Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution

Report of the Expert Panel

January 2012

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16 January 2012

The Hon Julia Gillard MP
Prime Minister
Parliament House
Canberra ACT 2600

Dear Prime Minister

We are pleased to present to you the report of the Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*. This report has been prepared in accordance with the Expert Panel's terms of reference issued on 23 December 2010.

Yours sincerely



Patrick Dodson
Co-chair

Mark Leibler AC
Co-chair

Expert Panel on Constitutional Recognition of Indigenous Australians

Foreword from the co-chairs

We present this report to the Prime Minister with the gratitude of all members of the Expert Panel for the opportunity to carry out the important task we were given in December 2010: to investigate how to give effect to constitutional recognition of Aboriginal and Torres Strait Islander peoples.

The Panel's task was to report to the Government on the options for constitutional change and approaches to a referendum that would be most likely to obtain widespread support across the Australian community. The conversation with our fellow Australians took place in communities, towns and cities across the country and gave the Panel invaluable insights into how people from many backgrounds and walks of life want to see their sense of nationhood and citizenship reflected in the Constitution.

The consultations the Panel undertook were a reminder of how far Australia has come since the nation's legal and political foundations were laid down in the late nineteenth century. Then, in line with the values of the times, Aboriginal and Torres Strait Islander peoples were excluded from the deliberations that led to the adoption of the Constitution. The text of the Constitution excluded them. It was not until two-thirds of the way through the nation's first century that the exclusion was removed and the Constitution shifted closer to a position of neutrality. The logical next step is to achieve full inclusion of Aboriginal and Torres Strait Islander peoples in the Constitution by recognising their continuing cultures, languages and heritage as an important part of our nation and by removing the outdated notion of race.

Public participation in and support for the Panel's consultations and submissions program has been strong. Together with research commissioned by the Panel during 2011, this has given us confidence that the constitutional changes recommended in this report are capable of gaining the overwhelming public support needed to succeed at a referendum.

While we believe that the options outlined in this report are capable of succeeding at a referendum, the consequences of failure would be damaging to the nation. An essential pre-condition to gaining the support needed for a successful referendum is cross-party parliamentary support. Notwithstanding their political differences, all major political parties have strongly affirmed the principle of constitutional recognition of Aboriginal and Torres Strait Islander peoples. We believe that significant common ground exists across the political spectrum in relation to the Panel's recommendations, and that this support has grown as the Panel has carried out its work throughout the year. In this we have been greatly assisted by the Panel's four parliamentary members.

The Panel hopes that all Australians will respond with an open mind to its recommendations. We believe that the current multiparty support creates a window of opportunity to recognise Aboriginal and Torres Strait Islander peoples in and eliminate race-based provisions from the Constitution, provided that the necessary conditions for a successful referendum, as detailed in this report, are in place.

It is now for the Government and the Parliament to take the Panel's recommendations forward. As co-chairs, we would be pleased to assist in this process by participating in discussions and providing advice, including on the extent to which any proposals the Government puts to Parliament are likely to be supported by the Australian community as a whole.

Finally, we thank the members of the Panel for their dedication and commitment during the past year, and we also thank the thousands of Australians who have contributed their ideas and their personal experiences to the Panel's deliberations.

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Executive summary

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

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

Methodology

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

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

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

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

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

Historical background

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

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

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

Comparative and international recognition

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

The national conversation: Themes from the consultation program

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

Statements of recognition/values

Idea 1. Statement of recognition in a preamble

Idea 2. Statement of recognition in the body of the Constitution

Idea 3. Statement of recognition and statement of values in a preamble

Idea 4. Statement of recognition and statement of values in the body of the Constitution

Equality and non-discrimination

Idea 5. Repeal or amend the 'race power'

Idea 6. Repeal section 25

Constitutional agreements

Idea 7. Agreement-making power.

Forms of recognition

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

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

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

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

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

The 'race' provisions

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

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

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

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

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

Racial non-discrimination

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

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

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

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

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

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

Governance and political participation

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

Specifically, this chapter addresses:

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

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

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

Agreement-making

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

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

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

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

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

The question of sovereignty

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

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

Approaches to the referendum

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

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

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

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

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

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

Recommendations

Recommendations for changes to the Constitution

The Panel recommends:

1 That section 25 be repealed.

2 That section 51(xxvi) be repealed.

3 That a new 'section 51A' be inserted, along the following lines:

Section 51A Recognition of Aboriginal and Torres Strait Islander peoples

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

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

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

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

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

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

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

Section 116A Prohibition of racial discrimination

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

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

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

Section 127A Recognition of languages

(1) The national language of the Commonwealth of Australia is English.

(2) The Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage.

Recommendations on the process for the referendum

a. In the interests of simplicity, there should be a single referendum question in relation to the package of proposals on constitutional recognition of Aboriginal and Torres Strait Islander peoples set out in the draft Bill (Chapter 11).

b. Before making a decision to proceed to a referendum, the Government should consult with the Opposition, the Greens and the independent members of Parliament, and with State and Territory governments and oppositions, in relation to the timing of the referendum and the content of the proposals.

c. The referendum should only proceed when it is likely to be supported by all major political parties, and a majority of State governments.

d. The referendum should not be held at the same time as a referendum on constitutional recognition of local government.

e. Before the referendum is held, there should be a properly resourced public education and awareness program. If necessary, legislative change should occur to allow adequate funding of such a program.

f. The Government should take steps, including through commitment of adequate financial resources, to maintain the momentum for recognition, including the widespread public support established through the *YouMeUnity* website, and to educate Australians about the Constitution and the importance of constitutional recognition of Aboriginal and Torres Strait Islander peoples. Reconciliation Australia could be involved in this process.

g. If the Government decides to put to referendum a proposal for constitutional recognition of Aboriginal and Torres Strait Islander peoples other than the proposals recommended by the Panel, it should consult further with Aboriginal and Torres Strait Islander peoples and their representative organisations to ascertain their views in relation to any such alternative proposal.

h. Immediately after the Panel's report is presented to the Prime Minister, copies should be made available to the leader of the Opposition, the leader of the Greens, and the independent members of Parliament. The report should be released publicly as soon as practicable after it is presented to the Prime Minister.



It is really sad that non-Aboriginal people do not understand about our law.

We cannot have traditions unless we know and respect *ngarra rom* and *mawul rom*. *Ngarra rom* is our law. *Mawul rom* is the law of peace-making. We hold *ngarra rom* in our identity. We have never changed our laws for thousands of years. It is like layers and layers of information about our country.

Ngarra rom works to enable government within the various Aboriginal nations, led by the *dilak*, or clan leaders. *Ngarra rom* also governs relations among nations. *Ngarra* is also a knowledge system. Under *ngarra*, there are *djunggaya* or public officers who make business go properly. There are *djunggaya* all over this country—for Yolngu, Arrernte, Walpirri, Murri, Koori and Noongar and all the Aboriginal nations.

We Yolngu have *ngarra* or hidden knowledge. *Ngarra* holds the Yolngu mathematical system about relationships among all people, beings and things in the world—land, sea, water, animals, plants, the wind and the rain, and the heavens.

We Yolngu have never been anarchists or lawless.

The Constitution in 1901 did not change *ngarra*.

In 1901, the Constitution ignored *ngarra rom*. Without acknowledgment in the Constitution, there is lawlessness and anarchy. Without acknowledgment in the Constitution, we are separate.

The preamble to the Constitution is a short job. The Constitution is a barrier to understanding the indigenous cultures of this country. No more British preamble. Let us be together in the Constitution to make unity in this country. This means 'We are one. We are many of this country'.

Timmy Djawa Burarrwanga, Gumatj Clan

Yalangbara Digging Stick of the Djang'kawu
1976
Wood, feathers, acrylic, cotton, wax
148 x 16 cm
House of Representatives, Parliament of Australia Collection, Canberra

This digging stick represents the greater Yalangbara area. As a symbol of Rirratjingu law and authority, the *mawalan* is similar to the parliamentary rod. In recognition of this, the *mawalan* is displayed in Parliament House, Canberra, next to the Yirrkala Bark Petition, which is regarded as a major symbol and affirmation of indigenous law. Displaying the digging stick at Parliament House was recommended by the Minister for Aboriginal Affairs, the Hon Ian Viner, who was presented with the *mawalan* in 1977 at a ceremony at Yirrkala celebrating the federal government's passing of the *Aboriginal Land Rights (Northern Territory) Act 1976*.

Introduction: Expert Panel and its methodology

Background to the establishment of the Expert Panel

On 8 November 2010, Prime Minister Julia Gillard announced the establishment of an expert panel to consult on the best possible options for a constitutional amendment on recognition of Aboriginal and Torres Strait Islander peoples to be put to a referendum. The Prime Minister stated:

> The first peoples of our nation have a unique and special place in our nation. We have a once-in-50-year opportunity for our country.

The Panel's terms of reference provided for it to report to the Government on possible options for constitutional change, including advice as to the level of support from indigenous people and the broader community for each option, by December 2011 (see box, page 3).*

In November 2007, Prime Minister John Howard had announced his support for recognition of Aboriginal and Torres Strait Islander peoples in a new preamble to the Constitution:[1]

> I announce that, if re-elected, I will put to the Australian people within eighteen months a referendum to formally recognise Indigenous Australians in our Constitution—their history as the first inhabitants of our country, their unique heritage of culture and languages, and their special (though not separate) place within a reconciled, indivisible nation. …
>
> A future referendum question would stand alone. It would not be blurred or cluttered by other constitutional considerations. I would seek to enlist wide community support for a 'Yes' vote. I would hope and aim to secure the sort of overwhelming vote achieved 40 years ago at the 1967 referendum. If approached in the right spirit, I believe this is both realistic and achievable.

On 23 July 2008, the Commonwealth Government conducted a community Cabinet meeting in eastern Arnhem Land. Prime Minister Kevin Rudd was presented with a Statement of Intent on behalf of Yolngu and Bininj clans living in Yirrkala, Gunyangara, Gapuwiyak, Maningrida, Galiwin'ku, Milingimbi, Ramingining and Laynhapuy homelands, approximately 8,000 Aboriginal people in Arnhem Land. The communiqué argued that the right to maintain culture and identity and to protect land and sea estates were preconditions for economic and community development in remote communities. The communiqué called on the Government to 'work towards constitutional recognition of our prior ownership and rights'. In accepting the communiqué, the Prime Minister pledged his support for recognition of indigenous peoples in the Constitution.

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* After much discussion, the Panel decided to use the term 'indigenous' rather than 'Indigenous' throughout this report, except where it occurs as part of the name of an entity, in a title or in a quote. The term 'indigenous' is therefore used to refer both to the first peoples of other continents and occasionally to Aboriginal and Torres Strait Islander peoples, although 'Aboriginal and Torres Strait Islander peoples' is preferred as the more inclusive and precise term.

The Australian Labor Party's 2010 election policy stated that 'constitutional recognition of Aboriginal and Torres Strait Islander peoples would be an important step in strengthening the relationship between indigenous and non-indigenous Australians, and building trust'. A Gillard Labor Government would establish an Expert Panel on Indigenous Constitutional Recognition comprising indigenous leaders, representatives from across the federal Parliament, constitutional law experts and members of the broader Australian community.

The Coalition's *Plan for Real Action for Indigenous Australians*, launched as part of the Coalition's 2010 election policy, confirmed that the Coalition had made a commitment to hold a referendum to recognise indigenous Australians in a new preamble to the Constitution, and that recognition of indigenous Australians in the Constitution 'makes sense, and is overdue'. The Coalition would encourage public discussion and debate about the proposed change, and seek bipartisan support for a referendum to be put to the Australian people at the 2013 election.

On 1 September 2010, following the 2010 election, the Australian Greens and the Australian Labor Party signed an agreement in which the ALP promised to hold referendums 'during the 43rd Parliament or at the next election on Indigenous constitutional recognition and recognition of local government in the Constitution'. On 2 September 2011, the Hon Julia Gillard MP and Andrew Wilkie MP signed an agreement containing a similar commitment. On 7 September 2010, the Australian Labor Party and Rob Oakeshott MP signed an agreement in which the ALP undertook to 'pursue a referendum during the 43rd Parliament or at the next election on recognition of Indigenous Australians in the Constitution'.

Membership of the Panel

On 23 December 2010, following nominations by the public, the Prime Minister announced the membership of an independent Expert Panel on Constitutional Recognition of Indigenous Australians. The Panel is made up of Australians from indigenous and non-indigenous communities and organisations, small and large business, community leaders, academics, and members of Parliament from across the political spectrum (see Appendix A). The membership was drawn from all States and Territories, cities and country areas. The members of the Panel served in their independent capacity.

Throughout 2011, the Panel was supported by an executive officer, a media adviser and the Indigenous Constitutional Recognition Secretariat in the Department of Families, Housing, Community Services and Indigenous Affairs.

The Panel met throughout 2011: in Canberra in February, Melbourne in March, Sydney in May, Melbourne in July, Sydney in September, Canberra in October and November, and Melbourne in December. The Panel also conducted much of its work out of session.

Terms of reference

The Government has committed to pursue recognition of Aboriginal and Torres Strait Islander peoples in the Australian Constitution.

This process requires:

- the building of a general community consensus;
- the central involvement of Indigenous and non-Indigenous people; and
- collaboration with Parliamentarians from across the political spectrum.

The Government has established an expert panel in order to ensure appropriate public discussion and debate about the proposed changes and to provide an opportunity for people to express their views.

The Expert Panel will report to the Government on possible options for constitutional change to give effect to Indigenous constitutional recognition, including advice as to the level of support from Indigenous people and the broader community for each option by December 2011.

In performing this role, the Expert Panel will:

- lead a broad national consultation and community engagement program to seek the views of a wide spectrum of the community, including from those who live in rural and regional areas;
- work closely with organisations, such as the Australian Human Rights Commission, the National Congress of Australia's First Peoples and Reconciliation Australia who have existing expertise and engagement in relation to the issue; and
- raise awareness about the importance of Indigenous constitutional recognition including by identifying and supporting ambassadors who will generate broad public awareness and discussion.

In performing this role, the Expert Panel will have regard to:

- key issues raised by the community in relation to Indigenous constitutional recognition;
- the form of constitutional change and approach to a referendum likely to obtain widespread support;
- the implications of any proposed changes to the Constitution; and
- advice from constitutional law experts.

Principles to guide the Panel's assessment of proposals for constitutional recognition

At its second meeting in Melbourne in March 2011, the Panel agreed on four principles to guide its assessment of proposals for constitutional recognition of Aboriginal and Torres Strait Islander peoples, namely that each proposal must:

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

In its consideration of options for constitutional recognition, the Panel has been guided by these four principles.

Consultation and community engagement

At its initial meetings, the Panel considered how best to approach the task of leading a broad national consultation and community engagement program, and raising awareness about the question of constitutional recognition of Aboriginal and Torres Strait Islander peoples. The Panel recognised that a referendum proposal concerns every voter in Australia. It was therefore essential to take into account the range of views in the Australian community across all age groups, and among people living in cities, major metropolitan centres, regional and rural Australia, and remote communities.

The Panel adopted a range of approaches, including preparing a discussion paper, developing a website and digital communications strategy, and holding public meetings and events. Advertisements were placed in the national print media to publicise the consultations and call for submissions (see Appendix B). The Panel also worked closely with organisations such as the National Congress of Australia's First Peoples, Reconciliation Australia and the Australian Human Rights Commission. Congress undertook a number of surveys of its members in relation to recognition of Aboriginal and Torres Strait Islander peoples in the Constitution. Reconciliation Australia undertook activities to complement the work of the Panel. These included contributing content to the Panel's website, appointing ambassadors and facilitating public meetings.

Discussion paper

In May 2011, the Panel published a discussion paper, *A National Conversation about Aboriginal and Torres Strait Islander Constitutional Recognition.* The discussion paper identified seven ideas for change based on proposals previously made for constitutional recognition of Aboriginal and Torres Strait Islander peoples (see Chapter 3). These ideas were intended to provide a starting point for conversation with the public envisaged by the Panel, and in no way to limit the scope of proposals that might be raised through the consultation and submissions process.

Print copies of the discussion paper and a two-page summary document were distributed at all community consultations and public meetings, and mailed to members of the public upon request. Overall, some 15,400 discussion papers and information packs were distributed in hard copy. The discussion paper was available on the Panel's website at www.youmeunity.org.au.

Digital communications strategy

The Panel's dedicated interactive website provided an online presence, and involved social media including Twitter, Facebook, YouTube, Flickr, Tumblr and a blog feed.[2] It provided access to Panel communiqués and other publications as well as the discussion paper. All submissions were published on the website unless confidentiality had been requested. The website was linked to the websites of the National Congress of Australia's First Peoples, Reconciliation Australia and the Australian Human Rights Commission.

Media and events

The Panel engaged a media adviser to develop a media strategy to inform the public as widely as possible about its work and opportunities for participation. The strategy included arranging features and opinion pieces, television and radio talkback programs, and speeches at various events.

Community information kits

Another mechanism to enable participation by a wide cross-section of Australians was through the provision of 'do it yourself' consultation kits to community groups and organisations, encouraging them to hold their own consultations. These kits were available on the website, or provided by post on request.[3]

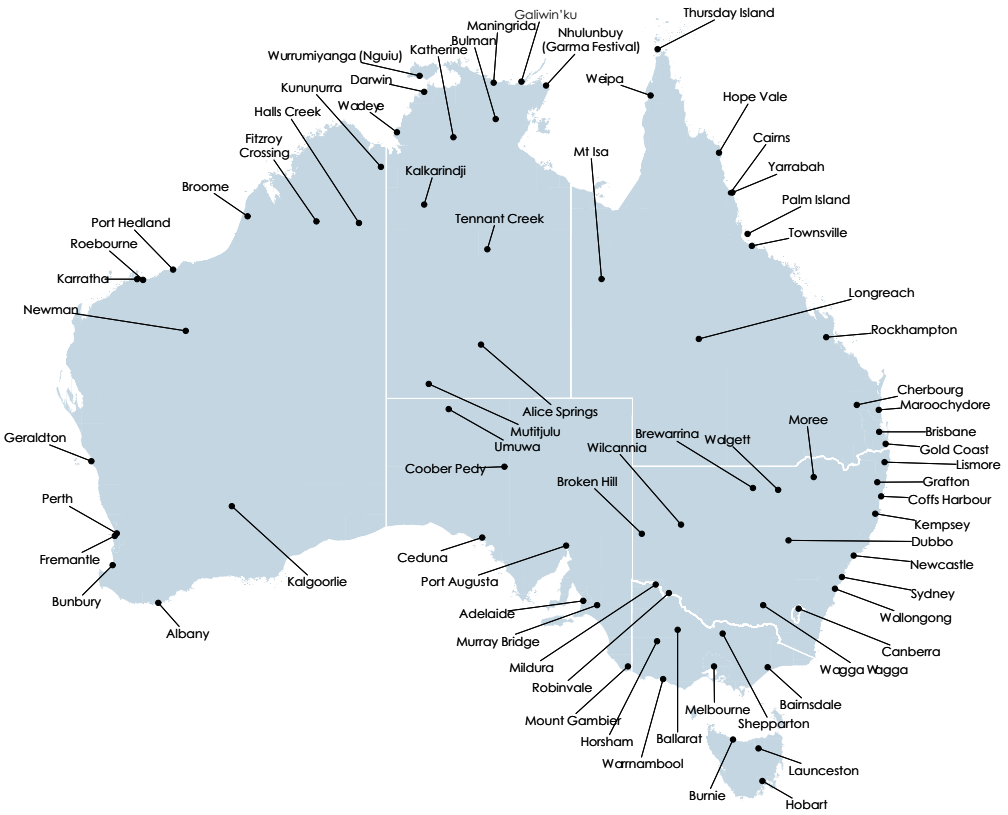
The national consultation program

Between May and October 2011, the Panel conducted a broad national consultation program. The program included public consultation meetings, individual discussions with high-level stakeholders, presentations at festivals and other events, the website, and a formal public submissions process.

The secretariat liaised with Panel members, State and local office contacts of the Department of Families, Housing, Community Services and Indigenous Affairs, and other local contacts to develop stakeholder lists for each consultation. In developing invitation lists, the Panel focused on contacting Aboriginal and Torres Strait Islander leaders, business leaders, community leaders, leaders of organisations with Reconciliation Action Plans, and faith-based leaders.

The consultation schedule included meetings with key stakeholders in each capital city, and public consultations in 84 urban, regional and remote locations and in each capital city. It involved as many Aboriginal and Torres Strait Islander communities as possible. Wherever possible, at least two Panel members attended each consultation. At most places, the Panel held an initial meeting with local elders before holding a public community

Locations of public consultations by the Expert Panel, May to October 2011



Produced by the Information Services Branch, Department of Families, Housing, Community Services and Indigenous Affairs.

consultation and, where achievable, meetings with other community and business leaders. At each consultation, copies of the discussion paper, the Australian Constitution, information kits, and a questionnaire were distributed.

Between May and October 2011, the Panel held more than 250 consultations, with more than 4,600 attendees. The map on page 6 provides a snapshot of the locations of consultations.

A short film summarising the discussion paper was translated into 15 Aboriginal and Torres Strait Islander languages, namely Guringdji, Murrinh-Patha, Anindiyakwa, Arrernte, Kimberley Kriol, Pitjantjatjara, Wik Mungan, TSI Kriol, Warramangu, Walpirri, Yolngu, Kriol, Tiwi, Alywarra and Kunwinjku. The film was presented by Panel member Alison Page. Interpreters of Aboriginal and Torres Strait Islander languages, as well as Auslan interpreters, were at consultations, as needed and where possible.

Public submissions

The Panel encouraged submissions by:

- including details about the submissions process in the discussion paper;
- encouraging people attending community meetings to take material back to their organisations with a view to making submissions;
- placing advertisements in major national newspapers and the indigenous press inviting submissions;
- sending a letter from the co-chairs to more than 350 academics and community and business leaders inviting submissions; and
- promoting submissions on the website.

Between May and September 2011, the Panel received some 3,500 submissions from members of the public, members of Parliament, community organisations, legal professionals and academics, and Aboriginal and Torres Strait Islander leaders and individuals.

A number of submissions were received after 30 September 2011. These are posted on the Panel's website, and have been considered by the Panel wherever possible. Appendix C contains a list of submissions received.

Analysis of consultations and public submissions

To assist its analysis of the records of consultations and public submissions, as well as to work closely on the preparation of its report, the Panel established a research and report subgroup.

An external consultant, Urbis, was engaged to provide a qualitative analysis of the key issues and themes raised in submissions. Appendix D contains the executive summary of the Urbis report; the full report is available on the Panel's website.

Following each public consultation, the secretariat prepared a summary of the views expressed at the meeting. These summaries included direct quotes and/or paraphrased discussion at the meeting. The summaries were reviewed for accuracy by the Panel members

who attended the consultation. While there were some verbatim quotes, in most cases the summary paraphrased what was said at the meeting. Accordingly, the quotes from consultations throughout this report are identified only by location and date and are not attributed to individuals.

The secretariat also prepared a qualitative analysis of the records of consultations. This analysis identified key themes, issues and opinions raised by the public at meetings. In addition, the secretariat prepared an analysis of some 280 responses to the questionnaire provided in the information kit.

Obtaining a broad community view

The Panel was aware that, in holding public meetings and inviting written submissions, it would only be able to obtain the views of a small number of Australians. To discover the views of a wider spectrum of the community, and to help build an understanding of the likely levels of support within the community for different options for constitutional recognition, the Panel commissioned Newspoll to undertake research.

In February 2011, Newspoll tested initial community support by placing a question on its National Telephone Omnibus Survey that asked: 'If there was to be a referendum to recognise indigenous Australians in the Australian Constitution, based on what you know now would you vote in favour of it or against it?' In March 2011, Newspoll again tested levels of community support. In August 2011, Newspoll undertook exploratory qualitative research designed to assist the Panel to better understand the views of the general Australian voting public on constitutional recognition of Aboriginal and Torres Strait Islander peoples.

In September and October 2011, Newspoll conducted two nationally representative telephone surveys. The first survey was designed to help the Panel understand the level of support for a broad range of ideas for constitutional change as the Panel's consultation activities were nearing their conclusion. The second survey aimed to test the Panel's early thinking on possible recommendations, and was timed to ensure that information on levels of public support was available during November and December while the Panel was deliberating on its final recommendations.

In November 2011, Newspoll conducted a second round of qualitative research designed to assist the Panel in finalising the language of its recommendations, and in future communications about advancing constitutional recognition of Aboriginal and Torres Strait Islander peoples.

The Panel also developed a web survey to test support for ideas that had been raised with it during the consultation period. A link to the survey was provided to people who had given contact details at consultations, and to people on the email databases of the National Congress of Australia's First Peoples, Reconciliation Australia and the Australian Human Rights Commission.

Between 22 and 30 November 2011, Newspoll conducted four online focus group sessions in relation to possible wording for recommendations. Online focus groups ('live chats') included people of different ages, and those both supportive of and opposed to constitutional recognition of Aboriginal and Torres Strait Islander peoples.

To some extent, submissions to the Panel were constrained by the way ideas were framed in the Panel's discussion paper. Discussions at consultations, on the other hand, were less constrained, and options were suggested that had not been canvassed in the discussion paper. As the Panel's work progressed throughout the year, its thinking about options for recognition developed. In this sense the process was an iterative one. The quantitative research undertaken by Newspoll also elicited responses to specific questions, which reflected the Panel's thinking at different stages of the process. To this extent, the Panel recognises that the analysis of consultations, the analysis of submissions and the results of the quantitative research are not directly comparable.

Understanding the level of support of Aboriginal and Torres Strait Islander peoples

The Panel's terms of reference included the requirement to advise the Government on the 'level of support from Indigenous people' for each option for changing the Constitution. One of the principles adopted by the Panel to guide its assessment of proposals was the need for any proposal to be 'of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples'.

Testing the level of support for any proposal across the entire Aboriginal and Torres Strait Islander population would be an immensely difficult task. There is no established survey instrument that can provide an accurate and representative picture of the opinion of Aboriginal and Torres Strait Islander people. At the request of the Panel, the possibility of constructing a statistically representative panel of Aboriginal and Torres Strait Islander respondents to a large national survey was investigated, but found not to be feasible.

As outlined above, the Panel placed a strong emphasis upon ensuring that its consultation schedule enabled it to capture the views of as many Aboriginal and Torres Strait Islander people and communities as possible within the available timeframes. In addition to the meetings held in the course of the broader consultation program, the Panel also held high-level focus groups with Aboriginal and Torres Strait Islander leaders. These are detailed below.

The Panel was also informed by responses to its web survey from people who identified themselves as Aboriginal or Torres Strait Islander. The Panel also sought to make use of other sources of information on the views of Aboriginal and Torres Strait Islander people, including surveys of its members conducted by the National Congress of Australia's First Peoples.

Finally, the Panel received submissions from many Aboriginal and Torres Strait Islander people and organisations. The views expressed in these submissions assisted the Panel in its discussions and in arriving at its recommendations.

Ensuring the Panel's recommendations are legally and technically sound

The last of the four principles agreed by the Panel required that any proposal be 'technically and legally sound'. This reflected the requirement in the Panel's terms of reference that suggested changes have regard to 'the implications of any proposed changes to the Constitution' and 'advice from constitutional law experts'.

The Panel sought legal advice on options for, and issues arising in relation to, constitutional recognition. Advice was provided by constitutional law experts among the Panel's members,

as well as by leading practitioners of constitutional law. In addition to this advice, legal roundtable meetings were held to further test that the Panel's proposed recommendations were legally and technically sound. These are outlined below.

