



Law Council
OF AUSTRALIA

Discussion Paper on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples

Referendum Council

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2017 Executive as at 1 January 2017 are:

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The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council of Australia is grateful for the assistance of the Indigenous Legal Issues Committee, Constitutional Law Committee, Law Institute of Victoria and Law Society of South Australia in the preparation of this submission.

Introduction

1. The Law Council of Australia welcomes the opportunity to make a submission to the Referendum Council's Discussion Paper on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (the **Discussion Paper**).
2. This submission references the Law Council's 6 October 2011 Submission to the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Australians (the **Expert Panel Submission**).¹ In preparing the Law Council's Expert Panel Submission, consultations were held widely with Indigenous and non-Indigenous people and organisations.
3. The Law Council's approach towards constitutional recognition has also been informed by a major discussion forum held on 22 July 2011 in Canberra, titled "*Constitutional Change: Recognition or Substantive Rights*".² The discussion forum brought together some of the leading thinkers on the topic from within Australia and overseas. Invitees included leaders within the Aboriginal and Torres Strait Islander communities and the legal profession, including members of the judiciary, parliamentarians and academics, as well as aspiring lawyers and future Aboriginal and Torres Strait Islander leaders.
4. The Law Council's policy position as outlined in the Expert Panel Submission has not changed. Principally that is, the Australian Constitution should formally recognise the distinct identities of Aboriginal and Torres Strait Islander peoples, and secure to them equality before the law. It is imperative that reform:
 - a. extends beyond the confines of the Preamble to the Imperial Act;
 - b. provide for an enforceable prohibition of racial discrimination/guarantee of racial equality; and
 - c. keep the process for reconciliation between Aboriginal and Torres Strait Islander peoples and other Australians active, including through the negotiation of agreements and a mechanism to confer Constitutional protection on such agreements.
5. In preparing this submission, reference is also made to reports and previous inquiries on constitutional recognition. This includes reports since the Law Council's Expert Panel Submission, including "*Recognising Aboriginal and Torres Strait Islander Peoples in the*

¹ Law Council of Australia, Submission to the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Australians, 'Constitutional Recognition of Aboriginal and Torres Strait Islander Australians', (6 October 2011), available at: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2600-2699/2626%20-%20Constitutional%20Recognition%20of%20Aboriginal%20and%20Torres%20Strait%20Islander%20Australians.pdf>.

² Law Council of Australia, Transcripts of Proceedings, 'Constitutional Change: Recognition or Substantive Rights? Exploring the Constitutional change process and its application to create meaningful change in Australia', (August 2011), available at: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/corporate/Transcripts.pdf>.

*Constitution: Report of the Expert Panel*³ (the **Expert Panel Report**) and "*Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples*"⁴ (the **Joint Select Committee Report**).

6. Additionally, in preparing this submission, regard is had to relevant international human rights law and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). UNDRIP recognises the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States. This includes measures such as constitutional recognition.
7. The Law Council emphasises the critical importance of consultation with Aboriginal and Torres Strait Islander communities and organisations in considering options for Constitutional reform. The Law Council acknowledges the efforts of the Referendum Council in supporting the constitutional dialogues that have been held in recent months. The dialogues have provided a valuable opportunity for participants to discuss the options for recognition, understand what they mean, as well as combine or modify existing options. Crucially, the Referendum Council has worked in partnership with a host organisation at each location, to ensure the local community is appropriately represented in the process.
8. The Law Council notes that the priorities from each of the dialogues will be reported to a First Nations Convention at Uluru on 24 to 26 May 2017, where final decisions will be made. There will be ten delegates from each of the regional dialogues. The Law Council emphasises the critical need to ensure that the views arising from the First Nations Convention are represented in the proposed form of constitutional recognition.

Distinct Role of the Legal Profession

9. One of the reasons behind the need to amend the Constitution is that Aboriginal and Torres Strait Islander people played no role in its formation. Aboriginal and Torres Strait Islander people were excluded from the 1890s Constitutional Conventions and have been subject to adverse discrimination under laws permitted by the Commonwealth Constitution. For example, the temporary suspension of Part II the *Racial Discrimination Act 1975* (Cth) for the purposes of the *Northern Territory National Emergency Response Act 2007* (Cth).
10. Some leading legal figures have noted that the Constitution in its current form contains "racist powers", including through the retention of section 51(xxvi).⁵ Sir Edmund Barton explained the original intention of section 51(xxvi) as being:

³ Report of the Expert Panel, 'Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution', January 2012, available at: http://www.recognise.org.au/wp-content/uploads/shared/uploads/assets/3446_FaHCSIA_ICR_report_text_Bookmarked_PDF_12_Jan_v4.pdf.

