoples... Without these factors constitutional recognition risks being perceived as an empty gesture and falling short of its potential to effect genuine and positive change. (Royal Australian and New Zealand College of Psychiatrists)

[Recognition] must be substantially significant that it shakes up the way law and policy making is made in this country, in other words a radical change need a radical solution. (Individual)

Three key suggestions for substantive reform emerged when investigating overall preferences for change, before reviewing the specific proposals put forward by the Council. The most significant call was for a Treaty/Treaties or an agreement-making power, which may sit in and/or outside of the Constitution. In advocating for a Treaty or similar, both legal and moral dimensions were raised. Specifically, there was strong support for a Treaty to set the legal framework for Aboriginal and Torres Strait Islander peoples moving forward, and for a Treaty to acknowledge past injustices thereby creating an enabling environment for self-determination.

Properly concluded Treaties reflecting the past, settling the past, securing the future, writing a new future, a roadmap forward is the only answer. (Individual)

A Treaty between the Commonwealth of Australia and the numerous Indigenous Nations is the only legally and morally recognisable way of containing the free, prior and informed consent required for a long-lasting agreement by all peoples on this great continent. (Individual)

There was also a clear desire for Aboriginal and Torres Strait Islander peoples to have a stronger voice on Indigenous affairs. However, when exploring general preferences for change, little detail regarding the nature of this voice (including membership or powers) was provided.

Such an amendment could ensure that the views of First Peoples are heard by lawmakers and could help Parliament to enact better and more effective laws. (Individual)

Reform via a Declaration of Recognition also received some support. This view noted a Declaration is an appropriate place for potentially emotive language, and argued this option carried a greater chance of successful implementation compared to a referendum to amend the Constitution.

Recognition demands a powerful and poetic statement that captures the imagination. An Australian Declaration of Recognition would have the kind of cultural significance for Australians that the Declaration of Independence has for Americans – even though it is not part of the Constitution of the United States. (Australian Catholic University)

Two key reasons for opposition to recognition arose. Firstly, some argued constitutional recognition is a mistake in an environment where sovereignty remains unceded. This view was most common among those who demanded substantive change in the lives and rights of Aboriginal and Torres Strait Islander peoples, not just in relation to their treatment in the Constitution. Secondly, the singling out of Aboriginal and Torres Strait Islander peoples in the Constitution was seen by others as undermining efforts to achieve equality in Australia.

Whilst recognising that our Sovereignty has never been ceded, do we put this constitutional reform debate on pause until we deal with that question? (Individual)

My [opposition] is based on the clear principle of opposition to racism in all forms. That includes purported positive discrimination as well as negative discrimination. (Liberal Democratic Party)

When considering the appropriate placement for recognition overall, the strongest support was for inclusion in a Preamble. A Preamble was considered to be the place of highest visibility and importance, and therefore appropriate for a reform of such significance as recognition.

4. Preferred proposals for recognition

The Council's Discussion Paper outlined five key proposals for constitutional reform, and all submissions were invited to express their support for or opposition to these measures.

The key proposals included:

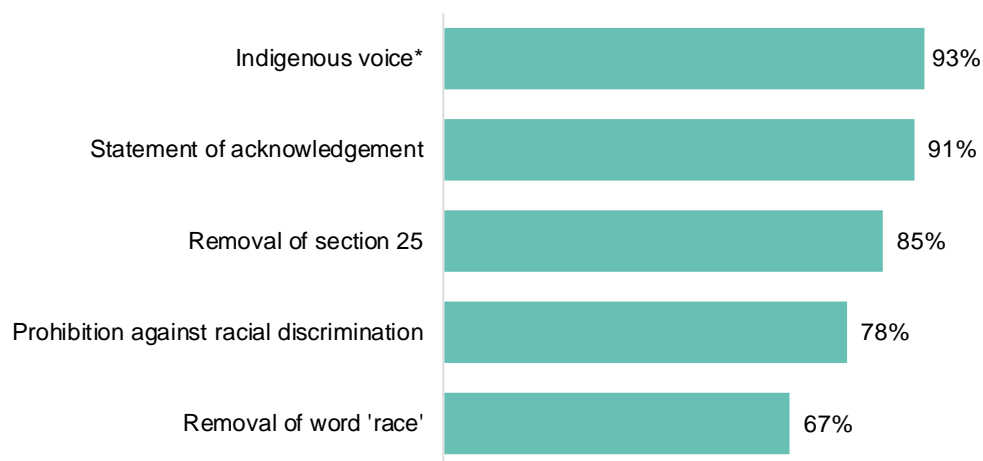
- inserting a statement acknowledging Aboriginal and Torres Strait Islander peoples as the First Australians, either inside or outside the Constitution
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- providing for an Indigenous voice to be heard by Parliament, and for the voice to be consulted on legislation and policy that affects Aboriginal and Torres Strait Islander peoples
- deleting section 25.

A large majority of submissions supported all five of these key proposals. With strongest support, more than nine in ten (93%) backed the inclusion of an Indigenous voice when Parliament and government make laws and policies about Indigenous affairs. A total of 77% supported the creation of a group providing this voice under the Constitution.

A statement of acknowledgement of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia also received significant backing, with 91% supporting this measure – 86% in favour of a statement within the Constitution and 5% in favour of a statement in normal Australian law.

Changes to the 'race provisions', section 25 and section 51 (xxvi), also received strong support with 85% of submissions supporting the removal of section 25 and more than two in three (67%) supporting removal of the word 'race' from the Constitution. A further 78% supported the insertion of a constitutional prohibition against racial discrimination.

Figure 4 – Preferred proposals for recognition



*Indicative of support for an Indigenous voice in general, rather than creation of a group under the Constitution

Quantitative analysis revealed that no respondents supported only a statement of acknowledgement, only an Indigenous voice in parliament, only the deletion of section 25 or only the insertion of a prohibition against racial discrimination. This reveals the extent of support for a broader package of reforms to achieve recognition for Aboriginal and Torres Strait Islander peoples.

It should be noted that respondents were asked to consider each proposal individually, rather than in bundles, and without consideration of the potential risks associated with each proposal. This may have created a bias towards support for the proposed measures.

5. Prerequisites for recognition

The submissions raised a number of key considerations for the Referendum Council on the journey towards constitutional recognition.