Submissions were also made to the Panel by many legal practitioners, academics and professional associations. These submissions assisted the Panel in its discussions and in forming its recommendations.

Testing the Panel's thinking

To test community responses to its proposed recommendations, the Panel adopted a number of strategies, including engaging Newspoll.

The Panel also held a series of high-level focus groups in October and November 2011 with Aboriginal and Torres Strait Islander leaders in order to further test proposed recommendations. The stakeholder lists that had been developed for the purpose of consultations were drawn on to invite participants to the Aboriginal and Torres Strait Islander focus groups. Focus groups were held in Adelaide, Brisbane, Broome, Cairns, Canberra, Darwin, Hobart, Melbourne, Perth, Sydney and Thursday Island.

These discussions were an important step in obtaining the views of Aboriginal and Torres Strait Islander people in relation to the Panel's proposed recommendations.

Legal roundtables were also held to further test proposed language for unintended consequences. Six roundtables were held: two in Sydney, two in Melbourne and one each in Brisbane and Perth. These were attended by some 40 barristers and academics with expertise in constitutional law.

Roundtables with officials from multiple government agencies were held in Melbourne and Brisbane. A roundtable discussion was also held in Sydney attended by 20 representatives from non-governmental organisations.

A historic opportunity

The 1967 referendum was held 45 years ago. Current multiparty support has created a historic opportunity to recognise Aboriginal and Torres Strait Islander peoples as the first peoples of Australia, to affirm their full and equal citizenship, and to remove the last vestiges of racial discrimination from the Constitution.

The Australian nation occupies land that Aboriginal and Torres Strait Islander peoples have looked after for at least 40,000 years,[4] perhaps much longer. They are the heirs to the oldest continuous cultures in the world. As at 30 June 2006 (the latest available census data), the indigenous population was 517,200 or 2.5 per cent of the total population of 20,184,300.[5] In some regions, such as the Pilbara, Kimberley and north Queensland, and in the Northern Territory, the indigenous proportion of the population ranges from 10 to 80 per cent and with projected demographic changes will continue to increase.[6]

The Panel has concluded that constitutional recognition is likely to obtain widespread support among Australians from across the social and political spectrums. Australians have come from

more than 200 countries to build a stable and prosperous democracy.[7] Given the at times violent conflicts over nationhood throughout the world over the last two centuries, the Panel appreciates the extraordinary achievements of those who have contributed to the stability of our democracy. Exceptionally, that democracy has not served Aboriginal and Torres Strait Islander Australians well.

Constitutional recognition of the cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples would declare an important truth in Australian history, and assist in sustaining their cultures and languages into the future. Constitutional recognition would help improve the self-esteem and dignity of Aboriginal and Torres Strait Islander people, and provide a better framework for the governance of the nation.

Most significantly, constitutional recognition would provide a foundation to bring the 2.5 per cent and the 97.5 per cent of Australians together, in a spirit of equality, recognition and respect, and contribute to a truly reconciled nation for the benefit of all Australians.

Constitutional recognition will not address all the issues raised at consultations and in submissions. Some of these issues were outside the Panel's terms of reference. Accordingly, the Panel has made no recommendations in relation to them. Nevertheless, the Panel has sought to record most of the issues raised at consultations and in submissions, having regard especially to one of the four principles that have guided its deliberations, namely 'the wishes of Aboriginal and Torres Strait Islander peoples'.

Notes

1 ABC Television, 'The Prime Minister on the New Preamble', *7.30 Report*, 11 August 2007; Noel Pearson, 'Reconciliation U-Turn Shows Leader's True Colours', *The Weekend Australian*, 24 November 2007. See Megan Davis and Zrinka Lemezina, 'Indigenous Australians and the Preamble: Towards a More Inclusive Constitution or Entrenching Marginalisation?' (2010) 33(2) *University of New South Wales Law Journal* 239.

2 The website received nearly 47,000 unique visitors. There was a social media audience of 15,992, consisting of 9,049 YouTube viewers, 384 Twitter followers, and 6,559 Facebook fans.

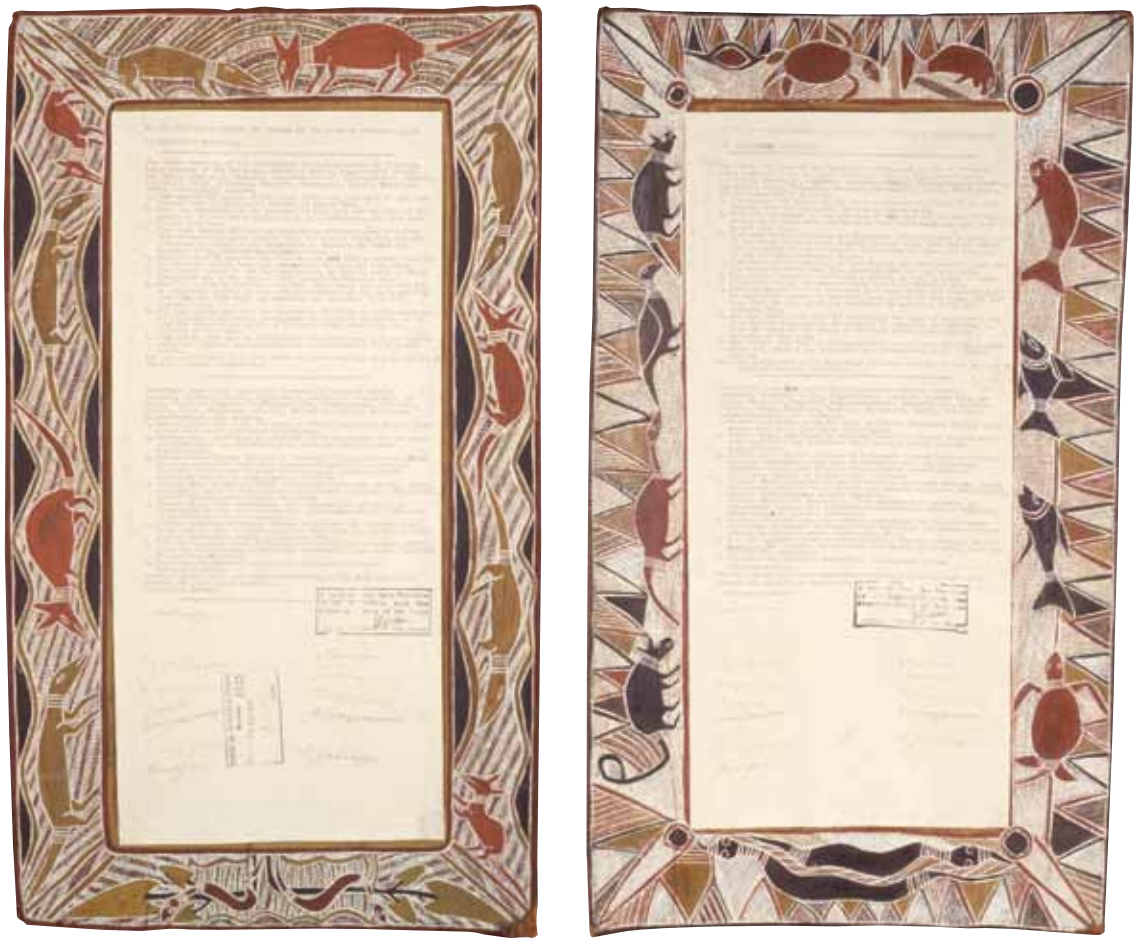
3 The kit was downloaded from the website almost 4,700 times, and more than 50 print copies were requested.

4 See Bill Gammage, *The Biggest Estate on Earth: How Aborigines Made Australia* (Allen & Unwin, 2011).

5 Australian Bureau of Statistics, *Population Distribution, Aboriginal and Torres Strait Islander Australians, 2006*, cat no 4705.0 (2006), at 5.

6 'If current rates of fertility and mortality were to continue over the 25-year period from 2006 to 2031, then the Indigenous population as a whole would increase from 517,023 to 847,915—a total increase of 64 per cent.' Nicholas Biddle and John Taylor, *Indigenous Population Projections, 2006–31: Planning for Growth* (Working Paper No 56/2009, Centre for Aboriginal Economic Policy Research, Australian National University), at 17. According to a media release of 8 September 2009 from the Australian Bureau of Statistics, the indigenous population of Australia is projected to grow by 2.2 per cent a year between 2006 and 2021 ('Australia's Indigenous population to exceed 700,000 by 2021', Media Release 62/2009, at www.abs.gov.au).

7 Department of Immigration and Citizenship, *Key Facts in Immigration*, Fact Sheet 2 (March 2011), at www.immi.gov.au/media/fact-sheets/02key.htm.



In 1963, the Yirrkala Elders of the Yolngu people presented a bark petition to the Commonwealth Parliament in the English and Gumatji languages. The petition protested the Commonwealth Government's decision to grant mining rights in the Arnhem Land reserve, and called for recognition of Yolngu land rights and a parliamentary inquiry.

Yirrkala Bark Petitions of the Dhuwa moiety (left) and Yirritja moiety (right)
1963
Natural ochres on bark, ink on paper
46.9 x 21 cm (each work)
House of Representatives, Canberra

1 Historical background

> Millions of non-indigenous Australians have joined with us in the search for a better relationship based on equity and justice. Australians at every level of our society have put up their hands to be counted as supporters of a nation that holds as its core value a society based on mutual respect, tolerance and justice. … I am convinced that true reconciliation that is not based upon truth will leave us as a diminished nation. And I … am convinced that such reconciliation is possible.
>
> Patrick Dodson[1]
>
> It is a question of the country's ability to deal with history, because history is not something that dwells in years gone by; it is something that dwells among us now and it prescribes the way in which we will behave in the future. Indeed it incites us to behave in different ways in the future. The success with which this country deals with its past is absolutely critical to the future that the country lays down for itself. To deal successfully with that past is to admit the truth of the past and admit the facts of what has happened.
>
> Noel Pearson[2]

1.1 The history of the Australian Constitution

The Australian Constitution grew out of moves towards a federation of the six self-governing colonies in the nineteenth century. Before 1901, ultimate power over these colonies—New South Wales, Victoria, Queensland, Western Australia, South Australia and Tasmania—rested with the United Kingdom Parliament at Westminster.

During the 1890s, a series of conferences were held to discuss federation. In 1895, the six premiers of the Australian colonies agreed to establish a new Constitutional Convention by popular vote. The convention met over the course of a year during 1897 and 1898. The Constitution was approved in referendums held between 1898 and 1900. After ratification by five of the colonies (that is, all except Western Australia), it was presented as a Bill to the Imperial Parliament with an Address to Queen Victoria, requesting the enactment of the Bill.[3] On 31 July 1900, the people of Western Australia voted at a referendum to join the Commonwealth of Australia.

In 1901, in their *Annotated Constitution of the Australian Commonwealth*, Quick and Garran commented:

> The Federation of the Australian colonies has occupied the best energies of the statesmen and the people of Australia for many years; and this Constitution is the outcome of exhaustive debates, heated controversies, and careful compromises.[4]

'[The Constitution] is the outcome of exhaustive debates, heated controversies, and careful compromises.'

John Quick and Robert Garran

Quick and Garran described the Constitution as 'represent[ing] the aspirations of the Australian people in the direction of nationhood, so far as is consistent and in harmony with the solidarity of the Empire'.[5]

The Australian Constitution is contained in clause 9 of the Commonwealth of Australia Constitution Act 1900 (Imp), a statute of the United Kingdom Parliament. The first eight clauses, referred to as the 'covering clauses', contain mainly introductory, explanatory and consequential provisions. The Imperial Act also contains a short preamble. The preamble provides:

> **Whereas** the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established.

The preamble made no reference to the Aboriginal people. Nor did it refer to the people of the Torres Strait Islands, which had been annexed in 1879 by the British colony of Queensland.

Most people would be surprised to learn that the Australian Constitution itself contains no preamble. At Federation, there were only two references to Aboriginal people in the body of the Australian Constitution:

- The Commonwealth Parliament was denied power to make laws with respect to people of 'the aboriginal race in any State'. Section 51(xxvi), the so-called 'race power', conferred on Parliament the power to make laws with respect to 'the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws'.
- Section 127 provided: 'In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.'

The purpose of section 127[6] was to prevent Queensland and Western Australia from using their large Aboriginal populations to gain extra seats in the Commonwealth Parliament and a larger share of taxation revenue.

At the time of Federation, legislation in Queensland and Western Australia disqualified, among others, Aboriginal men from voting. Against this background, section 25 allowed for the continuation of such racially discriminatory laws. Section 25 provided (and in 2012 still provides):

The purpose of section 127 was to prevent Queensland and Western Australia from using their large Aboriginal populations to gain extra seats in the Commonwealth Parliament and a larger share of taxation revenue.

> [I]f by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

Section 25 countenances the exclusion of persons of particular races from voting in State elections but was designed to penalise, by a reduction of their federal representation, those States where Aboriginal people had not been given the right to vote.[7]

There were four sections in the Constitution under which a reckoning of the number of the people of the Commonwealth was of operational importance:

- section 24, which remains of enduring importance, requiring membership of the House of Representatives to be distributed among the States in proportion to the numbers of their people;
- sections 89 and 93, requiring the allocation of certain Commonwealth expenses in proportion to population when calculating the payment to the States of the balance of customs duties collected by the Commonwealth; and
- section 105, providing for a population–proportion method of taking over part of State debts.

The convention debates of the 1890s make clear that section 51(xxvi) was intended to authorise the enactment by the Commonwealth of racially discriminatory laws.[8] In the original draft Constitution Bill of 1891, the proposal was for a grant of exclusive legislative power to the Commonwealth Parliament with respect to:

> [t]he affairs of people of any race with respect to whom it is deemed necessary to make special laws not applicable to the general community; but so that this power shall not extend to authorise legislation with respect to the aboriginal native race in Australia and the Maori race in New Zealand.

At that time, New Zealand was a potential member of an Australasian nation–state that might also have included Fiji and other Pacific islands. The course of debate suggests that Australia's first chief justice, Sir Samuel Griffith, proposed the clause.[9] Griffith explained:

> What I have had more particularly in my own mind was the immigration of coolies from British India, or any eastern people subject to civilised powers. … I maintain that no state should be allowed, because the federal parliament did not choose to make a law on the subject, to allow the state to be flooded by such people as I have referred to.[10]

As Professor Geoffrey Sawer has commented, everything Griffith was concerned about could have been achieved under the immigration, aliens and external affairs powers.[11] However, the convention debates make clear that the power was regarded as important by the framers of the Constitution. In 1898, Edmund Barton, Australia's first prime minister and a founding justice of the High Court of Australia, commented that the race power was necessary, so that 'the moment the Commonwealth obtains any legislative power at all it should have the power to regulate the affairs of the people of coloured or inferior races who are in the Commonwealth'.[12]

Arguing against a Commonwealth head of power, the future premier of Western Australia, Sir John Forrest, contended:

> We have made a law that no Asiatic or African alien can get a miner's right or do any gold mining. Does the Convention wish to take away from us, or, at any rate, not to give us, the power to continue to legislate in that direction? ... We also provide that no Asiatic or African alien shall go on our goldfields. These are local matters which I think should not be taken from the control of the state Parliament.[13]

'It is of no use for us to shut our eyes to the fact that there is a great feeling all over Australia against the introduction of coloured persons. It goes without saying that we do not like to talk about it but still it is so.'

Sir John Forrest

Forrest also observed that '[i]t is of no use for us to shut our eyes to the fact that there is a great feeling all over Australia against the introduction of coloured persons. It goes without saying that we do not like to talk about it but still it is so.'[14] A South Australian delegate, James Howe, commented: 'I think the cry throughout Australia will be that our first duty is to ourselves, and that we should as far as possible make Australia home for Australians and the British race alone.'[15]

John Reid, a future premier of New South Wales and fourth prime minister of Australia, agreed with Forrest that it was 'certainly a very serious question whether the internal management of these coloured persons, once they have arrived in a state, should be taken away from the state'.[16] He was prepared, however, to give that power to the Commonwealth because 'it might be desirable that there should be uniform laws in regard to those persons, who are more or less unfortunate persons when they arrive here'.[17]

The current Chief Justice of Australia, the Hon Robert French, has observed, writing extracurially, that the provision which became section 51(xxvi) was directed to the 'control, restriction, protection and possible repatriation of people of "coloured races" living in Australia'.[18] The sounds of the battles recorded in the race power are 'the sounds of an out-dated, false and harmful taxonomy of humanity'.[19] Sawer has commented that the convention debates in relation to section 51(xxvi) 'reveal only too clearly a widespread attitude of white superiority to all coloured peoples, and ready acceptance of the view that the welfare of such people in Australia was of little importance'.[20]

The tenor of the convention debates, with the exception of the contributions from Dr John Quick, Charles Kingston and Josiah Symon, indicated a desire for laws applying discriminatory controls to 'coloured races'. Both Quick and Kingston wanted to keep the 'coloured races' out. However, both urged that, once admitted, they should be treated fairly and given all the privileges of Australian citizenship.[21] Kingston, in particular, expressed the view that if coloured people were to be admitted to Australia, they should be admitted as citizens and enjoy all the rights and privileges of Australian citizenship:

> [I]f you do not like these people you should keep them out, but if you do admit them you should treat them fairly—admit them as citizens entitled to all the rights and privileges of Australian citizenship. …
>
> We have got those coloured people who are here now; we have admitted them, and I do trust that we shall treat them fairly. And I have always set my face against special legislation subjecting them [to] particular disabilities …
>
> I think it is a mistake to emphasize these distinctions …[22]

Robert French has commented that this must have seemed a radically liberal view at the time.[23] Likewise, the view of Josiah Symon was just as radical for its time:

> It is monstrous to put a brand on these people once you admit them. It is degrading to us and to our citizenship to do such a thing. If we say they are fit to be admitted amongst us, we ought not to degrade them by putting on them the brand of inferiority.[24]

In relation to other 'races', the records of the conventions reveal that some provisions suggested for inclusion in the Constitution were rejected so that the States could continue to enact legislation that discriminated on racial grounds. For example, the original Commonwealth Bill of 1891 provided that: 'A State shall not make or enforce any law abridging any privilege or immunity of citizens of other States of the Commonwealth, nor shall a State deny to any person, within its jurisdiction, the equal protection of the laws.'[25] The provision was similar to the guarantee of 'equal protection of the laws' in the Fourteenth Amendment to the Constitution of the United States. The Fourteenth Amendment, adopted in July 1868, provided that all persons born or naturalised in the United States were citizens and that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In 1886, the word 'persons' had been held to require equal protection of the laws of the United States without regard to race, colour or nationality.[26] The provision was adopted at the Adelaide Convention in 1897 verbatim. At the Melbourne Convention in 1898, an amendment proposed by the Tasmanian House of Assembly read:

> The citizens of each state, and all other persons owing allegiance to the Queen and residing in any territory of the Commonwealth, shall be citizens of the Commonwealth, and shall be entitled to all the privileges and immunities of citizens of the Commonwealth in the several states, and a state shall not make or enforce any law abridging any privilege or immunity of the citizens of the Commonwealth, nor shall a state deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of its laws.[27]

The proposal was rejected by 24 votes to 17. Instead, a section 117 was proposed to provide that a person shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State. In relation to this compromise, Victorian delegate Henry Higgins (and later justice of the High Court) confirmed at the Melbourne Convention in 1898 that 'we want

'It is monstrous to put a brand on these people once you admit them. It is degrading to us and to our citizenship to do such a thing. If we say they are fit to be admitted amongst us, we ought not to degrade them by putting on them the brand of inferiority.'

Josiah Symon

a discrimination based on colour'.[28] In their 1901 *Annotated Constitution*, Quick and Garran said of the race power:

> [I]t enables the Parliament to deal with people of any alien race after they have entered the Commonwealth; to localise them within defined areas, to restrict their migration, to confine them to certain occupations, or to give them special protection and secure their return after a certain period to the country whence they came.[29]

Sawer has referred to the introduction of the unfortunate expression 'alien race' in Quick and Garran's *Annotated Constitution*, and suggested that they probably did not mean 'alien' in any precise sense of nationality law, 'but merely people of a "race" considered *different from* the Anglo-Saxon-Scottish-Welsh-Cornish-Irish-Norman (etc. etc.) mixture, derived from the United Kingdom, which formed the main Australian stock'.[30]

In 1910, Professor Harrison Moore wrote that section 51(xxvi) was intended to enable the Commonwealth to pass the sort of laws which before 1900 had been passed by many States concerning 'the Indian, Afghan, and Syrian hawkers; the Chinese miners, laundrymen, market gardeners, and furniture manufacturers; the Japanese settlers and Kanaka plantation labourers of Queensland, and the various coloured races employed in the pearl fisheries of Queensland and Western Australia'.[31] Such laws were designed 'to localize them within defined areas, to restrict their migration, to confine them to certain occupations, or to give them special protection and secure their return after a certain period to the country whence they came'.[32]

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On any view, the intended reach of section 51(xxvi) was not the regulation of the affairs of the 'aboriginal natives'. In 1966, Sawer commented that, notwithstanding that the constitutional conventions 'contained many men who were in general sensitive, humane, and conscious of those less fortunate sections of the community', no delegate appears to have suggested 'even in passing that there might be some national obligation to Australia's earliest inhabitants'.[33] A review of the records of the time suggests no consideration by those who were to form Australia's first national government of the possible significance of section 51(xxvi) for Aboriginal and Torres Strait Islander peoples.[34] There was no discussion of their exclusion from the scope of the power, and no acknowledgment of any place for them in the nation created by the Constitution. In this respect, among others, the race power in the Australian Constitution differed markedly from the constitutions of the United States and Canada,[35] which made express reference to indigenous 'Indians'.

For the most part, Aboriginal and Torres Strait Islander people were not able to vote for delegates to the constitutional conventions.[36] During the 1890s, it was only in South Australia that Aboriginal people were placed on electoral rolls and able to vote for delegates. The Panel is not aware of any evidence that Aboriginal or Torres Strait Islander people participated in the conventions or played any role in the drafting of the Constitution.

This exclusion from the framing of the nation's Constitution continued a pattern of marginalisation and systematic discrimination, the consequences of which endure today. As Professor Megan Davis has commented:

> There is a sense that, beginning with their exclusion from the constitutional drafting process in the late 19th century, Aboriginal and Torres Strait Islander people have on the whole been marginalised by both the terms and effect of the Constitution.[37]

The Australian Constitution and system of government

The federal structure: Under Australia's federal system of government, powers are distributed between the Commonwealth and the six States. The three territories—the Australian Capital Territory, the Northern Territory and Norfolk Island—have self-government arrangements.

Three branches of government: The first three chapters of the Constitution deal with the Parliament (Chapter I), the Executive Government (Chapter II) and the Judicature (Chapter III). The Constitution confers the legislative power of the Commonwealth, the executive power of the Commonwealth, and the judicial power of the Commonwealth on these three bodies.

- *Legislative power* is the power to make laws. The Constitution enumerates the subject matters about which the Commonwealth Parliament can make laws. They include taxation, defence, foreign affairs, interstate and international trade, foreign, trading and financial corporations, marriage and divorce, naturalisation and aliens, immigration and bankruptcy.
- *Executive power* is the power to administer laws, and to carry out the business of government through bodies such as government departments, statutory authorities and the defence forces.
- *Judicial power* is the power exercised by courts to decide disputes between people, between people and governments, and between governments, and to determine guilt or innocence in criminal trials.

Responsible government: Australia is a constitutional monarchy. The executive power of the Commonwealth is formally vested in the Queen, and exercisable by the Governor-General as her representative. According to the principle of responsible government, the Queen and the Governor-General act on the advice of ministers, and ministers are members of and responsible to the Parliament. The ministry must have the confidence of the House of Representatives, and the Governor-General must appoint as ministers such members and senators as the Prime Minister advises.

Continued next page

Representative government: Consistent with the principle of representative government, sections 7 and 28 of the Constitution require regular elections for the House of Representatives and the Senate, and that members of the Commonwealth Parliament be directly chosen by the people. Section 24 requires that the number of members of the House of Representatives be 'as nearly as practicable, twice the number of the senators', and be in proportion to State populations.

Commonwealth Parliament: The Parliament consists of the Queen (represented by the Governor-General) and two Houses: the Senate and the House of Representatives.

- *The Senate:* The Senate—or upper house—is regarded as the States' House. The States enjoy equal representation in the Senate, regardless of their population. The Senate has 76 Senators. Twelve are elected for each of the six States, and two each for the Australian Capital Territory and the Northern Territory. State Senators are elected for six-year terms, and Territory Senators for three-year terms.
- *The House of Representatives:* The party or group with majority support in the House of Representatives forms the Government. The House of Representatives—or lower house—has 150 members, each representing a separate electoral division. Members are elected for terms of up to three years.
- *Law-making by the Parliament:* Bills cannot become law unless they are agreed to in the same terms by each House, and assented to by the Governor-General, except in the rare circumstance of a double dissolution followed by a joint sitting of both Houses.

The States and their legislative powers: Prior to Federation in 1901, each of the six colonies had its own constitution. State constitutions continue to regulate, among other things, the parliaments, executive governments and courts of the States. The Australian Constitution expressly guarantees the continuing existence of the States, and preserves (subject to the Australian Constitution) each of their constitutions.

Under the constitutions of each of the States, a State parliament can make laws on any subject of relevance to that particular State. With a few exceptions, the Australian Constitution does not limit the matters about which the States can make laws. The most important limits are that the States cannot impose duties of customs and excise (section 90) and cannot raise defence forces without the consent of the Commonwealth Parliament (section 114).

Concurrent legislative powers: Where the Commonwealth can make laws on a particular subject matter, the States can also generally legislate on the same subject matter. Concurrent legislation is not uncommon. Section 109 of the Constitution resolves the problem of inconsistent Commonwealth and State laws by providing that where a valid Commonwealth law is inconsistent with a law of a State, the Commonwealth law operates and the State law is invalid to the extent of the inconsistency.

Exclusive legislative power: In certain areas, only the Commonwealth Parliament has the power to make laws for the whole country. State parliaments may not legislate in those areas.