⁴ Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, 'Final Report', June 2015, available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Constitutional_Recognition_of_Aboriginal_and_Torres_Strait_Islander_Peoples/Constitutional_Recognition/Final_Report.

⁵ Ibid n2, for example, The Hon Michael Kirby AC CMG at p26.

*to deal with the affairs of such persons of other races-what are generally called inferior races, though I do not know with how much warrant sometimes-who may be in the Commonwealth at the time it is brought into existence, or who may under the laws of the Commonwealth regulating aliens come into it.*⁶

11. Recognising that a principal responsibility of the Law Council is to promote, protect and defend human rights, it is critical that the Australian legal profession plays a role in acknowledging the mistakes of the past and contribute positively towards Constitutional Recognition. The Law Council's policy on Indigenous Australians and the Australian Legal Profession⁷ states that the Law Council commits to:

*Promoting substantive equality for Indigenous Australians before the law, including effective measures to ensure continuing improvement of their economic and social conditions and to ensure they are able to maintain and strengthen their institutions, cultures and traditions.*⁸

12. Additionally, the Law Council commits to:

*Challenging legislation, policies and practices that discriminate against and violate the human rights of Indigenous Australians and impede substantive equality before the law.*⁹

13. The Law Council's Rule of Law Policy focuses on the most basic tenets of the rule of law. Of relevance is the Law Council's view that the law should be applied equally and should not discriminate between people on arbitrary or irrational grounds.¹⁰ This applies to all laws, including Australia's Constitution. Where a law distinguishes between different classes of persons, for example on the basis of race, there should be a demonstrable and rational basis for that differentiation.

14. As such, the Law Council is of the view that it should play a constructive role in ensuring that any proposed amendments to the Australian Constitution reflect these principal human rights and rule of law goals. In doing so the amendments will assist in forming a stronger foundation in the process towards reconciliation. It is from this position that the Law Council's responses to the Discussion Paper questions are framed.

⁶ Official Record of the Debates of the Australasian Federal Convention, Melbourne, 27 January 1898, 228. Cited by The Hon Chief Justice French AC, 'The Racial Discrimination Act: A 40 Year Perspective Inaugural Kep Enderby Lecture', 22 October 2015, available at:

<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj22oct15.pdf>.

⁷ Law Council of Australia, 'Policy Statement: Indigenous Australians and the Legal Profession', February 2010, available at: <http://lawcouncil.asn.au/files/pdf/policy-statement/1002-Policy-Statement-Indigenous-Australians-and-the-Legal-Profession.pdf?f66b7bd7-e1d6-e611-80d2-005056be66b1>.

⁸ Ibid, at para 13.

⁹ Ibid, at para 15.

¹⁰ Law Council of Australia, 'Policy Statement: Rule of Law Principles', March 2011, available at: <http://lawcouncil.asn.au/files/pdf/policy-statement/1103-Policy-Statement-Rule-of-Law-Principles.pdf?056c7bd7-e1d6-e611-80d2-005056be66b1>.

General Questions

Question 1: Do you support constitutional or other legal change to deal with the question of recognition?

15. The Law Council supports constitutional change to recognise Aboriginal and Torres Strait Islander peoples as the first peoples of Australia with distinct identities and histories, as well as their prior occupation and ownership, past dispossession and particular status in contemporary Australia.¹¹

Question 2: If you do, what form do you think change should take?

16. In line with its previous submissions to the Expert Panel, the Law Council supports constitutional recognition which takes the form of:

- a. recognition of the distinct identities and rights of Aboriginal and Torres Strait Islander peoples;
- b. repeal of anachronistic provisions which discriminate on the basis of race, namely section 51 (xxvi) and section 25;
- c. substantive protection through the insertion of a prohibition of racial discrimination or general guarantee of racial equality; and
- d. ensures that there is ongoing discussion of the rights of Aboriginal and Torres Strait Islander peoples, provision for the negotiation of agreements, and a mechanism to confer Constitutional protection on such agreements.