Consultation with Aboriginal and Torres Strait Islander peoples

The critical importance of consultation with Aboriginal and Torres Strait Islander peoples was strongly stated. There was significant deference to the opinion of Aboriginal and Torres Strait Islander peoples throughout the submissions. Many of the submissions, while supportive of one or more of the key proposals, declined to provide more detail, noting the model and its specifics should be the preserve of Aboriginal and Torres Strait Islander peoples themselves.

The model must 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. (Individual)

Indigenous views must be paramount in determining what forms of constitutional recognition to adopt. (The University of Western Australia)

I would prefer Aboriginal and Torres Strait Islander people to say what the change should look like. (Individual)

Substantive rather than symbolic change

The desire to see this process lead to substantive rather than symbolic only change was also clear. While many were supportive of one or several mechanisms for constitutional recognition, much of the detailed feedback noted these changes must be placed within a wider agenda of substantive change to be acceptable.

NSWALC's position on reform to the Australian Constitution [is that it] should be meaningful and not result merely in symbolic recognition. (NSW Aboriginal Land Council)

It must involve substantive change which will prevent First Nations' rights being eroded without their prior, free and informed consent. (Individual)

A move beyond mere symbolism and tokenism. (Individual)

Consideration of the chances of success

The conservative track record of Australia in relation to constitutional change was a key concern, particularly throughout organisational submissions. Many emphasised the need to develop a pathway for change with a strong likelihood of success, bi-partisan support and an accompanying plan for engaging the Australian population to support a successful outcome. Concern was expressed regarding the potential damage wrought by an unsuccessful attempt at constitutional recognition – for Aboriginal and Torres Strait Islander peoples specifically, and equality generally.

Given the political difficulties involved in amending the Australian Constitution, it is vital to consider possibilities for recognising Aboriginal and Torres Strait Islander peoples by way of small-c constitutional change. (Individual)

The diversity of Aboriginal and Torres Strait Islander peoples

The submission questions were phrased in relation to Aboriginal and Torres Strait Islander peoples as a collective group. However, the diversity of Aboriginal and Torres Strait Islander peoples was considered by many as both fundamental to success (to reach agreement on the model across the many and varied nations), as well as in achieving a right and just outcome.

Acknowledge them as First Nation peoples, represented by many nations. (Individual)

Do Aboriginal people want to be classified as one entity or recognition for each different nation? This should be decided by their selected representatives. (Individual)

Fairness and equality, including acknowledging Aboriginal and Torres Strait Islander peoples

The importance of the Constitution reflecting the values of fairness and equality was broadly emphasised. Singling out the specific experience and value of Aboriginal and Torres Strait Islander peoples was considered key by most to achieving an acceptable level of equality in Australia.

Changes should include reference to Aboriginal and Torres Strait Islander peoples as traditional owners of the land, having equal rights and access to same opportunities as other races. (Individual)

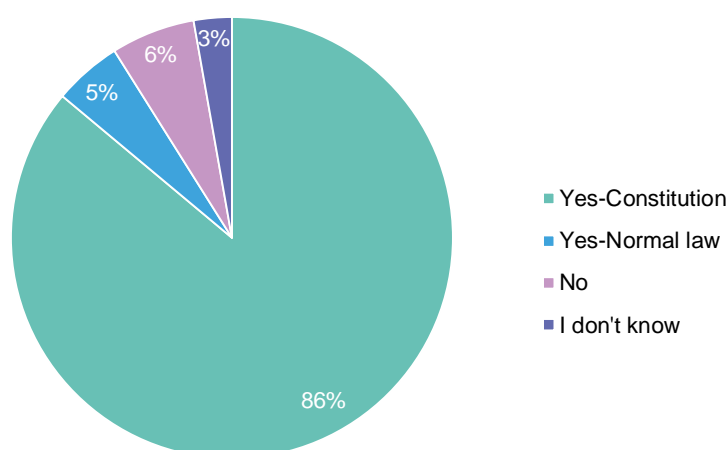
6. A statement acknowledging the First Peoples of Australia

According to the Council's Discussion Paper, a statement of acknowledgement is a statement of facts, and several suggestions for the statement's content were provided. The Discussion Paper also referred to the Expert Panel's recommendation that a statement of acknowledgement be included as an

introduction (preamble) to a proposed new law-making power. Another suggestion was that a statement of acknowledgement could be enshrined in a Declaration outside the Constitution, perhaps in legislation enacted by all parliaments – federal, State and Territory – at the same time to create a national defining moment of reconciliation. This path would not require a referendum.

The great majority of submissions (86%) supported a statement of recognition within the Constitution, with 5% preferring a statement in normal Australian law. Only 3% were in opposition to a statement at all, with 6% unsure. Those aged 35 or under were slightly more likely to support a statement of acknowledgement in the Constitution.

Figure 5 – Should we have a statement that acknowledges the First Peoples of Australia?



n=1,042

Those in favour of a statement cautioned that a statement on its own falls short of the recognition required. This prominent voice wanted any statement of acknowledgement to be framed as one step on the recognition pathway, that must be accompanied by more substantive changes.

The acknowledgement in no way should undermine future Treaty negotiations. (Caritas Australia)

We believe a statement of acknowledgement in the Constitution falls short of what is required for meaningful and purposeful change. (Individual)

A small number of key legal organisational submissions raised concerns related to introducing symbolic, potentially legally ambiguous language into the Constitution. They argued a Declaration of Recognition in normal law is a more appropriate approach to achieving the outcomes a statement of acknowledgement in the Constitution may deliver.

Any statement that is rich enough to capture the deep and profound significance of these issues will invariably contain the kind of language that is susceptible to legal uncertainty. (Australian Catholic University)

A small minority were opposed to any form of statement, believing singling out Aboriginal and Torres Strait Islander peoples undermines the goal of equality for all Australians, regardless of their race or ethnicity.

The views related to the statement's content were consistent regardless of the preferred placement – in the Constitution or in normal law. The majority emphasised the urgent need to correct the facts – clearly acknowledging Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia. There was

also some support for recognising the complexity and highly successful nature of Aboriginal and Torres Strait Islander societies at the point of occupation (as evidenced by the 60,000-year history of the various nations).