1.2 'Aboriginal natives'

Notwithstanding the reference in section 127 of the Constitution to 'aboriginal natives', the Constitution provided no definition of the term. Following an opinion obtained from the attorney-general, the first Commonwealth statistician confined the expression to 'full-bloods', and treated Torres Strait Islanders as outside section 127.[38] The Bureau of Census and Statistics interpreted section 127 as meaning that it could include 'aboriginal natives' in the count, but that they were to be excluded from published tabulations of population.[39] After 1901, the dominant expression in Commonwealth legislation was 'aboriginal native of Australia'. That reference first appeared in 1902 in the Commonwealth Franchise Act, and was last used in 1973 in the Aboriginal Affairs (Arrangements with the States) Act.[40]

The decline of the 'full-blood' population prompted a legislative response, with New South Wales legislation first referring to 'half-castes' in 1839, South Australia in 1844, Victoria in 1864, Queensland in 1865, Western Australia in 1874, and Tasmania in 1912. Thereafter and until the late 1950s the definition of aboriginality by 'blood' was the standard test.[41]

At the first Australian census in 1911, only those 'aboriginal natives' living near white settlements were counted, and the main population tables included only those of half or less Aboriginal descent. Details of 'half-caste' (but not 'full-blood') Aboriginal people were included in the tables on race. Details of 'full-blood' Aboriginal people were included in separate tables. The practice was followed in all censuses up until 1966.[42]

In 1929, the federal Attorney-General's Department advised the Chief Electoral Officer that an 'aboriginal native' was a person in whom Aboriginal descent preponderated, and that half-castes were 'aboriginal natives' within the meaning of section 127.[43] The Commonwealth Electoral Office applied this definition for Commonwealth electoral purposes between 1929 and 1961.[44]

In 1964, a reference to the 'Aboriginal people of Australia' first appeared in Commonwealth legislation establishing the Australian Institute of Aboriginal Studies, and was used in legislation in 1968, 1969 and 1975.[45] Generally, the Australian Government and courts have employed a broad definition of 'Aboriginal people' based on the three elements of descent, self-identification and Aboriginal community recognition.[46]

1.3 Colonisation and Aboriginal resistance

Aboriginal people have lived in Australia for some 40,000 to 60,000 years, possibly as long as 70,000 years.[47] When Aboriginal people first set eyes on Captain James Cook in 1770, the Aboriginal population consisted of some 250 distinct nations, within each of which there were numerous tribes or clans who spoke one or more of hundreds of languages and dialects. Complex social systems and 'elaborate and obligatory'[48] laws and customs differed from nation to nation. Under the laws or customs of the relevant locality, 'particular tribes or clans were, either on their own or with others, custodians of the areas of land from which they derived their sustenance and from which they often took their tribal names'.[49] When Cook arrived at the east coast of Australia in 1770, he carried instructions from the Admiralty issued in 1768. Those instructions provided, among other things: 'You are also with the consent of the natives to take possession of Convenient Situations in the Country in the Name of the King of Great Britain.'[50]

Aboriginal people have lived in Australia for some 40,000 to 60,000 years, possibly as long as 70,000 years.

After sailing to Tahiti and New Zealand in the *Endeavour*, Cook arrived at Botany Bay on 29 April 1770. Following an encounter with local Aboriginal people at Botany Bay, he wrote in his journal that 'all they seem'd to want was for us to be gone'. Cook continued to chart the Australian coast to the northern tip of Queensland, and raised the British flag at Possession Island, off Cape York Peninsula. He took possession of the whole eastern coast of Australia, and named it New South Wales.

In October 1786, the British Government appointed Captain Arthur Phillip as first governor of New South Wales, which was to be a convict settlement. By the time Phillip was commissioned to lead the First Fleet, his instructions from King George III had nothing to say about the 'consent of the natives'.[51] Phillip's instructions counselled him to 'live in amity and kindness' with the natives, but anticipated the need for measures to limit native 'interference'. Phillip was authorised to grant land to those who would 'improve it'.[52] On 18 January 1788, Phillip arrived at Botany Bay with a fleet of nine ships. Between 26 January and 6 February 1788, approximately 1,000 officials, marines, dependants and convicts came ashore at Port Jackson.

Phillip's instructions assumed that Australia was *terra nullius*, or belonged to no-one. The subsequent occupation of the country and land law in the new colony proceeded on the fiction of *terra nullius*.[53] It follows that ultimately the basis of settlement in Australia is and always has been the exertion of force by and on behalf of the British Crown. No-one asked permission to settle. No-one consented, no-one ceded. Sovereignty was not passed from the Aboriginal peoples by any actions of legal significance voluntarily taken by or on behalf of them.

'[A]ll they seem'd to want was for us to be gone.'

Captain Cook's journal

The status of Aboriginal people remained ambiguous for more than a century and a half. David Neal has commented that Aboriginal people were 'some hybrid of outlaw, foreign enemy and protected race [to whom] the rule of law provided cold comfort'.[54]

Aboriginal people did not accept their dispossession and the purported imposition upon them of foreign laws without resistance. The earliest record of fighting by Aboriginal people resisting European occupation was in May 1788. Fighting continued into the early 1930s as the colonists pushed further into the interior. This period of conflict between Aboriginal people and European settlers is sometimes referred to as 'the frontier wars'. One of the last documented massacres of Aboriginal people was the so-called Coniston massacre, which occurred in 1928 in the Northern Territory.[55]

1.4 'White Australia'

One of the first pieces of legislation introduced by the new Commonwealth Parliament was the *Immigration Restriction Act 1901* to 'place certain restrictions on immigration and ... for the removal ... of prohibited immigrants'. Prime Minister Edmund Barton argued in support of the Bill:

> I do not think either that the doctrine of the equality of man was really ever intended to include racial equality. There is no racial equality. There is basic inequality. These races are, in comparison with white races—I think no one wants convincing of this fact—unequal and inferior. The doctrine of the equality of man was never intended to apply to the equality of the Englishman and the Chinaman. There is deep-set difference, and we see no prospect and no promise of its ever being effaced. Nothing in this world can put these two races upon an equality. Nothing we can do by cultivation, by refinement, or by anything else will make some races equal to others.[56]

On 12 September 1901, Alfred Deakin, the first federal attorney-general and three times prime minister between 1903 and 1910, raised the question of how the Commonwealth would define non-European aliens once the program of a 'white Australia' had been implemented:

> The programme of a 'white Australia' means not merely its preservation for the future—it means the consideration of those who cannot be classed within the category of whites, but who have found their way into our midst … That end, put in plain and unequivocal terms, as the House and the country are entitled to have it put, means the prohibition of all alien coloured immigration, and more, it means at the earliest time, by reasonable and just means, the deportation or reduction of the number of aliens now in our midst. The two things go hand in hand, and are the necessary complement of a single policy—the policy of securing a 'white Australia'.[57]

Deakin explained the exclusion of Japanese people as follows:

> I contend that the Japanese require to be excluded because of their high abilities. … the Japanese are the most dangerous because they most nearly approach us, and would therefore be our most formidable competitors. It is not the bad qualities, but the good qualities of these alien races that make them dangerous to us. It is their inexhaustible energy, their power of applying themselves to new tasks, their endurance, and low standard of living that make them such competitors. [58]

In relation to the 'aboriginal race', Deakin declared:

> Little more than a hundred years ago Australia was a Dark Continent in every sense of the term. There was not a white man within its borders. In another century the probability is that Australia will be a White Continent with not a black or even dark skin amongst its inhabitants. The aboriginal race has died out in the South and is dying fast in the North and West even where most gently treated. Other races are to be excluded by legislation if they are tinted to any degree.[59]

In 1919, Prime Minister William Morris Hughes hailed the White Australia policy as 'the greatest thing we have achieved'.[60] During the Second World War, Prime Minister John Curtin reinforced the policy, saying: 'This country shall remain forever the home of the descendants of those people who came here in peace in order to establish in the South Seas an outpost of the British race.'

The White Australia policy was gradually dismantled after Immigration Minister Harold Holt's decision in 1949 to allow 800 non-European refugees to stay and Japanese war brides to be admitted to Australia. There followed an easing of restrictions on the migration of non-Europeans.[61] In March 1966, there was a watershed with the announcement by Immigration Minister Hubert Opperman, after a review of the non-European policy, that 'applications for migration would be accepted from well-qualified people on the basis of their suitability as settlers, their ability to integrate readily and their possession of qualifications positively useful to Australia'.[62] Over subsequent years, Commonwealth governments gradually dismantled the policy, and the final vestiges were removed in 1973 by the new Labor government.[63]

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1.5 Protection and assimilation

By the late nineteenth century, violence and disease had devastated the Aboriginal population. Social Darwinist ideas, loosely derived from Charles Darwin's 1859 *Origin of Species*, promoted the belief that Aboriginal people were headed towards extinction. Discourse around the White Australia policy seldom mentioned Aboriginal people, and then only to dismiss them as an 'evanescent race' who would eventually disappear in contrast to the dynamic, virile, enduring, and therefore threatening Asiatic races.[64]

A long era of control of Aboriginal and Torres Strait Islander peoples began. In 1860, a Chief Protector was appointed in South Australia to watch over the interests of Aboriginal people. In the late nineteenth and early twentieth centuries, 'protective' legislation, known as the 'Aborigines Acts', was enacted in all mainland States—Victoria in 1869, Queensland in 1897, Western Australia in 1905, New South Wales in 1909, and South Australia in 1911—and for the Northern Territory in 1912.[65] The Aborigines Acts could require Aboriginal people to live on reserves run by governments or missionaries where their lives were closely regulated. By 1911, there were 115 reserves in New South Wales alone. Aboriginal people living outside reserves, in towns, cities, on pastoral properties and in more remote areas, were spared the reserve regime, but their lives were permeated by protectionist legislation.[66] Otherwise they could apply to the Aborigines Protection Boards for an exemption, known as a dog tag, from the legislation: for example, section 33 of the *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qld).

Wages were routinely withheld from Aboriginal workers: they were either paid directly to the Protector or food and clothing were provided in lieu of wages.

The Aborigines Acts imposed restrictions on personal interactions between Aboriginal and non-Aboriginal people, and Aboriginal people residing on and off reserves. The restrictions imposed by the Acts included controlling marriage, prohibiting alcohol, empowering Protectors to place Aboriginal people on reserves, and curfews in town. By means of by-laws and regulations, as well as social convention, Aboriginal people were denied entry to swimming pools, picture theatres, hospitals, clubs and so on.[67]

In some States and the Northern Territory, the Chief Protector had legal guardianship over all Aboriginal children, including those who had parents. The removal of Aboriginal children from their families under the auspices of Protection Boards was common during this period.[68] Under the Aborigines Acts, the employment of Aboriginal people required a government permit or licence. Wages were routinely withheld from Aboriginal workers: they were either paid directly to the Protector or food and clothing were provided in lieu of wages.[69] The impact of these policies and practices was frequently raised by Aboriginal people in consultations with the Panel as a matter of deep continuing concern.

In the 1930s, legislators were widening the definition of 'Aborigines' in order to formalise control over an increasing population of mixed descent.[70] A bewildering array of legal definitions led to inconsistent legal treatment and arbitrary, unpredictable and capricious administrative treatment.[71] An analysis of 700 separate pieces of legislation suggests the use of no less than 67 identifiable classifications, descriptions or definitions.[72]

For example, in 1934, Queensland redefined 'Aborigines' as persons of full descent and 'half-castes', including 'any person being the grandchild of grandparents one of who is aboriginal' and any person of Aboriginal extraction who, in the opinion of the Chief Protector, was 'in need of … control'.

The status of 'quarter-caste' or 'quadroon' was created in Western Australia in 1936. The *Native Welfare Act 1963* (WA) excluded 'quarter-castes' from the definition of 'natives'. Queensland introduced the concept of 'quarter-caste' in the *Aborigines' and Torres Strait Islanders' Affairs Act 1965*, and retained it for six years until the *Aborigines Act 1971* redefined 'Aborigine' by descent.[73] In Queensland, the 1965 Act also introduced a new approach to classification that distinguished between 'Aborigine' (being a 'full-blood'), 'Part-Aborigine', 'Assisted Aborigine', 'Islander' and 'Assisted Islander'.[74] In 1957, the notion of 'descent' appeared in the *Aborigines Act 1957* (Vic), and continued to appear in subsequent legislation until the *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic) defined 'Aborigine' as an 'inhabitant of Australia in pre-historic ages or a descendant from any such person'.[75]

In 1937, the first Commonwealth–State Native Welfare Conference was held, attended by representatives of all States (except Tasmania) and the Northern Territory. The conference officially sanctioned the policy of assimilation:

> [T]his conference believes that the destiny of the natives of aboriginal origin, but not of the full blood, lies in their ultimate absorption by the people of the Commonwealth, and it therefore recommends that all efforts be directed to that end.

Until about 1972, virtually all aspects of the lives of Aboriginal people were subject to control. Viewed by the standards of 2011, fundamental human rights—such as freedom of movement, freedom of association, freedom of employment, control over property, and custody of children—were denied, and the law characterised by systematic racial discrimination.

In 1961, the Native Welfare Conference again endorsed the policy of assimilation as follows:

> [A]ll Aborigines and part-Aborigines are expected eventually to attain the same manner of living as other Australians and to live as members of a single Australian community, enjoying the same rights and privileges, accepting the same responsibilities, observing the same customs and influenced by the same beliefs, hopes and loyalties as other Australians.[76]

Until about 1972, virtually all aspects of the lives of Aboriginal people were subject to control. Viewed by the standards of 2012, fundamental human rights—such as freedom of movement, freedom of association, freedom of employment, control over property, and custody of children—were denied, and the law characterised by systematic racial discrimination.

1.6 Aboriginal and Torres Strait Islander suffrage

Among some consulted by the Panel, there was a perception that Aboriginal and Torres Strait Islander Australians first got the vote as a result of the 1967 referendum. The history of indigenous suffrage in Australia is more complicated. Technically, male Aboriginal persons had the right to vote in South Australia from 1856, Victoria from 1857, New South Wales from 1858, and Tasmania from 1896. When those colonies framed their constitutions, they gave voting rights to all male British subjects over the age of 21.

This included Aboriginal men. However, as the Australian Electoral Commission has commented, they were not encouraged to enrol to vote.[77] On the other hand, when Queensland gained self-government in 1859, and Western Australia in 1890, those colonies excluded Aboriginal people from the franchise. Pursuant to section 6 of the *Elections Act 1885* (Qld), '[n]o aboriginal native of Australia, India, China or the South Sea Islands' was entitled to vote. Section 12 of the *Constitution Amendment Act 1893* (WA) contained a similar disqualification: 'No aboriginal native of Australia, Asia or Africa …'.[78]

In 1895, South Australia gave women, including Aboriginal women, the right to vote and sit in Parliament.[79] This right also extended to Aboriginal men and women in the Northern Territory, which was then annexed to the colony of South Australia. It has been suggested that few Aboriginal people knew their rights, so very few voted.[80] Exceptionally, Point McLeay, a mission station near the mouth of the Murray River, got a polling station in the 1890s. Aboriginal men and women voted there in South Australian elections, and in 1901 voted for the first Commonwealth Parliament.[81] Aboriginal men and women in the Northern Territory were again denied the vote after responsibility for the administration of the Territory was passed to the Commonwealth pursuant to the *Northern Territory (Administration) Act 1910* (Cth), and regulations made excluding them from voting.

On 12 June 1902, the federal franchise was extended to women by the *Commonwealth Franchise Act 1902* (Cth). By section 3 of the Act—titled 'An Act to provide for an Uniform Federal Franchise'—women in the four States without female suffrage became entitled to vote in elections for the two Houses of the new Commonwealth Parliament. A proposal to extend the federal franchise to Aboriginal people was strongly resisted, and failed.[82] Among the opponents were Isaac Isaacs (later Australia's third chief justice and Governor-General), who thought Aboriginal people did not 'have … the intelligence, interest or capacity to vote', and H B Higgins (later a justice of the High Court) who considered it 'utterly inappropriate … [to] ask them to exercise an intelligent vote'.[83] Section 4 of the 1902 Act provided: 'No aboriginal native of Australia Asia Africa or the Islands of the Pacific except New Zealand shall be entitled to have his name placed on the Electoral Roll unless so entitled under section forty-one of the Constitution.'[84] The marginal note to section 4 was 'Disqualification of coloured races'.[85]

In 1949, the *Commonwealth Electoral Act 1918* was amended by the *Commonwealth Electoral Act 1949* to extend the franchise to any 'aboriginal native of Australia' entitled to vote under the law of a State, or who 'is or has been a member of the Defence Force'.[86] 'To our eternal shame', said Arthur Calwell (Labor, Melbourne), 'we have not treated the aborigines properly', adding: 'At last, our consciences have been stirred, and we are now admitting some of our obligations to the descendants of

Neanderthal man, whether he be full-blood, half-caste or three-quarter-caste.'[87] The Opposition's Harold Holt acknowledged 'uneasiness at the way in which we, as a people, have treated the aborigines who are the true natives of the Australian continent'.[88] Notwithstanding such statements, the right to vote was not extended to all indigenous Australians at Commonwealth elections.[89] Kim Beazley Senior (Labor, Fremantle) indicated that the Government felt itself constrained by State electoral laws, although he suggested it would be a good thing if '[t]he Commonwealth returning officer in each State had, himself, the right to classify aborigines and half-castes as having a sufficient standard'.[90]

In 1962, the Commonwealth Parliament enacted the *Commonwealth Electoral Act 1962* 'to give to Aboriginal Natives of Australia the right to Enrol to vote and to Vote as Electors of the Commonwealth'. In the same year, Western Australia passed legislation giving Aboriginal people the right to vote in State elections. Queensland, the last jurisdiction to do so, followed in 1965 with the *Elections Act Amendment Act 1965*, which extended voting rights to all Aboriginal people and Torres Strait Islanders in Queensland.

In 1983, the last hurdle in the achievement of equal voting rights was crossed when a Commonwealth Parliamentary Committee recommended that compulsory enrolment should apply to all Australians, and the *Commonwealth Electoral Legislation Amendment Act 1983* was enacted.[91]

1.7 Early voices for change

From as early as 1910, there were calls to amend the Constitution to provide the Commonwealth with power to make laws with respect to Aboriginal affairs. In 1910, the Australian Board of Missions called on 'Federal and State Governments to agree on a scheme by which all responsibility for safeguarding the human and civil rights of the aborigines should be undertaken by the Federal Government'.[92] In 1913, the Australian Association for the Advancement of Science made a similar proposal. In 1928, the Association for the Protection of Native Races submitted to the Royal Commission on the Constitution that 'the Constitution be amended so as to give the Federal Government the supreme control of all Aborigines'.[93]

From as early as 1910, there were calls to amend the Constitution to provide the Commonwealth with power to make laws with respect to Aboriginal affairs.

In 1929, a majority of the Royal Commission on the Constitution (1927–29) referred to the testimony of 'a great number of witnesses' about the need to give increased attention to Aboriginal people. The majority recognised that the effect of the treatment of Aboriginal people on the reputation of Australia furnished a powerful argument for the transfer of power to the Commonwealth,[94] but recommended against amending section 51(xxvi) 'mainly on the ground that the States were still better equipped than the Commonwealth to attend to the special needs of the aborigines within their territories'. The minority did not dissent from that view, but observed that

the financial burden of making special provision for Aboriginal people should not fall wholly on the States in which they were most numerous. This could be accommodated by the making of conditional federal grants to Queensland and Western Australia, where the largest number of 'full-bloods' outside the Northern Territory were to be found.[95] The Royal Commission made no recommendation in relation to section 127.

Between 1933 and 1936, the Melbourne Aboriginal community began gathering support for a petition to King George VI, seeking direct representation in Parliament, enfranchisement and land rights.[96] A leading figure in the movement was William Cooper who, on 23 February 1935, led the first Aboriginal deputation to a Commonwealth minister.[97] In 1936, the Australian Aborigines League was established.[98] In August 1937, Cooper sent the petition, which had gained 1,814 signatures, to Prime Minister Joseph Lyons, requesting that he forward it to King George VI. On 12 November 1937, Cooper called for a Day of Mourning to be held simultaneously with the celebrations on 26 January 1938 of the 150th anniversary of the arrival of the First Fleet in Sydney.[99] In preparation for the Day of Mourning, J T Patten and W Ferguson wrote a pamphlet titled *Aborigines Claim Citizen Rights! A Statement of the Case for the Aborigines Progressive Association*. The pamphlet appealed for a new Aboriginal policy, full citizenship status, equality and land rights, and condemned the New South Wales *Aborigines Protection Act 1909–1936* and the Aborigines Protection Board.[100]

On 26 January 1938, members of the Aboriginal community held the Australian Aborigines Conference in Sydney. The sesquicentenary Day of Mourning and Protest was attended by about 100 people. The meeting passed a resolution 'to raise our people to full citizen status and equality within the community'.[101]

In 1959, a Joint Parliamentary Committee on Constitutional Review unanimously recommended the repeal of section 127, but did not reach agreement on the grant of legislative power with respect to Aboriginal people.[102] The Joint Parliamentary Committee also recommended the repeal of section 25.[103] In 1961, the Federal Conference of the Australian Labor Party, at the instigation of Beazley, resolved that section 127 be repealed and the exclusion of Aboriginal people under section 51(xxvi) be removed.

In 1963, the Yirrkala Elders of the Yolngu people presented a bark petition to the Commonwealth Parliament in the English and Gumatji languages. The petition protested the Commonwealth Government's decision to grant mining rights in the Arnhem Land reserve, and called for recognition of Yolngu land rights and a parliamentary inquiry.[104] In response, the House of Representatives set up a seven-member select committee to investigate the grievances of the Yolngu people. The committee recommended payment of compensation to the Yolngu people, protection of sacred sites, and acknowledgment of the moral right of the Yolngu people to the land.[105]

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In 1964, the leader of the Labor Opposition, Arthur Calwell, introduced the Constitution Alteration (Aborigines) Bill to remove the exclusionary words 'other than the aboriginal race in any State' from section 51(xxvi) and to delete section 127. Calwell called attention to possible United Nations criticism that the Constitution was 'discriminating against' the Aboriginal people.[106] The Attorney-General, Billy Snedden, affirmed that all parliamentarians felt that 'there should be no discrimination against aboriginal natives of Australia'. He warned that the proposed change to section 51(xxvi) created the potential for 'discrimination ... whether for or against the aborigines'. In response, Calwell affirmed his view that the amendment would only be beneficial for Aboriginal Australians.[107] The Bill lapsed when Parliament dissolved.[108]

In 1965, Prime Minister Robert Menzies introduced the Constitution Alteration (Repeal of Section 127) Bill for a referendum for the removal of section 127. Menzies opposed the amendments to section 51(xxvi) on the ground that to include Aborigines in the race power 'would … not be in the best interests of the Aboriginal people', although he was sympathetic to the notion of repealing that section altogether.[109] While the Bill passed both Houses, it was not put to referendum.

In March 1966, William (Billy) Wentworth, the Liberal Member for Mackellar and later Australia's first Minister for Aboriginal Affairs, introduced a Private Member's Bill to repeal section 51(xxvi), and instead to confer on the Commonwealth Parliament power to make laws 'for the advancement of the Aboriginal natives of the Commonwealth of Australia'.[110] Wentworth also proposed a new 'section 117A' prohibiting any law, State or Commonwealth, that subjected any person born or naturalised in Australia 'to any discrimination or disability within the Commonwealth by reason of his racial origin'.

Clause 3 of the proposal contained a proviso that the section should not operate 'so as to preclude the making of laws for the special benefit of the aboriginal natives of the Commonwealth of Australia'. Wentworth cited a concern that the deletion of the exclusion of people of the Aboriginal race from section 51(xxvi) could leave them open to 'discrimination ... adverse or favourable'. He suggested that the 'power for favourable discrimination' was needed, but that there should not be a 'power for unfavourable discrimination'.[111] While the Bill passed both Houses of Parliament, it ultimately lapsed and did not go to referendum.[112]

'We do not need the power for favorable discrimination; we should not have the power for unfavorable discrimination.'

William Wentworth

In August 1966, Vincent Lingiari led a walk-off of 200 Gurindji, Ngarinman, Bilinara, Warlpiri and Mudbara stockmen from a cattle station at Wave Hill in the Northern Territory in protest at their pay and living conditions. The walk-off—immortalised in the Paul Kelly and Kev Carmody song 'From little things big things grow'—generated support within many sectors of the Australian population. The Gurindji walk-off was about equal pay, but also became a symbol of the struggle for equal citizenship rights and recognition of distinct rights relating to culture, land and self-determination.

In 1966, with the prospect of a referendum within the life of the twenty-fifth Parliament in sight, Geoffrey Sawer warned presciently that, having regard to 'the dubious origins of [section 51(xxvi)] and the dangerous potentialities of adverse discriminatory treatment which it contains, the complete repeal of the section would be preferable to any amendments intended to extend its possible benefits to the Aborigines'.[113] In relation to section 127, Sawer noted that by 1966 all Aboriginal people had the federal vote, and were likely soon to have the vote in all States. While it was difficult to see any case against the repeal of section 127, Sawer cautioned that its repeal would make 'little difference to anything that matters, and least difference of all to the Aborigines'.[114]

1.8 The 1967 referendum

On 1 March 1967, Prime Minister Harold Holt introduced the Constitution Alteration (Aboriginals) Bill, which proposed the deletion of words 'other than the Aboriginal race in any State' from section 51(xxvi), as well as the deletion of section 127. The amendment would give Parliament power to make special laws for Aboriginal people which, with cooperation with the States, would 'secure the widest measure of agreement with respect to Aboriginal advancement'.[115] The leader of the Opposition, Gough Whitlam, supported the Bill, and it passed both Houses of Parliament without a single dissenting voice. In the House of Representatives, Billy Wentworth commented that some discrimination was necessary in relation to Aboriginal people, but 'it should be favorable, not unfavorable'.[116] In the Senate, the minister responsible for the Bill (Senator Henty) repeated what had been said by the prime minister.[117] The leader of the Opposition in the Senate, Senator Murphy, said:

> The simple fact is that they are different from other persons and that they do need special laws. They themselves believe that they need special laws. In this proposed law there is no suggestion of any intended discrimination in respect of Aboriginals except a discrimination in their favour.[118]

There having been no opposition within the Parliament to the proposed alterations to the Constitution, it was necessary to prepare only an argument in favour of the proposed law. The case for the 'Yes' vote, authorised by the prime minister, the leader of the Australian Country Party and the leader of the Opposition, argued:

> The purposes of these proposed amendments ... are to remove any ground for the belief that, as at present worded, the Constitution discriminates in some ways against people of the Aboriginal race, and, at the same time, to make it possible for the Commonwealth Parliament to make special laws for the people of the Aboriginal race, wherever they may live, if the Commonwealth Parliament considers this desirable or necessary. ... The Commonwealth's object will be to co-operate with the States to ensure that together we act in the best interests of the Aboriginal people of Australia.[119]

'The original Constitution of 1901 established a negative citizenship of the country's original peoples. The reforms undertaken in 1967, which resulted in the counting of Indigenous Australians in the national census and the extension of the races power to Indigenous Australians, can be viewed as providing a neutral citizenship for the original Australians. What is still needed is a positive recognition of our status as the country's Indigenous peoples, and yet sharing a common citizenship with all other Australians.'

Noel Pearson

The referendum was put on 27 May 1967. In addition to gaining majority support in every State, the proposal received 90.8 per cent of valid votes nationally. This remains the largest majority for any referendum ever held in Australia, more than 10 per cent higher than for any other referendum before or since.[120]

The outcomes of the 1967 referendum

What were the results of the two amendments to the Constitution?

First, the repeal of the overtly discriminatory provision in section 127 meant the removal of the prohibition on counting Aboriginal people in the population statistics. The existence of census data from 1971 in relation to the demographics of the Aboriginal and Torres Strait Islander population has enabled the calculation of key health and other socio-economic indicators, such as infant mortality rates and life expectancy.

Second, the specific exclusion in section 51(xxvi) of power to make laws with respect to the 'people of the aboriginal race in any State' was removed. Aboriginal and Torres Strait Islander peoples ceased to be mentioned at all in the Constitution.

Noel Pearson has said of the 1967 amendments:

> The original Constitution of 1901 established a negative citizenship of the country's original peoples. The reforms undertaken in 1967, which resulted in the counting of Indigenous Australians in the national census and the extension of the races power to Indigenous Australians, can be viewed as providing a neutral citizenship for the original Australians. What is still needed is a positive recognition of our status as the country's Indigenous peoples, and yet sharing a common citizenship with all other Australians.[121]

Of particular significance among the post-1967 legislation enacted by the Commonwealth Parliament is the *Aboriginal Land Rights (Northern Territory) Act 1976*. The Woodward Royal Commission (1973–74) into Aboriginal land rights in the Northern Territory provided a legislative blueprint, and a Bill was introduced into Parliament in 1975 by Prime Minister Gough Whitlam. Prime Minister Malcolm Fraser reintroduced a Bill and steered it through Parliament in 1976. The Act provides for the strongest form of land rights in the country, and has resulted in almost half of the Northern Territory coming under Aboriginal ownership. The territories power in section 122 of the Constitution, which existed before 1967, already provided a source of Commonwealth legislative power and so section 51(xxvi) was not required for enactment.