17. In response to this question, the Law Council does not purport to preclude consideration of other forms of constitutional change which might be advanced by or through the Referendum Council's ongoing consultations with Aboriginal and Torres Strait Islander communities. The Law Council has not yet formed any views about other proposals under consideration.

Statement of Acknowledgment

Question 3: Should we have a statement of acknowledgment in Australian law?

18. The Law Council notes the suggestion in the Referendum Council's Discussion Paper that a statement of acknowledgement could be enshrined in legislation enacted by all parliaments, including State and Territory parliaments. This is separate to the developments in recent years leading to the amendments of each State Constitution.

¹¹ Ibid n1, p15.

19. The Law Council has not yet developed a position on this proposal. Such a position would require further consultation with the Law Council's Constituent Bodies.

Question 4: To effect an inspiring statement of recognition, should it be within the Constitution or outside it?

20. The Law Council supports a statement of recognition within the Constitution.¹²

Question 5: If it is to be within the Constitution, is the statement best placed as an introduction to a head of power to make laws with respect to the people it acknowledges?

21. 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.¹³ 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 addresses 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.

Question 6: What should be included in a statement of acknowledgement?

22. The Law Council notes the importance of the Referendum Council's dialogue process and the outcomes from the First Nations Convention which may guide the proposed language. Additional guidance can be gained from the Expert Panel Report and the Joint Select Committee Report. Any text will necessarily be the subject of careful consultation and negotiation with Aboriginal and Torres Strait Islander communities and organisations.

23. The Law Council does not have a view on the particular language contained in a statement of acknowledgment. However, the Law Council is willing to consider the legal implications and provide advice on proposals that emerge from the Referendum Council's consultations.

A Federal Power to Make Laws for Aboriginal and Torres Strait Islander Peoples

Question 7: Should references to 'race' be removed from the Constitution?

24. The Law Council supports the repeal of the anachronistic race power in section 51(xxvi) which, as interpreted by the High Court in a series of cases including *Kartinyeri v The Commonwealth*,¹⁴ provides a source of power for the enactment of racially

¹² Ibid.

¹³ Ibid.

¹⁴ (1998) 195 CLR 337.

discriminatory laws. The Law Council considers that the removal of the paragraph would enhance protection of other racial groups and prevent its use in the future so as to enact laws that discriminate against any racial group.

25. In the event that section 51(xxvi) is removed, the Federal Parliament would be able to utilise the external affairs power in section 51(xxix) to enact non-discriminatory laws. This includes, for example, giving effect to Australia's commitments under the *International Convention on the Elimination of Racial Discrimination* (CERD).
26. The Law Council notes that both the Expert Panel Report¹⁵ and the Joint Select Committee Report¹⁶ recommended the removal of section 51(xxvi).

Question 8: Should the federal Parliament retain a specific power to make laws with respect to Aboriginal and Torres Strait Islander peoples, to enable laws on issues like native title?

27. The Law Council supports the federal Parliament retaining a specific power to make laws with respect to Aboriginal and Torres Strait Islander peoples.¹⁷ Developing a new power will require careful consideration to ensure that legislation previously enacted in reliance on section 51(xxvi) is not invalidated, for example the *Native Title Act 1993* (Cth). The Law Council also notes that both the Expert Panel Report¹⁸ and the Joint Select Committee Report¹⁹ recommended that Parliament should retain a specific power to make laws with respect to Aboriginal and Torres Strait Islander peoples.

Question 9: Do you have any suggestions about how it is worded or where it is located in the Constitution?

28. The Law Council notes the wording and location of a recognition statement in the constitution will affect its legal implications and scope. The Law Council notes that a number of proposals have been put through the Expert Panel Report and the Joint Select Committee Report. The Law Council is willing and able to assist the Referendum Council in providing legal analysis of the implications of any proposals under consideration.

A Constitutional Prohibition against Racial Discrimination

Question 10: Do you think that a guarantee against racial discrimination should be inserted in the Constitution?

¹⁵ Ibid n3, p153.

¹⁶ Ibid n4, recommendation 4.

¹⁷ Ibid n1,

¹⁸ Ibid n3, p153.

¹⁹ Ibid n4, recommendation 4.

29. The Law Council supports the insertion of a prohibition of a guarantee against racial discrimination in the Constitution.²⁰

Question 11: Do you have any suggestions about how it is worded or where it is located in the Constitution?