This change should acknowledge [Aboriginal and Torres Strait Islander peoples] as First Peoples and it should convey the continuity of Aboriginal and Torres Strait Islander cultures as a significant part of our nation's identity. (Individual)

We should acknowledge the long and rich history of our First Nations people. (Individual)

We must eradicate the idea that Aboriginal society was unsophisticated and primitive. (Individual)

There was also a clear desire to acknowledge the importance of enduring languages, cultures, and connection to land and country among Aboriginal and Torres Strait Islander peoples today – and the contribution of these to contemporary Australian society. For example, many noted the significant cultural contribution of the First Peoples of Australia to our current national identity, and the important role Aboriginal and Torres Strait Islander peoples have played and continue to play in caring for country.

Acknowledge the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters. Respect the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples. (Individual)

Acknowledge that Aboriginal and Torres Strait Islander people occupied and looked after this land for millennia before white Australians arrived. (Individual)

They lived in harmony with the land for over sixty thousand years, and never dramatically altered its natural state. (Individual)

Correcting the record regarding occupation had strong support and implies an acknowledgement of past wrongs. However, there was broad support for more explicitly outlining these past, and contemporary, harms experienced by Aboriginal and Torres Strait Islander peoples. This view primarily emphasised past wrongs, namely the process of occupation as invasion or dispossession, although there was also a strong focus on acknowledging the more recent history of injustice, including the Stolen Generations, rates of incarceration of Aboriginal and Torres Strait Islander peoples and ongoing systemic discrimination. This commonly held view was also tempered by some caution regarding the use of highly emotive and potentially 'deal-breaking' language regardless of being factually correct.

We have to acknowledge this country was taken over by invasion and the treatment of the legitimate inhabitants was, and to some extent still is, disgraceful. (Individual)

Acknowledge the First Nations people were subjected to colonisation, resulted in genocide and racist government policies, experience intergenerational trauma, which affects their physical psychological and spiritual wellbeing... (Individual)

The statement should be a statement of redress, avoiding what are seen as deal breaking and emotive terms, like massacre and invasion (which are factually correct but not particularly strategically useful) by acknowledging the loss incurred by First Australians as a consequence of colonisation. (Individual)

Finally, a theme emerged regarding Aboriginal and Torres Strait Islander land rights. Most suggestions for the statement used legally ambiguous concepts such as custodianship, guardianship and Traditional Ownership. A small number contained specific suggestions with legal effect for formalising ownership arrangements, for example based on unceded sovereignty or native title law.

It should say that First Peoples are the rightful guardians of this land. (Individual)

That they are the custodians of land and water in Australia. (Individual)

There was overwhelming support for placing any constitutional statement of acknowledgement within a Preamble. This was based on the view a Preamble sets the spirit and aspiration for the document, and/or that placement in a Preamble implies very high significance of the content.

At the very beginning so it is loudly proclaimed. (Individual)

At the very start, as it is the most important thing. (Individual)

Those in opposition to the placement in a Preamble argued a statement should be inserted into a revised head of power, providing a guide to the purpose of the provision. Others feared placement in a Preamble rather than the body of the Constitution could be construed as tokenistic.

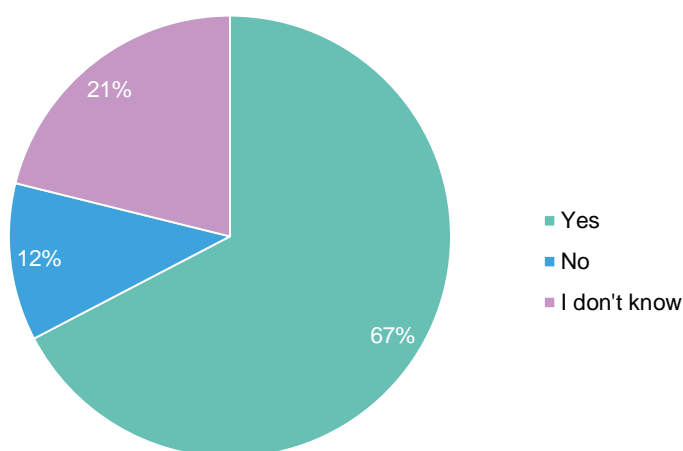
The Law Council supports the insertion of new preambular paragraphs as part of a new head of power to make laws with respect to Aboriginal and Torres Strait Islander peoples. The Law Council is of the view that this has the advantage of avoiding the political difficulties of seeking to insert a new preamble to the Constitution which addressed only the historical experiences and aspirations of Aboriginal and Torres Strait Islander peoples. Additionally, it avoids the challenges of developing a values statement in the preamble which may give rise to divisive debate. (The Law Council of Australia)

7. The ‘race power’

Known as the ‘race power’, section 51 (xxvi) is the head of power that allows the Commonwealth government to make laws regarding Aboriginal and Torres Strait Islander peoples on issues such as native title and heritage protection. The Expert Panel and Joint Select Committee both made the recommendation to repeal section 51(xxvi), yet retain a power to enable the Commonwealth government to legislate for Aboriginal and Torres Strait Islander peoples.

Two in three submissions (67%) supported removing the word ‘race’ from the Constitution. Around one in five (21%) were unsure, and only 12% were in opposition to the proposed changes to section 51 (xxvi). Older respondents (those aged 66 and over) were more likely to support the removal of the word ‘race’.

Figure 6 – Should the word ‘race’ be taken out of the Constitution?



n=1,032

When asked to provide further comment, the majority described the ‘race power’ as outdated, discriminatory and having no place in modern Australian society.

Section 25 and 51 should be completely removed as they allude to race, a non-existent ideology which stands against the inclusiveness of all peoples. (Individual)

Race should be removed where it has powers that discriminate in a negative way. (Individual)

Rationale for retaining ‘race power’ provisions (12% of submissions) included concern about the potential legal ramifications of amending this section.