Significant examples of legislation enacted by the Commonwealth Parliament since 1967 in reliance on, among other powers, section 51(xxvi) include:

- the *World Heritage Properties Conservation Act 1983*, sections 8 and 10 of which confer protection on sites of cultural significance to Aboriginal people;[122]
- the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*;[123]
- the *Native Title Act 1993*; and
- the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.

1.9 The 1988 Constitutional Commission report

In 1985, a commission was established to review the Australian Constitution. In its final report in 1988, the Constitutional Commission made a number of recommendations in relation to the provisions of the Constitution bearing upon the question of race and the position of Aboriginal and Torres Strait Islander peoples.

The Constitutional Commission recommended the repeal of section 25 of the Constitution 'because it is no longer appropriate to include in the Constitution a provision which contemplates the disqualification of members of a race from voting'.[124]

In relation to section 51(xxvi), the Constitutional Commission noted that until 1967, Parliament could 'pass special and discriminating laws' relating to the people of any race. The Constitutional Commission referred to a number of decisions in recent years in which judges had observed that laws made under section 51(xxvi) 'may validly discriminate against, as well as in favour of, the people of a particular race'. The Constitutional Commission concluded:

> It is inappropriate to retain section 51(xxvi) because the purposes for which, historically, it was inserted no longer apply in this country. Australia has joined the many nations which have rejected race as a legitimate criterion on which legislation can be based. The attitudes now officially adopted to discrimination on the basis of race are in striking contrast to those which motivated the Framers of the Constitution. It is appropriate that the change in attitude be reflected in the omission of section 51(xxvi).[125]

The Constitutional Commission recommended the repeal of section 25 of the Constitution 'because it is no longer appropriate to include in the Constitution a provision which contemplates the disqualification of members of a race from voting'.

The Constitutional Commission considered it unnecessary to retain section 51(xxvi) 'for the purposes of regulating such things as the entry and activities of aliens in Australia or the confinement of people who might reasonably be suspected of acting contrary to Australia's interests'. Other legislative powers provided ample support for any laws directed at protecting Australians from any activities or groups which were not in the national interest.[126]

Together with the recommendation for the omission of section 51(xxvi),[127] the Constitutional Commission recommended the insertion of a new paragraph (xxvi) that would give the Commonwealth Parliament express power to make laws with respect to 'Aborigines and Torres Strait Islanders'. The recommendation was made because:

- the nation as a whole has a responsibility for Aborigines and Torres Strait Islanders; and
- the new power would avoid some of the uncertainty arising from, and concern about, the wording of the existing power.[128]

The approval of such alteration of section 51(xxvi) would retain the spirit, and make explicit the meaning, of the alteration made in 1967, which Justice Brennan had described as 'an affirmation of the will of the Australian people that the odious policies of oppression and neglect of Aboriginal citizens were to be at an end, and that the primary object of the power is beneficial'.[129] Consistent with such an approach, the commission recommended the insertion of a new 'section 124G', which would give everyone the right to freedom from discrimination on the ground of race.[130] In relation to rights to equality, the Constitutional Commission recommended that the Constitution be altered to provide:

> 124G (1) Everyone has the right to freedom from discrimination on the ground of race, colour, ethnic or national origin, sex, marital status, or political, religious or ethical belief.
>
> (2) Sub-section (1) is not infringed by measures taken to overcome disadvantages arising from race, colour, ethnic or national origin, sex, marital status, or political, religious or ethical belief.[131]

The Constitutional Commission also considered a proposal for constitutional backing for an agreement between the Commonwealth of Australia and representatives of Aborigines and Torres Strait Islanders.[132] The Commission noted that the history of the gradual occupation of Australia was filled with examples of disregard for the interests of Aboriginal people dispossessed from their land, and that in recent years attempts had been made to formally recognise the fact that Australia was occupied before European settlement and that settlement had had adverse effects on the indigenous inhabitants of the land.[133] The Commission also referred to the recommendation in 1983 of the Senate Standing Committee on Constitutional and Legal Affairs for the insertion in the Constitution of a provision, along the lines of section 105A, conferring a broad power on the Commonwealth to enter into a compact with representatives of the Aboriginal people.[134]

The Constitutional Commission agreed that a constitutional alteration to provide the framework for an agreement provided 'an imaginative and attractive approach' but concluded that any alteration should not be

made until an agreement had been negotiated.[135] Section 105A, on which a possible referendum might be modelled, was approved at a referendum in 1928 after the Financial Agreement of 1927 had been entered into between the Commonwealth and the States. The electors were therefore in a position to know precisely what was being approved.[136] The 1988 referendum was held on 3 September. It contained four questions. None took up the recommendations of the Constitutional Commission in relation to provisions relating to Aboriginal and Torres Strait Islander people and the Constitution's race provisions. None of the four questions passed.

In April 1991, the Constitutional Centenary Conference held in Sydney presented to the prime minister, State and Territory premiers and chief ministers, and opposition leaders a statement which recommended among other items for action that the reconciliation process should 'seek to identify what rights the Aboriginal and Torres Strait Islander peoples have, and should have, as the indigenous peoples of Australia, and how best to secure those rights including through constitutional changes'.

1.10 The impact of *Mabo v Queensland (No 2)*

In *Mabo v Queensland (No 2)* (1992) the High Court upheld a claim by the Meriam people to rights of possession, occupation, use and enjoyment of the Murray Islands under a communal native title sourced in their pre-sovereign laws and customs.[137] Justice Brennan, with whom Chief Justice Mason and Justice McHugh agreed, held that '[t]he fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country'.[138] Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, 'an unjust and discriminatory doctrine of that kind' could no longer be accepted.[139]

Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, 'an unjust and discriminatory doctrine of that kind' could no longer be accepted.

Noel Pearson has described the decision in *Mabo (No 2)* as 'the most critical event in overturning racial discrimination in so far as indigenous people are concerned', and 'in terms of Australia's battle to respect racial equality and so overturn racial discrimination … surely the seminal event in the country's history'.[140] According to Pearson:

> The significance of the decision is that it recognises Aboriginal law and custom as a source of law for the first time in 204 years of colonial settlement. For the great part, however, Aboriginal law remains unrecognised. Nevertheless, the breadth of the context of this recognition sets the stage for an interaction which has never before been possible. Colonial law has been a reality in Australia since 1788. Aboriginal law has always been a reality and we are unanimous in our resolve that it continue to be so.[141]

Following the High Court's decision, Pearson spoke of the need for constitutional change. Noting the 'great protection of Aboriginal rights' provided by the *Racial Discrimination Act 1975* in the face of States willing to extinguish Aboriginal rights, he expressed concern that the Act 'will avail us little' where overridden by a later Commonwealth law, and called for constitutional protection against racial discrimination:

> I believe that the very strong messages for all of those who are concerned about the integrity of the Racial Discrimination Act is this country's need to move towards constitutional protection against racial discrimination. That is an agenda that needs to be embraced not only by the indigenous community, but by all of those sections of the community who are concerned about racial discrimination.[142]

The response of the Commonwealth Government to the 1992 decision in *Mabo (No 2)* consisted of three stages: first, the enactment of the *Native Title Act 1993* (Cth); second, the establishment of an Indigenous Land Fund; and third, the delivery of a 'social justice package'. In March 1995, following community consultation, each of the Aboriginal and Torres Strait Islander Commission (ATSIC),[143] the Council for Aboriginal Reconciliation[144] and the Aboriginal and Torres Strait Islander Social Justice Commissioner[145] provided a report on the social justice package to the prime minister. Each of these reports raised the need for constitutional reform.

ATSIC's report noted that the commission had adopted as one of the objectives in its corporate plan the securing of constitutional recognition of special status and cultural identity of indigenous peoples.[146] In its submission to the Council for Aboriginal Reconciliation, the commission had pointed out that constitutional change was an issue 'quite central to redefining ourselves as a nation in a way that would promote meaningful reconciliation':

> 4.7 With the rejection of the doctrine of terra nullius and the emerging legal view that the powers of Government belong to and are derived from the governed that is to say the people of the Commonwealth we consider that constitutional change should not be minimalist. There needs to be recognition in the Constitution that the sovereign power accorded to Governments is derived from the people including the Aboriginal and Torres Strait Islander peoples whose native title rights predate British colonisation.

The response of the Commonwealth Government to the 1992 decision in Mabo (No 2) *consisted of three stages: first, the enactment of the* Native Title Act 1993 *(Cth); second, the establishment of an Indigenous Land Fund; and third, the delivery of a 'social justice package'.*

ATSIC's report further noted:

> 4.14 Processes will need to be set up to facilitate the negotiation of the indigenous constitutional reform agenda with the Government, to provide for effective educational and public awareness for both the indigenous and wider communities and to ensure ongoing indigenous involvement in broader processes which could lead to constitutional reform.
>
> 4.15 Consultations: There was overwhelming support from all meetings on the Social Justice package that Aboriginal and Torres Strait Islander peoples must be given proper recognition in Australia's Constitution.

The report of the Council for Aboriginal Reconciliation included the following recommendations in relation to the Australian Constitution:[147]

> **Acknowledging the True Place of Indigenous Peoples within the Nation**
> 7. The Council recommends that an appropriate new preamble to the Constitution be prepared for submission to referendum with such preamble to acknowledge the prior occupation and ownership, and continuing dispossession of Aboriginal and Torres Strait Islander peoples. …
>
> 10. The Council recommends that any constitutional reforms dealing with the rights of Aboriginal and Torres Strait Islander peoples include a question to remove the power of any State to disenfranchise any citizens on the grounds of their race.
>
> **Constitutional Prohibition of Discrimination on the Grounds of Race**
> 11. The Council recommends that, in conjunction with other referendum questions dealing with indigenous issues, the proposition also be put that the Commonwealth's power to legislate to outlaw racial discrimination be entrenched in the Constitution.

The Council for Aboriginal Reconciliation explained recommendation 11 as follows:

> At the same time as a referendum question is put to repeal the race-related provisions of Section 25 of the Constitution, an opportunity would arise to pose a positive question to entrench in the Constitution a new clause which would explicitly prohibit the making of laws which discriminate on the grounds of race (save where such a provision was for the specific benefit of the race involved) and providing that the Commonwealth has the power to legislate to outlaw all forms of discrimination on the grounds of race.

The social justice package proposals were not progressed further following the 1996 federal election.

In its final report to the prime minister and the Commonwealth Parliament in December 2000, the Council for Aboriginal Reconciliation made, among others, the following recommendation in relation to the manner of giving effect to its reconciliation documents:

> 3. The Commonwealth Parliament prepare legislation for a referendum which seeks to:
>
> - recognise Aboriginal and Torres Strait Islander peoples as the first peoples of Australia in a new preamble to the Constitution; and
> - remove section 25 of the Constitution and introduce a new section making it unlawful to adversely discriminate against any people on the grounds of race.

1.11 Interpretation of the altered race power after 1967

The debate leading up to the 1967 referendum suggests it was generally assumed that the purpose of the 1967 amendment to section 51(xxvi) was to confer on the Commonwealth Parliament power to make laws for the benefit of Aboriginal and Torres Strait Islander peoples.

In 1982, a justice of the High Court held that the power was wide enough to enable Parliament to make laws '(a) to regulate and control the people of any race in the event that they constitute a threat or problem to the general community, and (b) to protect the people of a race in the event that there is a need to protect them'.[148] In another case decided in 1982, a different justice of the High Court confirmed that the power enabled laws because of both 'the special needs' of the people of a particular race, as well as 'the special threat or problem they present'.[149]

'[There is] little likelihood of any reversal of the now reasonably established proposition that the power may be used to discriminate against or for the benefit of the people of any race.'

The Hon Robert French

In a contribution to a collection of essays on constitutional law, the Hon Robert French provided an overview of post-1967 High Court jurisprudence in relation to section 51(xxvi), which culminated in the decision in *Kartinyeri v Commonwealth*, the so-called Hindmarsh Bridge decision.[150] He commented that, as construed by a now substantial body of High Court jurisprudence,[151] there is nothing in section 51(xxvi), 'other than the possibility of a limiting principle of uncertain scope, to prevent its adverse application to Australian citizens simply on the basis of their race'. It followed that there is 'little likelihood of any reversal of the now reasonably established proposition that the power may be used to discriminate against or for the benefit of the people of any race'.[152]

Robert French concluded his review by adopting the recommendation of the Constitutional Commission in 1988 that the race power be replaced by a provision empowering the Commonwealth Parliament to make laws with respect to Aborigines and Torres Strait Islanders: 'Such laws are based not on race but on the special place of those peoples in the history of the nation.'[153]

1.12 Policy approaches since 1972

In January 1972, Prime Minister William McMahon publicly acknowledged some of the concern in the community about the policy of assimilation. Following the election of the Whitlam Labor Government in 1972, the policy of assimilation was abandoned and a new policy of self-determination introduced.[154] The experience for Aboriginal and Torres Strait Islander communities in the 1970s and 1980s was mixed. As the Royal Commission into Aboriginal Deaths in Custody noted in 1991, Aboriginal people were keen to grasp the opportunity for self-determination, but were not trained

for the tasks suddenly presented. The inadequacies of the education system and 'the domination, lack of self-esteem and debilitation produced under the era of assimilation' meant that there would be many failures. According to the Royal Commission, Aboriginal people were not really being offered self-determination, 'just the tantalising hint of it'. They were bequeathed 'the administrative mess which non-Aboriginal people left' and told to fix it: 'It was their mess now.'[155]

The election of the Fraser Government in 1975 saw initiatives including the enactment of the *Aboriginal Land Rights (Northern Territory) Act 1976*, the establishment of the Aboriginal Development Commission, and consideration of the feasibility of a compact or 'Makarrata' between the Commonwealth and Aboriginal people, discussed in Chapter 8.

Under the Hawke and Keating governments after 1983, initiatives included the 1991 report of the Royal Commission into Aboriginal Deaths in Custody (established in 1987), the establishment in 1989 of ATSIC and in 1994 of the Torres Strait Regional Authority, the establishment in 1991 of the Council for Aboriginal Reconciliation, the creation in 1992 of the Office of Aboriginal and Torres Strait Islander Social Justice Commissioner within the Human Rights and Equal Opportunity Commission, the passage of the *Native Title Act 1993* and the establishment in 1995 of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families.

The election in 1996 of the Howard Government saw an emphasis on 'practical reconciliation', the concept of 'shared responsibility', and a commitment to address the profound economic and social disadvantage of many indigenous Australians.[156] At the 1999 referendum, electors were asked whether they approved of an alteration to the Constitution to insert a preamble, among other things, 'honouring Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country'. The proposal was rejected by a majority of Australian voters and by a majority of voters in a majority of States. ATSIC was disbanded with bipartisan support in 2005, and Commonwealth departments resumed the responsibilities previously undertaken by ATSIC. The Northern Territory Emergency Response, introduced in 2007, involved the Commonwealth assuming direct responsibility for Aboriginal affairs in the Northern Territory. The response has since been the subject of controversy. Also in 2007, Prime Minister John Howard reiterated his support for recognition of indigenous Australians in the Constitution.

Following its election in November 2007, the Rudd Government maintained a modified Northern Territory Emergency Response, and implemented the 'closing the gap' policy. On 13 February 2008, Prime Minister Kevin Rudd moved a motion of Apology to Australia's Indigenous Peoples in the

Parliament, with specific reference to the Stolen Generations. The prime minister described it as an occasion for 'the nation to turn a new page in Australia's history by righting the wrongs of the past and so moving forward with confidence in the future'. The Apology passed with bipartisan support.

More recent policy approaches include remote service delivery and setting targets for 'closing the gap' driven through national partnership agreements made by the Council of Australian Governments across a range of policy areas.

1.13 'Closing the gap'

The constitutional history set out in this chapter cannot be considered in isolation from the present levels of economic and social disadvantage suffered by a high proportion of Aboriginal and Torres Strait Islander people. As discussed in Chapter 7, at almost every consultation conducted by the Panel, those levels of disadvantage and frustration with failed policies were raised. This was unsurprising given the extensive documentation of these issues in a succession of government reports.

The 'closing the gap' statistics are by any standard a cause for concern. The best intentions of governments at all levels have failed to achieve acceptable results.

It is not intended to suggest that past discrimination and non-recognition in the Constitution are the only reasons why poverty among Aboriginal and Torres Strait Islander Australians remains unacceptably high. However, there are credible arguments that until remnant discrimination is removed from the Constitution, and 'all people are treated equally before the law, we will not ultimately succeed in achieving socio-economic equality, no matter how much responsibility we take to confront the more proximate drivers of poverty'.[157]

The Royal Australian and New Zealand College of Psychiatrists has identified an association between lack of constitutional recognition and the socio-economic disadvantage of indigenous people. The college's submission to the Panel stated:

> The Royal Australian and New Zealand College of Psychiatrists recognises that Australia, as a nation, needs to take the steps to put right what can be put right and to provide appropriate restitution to the communities and individuals who have been injured by historical policies. Recognition of Indigenous Australians as the first people of Australia is a critical step to support the improvement of Indigenous mental health. It is important for psychiatrists as a group to continue to practice and support reconciliation. Understanding the need for, and supporting the call for, recognition of Indigenous Australians as the first people in law is part of this contribution. …
>
> The lack of acknowledgement of a people's existence in a country's constitution has a major impact on their sense of identity, value within the community and perpetuates discrimination and prejudice which further erodes the hope of Indigenous people.[158]

The constitutional history set out in this chapter cannot be considered in isolation from the present levels of economic and social disadvantage suffered by a high proportion of Aboriginal and Torres Strait Islander people.

The Western Australian Centre for Health Promotion Research similarly argued that, without constitutional recognition, it will be impossible to 'close the gap' in indigenous health outcomes and life expectancy.[159]

In relation to life expectancy, the 2011 *Closing the Gap* report confirmed that the life expectancy in 2005 for an indigenous man was 67.2 years and 72.9 years for an indigenous woman.[160] The gap in life expectancy between indigenous and non-indigenous Australians is currently estimated at 11.5 years for men and 9.7 years for women. The gap has narrowed only slightly in comparison with increases in life expectancy for non-indigenous Australians.[161]

The Productivity Commission reports that, based on 2005–09 data,[162] the mortality rate for indigenous Australians in New South Wales, Queensland, Western Australia, South Australia and the Northern Territory combined was twice the rate for non-indigenous Australians.[163] Available data suggests that the gap in life expectancy between indigenous and non-indigenous people in Australia is larger than in other countries where indigenous people share a similar history of relatively recent European colonisation. In Canada, in 2011, there were gaps of between five and 14 years for aboriginal groups and all Canadians.[164] In 2005–07, the life expectancy gap between Māori and non-Māori closed slightly from 9.1 years (in 1996–97) to 8.2 years.[165]

In relation to infant mortality, although there has been a progressive decrease since 1998, the Productivity Commission reports that the mortality rate for indigenous infants is still 1.8 to 3.8 times higher than that of non-indigenous infants.[166]

In relation to reading, writing and numeracy education levels, the Productivity Commission reports that a substantially lower proportion of indigenous students achieved the year 3, 5, 7 and 9 national minimum standards for reading, writing and numeracy in 2010 compared to non-indigenous students.[167] In relation to year 12 attainment, the Productivity Commission reports that the proportion of indigenous young people who received a year 12 certificate increased from 20.2 per cent in 2001 to 25.8 per cent in 2008, while the non-indigenous rate remained constant at around 56.1 per cent.[168]

In relation to employment, the Productivity Commission's data shows a small increase in the employment to population ratio for both indigenous (50.7 per cent to 53.8 per cent) and non-indigenous (74.2 per cent to 76 per cent).[169] Overall, there was no significant change in the gap between indigenous and non-indigenous employment.[170]

In addition to the 'closing the gap' targets, the headline indicators of social and economic outcomes demonstrate the profound gulf that exists between indigenous and non-indigenous Australians in the areas of imprisonment and juvenile detention, post-secondary education, disability and chronic disease, household and individual income, substantiated child abuse and neglect, and family and community violence.

'The lack of acknowledgement of a people's existence in a country's constitution has a major impact on their sense of identity, value within the community and perpetuates discrimination and prejudice, which further erodes the hope of Indigenous people.'

Royal Australian and New Zealand College of Psychiatrists, submission no 3558

1.14 Conclusions

The Panel examined the history of the Australian Constitution and law and policy relating to Aboriginal and Torres Strait Islander peoples since Federation in order to fully address its terms of reference. This chapter has detailed the most relevant aspects of that history, which have informed the Panel's consideration of the substantive matters in this report. Those aspects include the racial discrimination and political and economic factors that resulted in the non-recognition of Aboriginal and Torres Strait Islander peoples in the Constitution and the use of the fiction of *terra nullius* to justify the taking and occupation of their lands.

The Panel's consultations revealed limited understanding among Australians of our constitutional history, especially in relation to the exclusion of Aboriginal and Torres Strait Islander people from full citizenship.

The Panel's consultations revealed limited understanding among Australians of our constitutional history, especially in relation to the exclusion of Aboriginal and Torres Strait Islander people from full citizenship. During the consultation process, many people were surprised or embarrassed to learn that the Constitution provides a head of power that permits the Commonwealth Parliament to make laws that discriminate on the basis of 'race'. Many were disappointed to learn that despite the overwhelming 'Yes' vote at the 1967 referendum, only the discriminatory exclusions in section 127 (relating to the census) and section 51(xxvi) (relating to the law-making powers of the Parliament in relation to the 'people of any race') were removed from the Constitution. Many were especially concerned to learn that section 51(xxvi), as amended in 1967, does not prevent legislation that potentially discriminates on the basis of race.

It was also clear, however, that many Australians are proud of the achievements in overcoming aspects of historical discrimination, not just against Aboriginal and Torres Strait Islander people, but others as well. The *Racial Discrimination Act 1975*, the *Native Title Act 1993* and other laws that address the denial of the rights and entitlements of Aboriginal and Torres Strait Islander Australians illustrate the steady, if slow, progress towards the recognition of Aboriginal and Torres Strait Islander peoples as the first Australians and confirmation of their full and equal citizenship. Further, most Aboriginal and Torres Strait Islander Australians want to participate in the nation's affairs and have developed innovative approaches to governance and political participation, which are discussed in Chapter 7.

While Australians are justifiably proud of their modern nation whose foundation is the Constitution, they are increasingly aware of the blemish on our nationhood caused by two of its sections, section 25 and the 'race power' in section 51(xxvi). They are also increasingly aware that in one important respect the Constitution is incomplete. It remains silent in relation to the prior and continuing existence of Aboriginal and Torres Strait Islander people. An essential part of the national story is missing.[171]

Notes

1 Patrick Dodson, 1999 Vincent Lingiari Memorial Lecture, 'Until the Chains Are Broken' (2000) 5(2) *Australian Indigenous Law Reporter* 73.
2 Noel Pearson, 'Racism: The Current Australian Experience' (1995) 8 *Without Prejudice* 10.
3 At the time the United Kingdom Parliament enacted the Commonwealth of Australia Constitution Act 1900 (Imp) Western Australia had not decided whether to join the Commonwealth.
4 John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1910), at vii.
5 Ibid.
6 On the background to section 127, see Geoffrey Sawer, 'The Australian Constitution and the Australian Aborigines' (1966–67) 2(1) *Federal Law Review* 17, especially at 25–30. John La Nauze suggests that the origin of section 127 is more complicated than is implied by Sawer. La Nauze argues that 'the origin of the exclusion of aborigines from the reckoning of the "numbers of the people" lay in the requirements of the finance clauses, including the cancelled clause concerning federal direct taxation'. According to La Nauze: 'The exclusion of the Aborigines from the reckoning was not based on the impossibility of counting nomads, nor on views about their inferiority, nor on any of the reasons alleged in 1967.' John La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972), at 67–68. See generally L R Smith, *The Aboriginal Population of Australia* (Australian National University Press, 1980), at 20–23.
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14 Ibid, at 666.
15 Ibid, at 251.
16 Ibid, at 241.
17 Ibid.
18 Robert French, 'The Race Power: A Constitutional Chimera' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003), at 181.
19 Ibid.
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21 Convention Debates, vol 4, Melbourne 1898, op cit, at 246–247 (Kingston), 245–246 (Quick).
22 Ibid, at 246–247 (Kingston).
23 French, op cit, at 184.
24 Convention Debates, vol 4, Melbourne 1898, op cit, at 250 (Symon).
25 Clause 17 in chapter v. See Quick and Garran, op cit, at 953.
26 In *Yick Wo v Hopkins*, 118 US 356 (1886), a San Francisco ordinance that denied licences to conduct laundries to Chinese applicants was held to be unconstitutional. In their 1901 *Annotated Constitution of the Australian Commonwealth*, Quick and Garran, at 623, contrasted section 51(xxvi), suggesting that in Australia, such a law could be made and could not be successfully challenged.
27 Convention Debates, vol 4, Melbourne 1898, op cit, at 664–691; also La Nauze, op cit, at 230–231.
28 Convention Debates, vol 5, Melbourne 1898, op cit, at 1801.
29 Quick and Garran, op cit, at 622.
30 Sawer, op cit, at 19 (emphasis in original).
31 Harrison Moore, *The Constitution of the Commonwealth of Australia* (Maxwell, 2nd ed, 1910), at 464.
32 Quick and Garran, op cit, at 622.
33 Sawer, op cit, at 18.