30. A guarantee against racial discrimination should be expressed so as to secure the protection of those rights of Aboriginal and Torres Strait Islander peoples which have been recognised (such as land rights, native title rights, heritage protection rights), as well as rights which might be negotiated and recognised in the future (through agreements, decisions of the High Court and so on).

31. In this context it will be important to ensure that any laws enacted pursuant to a new power to make laws with respect to Aboriginal and Torres Strait Islander peoples is not rendered invalid on the ground that it breaches a separate prohibition on racial discrimination. This situation can be avoided by adopting the following textual expedients, including:

- a. confining the Constitutional conferral of power by an express limitation;
- b. ensuring that the power to make laws with respect to Aboriginal and Torres Strait Islander peoples is part of the equality and non-discrimination guarantee, such that it cannot be argued that the power to make laws conferring special or advantageous or beneficial treatment on Aboriginal and Torres Strait Islander peoples was eliminated by the equality and non-discrimination guarantee; or
- c. the adopting of a non-derogation clause similar to section 25 of the Canadian Constitution, which creates an exemption to the *Canadian Charter of Rights and Freedoms*.

32. In the development of prohibition against racial discrimination in the Constitution, the Law Council notes the relevance of Australia's commitments under international law. This includes:

- a. Article 2 of CERD, which sets out both negative and positive obligations on States in relation to racial discrimination, including legislation, as required, to prohibit discrimination;²¹
- b. Article 4 of CERD, which elaborates on those obligations under Article 2 in declaring offences punishable by law ideas of racial superiority, or hatred,

²⁰ Ibid n1, p18.

²¹ It provides that the State must penalise the following four categories of conduct: (1) dissemination of ideas based upon racial superiority or hatred; (2) incitement to racial hatred; (3) acts of violence against any race or group of persons of another colour or ethnic origin; and (4) incitement to such acts. See: Committee on the Elimination of Racial Discrimination ('CERD'), General Recommendation 15, Measures to eradicate incitement to or acts of discrimination (Forty-second session, 1993), U.N. Doc. A/48/18 at 114 (1994), at [3]. See: <http://www1.umn.edu/humanrts/gencomm/genrxv.htm>.

incitement to racial discrimination, as well as all acts of violence or incitement to such acts;

- c. Article 8(2)(e) of UNDRIP, which calls on States to provide effective mechanisms for the prevention of and redress for propaganda designed to promote or incite racial or ethnic discrimination; and
- d. Article 15(2) of UNDRIP, which calls on States to take effective measures to combat prejudice and eliminate discrimination.

Question 12: Should any racial non-discrimination clause protect all Australians, or Indigenous Australians only?

33. The Law Council is of the view that the current process of constitutional recognition should focus on the fundamental objective of securing the belated recognition of the special place of Aboriginal and Torres Strait Islander peoples in the history of the nation, their distinct rights, and the magnitude of the historical injustices wrought upon them. However, the development a racial discrimination clause need not limit its effect to Aboriginal and Torres Strait Islander peoples. It would be invidious for a racial discrimination provision to be introduced that only prohibited discrimination against Indigenous people. A provision that only applied to Aboriginal and Torres Strait Islander peoples may not comply with Australian's international human rights obligations, including Articles 2 and 26 of the *International Covenant on Civil and Political Rights*.
34. The Law Council notes the recommendation from the Expert Panel Report called for the development of a general racial non-discrimination provision which should extend to both legislative and executive or government action.²² This would have the effect of prohibiting legislative or executive action on the part of the Commonwealth, and on the part of the States and Territories and under any of their laws, in which race, colour, ethnic or national origin is a criterion for different treatment.²³ The Expert Panel noted that their proposal would be consistent with the *Racial Discrimination Act 1975* (Cth) as well as State and Territory anti-discrimination legislation.²⁴
35. However, the Law Council notes there will be issues, depending on how the provision is drafted, as to how the courts will deal with a constitutionally entrenched guarantee of racial non-discrimination when it conflicts with other anti-discrimination measures. Presumably, a constitutionally entrenched measure would override other statutory anti-discrimination measures. The consequences being one form of anti-discrimination legislation is privileged over others, with potential implications. For example, if both race and sex discrimination are dealt with by ordinary legislation, the courts can appropriately balance interests when they conflict. If, however, racial non-discrimination is given a constitutional guarantee then it could prevent the balancing of interests and may result in unanticipated consequences. More consideration will need to be given to this issue,

²² Ibid n3, p171.

²³ Ibid.