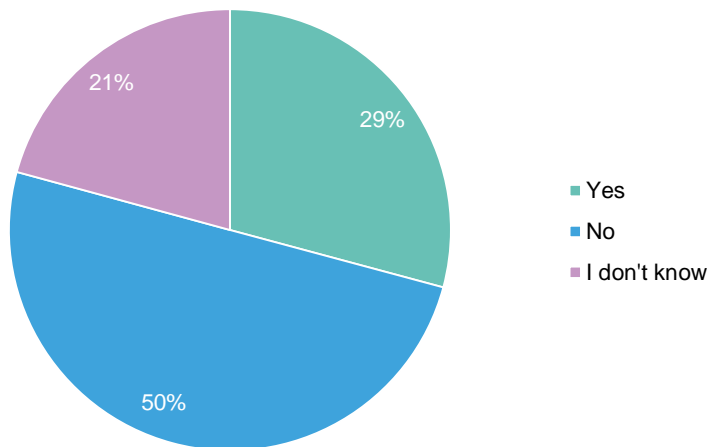
My suggestion is that the text of the Constitution be left as is and no changes made to section 51... These broad powers allow Parliament to respond flexibly to changing circumstances, for all minorities and all citizens, and should be left as is. (Individual)

Opinion was divided regarding whether government should retain the power to make special laws for Aboriginal and Torres Strait Islander peoples, with half indicating they were not supportive.

Only 29% indicated support for an amended power and 21% were unsure. However, this division may reflect the question construction, sequencing and the complex nature of legal implications associated with removing or amending the ‘race power’.

I am not sure how to answer this one. While there should be no place for laws based on race in the Constitution, powers for special laws to ensure fair and just treatment of our first peoples should be retained (e.g. regarding native title and Indigenous heritage). (Individual)

Figure 7 – Should the Australian Parliament keep the power to make special laws for Aboriginal and Torres Strait Islander peoples?



n=1,021

7.1 Suggestions for amendments to the ‘race power’

Three primary suggestions for amendment or removal of the ‘race power’ were made:

- remove the word ‘race’ but retain power
- include a prohibition to stop racial discrimination
- remove the ‘race power’ entirely.

Each of these is explored in further detail below.

7.1.1 Remove ‘race’ but retain power

The most significant support was for replacing the word ‘race’ with ‘Aboriginal and Torres Strait Islander peoples’. This was most commonly contingent upon adding a limit to the power to legislate only for the benefit or advancement of the Aboriginal and Torres Strait Islander peoples. Many referenced the recommendations of the Expert Panel and the Joint Select Committee in support of this position.

There should be a provision to make laws for Aboriginal and Torres Strait Islander peoples – the discussion paper makes the case well. However, any such laws need to be accompanied with safeguards to stop racial discrimination. (Individual)

Consultation with Aboriginal and Torres Strait Islander peoples underpinned support for this view, given Parliament’s definition of what is beneficial may differ from that of Aboriginal and Torres Strait Islander communities.

I can see that special laws may need to be made for issues such as native title, but I only support keeping this power if there are very strong protections to prevent this from being used against the interest of Indigenous people and this needs to be assessed by Indigenous people themselves, not imposed from outside. (Individual)

Key legal and Aboriginal and Torres Strait Islander organisations also cautioned amendments to the ‘race power’ would need to be carefully considered – to minimise risk of invalidating current, or future, Commonwealth laws with respect to Aboriginal and Torres Strait Islander peoples, including advancements made under the Native Title Act 1993 (Cth).

Whilst it does not appear that there are any serious suggestions that the race power should be removed altogether (as this would affect laws around Native Title and may hamper Commonwealth’s ability to work for the advancement of indigenous peoples). ACL recommends caution with respect to proposing any change whatsoever to section 51(xxvi). (Australian Christian Lobby)

The Native Title Act and the Racial Discrimination Act were enacted by the Commonwealth pursuant to that power... if the constitutional power to make laws for any race was removed, thought would need to be given to how to retain the rights afforded in the Native Title Act without further derogation... (Individual)

There was strong backing for amending section 51 (xxvi) to include a non-discrimination clause. For many, support for amending the ‘race power’ was again contingent on limiting Parliament’s power to ensure new laws do not adversely affect Aboriginal and Torres Strait Islander peoples, by including a constitutional prohibition against racial discrimination. The insertion of a new ‘section 116A’, as proposed by the Joint Select Committee, was often referenced.

The Australian Constitution in its current form retains discriminatory clauses which are sources of concern to Australian people and inconsistent with international human rights principles. The Australian Constitution must enshrine the rights of all Australian citizens... The repeal of problematic “race” provisions from the Constitution and the inclusion of a new section expressly prohibiting discrimination on the basis of race would ensure the universal human right. (Amnesty International)

7.1.2 Remove the ‘race power’

Some submissions called for the ‘race power’ to be removed from the Constitution altogether, to avoid further discrimination or racial segregation. The 2007 Northern Territory National Emergency Response was cited by some as an example of why this power should be removed.

While there is some scope for community laws within Aboriginal and Torres Strait Islander communities (or other communities) these laws should not contravene overall governing laws of

Australia. There shouldn't be discriminating laws that apply only to Aboriginal or Torres Strait Islander people such as in the [Northern Territory] Intervention. (Individual)

As discussed, while some urged for removal to be accompanied by the inclusion of a prohibition against discrimination, many provided no suggestion as to appropriate replacement powers.

A minority called for the removal of section 51(xxvi) on the grounds that Australian law is based on the principle of fairness and equity. They argued all Australian citizens should be equal under the law, with no individual race or group receiving special consideration in the Constitution.

All Australians should be governed equally, subject to the same laws regardless of race. (Individual)

8. A guarantee against racial discrimination

In 2012, the Expert Panel recommended the following 'Prohibition of racial discrimination' clause be inserted into the Constitution as 'section 116A':

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

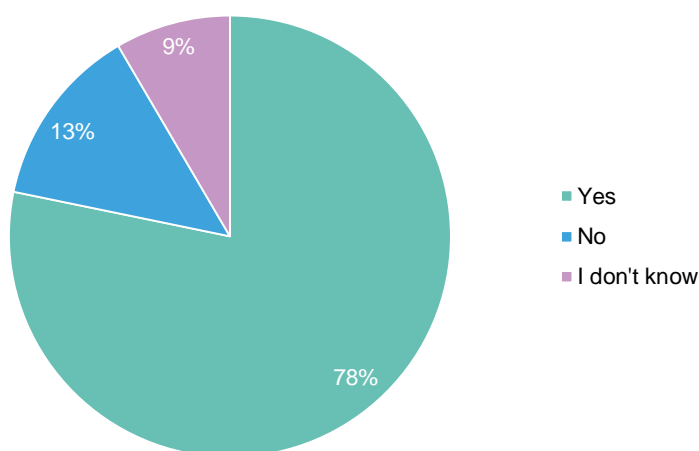
(2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group."