34 Ibid, at 20; French, op cit, at 185.
35 United States Constitution, article 1, section 8(3); Constitution Act 1867 (UK), section 91(24); French, op cit, at 185.
36 George Williams, 'The Races Power and the 1967 Referendum' (2007) 11 *Australian Indigenous Law Review Special Edition* 8.
37 Megan Davis, 'A Narrative of Exclusion: Indigenous Rights in Australia' (2007) 14(3) *Human Rights Defender*, at 16–18.
38 Sawer, op cit, at 26.
39 L R Smith, op cit, at 23–34, especially 30.
40 John McCorquodale, 'The Legal Classification of Race in Australia' (1986) 10(1) *Aboriginal History* 7, at 10.
41 Ibid, at 12.
42 Richard Madden and Fadwa Al-Yaman, 'How Statisticians Describe Aboriginal and Torres Strait Islander Peoples' in *2003 Seminars on Health and Society: An Australian Indigenous Context* (Australian Institute of Aboriginal and Torres Strait Islander Studies, 2003).
43 Australia, *Parliamentary Papers*, 1961, vol II, at 1400; McCorquodale, op cit, at 19.
44 McCorquodale, op cit, at 19.
45 Ibid, at 10.
46 For example, *Commonwealth v Tasmania* (1983) 158 CLR 1 per Deane J, at 273–274; *Mabo v Queensland (No 2)* (1992) 175 CLR 1 per Brennan J, at 70; *Gibbs v Capewell* (1995) 54 FCR 503 per Drummond J, at 505–506, 511–512; *Shaw v Wolf* (1998) 83 FCR 113 per Merkel J, at 118; *Patmore v Independent Indigenous Advisory Committee* (2002) 122 FCR 559 per Merkel and Downes JJ, at [56]; *Re Watson (No 2)* [2001] TASSC 105 per Cox CJ. See also *Attorney-General of the Commonwealth v Queensland* (1990) 25 FCR 125 per French J, at 147–148.
47 Peter Hiscock, *Archaeology of Ancient Australia* (Routledge, 2008); John Mulvaney and Johan Kamminga, *Prehistory of Australia* (Allen & Unwin, 1999).
48 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 per Deane and Gaudron JJ, at 99.
49 Ibid.
50 'Secret Instructions for Lieutenant James Cook Appointed to Command His Majesty's Bark the Endeavour', 30 July 1768, National Library of Australia.
51 See generally, Heather McRae, Garth Nettheim and Laura Beacroft (eds), *Indigenous Legal Issues: Commentary and Materials* (Lawbook, 4th ed, 2009), at [1.150].
52 'Draught Instructions for Governor Phillip', 25 April 1787, British Public Records Office.
53 According to Blackstone, English law would become the law of a country outside England either upon first settlement by English colonists of a 'desert uninhabited' country or by the exercise of the Sovereign's legislative power over a conquered or ceded country. William Blackstone, *Commentaries on the Laws of England* (Sweet and Maxwell, 17th ed, 1830), Bk II, ch 1, at 7.
54 David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge University Press, 1991), at 78, 151.
55 See, for example, Andrew Markus, *Governing Savages* (Allen & Unwin, 1990), at 3.
56 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 September 1901, at 5233 (Edmund Barton).
57 Commonwealth, *Parliamentary Debates*, House of Representatives, 12 September 1901, at 4805–4806 (Alfred Deakin).
58 Ibid, at 4812 (Alfred Deakin).
59 Ibid. See also John F Lack and Jacqueline Templeton (eds), *Sources of Australian Immigration History 1901–1945* (University of Melbourne, 1988), at 11–12.
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65 McRae, Nettheim and Beacroft, op cit, at [1.310].
66 Ibid, at [1.290].
67 Ibid.
68 Ibid, at [1.400], [11.40]–[11.500].
69 See generally Rosalind Kidd, *Hard Labour, Stolen Wages: National Report on Stolen Wages* (Australians for Native Title and Reconciliation, 2007).
70 Markus, op cit, at 48–53.
71 McCorquodale, op cit, at 7.
72 Ibid, at 9.
73 Ibid, at 15.
74 Ibid, at 13.
75 Ibid, at 14.
76 McRae, Nettheim and Beacroft, op cit, at [1.530].
77 Australian Electoral Commission, *History of the Indigenous Vote* (2006), at 4; also Australian Electoral Commission, *Electoral Milestone/Timetable for Indigenous Australians* (22 December 2010), at www.aec.gov.au/Voting/indigenous_vote/indigenous.htm.
78 Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 4th ed, 2006), at 180.
79 John Gardiner-Garden, *The 1967 Referendum—History and Myths* (Research Brief No 11, Australian Parliamentary Library, 2 May 2007). Generally, Murray Goot, 'The Aboriginal Franchise and Its Consequences' (2006) 52 *Australian Journal of Politics and History* 517.
80 Gardiner-Garden, op cit.
81 Ibid; also Australian Electoral Commission, *History of the Indigenous Vote*, op cit.
82 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 April 1902, at 11975–11980; Blackshield and Williams, op cit, at 180.
83 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 April 1902, at 11979 and 11977.
84 Section 41 provides: 'No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth.'
85 In 1918, the *Commonwealth Franchise Act 1902* was repealed and replaced by the *Commonwealth Electoral Act 1918*. In 1924, Mitta Bullosh, an Indian-born British subject and resident of Carlton in Melbourne, who had arrived in Melbourne in 1882 and was enrolled to vote in Victoria, was refused enrolment by the Commonwealth electoral office. Bullosh took out a summons against the electoral registrar, contending that the section of the *Commonwealth Electoral Act 1918* that deprived 'Asiatics' of the vote was unconstitutional, and seeking a declaration that he was entitled to enrolment: 'Rights of Indians', *The Argus,* 28 August 1924, at 19. On 3 September 1924, a magistrate in the District Court upheld Bullosh's eligibility to vote in Commonwealth elections: 'Enrolment of Asiatics. Successful test case', *The Argus,* 4 September 1924, at 9. In 1925, the Commonwealth Electoral Act was amended to give natives of British India the right to vote in federal elections, but continued to deny suffrage to any persons who were an 'aboriginal native of Australia, Asia, Africa, or the Islands of the Pacific (except New Zealand)' unless so entitled under section 41 of the Constitution. See generally P Stretton and C Finnimore, 'Black Fellow Citizens: Aborigines and the Commonwealth Franchise' (1993) 25 *Australian Historical Studies* 521.
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109 Commonwealth, *Parliamentary Debates*, House of Representatives, 11 November 1965, at 2639. Also *Kartinyeri v Commonwealth* (1998) 195 CLR 337 per Kirby J, at [140].
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112 French, op cit, at 188; Commonwealth, *Parliamentary Debates*, House of Representatives, 10 March 1966, at 130; 1 March 1967, at 278.
113 Sawer, op cit, at 35.
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139 Ibid, at 42.
140 Pearson, 'Racism: The Current Australian Experience', op cit.
141 Noel Pearson, 'Mabo: Towards Respecting Equality and Difference' in M Yununipingu, D West, I Anderson, J Bell, G Lui, H Corbett and N Pearson (eds), *Voices from the Land: 1993 Boyer Lectures* (ABC Books, 1994) 89.
142 Pearson, 'Racism: The Current Australian Experience', op cit.
143 ATSIC was established in 1989 under the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) with the following objectives (section 3): to ensure maximum participation of Aboriginal and Torres Strait Islander people in government policy formulation and implementation; to promote Indigenous self-management and self-sufficiency; to further Indigenous economic, social and cultural development; and to ensure coordination of Commonwealth, State, Territory and local government policy affecting Indigenous people.
144 The Council for Aboriginal Reconciliation was established in 1991 as a statutory authority under the *Council for Aboriginal Reconciliation Act 1991* (Cth) 'to improve the relationships between Aboriginal and Torres Strait Islander peoples and the wider Australian community'.
145 The position of the Aboriginal and Torres Strait Islander Social Justice Commissioner was created by the Commonwealth Parliament in December 1992 in response to the findings of the Royal Commission into Aboriginal Deaths in Custody and the National Inquiry into Racist Violence.
146 Aboriginal and Torres Strait Islander Commission, *Recognition, Rights and Reform: Report to Government on Native Title Social Justice Measures* (1995) reproduced in (1996) *Australian Indigenous Law Reporter* 27, www.austlii.edu.au/au/journals/AILR/1996/27.html, at [4.6].
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148 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 per Mason J, at 158. The passage was cited with approval by the High Court in *Western Australia v Commonwealth* (1995) 183 CLR 373 (*Native Title Act case*).
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150 *Kartinyeri v Commonwealth* (1998) 195 CLR 337.
151 Pre-1967 decisions include *Robtelmes v Brenan* (1906) 4 CLR 395 and *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468. See discussion in Jennifer E Eastick, 'The Australian Aborigine: Full Commonwealth Responsibility under the Constitution' (1980) 12 *Melbourne University Law Review* 516. Eastick also refers at 523–531 to various statutes apparently enacted in reliance on the power in section 51(xxvi).
152 French, op cit, at 206.
153 Ibid, at 208.
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156 John Howard, 'Practical Reconciliation' in Michelle Grattan (ed), *Reconciliation: Essays on Australian Reconciliation* (Bookman Press, 2000), at 89–96.
157 Noel Pearson, 'A Letter to the Australian People', submission no 3619.
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159 Western Australian Centre for Health Promotion Research, submission no 3268. See also Western Australian Council of Social Service, submission no 3550.

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166 Ibid, at 4.14; also Commonwealth, *Closing the Gap: Prime Minister's Report*, op cit, at 13.
167 Steering Committee for the Review of Government Service Provision, op cit, at 19.
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170 Ibid, at 4.63.
171 See Noel Pearson, 'A Letter to the Australian People', submission no 3619.

2 Comparative and international recognition

Australia is not the first settler society to grapple with the challenge of recognising indigenous peoples in its Constitution.

At community consultations, participants frequently asked the Expert Panel how other settler societies have approached the issue of constitutional recognition of indigenous peoples. It was suggested that in assessing options for the recognition of Aboriginal and Torres Strait Islander peoples in the Australian Constitution, it might be valuable for the Panel to consider the experience in other countries.

Submissions to the Panel also noted the various approaches to constitutional recognition of indigenous peoples in different countries.[1] For example, the Royal Australian and New Zealand College of Psychiatrists noted that 'comparable countries, New Zealand, Canada and the United States of America, with the same British colonial history, have recognised their Indigenous populations in law', and that 'Australia has been left behind on the recognition of its Indigenous peoples in law'.[2]

At community consultations and in submissions, the Panel was also referred to the recognition of indigenous peoples in international law, specifically the United Nations Declaration on the Rights of Indigenous Peoples, which was adopted by the General Assembly on 13 September 2007 and endorsed by Australia on 5 April 2009.

This chapter surveys comparative and international experience with recognition of indigenous peoples. The countries considered include the settler states Canada, the United States and Aotearoa/New Zealand, which have similar constitutional and common law traditions to those of Australia. Also considered are Finland, Norway, Sweden, Denmark, the Russian Federation, Bolivia, Brazil, Colombia, Ecuador, Mexico, the Philippines and South Africa, all of which have pursued constitutional reform in recent decades to provide recognition of indigenous peoples.

Finland, Norway, Sweden, Denmark, the Russian Federation, Bolivia, Brazil, Colombia, Ecuador, Mexico, the Philippines and South Africa have all pursued constitutional reform in recent decades to provide recognition of indigenous peoples.

2.1 Comparative recognition

Experience in other countries points to the variety of ways in which recognition of indigenous peoples has occurred, including through the protection and promotion of languages, cultures and heritage, demarcation of land title, and making of agreements, as well as through participatory mechanisms such as designated parliamentary seats.

Numerous submissions referred to the various forms that recognition has taken in other countries. The Birpai Local Aboriginal Land Council suggested that acknowledgment be given to Aboriginal people similar to the acknowledgment of indigenous peoples in New Zealand, Canada and the United States.[3] The Victorian Aboriginal Child Care Agency recommended that the Panel consider reserved seats for Aboriginal and Torres Strait Islander peoples similar to the parliamentary system in New Zealand.[4]

In his submission to the Panel, Senior Research Fellow in Law Lucas Lixinski wrote that Australia could learn a lot from the experience of other countries in the constitutional recognition of indigenous peoples.[5] Lixinski identified the constitutions of Ecuador and Bolivia as the most 'advanced' and 'progressive' examples of recognition of indigenous peoples in a multicultural nation. He suggested that the Brazilian Constitution might provide a more appropriate option for recognition in Australia. Lecturer in Law John Pyke suggested a 'long education campaign' about recognition of the Inuit in Canada, Native Americans in the United States and the Māori in New Zealand.

A number of submissions suggested that the lack of constitutional recognition in Australia could be a contributing factor to the higher rates of economic and social disadvantage of Aboriginal and Torres Strait Islander peoples 'compared to First Nation peoples in New Zealand, Canada and the United States'.[6] The Lowitja Institute noted that:

> The experiences of other countries, in particular New Zealand and the United States, have shown that recognition of a country's indigenous population in its constitution ... provides a basis for good governance and stewardship of the health of the indigenous population.[7]

'The experiences of other countries, in particular New Zealand and the United States, have shown that recognition of a country's indigenous population in its constitution ... provides a basis for good governance and stewardship of the health of the indigenous population.'

Lowitja Institute, submission no 3483

Associate Professor Sarah Maddison argued that constitutional recognition in the United States has created an enabling political environment for Native Americans in which Native Americans' relationship with the United States is political rather than race-based.[8]

Table 2.1 sets out the total population statistics for the countries discussed in this chapter, with their estimated indigenous populations given as a percentage of the general population.

Table 2.1 Relative population statistics, selected countries

Country	Population[a]	Indigenous peoples[b]	Indigenous population (%)
Australia	22,342,398	Aboriginal and Torres Strait Islander	2.5[c]
Canada	34,108,752	First Nations ('Indians'), Métis, Inuit	3.5
United States	309,050,816	565 federally recognised tribes[d]	1.6
Aotearoa/ New Zealand	4,367,800	Māori	17
Finland	5,335,481	Sámi	0.16
Norway	4,889,252	Sámi	1.06–1.38
Sweden	9,378,126	Sámi	0.22
Denmark	5,545,039	Inuit (Greenland)	88[e]
Russian Federation	142,938,285	Evenk, Sámi, Yupiq, Nenet, among others	<2
Bolivia	10,426,000	36 recognised groups, including Quechua, Aymara, Guaraní, Chiquitano	62
Brazil	193,252,604	227 groups	0.4
Colombia	45,508,205	87 groups	3.4
Ecuador	14,204,900	14 officially recognised indigenous nationalities	14
Mexico	107,550,697	Numerous indigenous groups	13
Philippines	94,013,000	Igorot, Lumad, Mangyan	10
South Africa	49,991,300	Khoe–San	1

Notes

a Population statistics for all countries in the table are taken from the United Nations *Population and Vital Statistics Report* (last updated 22 November 2011), Table 2 (the figures given represent the mid-year provisional estimate for 2009–10). See http://unstats.un.org/unsd/demographic/products/vitstats/default.htm.

b Source for all names and percentages of indigenous peoples (except Australia): International Work Group for Indigenous Affairs at www.iwgia.org/region.

c Source: Australian Bureau of Statistics, *Experimental Estimates and Projections, Aboriginal and Torres Strait Islander Australians, 1991 to 2021*, cat no 3238.0, September 2009 at www.abs.gov.au.

d Source: United States Bureau of Indian Affairs at www.bia.gov.

e Out of Greenland's population of 57,000, 50,000 are Inuit. See www.iwgia.org/regions/arctic/greenland.

Canada

The most commonly referenced comparative example of recognition at consultations and in submissions was Canada.[9]

> In 1982 the new Canadian constitution had a Charter of Rights to secure legal and formal recognition. Aboriginal rights sit alongside other rights—it gives a legal identity with a constitutional foundation from which to call for a treaty to settle unfinished business.[10]

In 1982, the Canadian Constitution was 'patriated' from the United Kingdom, following the passage of the Constitution Act 1982 by the United Kingdom and Canadian parliaments. This Act entrenched the Canadian Charter of Rights and Freedoms in the Canadian Constitution.[11] Section 35 of the Constitution included a provision recognising and affirming existing aboriginal and treaty rights in Canada.[12] These rights were recognised for three distinct aboriginal groups: the Indians, the Métis and the Inuit. In its current form, section 35 provides:

(1) The existing aboriginal and treaty rights of Aboriginal people of Canada are hereby recognised and affirmed.

(2) In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Metis peoples of Canada.

(3) For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Section 25 of the Charter operates to shield pre-existing aboriginal rights so that individual rights protected by the Charter do not limit or otherwise invalidate aboriginal rights. Section 25 provides:

> The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including:
>
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
>
> (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

United States

The United States Constitution provides that 'the Congress shall have Power: To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes'.[13]

Aotearoa/New Zealand

In 1840, the Treaty of Waitangi was signed between Māori chiefs and the Crown.

The first statutory recognition of Māori representation was the Maori Representation Act 1867 (NZ), which resulted in four Māori seats in Parliament.[14] At that time, the four Māori seats represented a population of around 50,000 people, compared to 72 seats for the non-Māori population of more than 200,000.[15] Māori men over the age of 21 were entitled to vote and stand for Parliament. In 1876, the Māori seats were made permanent. During the period from 1893 to 1896, the complete separation of Māori and non-Māori electoral systems was established. Open polling prevailed, which meant that Māori told polling officials who they wanted to vote for. The secret ballot was not established until 1938. In 1948, Māori electoral rolls were established. In 1975, the option to choose which electoral roll to belong to was introduced.

In 1993, following the recommendations of the 1986 Royal Commission into the Electoral System, New Zealand introduced the mixed-member proportional representation voting system. Under this system, electors have two votes, one for a member in their local electorate and one for a nationwide party list. Among a total of 120 members of Parliament, 69 represent physical electorates of which seven are reserved Māori seats.[16]

Māori seats retain separate voting rolls, and Māori may choose whether to enrol on the Māori electoral roll or the general electoral roll. The number of Māori seats changes according to the numbers of Māori who opt for the Māori roll. Currently, there are seven Māori seats, an increase from five in 1996.[17]

Finland

The Sámi inhabit Sápmi, which encompasses parts of far northern Sweden, Norway, Finland, the Kola Peninsula of Russia, and the border area between south and middle Sweden and Norway.

In 1995, the Constitution of Finland was amended to recognise the rights of the Sámi as indigenous people. A new Constitution commenced on 1 March 2000, and the provisions recognising the rights of the Sámi were retained.

Chapter 2 of the Constitution sets out basic rights and liberties, including the right to equality.[18] Section 17 provides as follows in relation to the right to language and culture:[19]

> The national languages of Finland are Finnish and Swedish.
>
> The right of everyone to use his or her own language, either Finnish or Swedish, before courts of law and other authorities, and to receive official documents in that language, shall be guaranteed by an Act. The public authorities shall provide for the cultural and societal needs of the Finnish-speaking and Swedish-speaking populations of the country on an equal basis.

In 1995, the Constitution of Finland was amended to recognise the rights of the Sámi as indigenous people.

> The Sámi, as an indigenous people, as well as the Roma and other groups, have the right to maintain and develop their own language and culture. Provisions on the right of the Sámi to use the Sámi language before the authorities are laid down by an Act. The rights of persons using sign language and of persons in need of interpretation or translation aid owing to disability shall be guaranteed by an Act.

Section 121 of the Constitution deals with municipal and other regional self-government, and provides that 'in their native region, the Sámi have linguistic and cultural self-government, as provided by an Act'.

A Sámi Parliament was established in Finland in 1972. In 1995, legislation was enacted to provide a new statutory basis for Sámi representation.[20] The Act confers on the Sámi Parliament the function of deciding how funds designated for the common use of the Sámi will be allocated.[21] It also creates a requirement for authorities to negotiate with the Sámi Parliament in relation to certain matters affecting the Sámi in the Sámi homeland.[22]

Norway

The Constitution of Norway[23] contains an article, inserted in 1988, which confirms the responsibility of the authorities of the state in relation to the Sámi as follows:

> **Article 110a**
>
> It is the responsibility of the authorities of the State to create conditions enabling the Sami people to preserve and develop its language, culture and way of life.

The recognition of the Sámi in the Constitution was recommended by the Sámi Rights Commission, which was established in 1980 following a controversy in the late 1970s (known as the Alta affair) in relation to a proposal to build a dam on the Alta-Kautokeino River. The Sámi opposed the dam on the basis that it would restrict traditional reindeer herding grounds.[24]

The Sámi Rights Commission also recommended the establishment of a Sámi representative body. In 1987, the Sámi Parliament was established by legislation enacted by the Norwegian Parliament.[25] The business of the Sámi Parliament is any matter that in the view of the Parliament particularly affects the Sámi people.[26]

Sweden

The Constitution of Sweden consists of four fundamental laws: the Instrument of Government, the Act of Succession, the Freedom of the Press Act and the Fundamental Law on Freedom of Expression.[27]

By amendments which came into force on 1 January 2011, the Constitution was amended to expressly recognise the Sámi.[28] Article 2, in Chapter 1 of the Instrument of Government, provides:

> Public power shall be exercised with respect for the equal worth of all and the liberty and dignity of the individual.
>
> The personal, economic and cultural welfare of the individual shall be fundamental aims of public activity. In particular, the public institutions shall secure the right to employment, housing and education, and shall promote social care and social security, as well as favourable conditions for good health. …
>
> The public institutions shall promote the opportunity for all to attain participation and equality in society and for the rights of the child to be safeguarded. The public institutions shall combat discrimination of persons on grounds of gender, colour, national or ethnic origin, linguistic or religious affiliation, functional disability, sexual orientation, age or other circumstance affecting the individual.
>
> The opportunities of the Sámi people and ethnic, linguistic and religious minorities to preserve and develop a cultural and social life of their own shall be promoted.

Article 12, in Chapter 2 of the Instrument of Government, provides:

> No act of law or other provision may imply the unfavourable treatment of anyone because they belong to a minority group by reason of ethnic origin, colour, or other similar circumstances or on account of their sexual orientation.

Article 17 dealing with freedom of trade provides:

> The right of the Sámi population to practise reindeer husbandry is regulated in law.

A Sámi Parliament was established in Sweden in 1993.

Denmark

The Kingdom of Denmark includes the external territory of Greenland (and the Faroe Islands).[29] The population of Greenland numbers 57,000, of whom 50,000 are Inuit.[30]

Since 1979, Greenland has been a self-governing overseas administrative division of Denmark.

Greenland has been part of Denmark since 1953, and is represented by two members in the Folketing (parliament). Section 28 of the Constitution of Denmark provides:[31]

> The Folketing shall consist of one assembly of not more than one hundred and seventy-nine members, of whom two members shall be elected in the Faroe Islands and two members in Greenland.

Since 1979, Greenland has been a self-governing overseas administrative division of Denmark. The 1979 Greenland Home Rule Act[32] transferred the right of the Danish Parliament to decide Greenland affairs to the Greenland Landsting, an elected legislative authority composed almost entirely of Greenlanders. The Danish government maintains control of defence, foreign affairs, policing and the administration of justice.

Russian Federation

Article 69 of the Constitution guarantees the rights of indigenous minority peoples according to the universally recognised principles and norms of international law and international treaties and agreements of the Russian Federation.[33]

Bolivia

In January 2009, a new Constitution was adopted by referendum. The Constitution proclaims Bolivia as a 'Unitary Communitarian Social Plurinational State under the Rule of Law'. Article 5(I) provides that indigenous languages are official languages together with Spanish. This article also provides that the bureaucracy must use as official languages one indigenous language as well as Spanish.

Article 30(I) states that a 'peasant original indigenous people or nation is all human collectivity that shares cultural identity, language, historical tradition, institutions, territoriality and worldview, the existence of which is prior to the Spanish colonial invasion'. Article 30(II) provides that indigenous peoples enjoy the following rights:

1. to exist freely.
2. to enjoy their cultural identity, religious belief, spiritualities, practice, customs and cosmovision.
3. to the cultural identity of each of their members and if desired, to register with Bolivian citizenship in his/her identity card, passport or other valid identification documents with legal validity.
4. their self-determination and territory.
5. their collective title of their lands and territory.
6. the protection of their sacred places.
7. to create and administrate their own net and communication media.
8. the respect and promotion of their traditional knowledge, traditional medicine, languages, rituals, symbols and clothing.
9. to live in a healthy environment.
10. their collective intellectual property of their knowledge, science as well as its valoration, promotion and development.
11. an intracultural, intercultural and multilingual education system.
12. the universal and healthcare system which respect their cosmovision and traditional practices.
13. the exercise of their political, legal and economic system taking into account their cosmovision.

14. the right to prior consultation in issues which can affect them. The prior consultation in this context is compulsory by the State. In addition, it is obligatory also this consultation regarding the exploration of their non-renewable natural resources in the territory they inhabit.

15. the right of their participation of the benefits of the natural resources' exploitation in their territories.[34]

Brazil

The Constitution of Brazil, promulgated in 1988, contains a new chapter on indigenous peoples' rights. Article 231 recognises indigenous peoples' social organisation, customs, languages, beliefs and traditions, as well as their original title over the lands they traditionally occupied. Article 210 recognises that a minimum curriculum should be established in primary schools in order to foster respect for cultural values, including that primary education in indigenous communities shall ensure the use of their 'native tongue'.[35]

Colombia

The Constitution of Colombia, promulgated in 1991, recognises and protects the ethnic and cultural diversity of the Colombian nation.[36] Article 246 provides that the authorities of the indigenous peoples may exercise their jurisdictional functions within their territorial jurisdiction in accordance with their own laws and procedures. This indigenous jurisdiction must not be contrary to the laws of the Constitution or the laws of the Colombian republic. Article 330 also provides that indigenous territories will be governed by councils that are formed and regulated in accordance with the customs of the community.[37]

Ecuador

On 28 September 2008, Ecuador adopted a new Constitution. The National Constitution of Ecuador recognises indigenous languages as part of the national culture.[38] The Constitution also requires the education systems in indigenous areas to use indigenous languages, and provides that Spanish is the language that should be used for intercultural relations.[39]

Article 84 of the Constitution provides that the state shall recognise indigenous peoples in conformity with the Constitution, human rights and collective rights. The rights recognised in article 84 include the right to maintain, develop and strengthen spiritual, cultural, linguistic, social, political and economic identity and traditions. This includes the right to preserve and promote the management of biodiversity and the natural environment, as well as the right to be consulted on exploration and exploitation of natural resources on indigenous lands. It also includes the right to maintain, develop and manage their cultural and historical heritage.

The National Constitution of Ecuador recognises indigenous languages as part of the national culture.

Mexico

The Political Constitution of the United Mexican States was approved by the Constitutional Convention on 6 February 1917. Article 4 of the Mexican Constitution provides that Mexico is a pluricultural nation 'originally based on its indigenous peoples', and provides that the law shall protect and promote the development of their languages, cultures, uses, customs, resources and specific forms of social organisation, and guarantee their members effective access to the judiciary.[40]

In the State of Oaxaca, the Constitution recognises the right of indigenous peoples to nominate and elect their own representatives in local government elections.[41]

Philippines

The 1987 Constitution of the Philippines recognises and promotes the rights of indigenous cultural communities 'within the framework of national unity and development'.[42]

Initially, the Constitution provided for a form of designated parliamentary seats. For three consecutive terms after the ratification of the 1987 Constitution, one-half of seats were required be filled by selection or election from the labor, peasant, urban poor and indigenous cultural communities, and 'such other sectors as may be provided by law, except the religious sector'.[43]

Article XII section 5 provides that the state shall protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social and cultural wellbeing. Article XVI section 17 provides that the state shall recognise, respect and protect the rights of indigenous cultural communities to preserve and develop their cultures, traditions, and institutions and will consider these rights in the formulation of national plans and policies. According to Article XIV section 2, 'indigenous learning systems' are 'encouraged' by the state. Article XVI section 12 provides that the congress may create a consultative body to advise the president on policies affecting indigenous cultural communities.

South Africa

In South Africa, the San (Xun, Khwe and Khomani) and Khoe (Nama) ethnic groups identify as indigenous peoples.[44]

The Constitution of the Republic of South Africa came into force on 4 February 1997. Section 6 of the Constitution recognises indigenous languages as follows:

> Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages ...

2.2 International recognition

The 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP) was raised at most consultations and in a number of submissions to the Panel. For example, the Royal Australian and New Zealand College of Psychiatrists suggested that moving to constitutional recognition of Aboriginal and Torres Strait Islander peoples would demonstrate the Commonwealth Government's commitment to the principles in the UNDRIP.[45] The Humanist Society of Victoria Inc. and the Newcastle Family Support Services Inc., among others, recommended incorporation of fundamental principles of the UNDRIP into the Constitution in order to ensure greater participation of Aboriginal and Torres Strait Islander peoples in decision-making about their lives.[46] The Aboriginal Catholic Ministry suggested that the Constitution should be 'examined through the lens of the principles of the UNDRIP'.[47]

'The UN Declaration on the Rights of Indigenous Peoples ratified by Australia recognises that Indigenous peoples have rights to language, culture and land. These rights should be recognised in the Constitution.'