²⁴ Ibid, p172.

particularly as to the language used in such a proposal. The Law Council the Law Council is willing to consider the legal implications and provide advice on any such proposals.

36. The Law Council also notes the challenges involved in moving towards a general guarantee of non-discrimination. Such a proposal, as noted in the Expert Panel's Report,²⁵ may not gain the necessary level of support and could potentially shift the focus of the conversation away from constitutional recognition.

Question 13: Are there other ways of preventing racial discrimination in Commonwealth laws and policies if such a clause does not win support?

37. The Law Council supports the development of a charter or bill of rights at the federal level.²⁶ In particular, the Law Council supports 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.²⁷

38. UNDRIP recognises a number of rights that are exclusively enjoyed by Indigenous peoples. These distinctive rights should be enjoyed by Indigenous peoples as a result of their unique status as traditional owners of land, their relationship with the land and waterways, and their vulnerability to losing their traditional customs, knowledge and language.²⁸ The development of a Human Rights Act would go some way to realising such rights. In this context, it is the Law Council's view that economic, social and cultural rights should be protected to the same extent as civil and political rights. The Law Council has put forward these arguments in more detail in a submission to the National Consultation on Human Rights²⁹ and it is outlined in the Law Council's policy on Indigenous Australians and the Australian Legal Profession.³⁰

39. By protecting and promoting rights contained in *International Covenant on Economic, Social and Cultural Rights*, in addition to the ICCPR, a Human Rights Act could assist in improving the social advancement of Aboriginal and Torres Strait Islander peoples. Some of the most disturbing incidences of rights violations in Australia, such as the comparatively low life expectancy of Indigenous Australians or the comparatively low mortality rates for Indigenous children, concern the denial of economic, social or cultural rights. Additionally, the Law Council is of the view that the development of a

²⁵ Ibid, p171.

²⁶ Law Council of Australia, 'Policy Statement, A Charter: Protecting the Rights of all Australians', (2008), available at: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/BillofRightsPolicyStatement.pdf>. See also, the forthcoming; Law Council of Australia, Policy Statement, 'Human Rights and the Legal Profession: Key Principles and Commitments', (2017).

²⁷ Law Council of Australia, Charter of Rights: A Constructive Dialogue, (2008), available at: <http://lawcouncil.asn.au/files/web-pdf/1004-Charter-Charter-of-Rights-Fact-Sheet.pdf?f9e2b0ea-bdd6-e611-80d2-005056be66b1>.

²⁸ National Human Rights Consultation, 'National Human Rights Consultation Report', September 2009, at p208.

²⁹ Law Council of Australia, 'A Charter: Protecting the rights of all Australians', Submission to the National Consultation on Human Rights, 6 May 2009.

³⁰ Ibid n8, at para 9.

Human Rights Act would assist in improving the participatory role of Aboriginal and Torres Strait Islander people through parliament arising from the 'dialogue' model.

40. In supporting a 'dialogue' model as a policy position the Law Council notes the relevance of *Momcilovic v The Queen* (2011) 245 CLR 1, which considered the validity of Section 36 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Section 36 empowers a court to issue a declaration of inconsistent interpretation if the impugned legislation cannot be interpreted so as to achieve a rights-compatible approach. This is an important mechanism of a 'dialogue' model. Although the decision did not invalidate the development of a national human rights charter, it does suggest that the 'dialogue' model in place through the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT) may not be able to be replicated in exactly the same form federally. For example, an option would still be available for a declaration of incompatibility to be conferred on an independent, non-judicial body.

An Indigenous Voice

Question 14: Do you think Indigenous people should have a say when Parliament and government make laws and policies about Indigenous affairs?

41. The Law Council is of the view that Indigenous Australians, through their representatives, have a right to be consulted about and participate in decision-making concerning legislative and policy changes affecting their rights and interests.³¹ This position is consistent with international human rights law and UNDRIP principles, including recognition of the right to self-determination. UNDRIP Article 3 states:

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

42. UNDRIP Article 4 expands on this, stating:

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

43. Exercising the right to self-determination can encompass a range of different actions. In the Law Council's view, one aspect is the capacity for Aboriginal and Torres Strait Islander peoples to determine their own political future. Being provided with a role when Parliament and government make laws and policies about Indigenous affairs is integrally linked to freely pursuing their political status and freely pursuing their economic, social and cultural development as outlined in Article 1 of ICESCR and Article 1 of ICCPR.