The Referendum Council asked Australians to consider the proposal to insert a guarantee into the Constitution, to prevent the Federal Parliament from discriminating against people of any race or cultural background.

The inclusion of a constitutional guarantee against racial discrimination was supported by nearly four in five (78%). Only 13% were opposed to the proposal and a further 9% were unsure. Women, and those aged 35 or under were more likely to be supportive of the insertion of a guarantee.

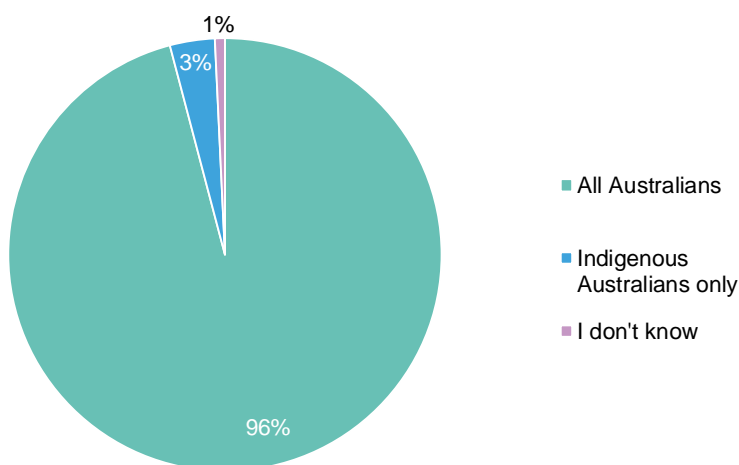
Among those supportive of a guarantee, 96% supported extending the guaranteed protection to all Australians. Only 3% favoured the introduction of a guarantee against racial discrimination for Aboriginal and Torres Strait Islander people only. Support for the guarantee was always coupled with support for at least one other proposed reform, indicating the guarantee is seen as part of a package of reforms for recognition.

Figure 8 – Do you think that a guarantee against racial discrimination should go in the Constitution?



n=1,043

Figure 9 – Should the guarantee protect all Australians against racial discrimination, or only Indigenous Australians?



n=806

The complexity of issues related to the 'race power' extended into ideas about a guarantee, including its wording and placement. The potentially contradictory relationship between changes to the 'race power' and a guarantee against racial discrimination, depending on how 'race' is interpreted, were most clearly addressed by key organisations including the Law Society of New South Wales, the Law Council of Australia, the Royal Australian and New Zealand College of Psychiatrists (RANZCP), and Amnesty International.

The RANZCP support the removal of section 51(xxvi) ... and the insertion of a new clause allowing the Parliament to make laws for the benefit of Aboriginal and Torres Strait Islander peoples. This is conditional on the inclusion of a constitutional prohibition against racial discrimination. (Royal Australian and New Zealand College of Psychiatrists)

These groups supported the introduction of 'section 116A' as proposed by both the Expert Panel and Joint Select Committee – to not only protect the rights of Aboriginal and Torres Strait Islander peoples, but also increase broader human rights protections for all Australians. They emphasised any changes to the 'race power' must be accompanied by such a clause. Some submissions reflected on the complexity inherent in supporting the removal of 'race', while simultaneously being in favour of protection against racial discrimination.

... Amnesty International supports a new section 116A as recommended by the Expert Panel and the progress report of the Joint Select Committee... The inclusion of a section which prohibits discrimination would further strengthen Australia's commitment to realising the principles of the UDHR [United Nations Declaration on Human Rights], international human rights treaties and the Declaration on the Rights of Indigenous Peoples. The inclusion of new section 116A would not only represent a demonstrated commitment to Indigenous Peoples' rights in Australia, but would increase broader human rights protections for all Australian citizens in line with Australia's international human rights commitments. (Amnesty International)

Individuals also strongly supported a racial non-discrimination provision, with most in favour of the principle of racial equality for all Australians. A minority of supporters proposed the new constitutional guarantee should focus only on Aboriginal and Torres Strait Islander peoples. Others proposed that further measures, such as a Bill of Rights, were required to move forward from past wrongs and ensure all citizens are treated fairly by the Australian Government.

I believe that Australia requires a constitutional Bill of Rights. The intervention into Aboriginal communities in the Northern Territory was effected only by legislating an exception to the Racial Discrimination Act. Clearly legislative measures are insufficient protection against a Commonwealth inclined to intervene in such a way. (Individual)

A high level declaration, similar to that used in the Universal Declaration of Human Rights would be a holistic way to introduce the topic, and then drill down to indigenous rights. (Individual)

Organisations, including the Law Council of Australia, proposed a national charter or Bill of Rights would provide an appropriate legal framework to ensure laws for Australian citizens are consistent with human rights.

The Law Council supports the development of a charter or bill of rights at the federal level... In particular... a 'dialogue' model of a Charter of Rights or a Human Rights Act. This Charter would facilitate a constructive dialogue between the courts and the parliament about whether Australian laws are consistent with human rights, and if not, whether they remain appropriate for the Australian community. (The Law Council of Australia)

A guarantee against racial discrimination should form part of a Bill of Rights for Australia. CLA believes the question of 'not enough support' does not arise - all consultations at state and federal levels have shown overwhelming support for such an instrument ... such a Bill of Rights need not form part of the Constitution. CLA remains open to other models for enshrining a Bill of Rights in Australia. (Civil Liberties Australia)

Among those opposed to a guarantee, some argued existing laws are sufficient, or suggested strengthening existing laws, while others expressed concern that a legal guarantee is not enforceable.