Bede Harris, submission no 988

UN Declaration on the Rights of Indigenous Peoples

The UNDRIP was initially drafted in the Working Group on Indigenous Populations (WGIP), an independent expert mechanism established in 1982 by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, as authorised by the UN Economic and Social Council.[48] The mandate of the WGIP was to review 'developments pertaining to the promotion and protection of the human rights and fundamental freedoms of Indigenous populations' and 'to give special attention to the evolution of standards concerning the rights of such populations'.[49]

The 'review of developments' aspect of the WGIP's mandate allowed indigenous peoples to voice serious concerns about historical and ongoing violations of their human rights.[50] The standard setting mandate enabled the WGIP to respond substantively to the historical and contemporary experiences raised by indigenous peoples during the 'review of developments'. In 1985, the expert members resolved to elaborate a draft declaration on the rights of indigenous peoples. The purpose of elaborating an international instrument was to address the protection gap in legal standards pertaining to indigenous peoples raised in the WGIP.[51] In 1993, the final text of a Draft Declaration on the Rights of Indigenous Peoples was concluded by the WGIP.[52]

In 1995, Matthew Coon Come, Grand Chief of the Grand Council of the Crees, said of the Draft Declaration:

> Every paragraph of the Draft Declaration is based upon known instances of the violations of the human rights of indigenous peoples. There is nothing theoretical, abstract, or speculative about the substantive content of the Draft Declaration. … The Draft Declaration ... began from a cry from the indigenous peoples for justice, and it is drafted to confirm that the international standards which apply to all peoples of the world apply to indigenous peoples. It is an inclusive instrument, meant to bring indigenous peoples into the purview of international law as subjects of international law.[53]

In 1995, the then United Nations Commission on Human Rights established an open-ended intersessional working group to follow on from the WGIP's work in drafting an international legal instrument on indigenous rights.[54] At the first session of the intersessional working group in November 1995, the representative of the Grand Council of the Crees stated:

> The Draft Declaration is perhaps the most representative document that the United Nations has ever produced, representative in the sense that its normative statements reflect in a more than token way, the experience, perspectives, and contributions of indigenous peoples. In a word, it is a document that was produced in a decade-long spirit of equal dialogue and mutual recognition ...[55]

On 13 September 2007, the General Assembly adopted the Declaration on the Rights of Indigenous Peoples.

The UNDRIP contains a number of provisions that are relevant to the issues with which the Panel has been concerned, and which have been raised at consultations and in submissions to the Panel. These include provisions relating to self-determination which are invoked by indigenous peoples internationally as the normative basis of their relationship with states. For most indigenous peoples, the right to self-determination involves exercising control over their own communities, and participating in decision-making processes and the design of policies and programs that affect their communities.

In this regard, articles 18 and 19 provide important procedural guarantees. Article 18 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.

For most indigenous peoples, the right to self-determination involves exercising control over their own communities, and participating in decision-making processes and the design of policies and programs that affect their communities.

Articles 18 and 19 speak to those submissions to the Panel which raised concerns about the inadequacy of consultations with Aboriginal and Torres Strait Islander communities before legislative or administrative measures are adopted which affect them. Those concerns are addressed in Chapter 7. The Cape York Institute, for example, in proposing an Equal Rights and Responsibilities Commission and recommending that laws and measures affecting Aboriginal and Torres Strait Islander peoples be reviewed periodically, was concerned that 'the views and aspirations of the … people affected by the laws shall be taken into account'.[56]

2.3 Conclusions

The experience of settler societies in undertaking constitutional and other structural change following colonisation has provided valuable assistance to the Panel in deliberating upon proposals for constitutional recognition in Australia. Likewise, the Panel has been mindful of the significance of the adoption by the international community, including Australia, Canada, Aotearoa/New Zealand and the United States, of a United Nations declaration that specifically addresses the rights of indigenous peoples.[57]

The experience of settler societies in undertaking constitutional and other structural change following colonisation has provided valuable assistance to the Panel in deliberating upon proposals for constitutional recognition in Australia.

Ultimately, of course, the task of the Panel is to recommend options which are suitable having regard to the Australian historical experience, our constitutional and legal framework, and the aspirations of the Australian people. This point was made at a number of consultations:

> These international examples should provide guidance; however, it is particularly important for Australia to find its own solutions.[58]

> When looking at constitutional change, care should be taken not to transpose approaches in Canada and the USA as the circumstances of those communities are different—one size does not fit all.[59]

Nonetheless, the example of comparative jurisdictions provides encouragement that recognition of indigenous peoples can be successfully achieved with the support of a majority of the population.

Notes

1 Matthew Baird, submission no 3484, at 9; Lowitja Institute, submission no 3483.
2 Royal Australian and New Zealand College of Psychiatrists, submission no 3538, at 1.
3 Birpai Local Aboriginal Land Council, submission no 3469, at 1.
4 Victorian Aboriginal Child Care Agency, submission no 1874.
5 Lucas Lixinski, submission no 1270.
6 Reconciliation Queensland Inc., submission no 3534, at 1–2. See Lowitja Institute, submission no 3483; also ANTaR National, submission no 3432, at 12.
7 Lowitja Institute, submission no 3483, at 1.
8 Sarah Maddison, submission no 3082, at 27.
9 For example, Castan Centre for Human Rights Law, submission no 3554, at 8.
10 Adelaide, May 2011.
11 *Canadian Charter of Rights and Freedoms* in Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK) c 11, Part 1.
12 Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK) c 11.
13 Article I, section 8, clause 3.
14 Sarah McClelland, 'Maori Electoral Representation: Challenge to Orthodoxy' (1997) 17 *New Zealand Universities Law Review* 272.
15 Andrew Geddis, 'A Dual Track Democracy? The Symbolic Role of the Maori Seats in New Zealand's Electoral System' (2006) 5 *Election Law Journal* 352.
16 Electoral Act 1993 (NZ), section 45.
17 Ibid.
18 Section 6.
19 Available at www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf (unofficial translation).
20 Act on the Sámi Parliament 974/1995. Available at www.finlex.fi/fi/laki/kaannokset/1995/en19950974.pdf (unofficial translation).
21 Section 8(1).
22 Section 9. For discussion and analysis of the Sámi Parliament, see Jane Robbins, 'Indigenous Representative Bodies in Northern Europe and Australia' in Günter Minnerup and Pia Solberg (eds), *First World, First Nations: Internal Colonialism and Indigenous Self-Determination in Northern Europe and Australia* (Sussex Academic Press, 2011), at 60–61.
23 Available at www.stortinget.no/en/In-English. The Constitution was laid down on 17 May 1814, and can be amended by submitting a proposal to amend it to the Storting (Parliament) during one of the first three years of a four-year parliamentary term. The proposal cannot be considered by the Storting until one of the first three years of the next parliamentary term. Two-thirds of the members of the Storting must vote in favour of the proposal in order for it to be adopted (article 112).
24 Robbins, op cit, at 62.
25 Act No 56 of 12 June 1987 concerning the Sameting (the Sámi Parliament) and other Sámi legal matters (the Sámi Act). See also the Act relating to the strengthening of the status of human rights in Norwegian law (Human Rights Act 1999 No 30). The Human Rights Act gives the force of Norwegian law to the International Covenant on Civil and Political Rights, including article 27, which provides: 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'. Section 3 provides that the provisions of the conventions and protocols mentioned in section 2 shall take precedence over any other legislative provisions that conflict with them.
26 Cl 2-1. For further discussion and analysis of the Sámi Parliament and the previous Sámi Council, see Robbins, op cit, at 61–64.
27 Available at www.riksdagen.se/templates/R_Page____6357.aspx.
28 Available at www.sweden.gov.se/sb/d/12711/a/138927. Robbins suggests that the Swedish Sámi Parliament has less autonomy than the other Nordic Sámi Parliaments, op cit, at 65.

29 The Faroe Islands were granted limited self-rule in 1948. Two members of the Danish Folketing are also elected in the Faroe Islands: section 28 of the Constitution.
30 See www.iwgia.org/regions/arctic/greenland.
31 Available at www.worldlii.org/dk/legis/const/1992/1.html. Amendment of the Constitution requires passage of the Bill (in the same form) in two consecutive Parliaments before and after a general election. The Bill must also be submitted to the electors, and a majority of voters and at least 40 per cent of the electorate must vote in favour of it: section 88 of the Constitution.
32 Available at www.stm.dk/_p_12712.html. See also Minority Rights Group International, *World Directory of Minorities and Indigenous Peoples,* 'Denmark: Inuit (Greenlanders)', 2008, at www.unhcr.org/refworld/docid/49749d307.html.
33 Constitution of the Russian Federation (1993).
34 Republic of Bolivia Constitution (2009).
35 Constitution of the Federal Republic of Brazil (1988).
36 Article 7.
37 Constitution of Colombia (1991).
38 Article 1.
39 Article 27.
40 Political Constitution of the Mexican United States (1917).
41 Articles 16 and 25.
42 Article II, section 22.
43 Article VI, section 5 (2).
44 International Labour Organization and African Commission on Human and Peoples' Rights, *Country Report on the Constitutional and Legislative Protection of the Rights of Indigenous Peoples: South Africa* (2009), at 1.
45 Royal Australian and New Zealand College of Psychiatrists, submission no 3538, at 1.
46 Humanist Society of Victoria Inc., submission no 3523, at 3. See also Hunter Valley Quaker Meeting, submission no 3535, at 1; Newcastle Family Support Services Inc., submission no 3436, at 1.
47 Aboriginal Catholic Ministry, submission no 3071, at 2; also Cr Marcelle Hoff, submission no 1882, at 2; Anglicare WA, submission no 3129, at 3; various Anglican organisations, submission no 3528, at 3.
48 ESC Res 1982/34, UN ESCOR, Supp (No 1) at 26, UN Doc E/1982/82 (1982). See generally S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2004).
49 ESC Res 1982/34, UN ESCOR, Supp (No 1) at 26, UN Doc E/1982/82 (1982).
50 Ibid.
51 *Report of the United Nations Working Group on Indigenous Populations on its Fourth Session*, UN Doc E/CN 4/Sub 2/1985/2, Annex II (1985). Generally Julian Burger, 'The United Nations Draft Declaration on the Rights of Indigenous Peoples' (1996–97) 9 *St Thomas Law Review* 209.
52 *Draft Declaration on the Rights of Indigenous Peoples*, UN Doc E/CN 4/Sub 2/1994/2/Add 1 (1994); *Technical Review of the Draft United Nations Declaration on the Rights of Indigenous Peoples*, UN Doc E/CN 4/Sub 2/1994/2/Add 1 (1994).
53 Mathew Coone Come, Grand Chief of the Grand Council of the Crees at a seminar organised by the Aboriginal and Torres Strait Islander Commission, Sydney, 1995, cited in Sarah Pritchard and Charlotte Heindow-Dolman, 'Indigenous Peoples and International Law: A Critical Overview' (1998) 3 *Australian Indigenous Law Reporter* 473, at 477.
54 *Establishment of a Working Group of the Commission on Human Rights to Elaborate a Draft Declaration in Accordance with Paragraph 5 of General Assembly Resolution 49/214 of 23 December 1994*, Commission on Human Rights Res 1995/32, UN Doc E/CN 4/1995/32 (1995). See also *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995*, UN Doc E/CN 4/1996/84 (1996).
55 Commission on Human Rights Open-ended Intersessional Working Group, First Session, 20 November – 1 December 1995.
56 Cape York Institute, submission no 3479, at 29.

57 In addition, Australia submits periodic reports to the Conference of the Parties to the Convention on Biological Diversity in relation to Australia's implementation of article 8j of the Convention. Article 8j provides that, subject to national legislation, contracting parties shall 'respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices'. In response to recommendations of the recent Universal Periodic Review by the United Nations Human Rights Council that Australia ratify the 1989 International Labour Organization Convention 169 on the Rights of Indigenous and Tribal Peoples (recommendations 8 and 11), Australia responded that it would formally consider becoming a party to that treaty.

58 Mildura, August 2011.

59 Redfern, May 2011.



Panel member Megan Davis (third from left) with community representatives at the Cherbourg consultation, June 2011

3 The national conversation: Themes from the consultation program

As outlined in the Introduction, between May and October 2011 the Expert Panel conducted a nationwide consultation program aimed at engaging with the public and raising awareness about the importance of constitutional recognition of Aboriginal and Torres Strait Islander peoples. The Panel also commissioned quantitative and qualitative research from Newspoll and engaged Urbis to conduct an analysis of written submissions to the Panel (see Appendix D). This chapter outlines the key themes that emerged from consultations, submissions and research. It also records feedback received in October and November 2011 during the testing of specific proposals through polling and online focus groups.

In its discussion paper, the Panel set out seven ideas for constitutional recognition of Aboriginal and Torres Strait Islander peoples and invited the views of the community on these ideas. Many of them had been raised by Aboriginal and Torres Strait Islander peoples in several important statements, such as the 1988 Barunga Statement (see chapters 8 and 9) and the 1998 Kalkaringi Statement,[1] as well as by constitutional experts and a series of commissions and parliamentary committees. The ideas for change were as follows:

Statements of recognition/values

Idea 1. Statement of recognition in a preamble

Idea 2. Statement of recognition in the body of the Constitution

Idea 3. Statement of recognition and statement of values in a preamble

Idea 4. Statement of recognition and statement of values in the body of the Constitution

Equality and non-discrimination

Idea 5. Repeal or amend the 'race power'

Idea 6. Repeal section 25

Constitutional agreements

Idea 7. Agreement-making power.

These seven ideas were not intended to limit the suggestions for recognition that might emerge during the national consultation program. It was apparent to the Panel that, as the program rolled out, the 'national conversation' was not, in the event, constrained by these ideas.

'The highlight of being a part of the consultation process throughout the year has been listening to the many heartfelt personal stories. My fellow Panel member Henry Burmester and I travelled to Coober Pedy and listened to the stories of the Kupa Piti Kungka Tjuta (Senior Aboriginal Women of Coober Pedy South Australia). To be invited to the Umoona Aged Care Home and to be presented with their book Talking Straight Out *was both a tearful and a joyful experience.'*

Lauren Ganley, Expert Panel member

The following key themes emerged:

- constitutional recognition in general (3.1);
- a specific statement of recognition (3.2);
- Aboriginal and Torres Strait Islander cultures and languages (3.3);
- a statement of values (3.4);
- the 'race' provisions: sections 25 and 51(xxvi) (3.5);
- a racial non-discrimination provision/equality guarantee (3.6);
- governance and political participation (3.7);
- matters of sovereignty (3.8);
- agreement-making (3.9);
- the Panel's processes (3.10); and
- the process for the referendum (3.11).

This chapter summarises these key themes, other ideas for change provided during consultations and in submissions (3.12), and views of some who were not supportive of the ideas in the discussion paper.

3.1 Constitutional recognition in general

'Constitutional recognition is an important step that must be taken in order to redress the discrimination and disempowerment Indigenous Australians have suffered since settlement.'

Women's Activities and Self Help House, submission no 2568

At consultations and in submissions, there was widespread support for the idea of recognising Aboriginal and Torres Strait Islander peoples in the Constitution.

Consultations

At public consultations, people expressed their support for recognition in a variety of ways:

> I want my daughter to grow up proud to be Aboriginal, proud of her heritage, and I want a future where all Australians are proud of this same heritage.[2]

> The Constitution needs to reflect that we are the first people of our nation.[3]

> It's about acknowledging that this wasn't a barren place, that people were here before Europeans arrived, and it's very important to acknowledge both the history and that Aboriginal people are still here today.[4]

> [Changing the Constitution] is about just being equal not being special, not taking from anyone else, just so we feel we are on a level playing field so that we contribute to a country we love and care for. I have Swedish, English, South Sea Islander and Torres Strait heritage so it's about equality.[5]

A number of participants at consultations commented that recognition would be a positive experience for all Australians:

> This process will provide greater harmony and equality for all Australians… changing the Constitution will contribute to a sense of belonging and improved self-esteem for so many Indigenous people… [it will]… help restore unity and mutual respect and will start to change attitudes.[6]

> We need enhanced protection of our culture, heritage and law, and for broader Australia to share in our culture.[7]

> I hope that all of Australia obtains a greater knowledge of Aboriginal people, culture and issues through this process.[8]

A number of participants commented on the particular benefits of recognition for Aboriginal and Torres Strait Islander peoples, including the enhanced protection of Aboriginal and Torres Strait Islander cultures, and an improved sense of identity and mental health:

> There has been a dramatic rise in suicide and mental health problems among Aboriginal people. A lot of these problems stem from disempowerment, of people, families, language groups and culture. Constitutional change must help put power back into the hands of Indigenous people and prevent governments from making laws that further withdraw power and self-determination of Aboriginal people.[9]

> Recognition of Aboriginal identity and culture may positively contribute to addressing psychological illness and issues of mental health. A strong statement recognising Aboriginal identity will produce a positive sense of self.[10]

> It is important that all of Australia understands Aboriginal values and protects Aboriginal culture.[11]

As discussed in Chapter 4, many participants at consultations were concerned that recognition go beyond the merely symbolic or 'tokenistic' and be accompanied by substantive change:

> We have to get it right and we need to strengthen the wording to avoid it being seen as tokenism.[12]

Ninety-two per cent of Aboriginal and Torres Strait Islander respondents, and 87 per cent of all respondents, to questionnaires distributed at public consultations and in information packs indicated that they 'strongly agreed' with constitutional recognition. Some 85 per cent of all respondents 'strongly agreed' with the statement that recognising Aboriginal and Torres Strait Islander peoples would make the Constitution better reflect who we are as a nation.

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Ninety-three per cent of Aboriginal and Torres Strait Islander respondents and 78 per cent of non-indigenous respondents strongly agreed that constitutional recognition of Aboriginal and Torres Strait Islander peoples was important to them.

Submissions

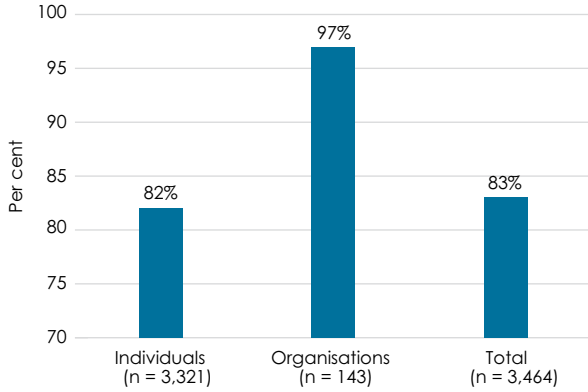
A large majority of the submissions received by the Panel (83 per cent) supported recognition of Aboriginal and Torres Strait Islander peoples in the Constitution.

A large majority of the submissions received by the Panel (83 per cent) supported recognition of Aboriginal and Torres Strait Islander peoples in the Constitution. A total of 97 per cent of submissions received from organisations and 82 per cent of submissions received from individuals supported constitutional recognition (see Figure 3.1).

Of submissions that expressed support for constitutional recognition, around 80 per cent provided at least one reason for that support. The analysis of submissions conducted for the Panel summarised the reasons most frequently given as follows:

- Aboriginal and Torres Strait Islander peoples occupy a unique position in Australian society as the first peoples and original custodians of the land, and therefore should have special recognition in the Constitution;
- Aboriginal and Torres Strait Islander peoples should be guaranteed equality before the law, and the Constitution should be free from racially discriminatory clauses;
- constitutional recognition of Aboriginal and Torres Strait Islander peoples is overdue;
- constitutional recognition will more accurately reflect Australia's history and national identity; and
- recognising Aboriginal and Torres Strait Islander peoples in the Constitution is important for recognising and protecting their unique cultures.[13]

Figure 3.1: Support for a statement of recognition among submissions that mention a statement of recognition



Source: Urbis analysis of submissions for the Panel, October 2011

Alternative views

A small number of all submissions (3 per cent) did not support constitutional recognition of Aboriginal and Torres Strait Islander peoples. The reasons most frequently given for not supporting constitutional recognition included a perceived need for all Australians to be treated the same under the law, concern that special recognition would be divisive rather than uniting, and the view that constitutional recognition is not necessary.

> We believe the Government is attempting to take our sovereignty in a deceptive manner. Recognition of Aboriginal peoples in the Constitution must not usurp our continuing sovereignty. The only resolution of the constitutional issue is by way of negotiated sovereign treaties under the supervision of the international community.
>
> Aboriginal Tent Embassy, submission no 3591

> TREATY!!! Let's not forget the true dream people! We could have rights akin to Aboriginal's in Canada and Native American's in the USA. Until we are given the ability to have sovereign rights in our own country what is the point of a piece of paper acknowledging us!?!?!?
>
> Shane Derschow, submission no 990

> [C]onstitutional recognition of any one particular race does not equate to equality. In fact the opposite is true, as such recognition singles out one race and raises it above all others. Including a preamble that recognises any particular nation or peoples other than Australia and Australians is discriminatory and prejudicial.
>
> Jesse Sounness, submission no 141

> No. Australia is now too diverse with too many ethnic groups wanting to change the rules to suit themselves. Australians should all be treated the same. One law for the whole country.
>
> Veronica Down, submission no 1776

> I must be missing something—I thought all citizens of Australia had equal rights. As far as aborigines go they seem to have more rights than their fellow Australians.
>
> Francis Daly, submission no 1187

> By continuing to separate the indigenous from non-indigenous Australians, we are continuing to drive a wedge between these two elements of society. We should stop recognising differences and start celebrating the similarities.
>
> Gillian Fennell, submission no 3424

> Our constitution is for all Australians; therefore it is not appropriate for any class of persons to get specific mention, as if they are somehow different from the rest. This means that we should remove all references to different races, which would mean deleting sections 25 and 51(xxvi). To go beyond this and make special mention of indigenous people as having been here first, or entitled to special treatment, would be unhelpful. Such an inclusion would codify the notion that there are two classes of Australians, the entitled early arrivals and the later invaders. It seems a perverse way to promote unity among our people. There is little benefit in removing the fashionable racism of the late nineteenth century from our constitution, if we are only going to replace it with the fashionable racism of today.
>
> Brigid Mullane, submission no 2714

'By accurately highlighting our past—the history and roles of Aboriginal and Torres Strait Islander peoples in our Constitution—we can better unite our future.'

Victorian Women's Trust, submission no 3402

Other reasons for supporting constitutional recognition included furthering reconciliation, updating the Constitution with contemporary values, and improving democratic processes and citizenship. Achieving better social and economic outcomes for Aboriginal and Torres Strait Islander peoples, as well as enhanced recognition of rights to lands and waters, culture and languages, and self-determination, were also common themes.

Other submissions argued that other forms of recognition, such as a treaty or recognition of unceded sovereignty, were more appropriate than constitutional recognition.[14] These submissions are further considered in chapters 8 and 9.

> If the powers that be in Federal parliament go ahead with the inclusion of Aboriginal people in the constitution, won't that mean that Aboriginal people will be controlled by the White Australian Laws or constitution?
>
> Robert Briggs, submission no 2074
>
> The constitutional change being proposed here with the very best of intentions, would, from the perspective of the broader Australian community, be an assertion that their game is the only valid one in this country, and that everybody in the country is playing in it, and in it exclusively.
>
> Lin Morrow and Andrew Dunstone, submission no 3313

Research

A nationally representative telephone survey conducted by Newspoll in February 2011 found that 75 per cent of respondents would vote in favour of a referendum to recognise Aboriginal and Torres Strait Islander peoples in the Constitution.

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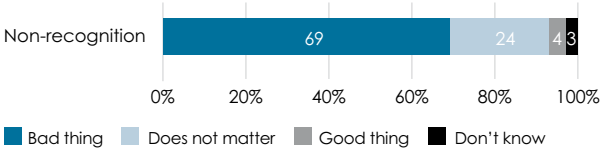
In August 2011, Newspoll conducted exploratory qualitative research intended to gauge readiness for constitutional change, perceptions of the benefits of constitutional recognition, and responses to different ideas and language that might be used in a statement of recognition. This research found that support for constitutional recognition was driven by:

- 'an empathy with and respect for Aboriginal people';
- 'a view that constitutional recognition was not only reasonable but in keeping with modern Australian values';
- 'a belief that recognition would help rectify past wrongs'; and
- 'a sense that constitutional recognition is a step in establishing Aboriginal and Torres Strait Islander peoples as full Australians'.

This qualitative research also explored reasons for non-support. These included characterising recognition as merely 'symbolic', concerns about committing money and resources to the effort, concerns about long-term and possibly unforeseeable legal consequences, possible future judicial interpretation of any new constitutional text, and a concern that recognition would represent special treatment for a particular group and thereby undermine national ideals such as unity, equality and democracy.

In September and October 2011, the Panel commissioned Newspoll to conduct two further nationally representative telephone surveys. The results from these surveys were weighted to represent the demographics of members of the Australian public eligible to vote at a federal election. The September survey found that 69 per cent considered it a 'bad thing' that the Constitution 'currently does not recognise Aboriginal and Torres Strait Islander peoples as the nation's Indigenous peoples' (see Figure 3.2).

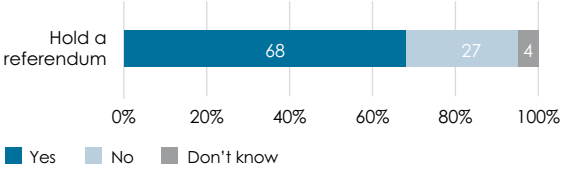
Figure 3.2: Survey respondents' attitudes regarding the current absence of recognition of Aboriginal and Torres Strait Islander peoples as the nation's indigenous peoples in the Constitution



Source: Newspoll survey, September 2011

The September survey found that just under a quarter (24 per cent) of respondents were 'very concerned', and a further 36 per cent were 'somewhat concerned', that the Constitution does not recognise Aboriginal and Torres Strait Islander peoples. The survey also found that more than two-thirds (68 per cent) of respondents considered that a referendum should be held on this issue (see Figure 3.3).

Figure 3.3: Support for holding a referendum to recognise Aboriginal and Torres Strait Islander peoples in the Constitution



Source: Newspoll survey, September 2011

Reasons for non-support were further explored in this survey. The most common reasons for non-support were concerns about special treatment and equality.

Eighty-nine per cent of Aboriginal and Torres Strait Islander respondents, and 83 per cent of all respondents, to the Panel's consultation questionnaire 'strongly agreed' with adding a statement of recognition to the Constitution to recognise the place of Aboriginal and Torres Strait Islander peoples in our nation.

3.2 A specific statement of recognition

The proposal to include a specific statement of recognition dominated consultations and submissions. The views expressed related to where such a statement of recognition should appear in the Constitution, as well as its possible content.

The issue of recognition and protection of Aboriginal and Torres Strait Islander cultures and languages was raised at almost every consultation. For this reason, the issue is considered separately in 3.3.

Consultations

Location of a statement of recognition

Participants at consultations strongly supported recognition of Aboriginal and Torres Strait Islander peoples in a preamble to the Constitution.

> If it eventuates that there is not enough mainstream support and that it would be too hard to get support to remove discriminatory clauses, then at the least we need acknowledgement in a preamble.[15]

There was also strong support for a statement of recognition in the body of the Constitution. People who advocated this referred to the possibility of practical legal outcomes, and the symbolic strength of recognition in the Constitution 'proper'.

> Aboriginal and Torres Strait Islander peoples are not adequately recognised in the Constitution and it's very important to us for this to happen as soon as possible, and in the body of the constitution, not as a preamble to it.[16]

Some queried whether it was possible to have recognition in a preamble as well as in the body of the Constitution.

> Is there any reason that you couldn't have both? I like the idea that it's the first thing you read [in the preamble] but also in the body as law. It would have social and moral value.[17]

'First peoples', 'first Australians'

Consultations also revealed wide support for constitutional recognition of Aboriginal and Torres Strait Islander peoples as the 'first peoples' of Australia. Other expressions used included 'original Australians', 'first nations', and 'first Australians'.