Question 15: Should Aboriginal and Torres Strait Islander peoples have an advisory role or body mandated in the Constitution, so they are guaranteed a voice in political decisions made about them?

³¹ Ibid n8, at para 10.

44. The Law Council supports providing Indigenous peoples with an advisory role or body, to the extent that the body created ensures that Indigenous Australians are consulted about decisions that affect their rights. This includes a voice in political decisions that affect them and the development of structure that allows Aboriginal and Torres Strait Islander people to exercise their right to self-determination.³² An advisory body has the capacity to empower and inspire Aboriginal and Torres Strait Islander peoples by enabling individuals and groups to participate in decision making processes.³³ Furthermore, such a body could assist in helping Aboriginal and Torres Strait Islander peoples to work more closely with government and other agencies in designing and applying solutions to social problems that are community driven.³⁴
45. The Law Council has not yet developed a position whether an advisory body or role should be mandated in the Constitution. Such a position would require further consultation with the Law Council's Constituent Bodies.
46. The Law Council notes that the development of an advisory body or role will require further research, scrutiny and consultation. If such a function was mandated in the Constitution they would need to have the funding to carry out basic functions that assist in bringing community voices to the table and have robust, frank, and fearless conversations on Indigenous matters. An example of some questions requiring further consideration include:
- a. Would a body mandated in the Constitution otherwise be more effective or achieve participatory aims over an advisory body established by legislation?
 - b. What would be the objectives of such a body?
 - c. How would it be ensured that a body is representative of Aboriginal and Torres Strait Islander voices?
 - d. What sort of support would be provided by the Federal Government for such a body, financially, administratively and across the public sector?
 - e. How could a body mandated in the Constitution be abolished, if it was deemed that it was no longer giving effect to its intended purpose?
47. In considering the establishment of a new advisory body, it is worth reflecting on past and current bodies. The Law Council notes that since the abolition of Aboriginal and Torres Strait Islander Commission (ATSIC) in 2005 there has been a gap in the Commonwealth landscape of Government supported and funded representative Aboriginal and Torres Strait voices. Since 2010, the National Congress of Australia's First Peoples has been a strong leader in unifying the voices of Aboriginal and Torres Strait

³² Ibid n8, at para 9.

³³ Australian Human Rights Commission, 'Our future in our hands: Creating a sustainable National Representative Body for Aboriginal and Torres Strait Islander Peoples, 2009, p5, available at: https://www.humanrights.gov.au/sites/default/files/content/social_justice/repbody/report2009/report.pdf.

³⁴ Ibid.

Islander Peoples. For example, National Congress' recent engagement through the Redfern Statement, a coordinated call by Aboriginal and Torres Strait Islander peak representative bodies to meaningfully address Aboriginal and Torres Strait Islander disadvantage.³⁵ The Law Council supported the Redfern Statement as a co-signatory and recognises the critical importance of Aboriginal and Torres Strait Islander led-solutions.

48. However, National Congress' future has often been unclear due to funding uncertainties. In the 2014-15 Budget, \$15 million was withdrawn from its budget, with no additional investment since. The decision to defund National Congress has limited its capacity to operate as a national voice, despite substantial achievements in recent years. It is important that the development of any advisory body receives strong bipartisan commitment to ensure that it has a strong sense of continuance, particularly with respect to funding.

49. UNDRIP emphasises the importance of genuine Indigenous participation and consultation in political decisions about their rights. Article 18 states:

Indigenous peoples have the right to participate in decision-making in matters which would affect 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.

50. The Law Council notes that no formal processes have commenced in Australia to implement Article 18. The development of an advisory body, depending upon its structure, purpose and support, has the potential to assist in underlying Australia's commitments to UNDRIP. Of additional relevance are Articles 5, 19, 23, 27 and 28. While UNDRIP is not a treaty, courts have held and commentators contend, that many, if not all of its provisions, reflect customary international law.³⁶ Additionally, legislative amendments have been made in Australia to give effect to UNDRIP principles.³⁷

Question 16: Given that the proposal is for the body to offer non-binding advice, so it cannot veto legislation, would it still be worthwhile?

51. The Law Council is of the view that there remains value in the development of an advisory body even if it is to offer non-binding advice. The Law Council agrees with the Discussion Paper as to the critical importance of Aboriginal and Torres Strait Islander Peoples being engaged in the development and implementation of laws, policies and programs that affect them and their rights.