No law will stop racial discrimination. (Individual)

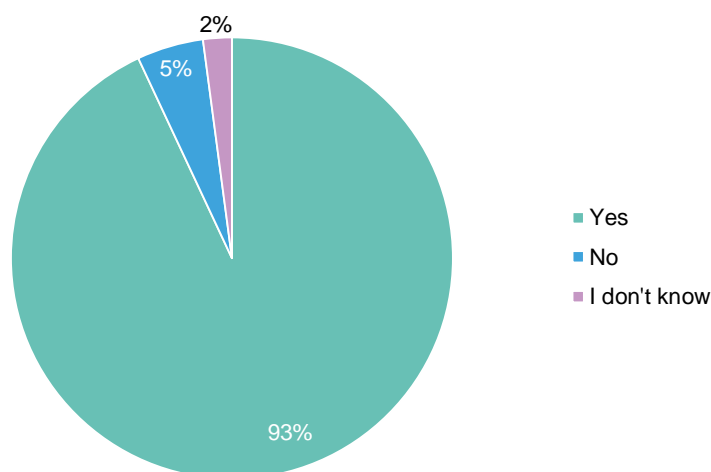
A government cannot guarantee a stop to racial discrimination. (Individual)

9. An Indigenous voice

The Discussion Paper notes establishing an Indigenous voice is about ensuring better political representation for, and consultation with Aboriginal and Torres Strait Islander peoples, especially when government and Parliament make decisions about Indigenous affairs. Although Australia has acceded to the UN Declaration on the Rights of Indigenous Peoples, which “emphasises the importance of genuine participation...in political decisions”², no formal processes have yet been implemented to facilitate this voice. Aboriginal and Torres Strait Islander peoples have long advocated for a stronger voice, especially in the Australian system of representative democracy, where the voice of minority populations cannot always be heard.

A large majority of structured submissions (93%) supported Aboriginal and Torres Strait Islander peoples having a say when Parliament and government make laws and policies about Indigenous affairs.

Figure 10 – Do you think Indigenous people should have a say when Parliament and government make laws and policies about Indigenous affairs?



n=1,048

One submission reflected on a number of reasons for supporting this change:

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...It's 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.

(Individual)

No respondents supported the establishment of an Indigenous voice only (to the exclusion of all other proposals for change). This again reinforces the overall preference for a package of reforms to be made to the Constitution.

Of the submissions not in support of an Indigenous voice to be set up under the Constitution, a primary reason included concern the establishment of special provisions for Aboriginal and Torres Strait Islander peoples may contribute to racial segregation (as reflected throughout the submissions). There was also a concern that if a mechanism established under the Constitution to achieve an Indigenous voice were to

² p. 11, Referendum Council, *Discussion Paper on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples*, October 2016

be unsuccessful – with some submissions reflecting on issues associated with the Aboriginal and Torres Strait Islander Commission (ATSIC) – there would be no flexibility to make changes to the mechanism or to adopt an alternative mechanism.

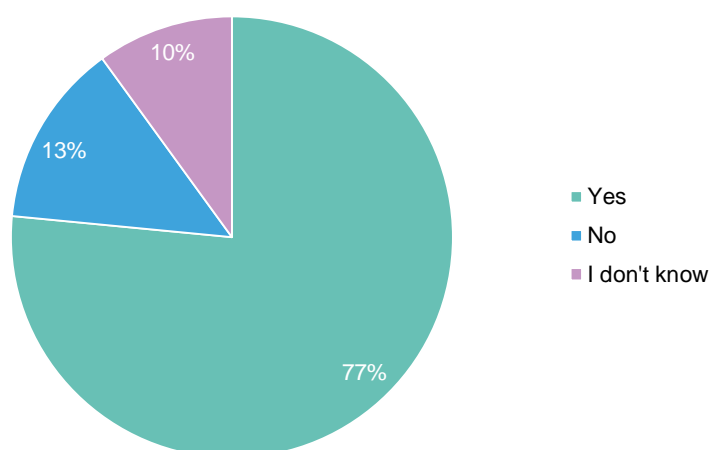
9.1 Suggestions for the Indigenous voice

There are a number of ways a stronger Indigenous voice could be achieved via constitutional change. The structured survey asked respondents to comment on a specific proposal for a new Indigenous group to be set up under the Constitution, and there were also other mechanisms suggested.

9.1.1 An Indigenous group

The specific proposal for a new Indigenous group to be set up under the Constitution was supported by a majority (77%) of structured submissions. Those aged 35 or under were more likely to support the creation of a group under the Constitution.

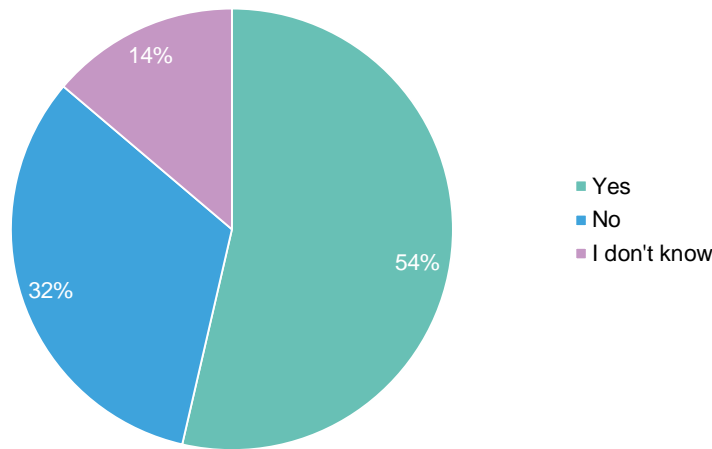
Figure 11 – Should a new Indigenous group be set up under the Constitution to give advice and make sure Indigenous people have a voice in political decisions that affect them?



n=1,031

Those respondents in support of the specific proposal (n=789) were asked if it was worth creating a group that could give advice only, and not have the power to block new laws. Over half of all submissions (54%) agreed that it was worth it, while nearly a third (32%) disagreed. While those aged 35 and under were more likely to be supportive of a constitutionally created group, they were also more likely to be in favour of a group even with advisory only powers.

Figure 12 – Is it worth creating the new group if it can only give advice and does not have the power to block new laws?



n=761

When asked what the new group should look like, respondents commented on a number of aspects including membership composition, governance arrangements, and the purpose and powers of the group.

Purpose

Supporters called for the group to elevate the voice of Aboriginal and Torres Strait Islander peoples in Parliament, in particular around Indigenous affairs. There was strong support for the principle of self-determination. This was consistent regardless of views on the group's powers (i.e. having an advisory role versus the ability to block laws).