> People are talking about 'Indigenous', 'first nations', etc. For me, I have a wife who is a Torres Strait Islander and my kids are mixed. So I have an issue with the word 'Indigenous'. Often Torres Strait Islander peoples are not recognised. They are their own people, they are not Aboriginal, so this difference should be reflected as it's about identity.[18]

> That terminology 'first Australians' does not mean anything unless it is in the Constitution. This would give us recognition and respect and give us a way forward.[19]

As discussed in 4.5, a survey by the National Congress of Australia's First Peoples indicated that the expression 'first Australians' was not popular among its membership.

At almost all consultations there was discussion of the historical and ongoing importance of lands and waters for Aboriginal and Torres Strait Islander peoples. A number of participants argued that the Constitution should expressly dismiss the notion that Australia was terra nullius *at the time of European settlement.*

Lands and waters

At almost all consultations there was discussion of the historical and ongoing importance of lands and waters for Aboriginal and Torres Strait Islander peoples. A number of participants argued that the Constitution should expressly dismiss the notion that Australia was *terra nullius* at the time of European settlement.

> All Aboriginal and Torres Strait Islanders will agree that land is the most important thing to them. The way we deal with native title, mining and government—what we put in the Constitution has to make this process stronger or better. Aboriginal peoples are so diverse around the Kimberley let alone the Australian continent, but we all share a common value of the importance of land.[20]

> Connection to land is very, very important; and our continual connection should be recognised.[21]

> Any recognition must allow us to maintain ties to our lands, our ancestors and foster our tradition customs.[22]

> We should recognise the first peoples' spiritual connection to land and water (ownership is a European concept). I think it is important that the context not be just historical. There needs to be a context that has currency today as well.[23]

> Australia was created on lack of consent and a myth of *terra nullius*. This history should be addressed in a preamble.[24]

There was considerable discussion of the appropriate terminology to recognise the relationship of Aboriginal and Torres Strait Islander peoples with their lands and waters. Suggestions included 'original owners' and 'first custodians'. Other comments focused on the spiritual, social, cultural and economic nature of the relationship, and the continuing rights and entitlements arising from the relationship.

> It's more than ownership. There is a word somewhere that is a better fit. Maybe something that refers to the spiritual connection between Aboriginal peoples and the land.[25]

Aboriginal and Torres Strait Islander histories

Significant support was expressed at consultations for recognition of Aboriginal and Torres Strait Islander histories in the Constitution. Although some discussion focused on recognition of the history of Aboriginal and Torres Strait Islander peoples before European settlement, much of the focus was on recognition of the injustices inflicted upon Aboriginal and Torres Strait Islander peoples since 1788, with some emphasis placed on the need to redress past wrongs.

> It's really important that the story of Aboriginal people is told in the Constitution—if you say that this is a country that has had people here since time immemorial, that it wasn't *terra nullius*, that there were people here with different languages and culture, and this is told in the introduction, then it would set the context and we don't start with us—it could create a Constitution unlike any other.[26]

> The hurts of the past and the present need to be talked about.[27]

> For the stolen generation mob the bringing them home stuff was great but… [t]here are people still walking around incomplete. If this document is going to leave us still incomplete I'm not for it. If this document does not recognise who I am and complete me and recognise where you are then I don't want it.[28]

> Constitutional recognition should ensure there is a shared understanding of Australian history, both prior to European settlement and post-1788. The Aboriginal experience must be more widely understood in mainstream Australia.[29]

> The only way we can proceed in the future is to learn from the past. If the majority of Australians understood that our history is longer than 200 years old, then we could start to talk about why there is still hurt. The Stolen Generations aren't history, they're still here. If Australians don't understand that we don't have a hope …[30]

> This is an opportunity to share the history of this land.[31]

Other ideas in relation to a specific statement of recognition

Other ideas raised at consultations included recognising sacred sites, and including a 'Welcome to Country' in the Constitution.

> Can the Constitution recognise sacred sites like Uluṟu and Lake Eyre?[32]

> I think a 'Welcome to Country' would be appropriate in the preamble to the Constitution and I would give Indigenous people an important role in writing it. Having a welcome to the whole nation through our founding document, welcoming whoever reads the Constitution to our nation and the spirit of it. It could be a preamble in itself. Its symbolism is one of the most important aspects of it. 'Welcome to Country' was dismissed for its symbolism, but that's the whole point of it.[33]

Recognition of Aboriginal and Torres Strait Islander peoples through legislation was also raised at consultations:

> I would like to see culture somehow translated into legislation. Traditional adoption is understood and we accept this practice, but the legal system struggles with its application.[34]

Submissions

A total of 539 submissions mentioned a statement of recognition, representing 16 per cent of the submissions received by the Panel. Of these, 96 per cent supported the insertion of a statement of recognition into the Constitution.

Many submissions (83 per cent) expressed views in relation to the content of a statement of recognition. The most common suggestions included:

- recognising Aboriginal and Torres Strait Islander peoples as Australia's first peoples;
- recognising the unique cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;
- recognising Aboriginal and Torres Strait Islander peoples' relationship with their lands and waters;
- recognising Aboriginal and Torres Strait Islander ownership, custodianship and occupancy of their lands and waters; and
- recognising the unique contribution made by Aboriginal and Torres Strait Islander peoples to the life of the nation.

Around 7 per cent of submissions highlighted the need for the development of a statement of recognition to involve Aboriginal and Torres Strait Islander peoples.

> The precise form of the acknowledgement and of the commitment should be determined following a process of consultation between the Commonwealth Government and Indigenous Australians directly and through their own representative institutions in order to obtain their free and informed consent before the matter is put to a referendum. Without such consent, any statement of recognition will ring hollow.[35]

Of submissions which supported a statement of recognition, around 29 per cent indicated a preference for its inclusion in a preamble to the Constitution, whereas 14 per cent indicated a preference for its inclusion in the body. Around 23 per cent of submissions indicated a preference for it to be in the body and/or a preamble.

> I believe that symbolic and legal aspects of recognition are equally important. I would like to see recognition included in the preamble as it states who we are as a nation. However, I also realise that in order to hold weight within the law, it would need to be in the body of the document. I wonder if it could be included in both places.[36]

'The precise form of the acknowledgement and of the commitment should be determined following a process of consultation between the Commonwealth Government and Indigenous Australians directly and through their own representative institutions in order to obtain their free and informed consent before the matter is put to a referendum. Without such consent, any statement of recognition will ring hollow.'

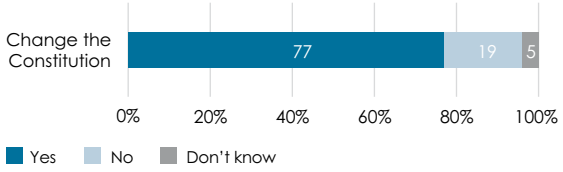
Executive Council of Australian Jewry Inc., submission no 3599

Research

As noted earlier, a survey conducted in September 2011 by Newspoll found that 24 per cent of respondents were 'very concerned' and 36 per cent 'somewhat concerned' that the Constitution does not recognise Aboriginal and Torres Strait Islander peoples. Sixty-eight per cent considered that a referendum should be held on this issue.

Seventy-seven per cent considered that the Constitution should be changed to recognise Aboriginal and Torres Strait Islander peoples (see Figure 3.4).

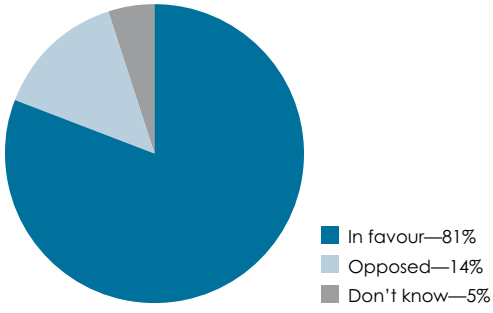
Figure 3.4: Should the Constitution be changed to recognise Aboriginal and Torres Strait Islander peoples?



Source: Newspoll survey, September 2011

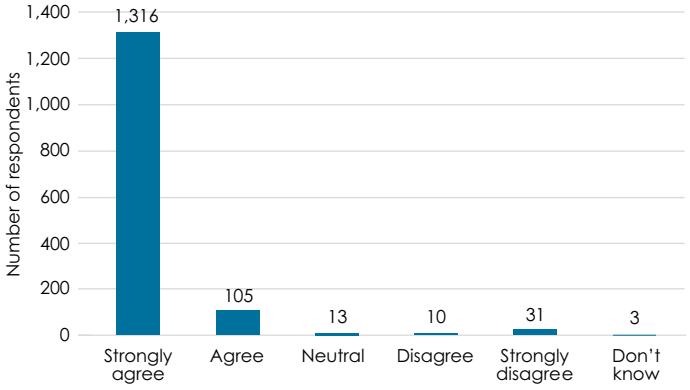
The October Newspoll survey found that 81 per cent of respondents supported amending the Constitution to recognise Aboriginal and Torres Strait Islander peoples and their cultures, languages and heritage, 14 per cent were opposed, and 5 per cent 'didn't know' (see Figure 3.5). Support for constitutional recognition of Aboriginal and Torres Strait Islander peoples alone was at least 73 per cent or higher in all States and Territories. An overwhelming majority of those who took part in the Panel's web survey also supported changing the Constitution to recognise Aboriginal and Torres Strait Islander peoples and their cultures, languages and heritage (see Figure 3.6).

Figure 3.5: Support for amending the Constitution to recognise Aboriginal and Torres Strait Islander peoples and their cultures, languages and heritage



Source: Newspoll survey, October 2011

Figure 3.6: Level of agreement for changing the Constitution to recognise Aboriginal and Torres Strait Islander peoples and their cultures, languages and heritage

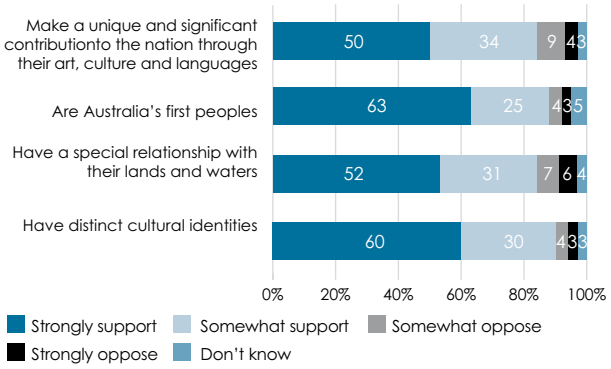


Source: Panel web survey, 27 October to 8 November 2011

These levels of support were very similar to those from the September survey, which found that 82 per cent of respondents would vote in favour of a referendum to recognise Aboriginal and Torres Strait Islander peoples, with 46 per cent 'strongly in favour' of change. Thirteen per cent were opposed, and 4 per cent indicated that they did not know.

When asked about what should be recognised, the results showed the highest levels of support for recognising Aboriginal and Torres Strait Islander peoples as 'Australia's first peoples' (88 per cent), and for a statement recognising the 'distinct cultural identities' of Aboriginal and Torres Strait Islander peoples (90 per cent) (see Figure 3.7).

Figure 3.7: Support for possible content of a statement in the Constitution recognising Aboriginal and Torres Strait Islander peoples



Source: Newspoll survey, September 2011

The October 2011 survey conducted by Newspoll found that a statement of recognition emphasising Aboriginal and Torres Strait Islander peoples' relationship with their traditional lands and waters, and the rights and

entitlements that come from this relationship, was supported by 73 per cent of those respondents who would otherwise support a constitutional amendment.

Participants in the exploratory qualitative research conducted by Newspoll in August 2011 expressed most support for the recognition of cultural identity and Aboriginal and Torres Strait Islander peoples' custodianship of, and connection to, land. Recognition of 'self-determination' and 'sovereignty' received unsupportive responses.

Auspoll research commissioned by Reconciliation Australia found that most people supported changing the preamble to recognise the importance of all Australians, including Aboriginal and Torres Strait Islander peoples, English settlers and other migrants. The results showed a much higher level of support for recognising all Australians (61 per cent), compared with only recognising the place of Aboriginal and Torres Strait Islander peoples (42 per cent).[37]

The National Congress of Australia's First Peoples released a survey of its members' views in July 2011. The results showed that almost 90 per cent of respondents considered it important that Aboriginal and Torres Strait Islander peoples are recognised in the Constitution. Key concepts and words that respondents considered should be in such a statement included 'spiritual, social, cultural and economic relationship with traditional lands and waters' (43 per cent identified these as their first choice), 'original custodians of the land' (30 per cent), and 'ownership of traditional lands and waters (almost 20 per cent).

Issues relating to a statement of recognition are considered further in Chapter 4.

'The need for recognition of the special status and place of the First Australians is no longer a matter for debate.

'FECCA believes that the recognition of Aboriginal and Torres Strait Islander culture as distinct and unique holds important outcomes for all Australians.

'The recognition of the uniqueness and importance of Aboriginal and Torres Strait Islander cultures takes the next steps towards the creation of trust and relationship building with the First Australians.'

Federation of Ethnic Communities' Councils of Australia, submission no 3271

3.3 Aboriginal and Torres Strait Islander cultures and languages

The recognition and protection of Aboriginal and Torres Strait Islander cultures and languages was raised at almost all consultations, and in numerous submissions to the Panel.

Consultations

> Aboriginal cultures need to receive greater constitutional protection.[38]
>
> We must protect culture otherwise it will be lost forever. Historical assimilation policies were highly detrimental to our people and our culture.[39]
>
> Preserving culturally significant sites: property owners won't tell us if they find anything, because they are scared we will take land away from them, even though that's not how it's going to happen, they are scared.[40]
>
> Recognition must ensure that protection of culture is strengthened.[41]

There were numerous calls for Aboriginal and Torres Strait Islander history to be taught in schools.

> I would hope that this process would bring the education system together. In education we only learned about the European version of history, we did not get anything from before 1788 or what happened from an Aboriginal perspective after this point. I think it would be important for the Aboriginal history to be documented and awareness of Aboriginal culture to be taught in schools.[42]

> Aboriginal history should be part of school teachings/curriculum. I understand how important aboriginal history, local languages, and culture are to keep our new generations safe and healthy. It needs to be in schools.[43]

There was particular support at consultations for constitutional recognition of Aboriginal and Torres Strait Islander languages.

> New Zealand and South Africa have indigenous languages in their national anthems and convey a sense of national pride of the diverse cultures that make up those countries. I hope that recognition would prompt equivalent national pride in Australia.[44]

> What we want to see happen across Australian educational institutions is for all Australian people to learn indigenous languages and cultures in schools and universities to strengthen our own culture and languages in our schools. It's not happening enough—we need them to all have indigenous languages included in the curriculum. We want other Australians to learn an indigenous language and about culture, this is the missing link. They misunderstand a lot because of their lack of understanding about indigenous peoples and culture—it should be taught, the history before Captain Cook came, the history of indigenous peoples in Australia. All peoples in all schools have to learn this and we want that included—to recognise.[45]

Many participants expressed concern that past policies of discrimination have led to a loss of language, and supported the importance of bilingual education, especially in the Northern Territory.

> What worries me is whether we are still going to be able to practise our ways under the anti-discrimination laws and have our language back, which for years we were told we could never speak. These are the things that worry me. Under the anti-discrimination laws—we still don't come under them with our own language. So is that going to be changing the anti-discrimination laws so that we can speak our language?[46]

> Most of the languages are living languages but bilingualism has been taken away from the schools.[47]

Submissions

In addition to submissions calling for constitutional recognition of Aboriginal and Torres Strait Islander cultures and languages, a number of submissions suggested that school curriculums should include the histories, cultures and languages of Australia's first peoples.

'Aboriginal and Torres Strait Islander history and culture should be a compulsory part of all school curricula. This would help to break down the barriers and help non-Aboriginal people to understand the many problems that Aboriginal and Torres Strait Islander peoples have to face and to help eliminate the problems. It would also help us to appreciate the wonderful culture that is in this land. Teaching local Aboriginal and Torres Strait Islander languages would also be great.'

Dianne Abbott, submission no 2630

The Cape York Institute, in particular, provided a detailed proposal for a constitutional amendment to recognise and protect Aboriginal and Torres Strait Islander languages.[48]

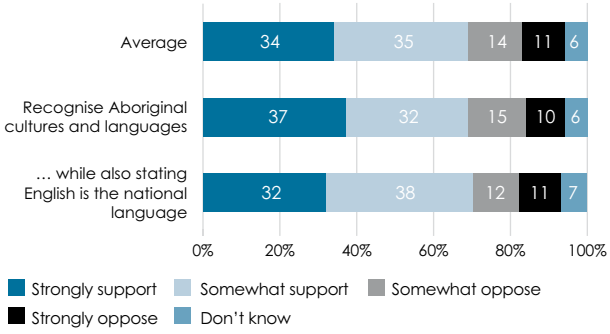
Constitutional recognition and protection of Aboriginal and Torres Strait Islander peoples' cultures and languages is considered in Chapter 4.

Research

The exploratory qualitative research conducted in August 2011 by Newspoll found that the concept of recognising Aboriginal languages in the Constitution was generally opposed. Reasons given by participants included that it was not practical or achievable when there are so many different Aboriginal languages. While preservation of Aboriginal languages was seen as desirable, it was not considered appropriate for inclusion in the Constitution. Some participants were concerned that legislation to encourage the use of Aboriginal languages might lead to compulsory language lessons for all Australians.

The September Newspoll survey found 70 per cent support for the recognition of Aboriginal and Torres Strait Islander cultures and languages in the Constitution. Thirty four per cent were 'strongly' supportive, while 24 per cent were opposed, including 11 per cent who were 'strongly' opposed. The September survey also found that including a statement that would enshrine English as the national language made little difference to levels of support (see Figure 3.8).

Figure 3.8: Levels of support for recognising Aboriginal and Torres Strait Islander cultures and languages, with and without a statement that English is the national language



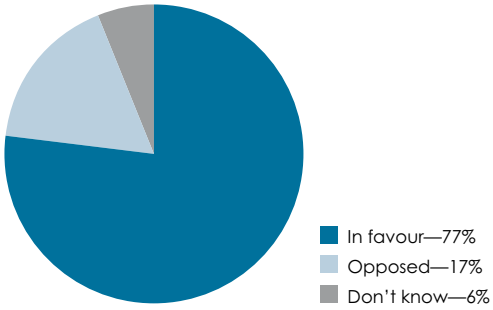
Source: Newspoll survey, September 2011

The nationally representative survey conducted for the Panel by Newspoll in October 2011 tested support for amending the Constitution so that English is recognised as the national language of Australia, and Aboriginal and Torres Strait Islander languages are recognised as the original Australian languages. Respondents were told that 'it has been estimated the knowledge

of Australia's Indigenous languages will be lost within 10 to 30 years unless steps are taken to prevent this'.

The October survey found that 77 per cent of eligible voters were in favour of recognising English and Aboriginal languages in the Constitution, 17 per cent were opposed, and 6 per cent 'didn't know' (see Figure 3.9).

Figure 3.9: Levels of support for amending the Constitution so that English is recognised as the national language of Australia and Aboriginal and Torres Strait Islander languages are recognised as the original Australian languages



Source: Newspoll survey, October 2011

The October survey also asked about amending the Constitution to insert a guarantee that all Australian citizens have the right to learn, speak and write the languages of their choice. This possible amendment received a lower level of overall support (66 per cent).

3.4 A statement of values

The Panel's discussion paper raised the idea of adding a statement to the Constitution describing the Australian people's fundamental values, such as a commitment to democratic beliefs, the rule of law, gender equality and acknowledgment of freedoms, rights and responsibilities.

Consultations

Consultations revealed limited support for the inclusion of a statement of values in the Constitution. Concern was expressed that a statement of values could be divisive and politically risky, reducing the chances of success at referendum.

> These ideas [a statement of values in a preamble] and [a statement of recognition and a statement of values in a preamble] will be a legal and political minefield that you may not be able to surmount.[49]

Those who supported a statement of values referred to the potential for bringing all Australians together.

> We want to be whole; we want no division in the Constitution. We want it to bring us together, not be divisive. Maybe bringing broader values is the way to get people over the line, to have that holistic view we're looking for.[50]

The questionnaire distributed at Panel consultations and with information packs asked about adding a statement of recognition 'accompanied by a statement of values that describes the Australian people's fundamental values' to the Constitution. Seventy-nine per cent of Aboriginal and Torres Strait Islander respondents 'strongly agreed' and 9 per cent 'agreed' with this suggestion. Among all respondents, 64 per cent 'strongly agreed' and 14 per cent 'agreed'.

Submissions

A small number of submissions (3 per cent) received by the Panel supported a statement of values. The suggested content of a statement of values included, in order of preference, equality (including both gender and racial equality), the rule of law, freedom, democratic belief, various rights, and non-discrimination and human dignity.

Of the submissions that referred to risks and limitations associated with a statement of values, most commented on the difficulty of agreeing upon a set of 'values'.

Research

Exploratory qualitative research undertaken for the Panel in August 2011 inquired about the possible inclusion of a statement of values alongside a statement of recognition. Participants in the research indicated that they did not see a logical connection between a statement recognising Aboriginal and Torres Strait Islander peoples in the Constitution and recognition of broader values.

The question of a statement of values is considered further in Chapter 4.

3.5 The 'race' provisions

The Panel's discussion paper noted that two provisions of the Constitution—sections 25 and 51(xxvi)—contemplate discrimination on the grounds of race. The discussion paper included among its ideas the possible deletion of these provisions.

Consultations

During public consultations, sections 25 and 51(xxvi) featured prominently in discussion. Many participants identified the removal of these sections from the Constitution as a priority. A number of participants were concerned

that the public is not aware of these provisions, and that any attempt to change them should be accompanied by an education campaign.

> I have some concerns about the race power. I think the way that's going to be [received] very much depends on how well the wide Australian community will be educated.[51]

An overwhelming majority of participants supported the removal of section 25. Many participants expressed the opinion that the provision reflects values which are inappropriate in contemporary society. Some participants focused on the conflict between section 25 and Australia's underlying democratic values. A common theme was that section 25 has potential application to all groups within Australia's multicultural society, and its removal is therefore likely to receive widespread support.

> In terms of any provision of the Constitution that creates powers to discriminate against or favour people on the basis of race is anathema to the views of Australia as a multicultural society. Let's get rid of section 25, which allows a state to prevent a race from voting.[52]

The majority of participants who discussed section 51(xxvi) supported its amendment or removal, or its replacement with a new head of power. Numerous participants urged the Panel to proceed with caution in developing proposals in relation to this provision because of concern as to the impact of its removal on legislation enacted in reliance on it.

> Removal of section 25 seems obvious. Care must be taken in drafting a new section 51(xxvi) because of the interdependent relationship between this section and native title, heritage laws and educational support.[53]

The focus of comments on section 51(xxvi) was in its potential use by the Commonwealth Parliament to make laws to the detriment of Aboriginal and Torres Strait Islander peoples. Disappointment was expressed in relation to the interpretation of section 51(xvii) following its amendment at the 1967 referendum.

> The 1967 referendum left interpretive ambiguity over section 51(xxvi). So the result of three decades of advocacy for some form of recognition and an amendment of the race power was used for the detriment.[54]

> I went to a High Court case a number of years ago now— the Hindmarsh Island case with the Ngarrindjeri people. I just thought it was an amazing thing that argued against the case, which was that section 51(xxvi) can be used to the detriment of Aboriginal people. And that's apparently one of the technicalities that lost them [the Ngarrindjeri people] that case. The memory of this is really important to a lot of people. That's a really important point that has to be brought up.[55]

Ideas for changing the 'race power' included replacing it with a power to make laws for any group or community on the basis of need. There were frequent suggestions to alter the power to make clear that it could only be used for the 'benefit' or 'advancement' of a particular racial group. There was some concern expressed as to the interpretation of 'benefit' and 'advancement'.

Another idea was for a requirement for 'the free, prior and informed consent' of a group before legislation could be enacted for that group.

> Adjust this clause so it doesn't just refer to traditional land holders. We are a multicultural society, broaden the spectrum to include multi-racial groups who require additional support—then this would allow government to formulate legislation for any group or community in need.[56]

> Given that Australia has signed off on this international agreement, it does not make sense for Aboriginal people not to be recognised in the Constitution. Rights including 'self-determination' and 'free, prior and informed consent' should be transplanted from the Declaration into our Constitution.[57]

> Section 51(xxvi) needs to be addressed; 'benefit' is a very subjective word so to address the issues around the race power we may need a clause to be added to section 51(xxvi) that stipulates it can only be exercised with the 'free, prior and informed consent' of that particular race.[58]

> Whatever goes into the preamble or body, all the wording should be 'for the betterment of the Aboriginal people'.[59]

> Regarding benefit: has there been much discussion on how Aboriginal people could determine what benefit is? It is a legalistic framework but at least it opens up the question whereas now it is all dictated by the state.[60]

Some participants suggested changes to require greater scrutiny of the impact on Aboriginal and Torres Strait Islander peoples by Parliament when enacting legislation.

> Both sides of politics thought that [the Northern Territory Emergency Response] was for the benefit under 51(xxvi). This [change] would slow those decisions down, make those decisions contestable and require more scrutiny. It would also encourage more media scrutiny on Aboriginal issues. [It would create a] built-in safety net, a check and balance.[61]

A number of participants referred to the irrelevance of the concept of 'race' in contemporary Australia, and discussed the social construction of the concept.

> I think there should be no reference to race in any form, it has nothing to do with anything, laws should be made using some other form of words.[62]

> The concept of 'race' should be removed from the Australian Constitution. It is an archaic social construct which does not have a place in modern Australia.[63]

Responses to the Panel's consultation questionnaire by Aboriginal or Torres Strait Islander people showed strong support for changes to the 'race' provisions. There was also strong support from non-indigenous respondents.

Responses to the Panel's consultation questionnaire by Aboriginal or Torres Strait Islander people showed strong support for changes to the 'race' provisions. Seventy-seven per cent 'strongly agreed' with removing section 51(xxvi), 75 per cent with changing section 51(xxvi) to ensure that laws cannot discriminate against Aboriginal and Torres Strait Islander Australians, and 78 per cent with removing section 25. There was also strong support for these options from non-indigenous respondents.

Submissions

Of the total submissions received by the Panel, 280 referred to section 25. Of these, 97.5 per cent supported the removal of the provision.

The reasons most frequently provided in support of the removal of section 25 were that it is racially discriminatory, is outdated, and serves no useful purpose in contemporary Australia.

> Considering the racial and undemocratic nature of section 25, we submit that this section allows for laws that disenfranchise, disempower and discriminate against entire groups of people in our society. We suggest that such laws are not reflective of the values of modern Australian society, which do not accept exclusion on the basis of race. We thus submit that any referendum placed before the Australian people concerning constitutional recognition of Indigenous Australians include a question repealing section 25.[64]

> Section 25 is a provision that contemplates the possibility that State governments might exclude some Australians from voting in State elections on the basis of their race. This section is undemocratic and should be removed from the Constitution.[65]

> The [service] supports the repeal of section 25 as being anachronistic and being contrary to values of inclusion, equality and respect for the diversity of cultures.[66]

Only 2 per cent of submissions that addressed section 25 supported its retention.

> This section is designed to punish any State which refuses the right to vote to any particular ethnic group. As unimaginable as it may seem in our current social climate, should such a State ever disqualify a race from voting, this section may be necessary to ensure that that State is punished by being given fewer seats in the House of Representatives.