³⁵ National Congress et al, 'The Redfern Statement', 9 June 2016. Available at:

<http://nationalcongress.com.au/wp-content/uploads/2017/02/The-Redfern-Statement-9-June-Final.pdf>.

³⁶ For example, see Professor Megan Davis, 'To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On', Australian International Law Journal, Vol. 19, 2012: 17-48.

³⁷ For example, section 27 of the *Human Rights Act 2004* (ACT) which was introduced in 2015. Section 27(2)(a) reflects the aspirations of article 31 of UNDRIP, which recognises the right of Indigenous peoples to maintain, control and develop their cultural heritage and traditional knowledge. While section 27(2)(b) reflects the aspirations of article 25 of UNDRIP, which further acknowledges the distinctive spiritual, material and economic relationships of Indigenous peoples.

52. As with some of the legal and structural questions posed in Question 15, likewise there are a number of questions that arise from a body that provides non-binding advice. For example that includes:

- a. At what stage would the advice be provided in the development of policy and bills?
- b. How would such a body intersect with existing parliamentary bodies which provide non-binding advice on bills before Parliament, particularly parliamentary committees, such as the Parliamentary Joint Committee on Human Rights?
- c. Would the government be required to provide a response to the provision of advice? And if so, what processes would be put in place to enable dialogue between the advisory body and the relevant Minister or department responsible?

53. The Law Council is willing and able to offer views on the legal aspects of any such proposal that emerges from the Referendum Council's consultation process.

Question 17: Do you have any ideas about the design of such a body?

54. The Law Council is of the view that the design of such a body should be guided by considered consultation with Aboriginal and Torres Strait Islander Peoples, ensuring that the body provides a representative and respected voice.

55. The consultation process undertaken by the Aboriginal and Torres Strait Islander Social Justice Commissioner which led to the development of National Congress is a useful example to draw upon. In December 2008, the Aboriginal and Torres Strait Islander Social Justice Commissioner convened an Independent Steering Committee to research a preferred model for a national representative body for Aboriginal and Torres Strait Islander peoples. In 2009, a comprehensive series of consultations and workshops were held around the country gathering feedback and advice from Aboriginal and Torres Strait Islander communities about the model. The consultations culminated in November 2009 with the release of the Steering Committee's the report titled, "*Our future our hands*".³⁸

Deleting Section 25

Question 18: What would be achieved by deleting section 25?

56. The Law Council strongly supports the removal of section 25 which discriminates on the ground of race.³⁹ The Law Council considers that the possibility excluding certain racial groups from voting is anathema in contemporary Australian society, and has no place in the Constitution. Its ongoing maintenance is an affront to the principle of non-discrimination in restricting voting on the basis of race.

³⁸ Ibid n27.

³⁹ Ibid n1, p16-17.

57. Given the *Racial Discrimination Act 1975* (Cth), and section 109 of the Constitution, section 25 is now a dead letter. However, its ongoing presence continues to serve as a reminder of the racial discriminatory elements that form part of the Constitution. The Law Council notes that both the Expert Panel Report⁴⁰ and the Joint Select Committee Report⁴¹ have recommended its removal.

Question 19: Is there any point in retaining it?

58. The Law Council is of the view that there is no point in retaining section 25. The Law Council agrees with the assessment of the Joint Select Committee Report that it has “no ongoing utility” or “has any place in the Constitution”.⁴²

Conclusion

Question 20: Do you have any other comments?

59. The Law Council supports the insertion of a new provision which would provide a commitment to constitutional conferences or other processes to discuss Indigenous rights.⁴³ Development of a such a provision would accord with UNDRIP principles with regards to political participation, providing opportunities for appropriately resourced consultants within Aboriginal and Torres Strait Islander communities and organisations, and wider community education, in relation to appropriate arrangements for addressing issues including sovereignty, self-determination, political representation, the recognition of customary law and land rights.

60. The Law Council notes that the development of constitutional conferences may assist in further discussion of issues arising from proposals to questions 14 to 17. Additionally, it may assist in the context of continuing calls for a treaty or treaties. Constitutional recognition should not and would not preclude pursuit of the aspirations for recognition of sovereignty and treaty.

⁴⁰ Ibid n3, p144.

⁴¹ Ibid n4, p22.

⁴² Ibid n4, p21.

⁴³ Ibid n1, p19.