We need to elevate Indigenous Australians to the rightful place. (Individual)

Regardless of whether or not Aboriginal and Torres Strait Islanders [sic] are given the power to block new laws, it's a starting point for their voice to be heard and to represent the needs of their communities. (Individual)

Membership

There was strong support for the group to comprise Aboriginal and Torres Strait Islander peoples only (again, in line with the principle of self-determination). The importance of demographic diversity – including by gender, age, state/territory, metropolitan/rural/remote location, and the various Aboriginal and Torres Strait Islander Nations – was clearly emphasised. Many respondents wanted to see a mix of Elders, leaders, prominent people and influencers in Indigenous affairs; while at the same time maintaining genuine community representation, with members acting as a conduit between their local communities and government.

The risk with any advisory group is that one voice can dominate and not be representative of broader and divergent views. (Individual)

[The group should be made up of] people from all walks of life. (Individual)

It should in some way represent the many countries that make up Indigenous Australia. (Individual)

Powers

Over half (54%) of all supporters thought it was worth creating a group with an advisory role only. Some argued this facilitated a greater Indigenous voice, while also balancing the need to maintain the sovereignty of the Australian Parliament.

“The constitutional establishment of an Indigenous advisory body would require Parliament to consider whether Indigenous people themselves believe that a proposed law discriminates against them. In this way, Indigenous people become incorporated into the process...without undermining the sovereignty of Parliament. (Australian Catholic University)

Among supporters who only backed the creation of a group with the power to block laws, there was a view that an advice only role risked being tokenistic. There was also support for the group to exist independently of political motivations.

Not advice [only]. We need to get serious about this and work with Aboriginal people. They must be a very real part of any decisions made about them. (Individual)

Some argued the group should have an even greater role in facilitating change and embedding self-determination, including the power to create (not just block) new laws.

The group must have the power to make change. (Individual)

Governance

There was a strong preference for members to be elected at the local level by Aboriginal and Torres Strait Islander communities, rather than being appointed by communities or government. This was, again, about ensuring genuine community representation.

Representatives...who...tap into local Aboriginal networks. (Individual)

Having the body be democratically elected would present significant benefits to ensuring the broader Aboriginal and Torres Strait Islander population have input. (Royal Australian and New Zealand College of Psychiatrists)

9.1.2 Other mechanisms

Feedback on other mechanisms for achieving an Indigenous voice was not explicitly invited in the structured online survey. Alternative mechanisms were therefore primarily suggested by those in opposition to the specific proposal for a new Indigenous group to be set up under the Constitution, or as part of free form submissions.

Suggestions for alternative mechanisms included a third (Indigenous) House of Parliament or a dedicated number of seats in existing Houses of Parliament. Those in favour of an Indigenous House of Parliament occasionally referenced the Sami Parliaments in Sweden and Norway which are publicly elected and have responsibility for decisions made in relation to Sami (Indigenous) affairs. Those in favour of a dedicated number of seats in existing Houses of Parliament occasionally referenced the approach taken in New Zealand where Maori people can choose to enrol in either Maori or main electorates, and the number of people enrolling in Maori electorates determines the number of dedicated Maori seats in Parliament (currently 7 seats).

Our nations are all different and limited representation will be tokenistic...the only real way to solve this would be a third house of Parliament. (Individual)

Allocated seats for Aboriginal and Torres Strait Islander people in the Federal Parliament would provide, as per the New Zealand model, a legitimate Indigenous voice. (Individual)

Ultimately, there was strong support for Aboriginal and Torres Strait Islander peoples to be consulted in the establishment of an Indigenous voice in parliament – to ensure the mechanism was appropriate and achieved its intended objectives.

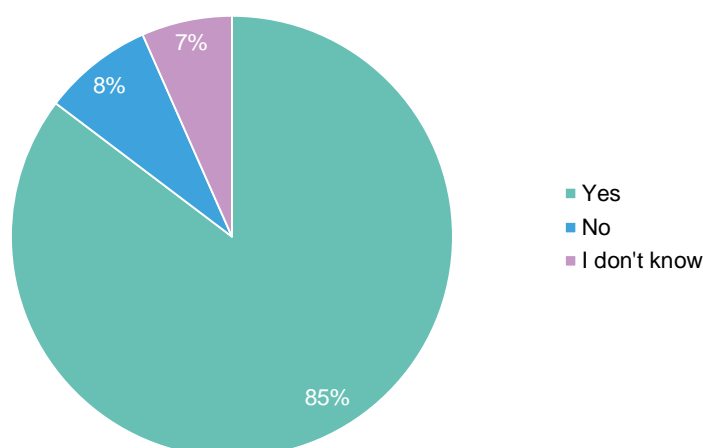
Ask the Indigenous community what they want. (Individual)

10. Section 25

Section 25 of the Constitution “contemplates that States might pass a law banning people from voting at a State election, on the basis of their race”.³ Practically speaking, section 25 is considered a ‘dead letter’, as the Racial Discrimination Act takes care of State voting laws and the section itself provides a disincentive to race-based voting legislation by ensuring a reduction in representation at the Federal level if this legislation were to be enacted. However, calls for the removal of section 25 have consistently been made as its existence means the Constitution contemplates race-based voting, which is broadly considered an outdated concept.

The broad support for the removal of section 25 was confirmed in the structured submissions, with a large majority (85%) supporting its removal. Only 8% did not support its removal and 7% indicated they were unsure. Women, respondents aged 35 or under and those who did not identify as Aboriginal and Torres Strait Islander were more likely to support this proposal.

Figure 13 – Should we delete section 25?



n=1,042

Reasons for support strongly reflected a desire to modernise the Constitution – to create a document in line with the values of contemporary Australian society. Removing a discriminatory power was also seen as a symbolic gesture to address the wrongs of the past, and as a protection against the discriminatory power being used in the future. Overall, there was a good understanding that the provision had no current legal effect, but nonetheless there was a desire to ‘tidy up’ the Constitution.

This section is a legacy from the era of the White Australia Policy and it should be removed as part of the package of changes necessary to finally eliminate racially discriminatory provisions from the Constitution. (Caritas Australia)

³ p. 11, Referendum Council, *Discussion Paper on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples*, October 2016

This section is outdated. In the words of one witness at the Committee hearings in September 2015: section 25 is a “vestige of racial concepts and practices that have no place in contemporary Australia”. (Australian Christian Lobby)

Removing [section 25] sends a clear message that Australia is moving forward. (Individual)

When asked whether there was any point keeping section 25, no clear arguments were presented for maintaining the section.

No respondents supported the deletion of section 25 only (to the exclusion of all other proposals for change). Once more, this reinforced the overall preference for a package of reforms to be made to the Constitution.

11. Alternative options for recognition

Several other options for substantive reform emerged when investigating overall preferences for change, beyond the specific proposals put forward by the Referendum Council. The strongest level of support was for a Treaty/Treaties, or to strengthen the Constitution to better reflect Australia’s commitments under international law.

11.1 Support for a treaty

In the context of constitutional reform, reference to a Treaty, or Treaties, generally relates to an agreement between Indigenous people and government that has legal effect. In the United States, New Zealand and Canada, Treaties form the basis for relationships between governments and First Peoples. Both the Expert Panel and Joint Select Committee acknowledged strong support for a treaty, while noting that such substantial reform may require a longer timeline and more national discussion.⁴

The proposal for a Treaty or an agreement-making power was not put forward as a specific reform proposal for comment. Nonetheless, calls for a Treaty, Treaties, or an agreement-making power frequently emerged as a preferred option for reform. There was strong support for a Treaty to provide legal certainty for Aboriginal and Torres Strait Islander peoples moving forward, and for a Treaty to acknowledge past injustices.

It should state that it is now the intention to invite the members of the pre-1770 Indigenous societies to unite with Australians under the Australian Constitution, that is part of the treaty process. They were excluded from the start and that intention cannot be changed just by adding some little clause into an exclusionary legal foundation. (Individual)

Many were also of the view that a Treaty process should be the precursor to any constitutional reform, or at the very least occur simultaneously to constitutional recognition.

A Treaty recognising Aboriginal and Torres Strait Islander peoples and then constitutional reform. (Individual)

Recognition in the Constitution is important but should not be presented as the only legal change needed. It would be good if the Recognise team could place constitutional change in relation to Treaty. Both are necessary... (Individual)

A minority called for a Treaty as the only legitimate option for constitutional reform. Those of this view were unsupportive of all other proposals put forward.

⁴ Referendum Council, Discussion Paper on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, October 2016

Treaty. There is nothing other than a Treaty with First Nations People that will right the wrongs of the past and prove to everyone that respect is returned to the original inhabitants and caretakers of this wonderful country. (Individual)

Some who favoured a Treaty also acknowledged such reform is inherently complex and proposed an agreement-making power as an interim step. Treaty between the Commonwealth and Aboriginal and Torres Strait Islander peoples remained the goal of constitutional reform for this group.

Few submissions provided specific comment on what a Treaty would like or what form it would take. However, several referenced international jurisdictions with existing Treaty arrangements with their Indigenous populations, such as New Zealand, Canada and the United States of America as models for Australia to emulate.

Our First Nations peoples should have powers to make certain laws pertaining to them alone, like the Maori and the people of the Canadian First Nations. (Individual)

Treaties ... are accepted around the world as the means of reaching a settlement between indigenous peoples and those who have settled their lands. Treaties can be found in countries such as the US, Canada and New Zealand... Australia is the exception. We are now the only Commonwealth nation that does not have a treaty with its indigenous peoples. (Individual)

11.2 Declaration on the Rights of Indigenous Peoples

There was also some support for constitutional change to reflect Australia's commitments under international law. The United Nations Declaration on the Rights of Indigenous Peoples (the UN Declaration) was the international instrument referenced most frequently.

In their 2012 report, the Expert Panel note that Articles 18 and 19 of the Declaration provide important procedural guarantees: "Article 18 of the Declaration recognises the right of indigenous peoples to participate in decision-making in matters affecting their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions. Article 19 requires states to consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions before adopting and implementing legislative or administrative measures that may affect them."⁵

The UN Declaration was mentioned in several different contexts. Some proposed the principles of the UN Declaration should underpin the process of constitutional recognition. Others called for the specific rights afforded to Indigenous persons within the UN Declaration to be incorporated into the Australian Constitution.

If framed correctly... prohibiting discrimination in the Constitution is entirely in keeping with Australia's national identity, with its emphasis on egalitarianism and fairness, and is also a natural progression from Australia's ratification of international legal conventions like the United Nations Declaration on the Rights of Indigenous Peoples. (Royal Australian and New Zealand College of Psychiatrists)

While few individuals referred to specific articles of the UN Declaration, many drew on the 'general principles' of the instrument to provide further support the view that Aboriginal and Torres Strait Islander peoples should be properly consulted on any form of constitutional recognition.

⁵ p. 60, Expert Panel, Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel, 2012

The most comprehensive proposals relating to the incorporation of international commitments into constitutional reform were again put forward by organisations, including the Law Council of Australia and Amnesty International.

... Amnesty International calls on the Australian government to draw upon the principles encoded in these international instruments to ensure the Australian Constitution reflects a language of rights... With specific reference to Indigenous rights, Amnesty International calls on the Australian Government to ensure that Article 2 of the Declaration on the Rights of Indigenous Peoples is fully realised in any amendments made to the Australian Constitution: "Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity. (Amnesty International)

12. Summary

A large majority (90%) of submissions supported the constitutional recognition of Aboriginal and Torres Strait Islander peoples, although there were differing views on what proposals would constitute the most appropriate mechanisms for recognition. This report has outlined the levels of support for the various reform proposals and relevant details regarding reasons for and against these options.

This report has also outlined the reasons provided for supporting overall constitutional recognition of Aboriginal and Torres Strait Islander peoples. The majority of submissions supported a package of constitutional reforms, and support substantive rather than symbolic only change. In addition to arguing the importance of recognising Aboriginal and Torres Strait Islander peoples as the First Australians, and for recognising and protecting their unique heritage, cultures and languages, there was also broad support for modernising the Constitution, to enshrine the principles of equality and non-discrimination within the document.

Submissions also outlined some overall considerations regarding the process for achieving constitutional recognition. This report has summarised what submissions suggest are the prerequisites for referendum success. These include:

- consultation with Aboriginal and Torres Strait Islander peoples
- substantive rather than symbolic change
- consideration of the chances of success at referendum
- accommodating the diversity of Aboriginal and Torres Strait Islander peoples
- prioritising fairness and equality, including acknowledging Aboriginal and Torres Strait Islander peoples.

We thank the Referendum Council for the opportunity of working on this important project, and look forward to the Council's full report.

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