> To repeal Section 25 would be to diminish important constitutional protections for ethnic minorities—protections that ensure their voice is heard in our democracy.[67]

Almost 10 per cent of the submissions received by the Panel (322) referred to the 'race power' in section 51(xxvi). Of these, 94 per cent supported some form of change. The majority (57 per cent) supported repealing the race power. A substantial minority (32 per cent) supported amending it. A further 120 submissions (3 per cent) made general statements about removing racially discriminatory provisions from the Constitution, while not directly addressing changes to either section 25 or section 51(xxvi).

> It can therefore be argued that section 51(xxvi) of the Australian Constitution is essentially racist and inconsistent with both Commonwealth and international laws regarding racial discrimination. In view of the upcoming referenda, it is difficult to conceive that it would be socially just to allow this constitutional power to stand, or to amend it in such a way as to uphold its constitutional validity.[68]

'Considering the racial and undemocratic nature of section 25, we submit that this section allows for laws that disenfranchise, disempower and discriminate against entire groups of people in our society. We suggest that such laws are not reflective of the values of modern Australian society, which do not accept exclusion on the basis of race.'

Constitutional Law students, University of Wollongong, submission no 2655

Numerous submissions supported the insertion of a new power to make laws with respect to Aboriginal and Torres Strait Islander peoples to replace section 51(xxvi).

> If a new head of power is created to replace the race power, it should be based on culture, historical disadvantage and the unique place of Aboriginal and Torres Strait Islander peoples as the descendants of the original owners, occupiers and custodians of Australian land and waters.[69]
>
> A new head of power should be inserted to allow governments to make laws for the benefit of 'First Peoples'.[70]
>
> The removal of the race power and replacement of that with a power to make beneficial laws for Aboriginal and Torres Strait Islander Peoples for the protection of their culture, to remedy historical disadvantage and with respect to their unique place in this nation. Such laws should only be made with the full, prior and informed consent of the relevant Aboriginal and Torres Strait Islander Peoples affected by any proposed laws or their representatives.[71]

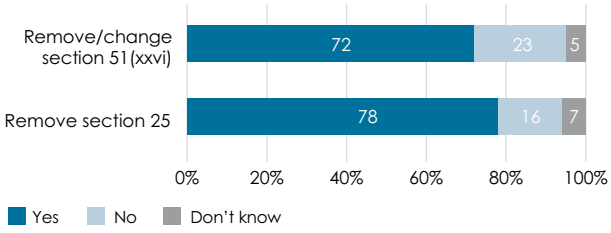
'We believe that the race power should be removed and a new power to make laws enacted in its place. We recognise the need for the Federal Government to have the power to legislate with respect to Aboriginal and Torres Strait Islander people in order that the Government continue essential service delivery, protect culture and overcome disadvantage. We support the creation of a new head of power that allows the Federal Government to legislate with respect to Aboriginal and Torres Strait Islander people.'

Kingsford Legal Centre, submission no 3570

Research

A survey conducted for the Panel in September 2011 by Newspoll found that 78 per cent supported removing section 25, and that nearly three-quarters (72 per cent) believed that the 'race power' in section 51(xxvi) should be either changed or removed from the Constitution (see Figure 3.10).

Figure 3.10: Support for changing sections 51(xxvi) and 25 of the Constitution

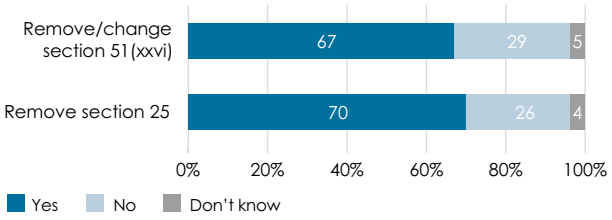


Source: Newspoll survey, September 2011

The September 2011 survey also asked respondents concerned about these provisions whether a referendum should be held to change them, and whether they would vote in favour of changes at such a referendum. The survey found that 81 per cent of respondents were concerned about section 25, with 52 per cent 'very concerned', and 29 per cent 'somewhat concerned'. Seventy per cent thought that a referendum should be held on the issue. When asked how they would vote at a referendum, 82 per cent indicated that they would vote in favour of removing section 25, including 53 per cent who were 'strongly' in favour of this. Fifteen per cent were opposed, and 4 per cent 'didn't know'.

The September 2011 survey also found that 71 per cent of respondents were concerned about the 'race power', with 33 per cent being 'very concerned', and 38 per cent 'somewhat concerned'. Two-thirds (67 per cent) thought that a referendum should be held on the issue (see Figure 3.11).

Figure 3.11: Support for holding a referendum on the 'race power'



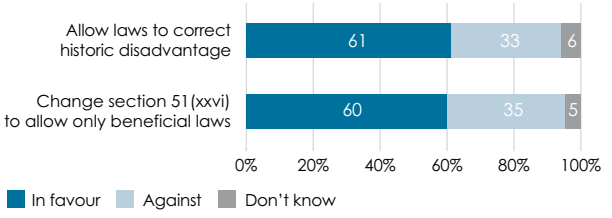
Source: Newspoll survey, September 2011

The September 2011 survey also asked about possible options for changing the 'race power' in section 51(xxvi). Sixty per cent supported changing section 51(xxvi) to provide that the Commonwealth can only make laws for the benefit of racial groups (see Figure 3.12). Twenty-five per cent 'strongly' supported this change. One-third (35 per cent) were opposed to the idea, including 18 per cent who were 'strongly' opposed.

Sixty-one per cent supported inserting a provision in the Constitution to allow the Commonwealth to make laws to correct the historic disadvantage experienced by Aboriginal and Torres Strait Islander peoples. Twenty-eight per cent 'strongly' supported this change. One-third (33 per cent) were opposed, including 16 per cent who were 'strongly' opposed.

The September 2011 survey also discussed other changes in connection with the removal of the 'race power' and its replacement with a new head of power, in particular the insertion of a new provision prohibiting racial discrimination. The idea for a racial non-discrimination provision is considered in Chapter 6.

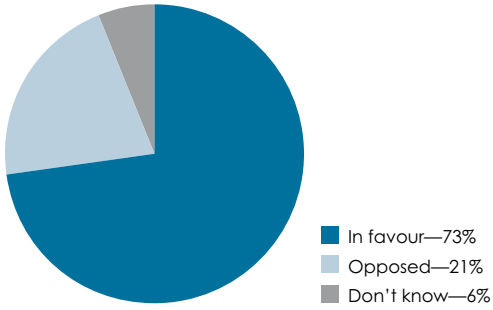
Figure 3.12: Support for options to change the 'race power'



Source: Newspoll survey, September 2011

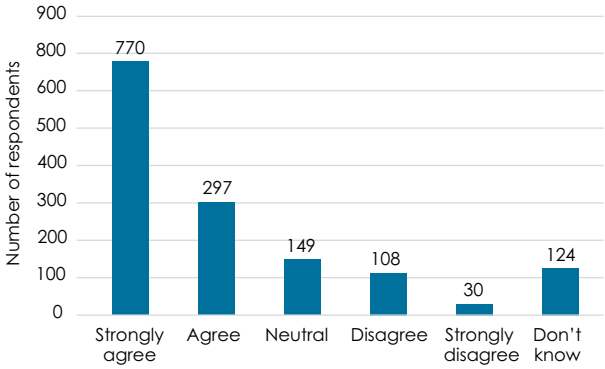
The October Newspoll survey found that 73 per cent were in favour of removing the current provisions in the Constitution that refer to 'race' (see Figure 3.13). The Panel's web survey also found a strong level of support among respondents for removing these provisions (see Figure 3.14).

Figure 3.13: Support for removing current provisions in the Constitution that refer to 'race'



Source: Newspoll survey, October 2011

Figure 3.14: Level of agreement for removing current provisions in the Constitution that refer to 'race'



Source: Panel web survey, 27 October to 8 November 2011

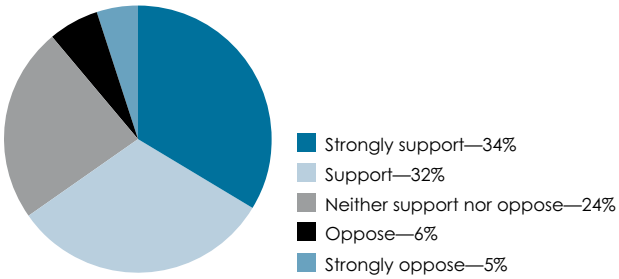
The October 2011 Newspoll survey also tested support for changes to the 'race power' to insert a new head of power for the Commonwealth Parliament to make laws with respect to Aboriginal and Torres Strait Islander peoples. The survey found that 57 per cent were in favour of such a change, 28 per cent opposed it, and 14 per cent 'didn't know'. There was more than 50 per cent support in all States and Territories for a new head of power.

Research conducted for Reconciliation Australia by Auspoll in February 2011 also found that a clear majority of Australians surveyed supported removing sections of the Constitution that allow discriminatory laws to be made against people based on their race (see Figure 3.15).[72]

Issues relating to the 'race powers' in sections 25 and 51(xxvi) are considered in more detail in Chapter 5.

Research conducted for Reconciliation Australia by Auspoll in February 2011 also found that a clear majority of Australians surveyed supported removing sections of the Constitution that allow discriminatory laws to be made against people based on their race.

Figure 3.15: Support for removing sections of the Constitution that allow discriminatory laws to be made against people based on their race



Source: Auspoll research for Reconciliation Australia, February 2011

3.6 A racial non-discrimination provision/ equality guarantee

Consultations

The idea of a non-discrimination provision was discussed at many consultations.

> [The] Constitution is about everybody being equal; the Constitution should address this without the titles [such as race]. This creates segregation, division and resentment.[73]

> I strongly endorse the comments made earlier about the importance of addressing racial discrimination in the Constitution, independent of a race power. Constitutions tend to be in Australia, various state documents. So if we're talking about if there's going to be a national power in relation to Aboriginal and Torres Strait Islander people in the Commonwealth Parliament and national laws in that area, we have to think about what are the laws that the Panel wants and the community wants the Parliament to make in 50 years' time. And the easiest way to answer that question is very broad and neutral wording like a power in respect to Aboriginal and Torres Strait Islander people and if there's a non-discrimination clause then that's going to perhaps put some safeguards around that power.[74]

> Insertion of the Declaration on the Rights of Indigenous Peoples would address issues of equality and discrimination in the current Constitution.[75]

Eighty-four per cent of people identifying as Aboriginal and/or Torres Strait Islander, and 82 per cent of all people, who responded to the questionnaire distributed at Panel consultations and with information packs 'strongly agreed' with adding a racial non-discrimination/equality provision to the Constitution.

Submissions

A key concern raised in submissions was ensuring that a racial non-discrimination provision did not prevent the adoption of laws or measures to redress disadvantage and recognise the cultures, languages or heritage of any group.

About one-half (49 per cent) of the 302 submissions received by the Panel that supported a change to section 51(xxvi) also supported the insertion of a racial non-discrimination or equality provision.

> The Constitution should be amended to prohibit any laws that would discriminate on the basis of culture, ethnicity, religion and Aboriginal and Torres Strait Islander peoples as the descendants of the original owners and occupiers of Australia.[76]

A key concern raised in submissions was ensuring that such a racial non-discrimination provision did not prevent the adoption of laws or measures to redress disadvantage and recognise the cultures, languages or heritage of any group.

> In the laws of the Commonwealth, States and Territories racial equality and racial non-discrimination are guaranteed principles. However no law made and which remains necessary for the benefit of the people of any race, to reduce or eliminate the impact of past racial inequality of discrimination, shall infringe those principles.[77]

A number of submissions argued for a broader equality guarantee, encompassing discrimination on the basis of age, gender, race, religion, culture, disability, sexuality and other grounds.

> A new guarantee should be inserted to ensure for the first time in our history that no one will be discriminated against on the basis of their age, gender, race, religion or culture. By stating this in explicit terms we would offer Aboriginal and Torres Strait Islander people the strongest guarantee against the discrimination that they have endured for more than two centuries.[78]

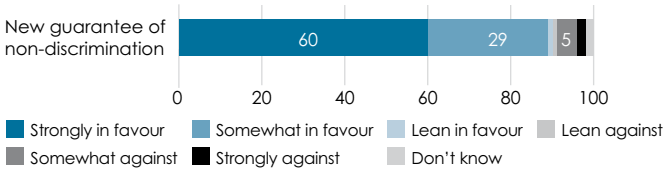
Research

Initial exploratory qualitative research conducted for the Panel by Newspoll in August 2011 found that participants were generally supportive of inserting a guarantee of non-discrimination in the Constitution. Regarding a 'special measures' clause to address disadvantage and discrimination, respondents did not mind the idea of making laws for the 'benefit' of racial groups, so long as there was no chance that this power would be abused in future.

The September Newspoll survey found that a very large majority of eligible voters (90 per cent) supported the idea of inserting a new guarantee in the Constitution to protect all Australians from racial discrimination. This included 60 per cent who were 'strongly in favour' of such a change (see Figure 3.16).

The September Newspoll survey found that a very large majority of eligible voters (90 per cent) supported the idea of inserting a new guarantee in the Constitution to protect all Australians from racial discrimination.

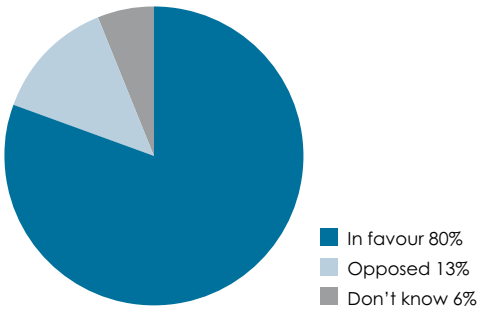
Figure 3.16: Likely support at a referendum vote to change the Constitution by inserting a new guarantee making a commitment to protect all Australians from racial discrimination



Source: Newspoll survey, September 2011

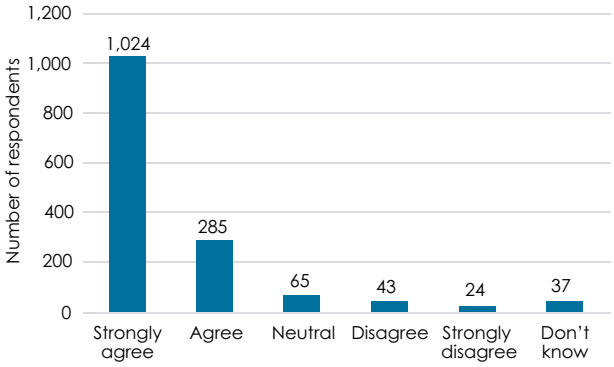
The October Newspoll survey found that 80 per cent of respondents were in favour of amending the Constitution by inserting a provision that prevents laws that discriminate on the basis of race, colour or ethnic origin (see Figure 3.17). The Panel's web survey found a similarly high level of support among respondents (see Figure 3.18). In the October Newspoll survey, the level of support ranged from 78 per cent to 88 per cent across the States and Territories (see Figure 3.19). These issues are explored in more detail in Chapter 6.

Figure 3.17: Support for amending the Constitution so that there is a new guarantee that prevents laws that discriminate on the basis of race, colour or ethnic origin.



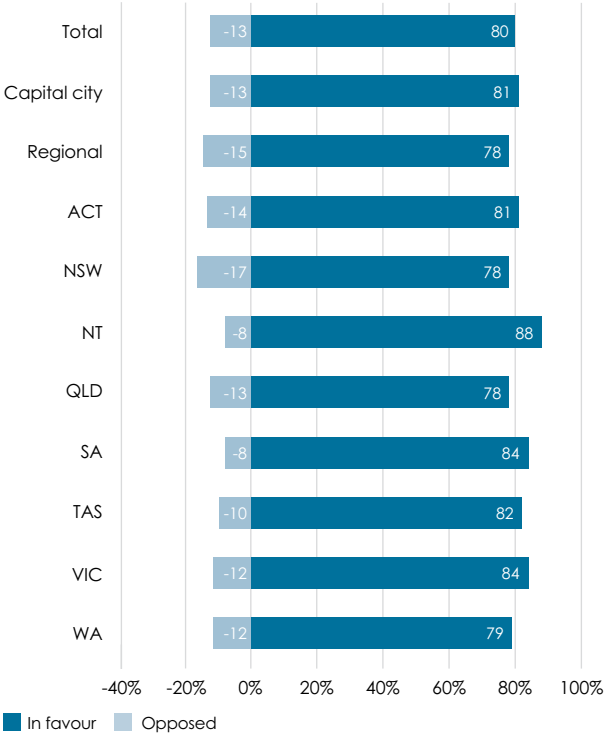
Source: Newspoll survey, October 2011

Figure 3.18: Support for inserting a provision that prevents laws that discriminate on the basis of race, colour or ethnic origin into the Constitution



Source: Panel web survey, 27 October to 8 November 2011

Figure 3.19: Support for amending the Constitution so that there is a new guarantee that prevents laws that discriminate on the basis of race, colour or ethnic origin, by State and Territory and region



Source: Newspoll survey, October 2011

3.7 Governance and political participation

Consultations

The idea of establishing dedicated parliamentary seats for Aboriginal and Torres Strait Islander representatives was raised at many consultations. Many participants expressed the view that ensuring additional representation in Commonwealth and State and Territory parliaments would provide a greater voice for Aboriginal and Torres Strait Islander peoples. New Zealand was frequently cited as an example.

> Is there multiparty support only for a preamble, or will it extend to other things, like extra seats in parliament for example? We need more of our people and our voice in parliament.[79]

> We should be able to look at other countries, like New Zealand, which has reserved seats for Māori people.[80]

> New Zealand also has special dedicated seats in Parliament for indigenous people, worked out on a per capita basis—just wanted to raise these considerations and note that it's important to consider that experience.[81]

> I don't feel like there is equal discussion in Parliament for Aboriginal people. Will there be designated seats for Aboriginal people in Parliament?[82]

Many participants also pointed to Canada as an example of how a settler society has accommodated indigenous peoples in a way that has resulted in a significant political voice.

> Canada did this [constitutional reform] in 1982 and the sky did not fall in. It has benefited their indigenous people in huge ways.[83]

> I'd like to see multiple questions. The public is wise enough to figure it out. The Canadian Constitution (sections 15 and 35) outlines great rights to protect civil liberties—so be brave and ask for more![84]

> In 1982 the new Canadian constitution had a Charter of Rights to secure legal and formal recognition. Aboriginal rights sit alongside other rights—it gives a legal identity with a constitutional foundation from which to call for a treaty to settle unfinished business.[85]

> First nations should be recognised in the Constitution, like Canada has done. We are very proud of being the first nations here before occupation.[86]

The principle of self-determination for Aboriginal and Torres Strait Islander peoples was also raised at consultations. At many consultations, it was suggested that current policies have limited the capacity of Aboriginal and Torres Strait Islander people to exercise self-determination. Issues raised in this context included the Northern Territory Emergency Response, non-recognition of governance structures and of customary law, and administrative practices in the funding and delivery of programs to Aboriginal and Torres Strait Island communities. Many participants

saw constitutional recognition as a way to return some self-governance to individuals and communities.

> I've been involved with Aboriginal health for 30 years—I want to see better funding. I don't want to be dependent on program funding and have to run cap in hand for money to extend the life of my people.[87]
>
> What works for us is culture. But when you put the machinery of government into that, it gets messed up.[88]
>
> Our traditional law is not recognised. With decision making powers you could have governance structures. People are concerned about the lack of recognition of our governance structure and our law.[89]
>
> The suspension of the Racial Discrimination Act in the NTER [Northern Territory Emergency Response] is proof of Federal Laws being used against Aboriginal peoples. As an Aboriginal person, any time the Government, State or Federal, enact a law and the power to take away—that leads to an immense amount of uncertainty. I don't see guarantees against Government acting discriminatively towards Aboriginal and Torres Strait Islander peoples.[90]
>
> Why is removal of the Racial Discrimination Act still possible under the NTER? Could they do an NTER-style intervention in other States?[91]

Submissions

Forty-five submissions raised the issue of dedicated parliamentary seats for Aboriginal and Torres Strait Islander peoples. Submissions provided a number of ideas for what such representation might look like. These included dedicated seats in both upper and lower houses of Commonwealth and State and Territory parliaments, and the provision for Aboriginal and Torres Strait Islander senators in the Senate. Other ideas included the formation of an 'Indigenous General Council' nominated by Aboriginal and Torres Strait Islander people to the Parliament to advise on laws and policies that affect Aboriginal and Torres Strait Islander peoples, and the inclusion of a 'Council of Indigenous Elders' in the Senate.

Other ideas included a ceremonial position of 'First Australian' alongside the Governor-General, and an Aboriginal Land Commission to allocate native title land among Aboriginal and Torres Strait Islander peoples. Another idea was for the Constitution to be translated into Aboriginal and Torres Strait Islander languages.

Some submissions raised concerns about the likelihood of such options, in particular dedicated parliamentary seats, succeeding at referendum.

Research

Participants in the initial exploratory qualitative research by Newspoll expressed little support for the concept of dedicated seats in the Commonwealth Parliament for Aboriginal and Torres Strait Islander persons.

A number of reasons were given for the lack of support for the idea: that the idea was seen as undemocratic and impractical in terms of representation; that it could lead to members of parliament who were ill-equipped for the job; and that it could lead to pressure from other minority groups for similar guarantees of representation.

Issues in relation to governance and participation are considered further in Chapter 7.

3.8 Agreement-making

Consultations

There was widespread interest at consultations in the possibility of an agreement-making power in the Constitution. Many questions were asked about how such a power would operate, and how an agreement-making power would affect agreements currently in place, including with State governments. Some expressed a preference for legislated agreements.

> Agreement-making could be done legislatively. Local communities could enter into agreements with the Commonwealth Government on a range of issues to acknowledge the special needs of Aboriginal and Torres Strait Islander communities.[92]

The perceived benefits of an agreement-making power included that communities could be consulted in relation to and have control over their local affairs, including provision of services, infrastructure, native title and resource development.

> So in the process is there also scope to look at State and Federal bodies in the policy making where the communities have more say in what goes on and how it goes on. Currently you have government agencies which are really dancing to the tune of Canberra since 1967 which doesn't help us much.[93]

The perceived benefits of an agreement-making power included that communities could be consulted in relation to and have control over their local affairs, including provision of services, infrastructure, native title and resource development.

Discussion of an agreement-making power, agreement-making more generally, and the question of a treaty often overlapped.

The main reasons for opposing an agreement-making power include distrust of government, and concerns about the poor prospects of achieving the necessary support at referendum.

> Many people will have genuine misgivings about entrusting a government to enter into an agreement that will be binding on another government that cannot be altered by any intervention.[94]

> I still get a little bit worried that as you only get one crack at it in every 40 years or so, you'd have to have people satisfied with approach. There may be many people who wouldn't want agreements to have treaty status for example.[95]

> I'd be all for a treaty as well, and I'm sure other Aboriginal people would too, but if you put the word treaty in, it raises a red flag. Put a treaty in there, Australians will ask 'What will I lose in this?' We're not mature enough as Australians yet.[96]

The questionnaires handed out at consultations in information packs asked about adding a new section to the Constitution so that the Government could create agreements with Aboriginal and Torres Strait Islander communities that would have the same effect as Commonwealth laws. Seventy-four per cent of Aboriginal and Torres Strait Islander people 'strongly agreed', and a further 14 per cent 'agreed', with such a proposal. The overall levels of support were 56 and 15 per cent respectively.

Submissions

More than 160 submissions referred to an agreement-making power. Of these, 141 submissions (86 per cent) explicitly supported the inclusion of an agreement-making power in the Constitution. There was notable support for an agreement-making power in the Constitution from organisations, with 35 per cent of all organisations and 48 per cent of indigenous organisations addressing this issue.

> The constitution is not the right place to set out the specific terms of a treaty. The best role that the Constitution can play is to facilitate the making of such agreements in the future. Hence, the Constitution should contain a provision that permits the making of agreements between governments and Indigenous peoples. It should also give those agreements, once ratified by the relevant parliament, the full force of the law.[97]

The main reasons cited in support of an agreement-making power were that it would help in redressing past wrongs and begin healing the relationship between indigenous and non-indigenous Australians, that it would facilitate the making of a treaty or agreements at national, state and regional levels, and that it would go some way towards recognising the sovereignty and self-determination rights of Aboriginal and Torres Strait Islander peoples. Another reason often given was that agreements could lead to improved outcomes in areas such as education and health.

A view expressed frequently in submissions both in favour of and against an agreement-making power was that it may be too difficult to secure support for an alteration to the Constitution at referendum.

Research

Initial exploratory qualitative research conducted for the Panel by Newspoll in August 2011 addressed the concept of constitutional agreements. Many participants considered that these types of agreements are already in place but were unsure if they had been entrenched in the Constitution. Some questioned whether it would be necessary or desirable to include them in the Constitution. Others suggested that adoption of an agreement-making power could remove the need to amend the Constitution in other ways. While the general concept was favourably received, there was considerable confusion among participants over the intent, scope and operation of such a power.

The considerable ambiguity and lack of awareness about an agreement-making provision uncovered during this qualitative research highlighted the difficulty of testing opinion using a representative telephone survey. Accordingly, the Panel chose not to ask survey questions on this issue.

These issues are further considered in Chapter 8.

3.9 Matters of sovereignty

Consultations

At almost every consultation, Aboriginal and Torres Strait Islander participants raised issues of sovereignty, contending that sovereignty was never ceded, relinquished or validly extinguished. Participants at some consultations were concerned that recognition would have implications for sovereignty. There was also a concern that constitutional recognition and terms such as 'prior ownership' would compromise the few rights that had been won to date.

> Aboriginal and Torres Strait Islander people never ceded sovereignty in this country … we really are talking about things that matter. Aboriginal and Torres Strait Islander culture has a lot to give us. There is some unfinished business.[98]

> We should be talking about sovereign people and how they want to conduct themselves in their nation's affairs. So far discussion has focused on a model written by white people back in 1901 organising how they want to live. That model views people as individuals and has not looked at how to deal with nations of indigenous peoples. Aboriginal people organise themselves as nations of sovereign people. We need to look at how we are trying to live as sovereign nations.[99]

> We want sovereignty along with recognition. It is not realistic for us to have our own government, but we can look at the positions within government and areas for us to have power over. If the consensus in the community is that we should have a say in how this country is run then we should have a piece of it.[100]

> We need to ensure that we pursue our sovereignty and our sovereign rights.[101]

> A large number of Aboriginal colleagues simply say we don't want to be included in the Constitution. It is the sovereignty issue because we never surrendered this and it precludes us from a treaty.[102]

> Going into the Constitution relinquishes what I own. They want us to be in the Constitution now so that the Government has greater control. If we are not recognised as sovereign owners then they are not serious about including us in that book. We have got more educated in the last 100 years. Native title was a white creation, how they see land, not how we see land. It is government fear that is driving the need for this change. If we are in the Constitution it means the white law will have stronger impact.[103]

Another concern raised at consultations was that calls for recognition of sovereignty, such as calls for a treaty, could jeopardise support for other forms of constitutional recognition.

> All of these options are a tinkering of a colonial document. Is there an idea of a fundamental change recognising Indigenous sovereignty or is that too far?[104]

Related to calls for recognition of sovereignty were calls for recognition of Aboriginal and Torres Strait Islander law in the Constitution.

> Aboriginal people have a different law and it should be recognised. It should be recognised as a law that runs parallel to white law.[105]

A number of participants suggested that improved recognition of Aboriginal and Torres Strait Islander law would enhance the wellbeing of communities and lead to fewer interactions with the criminal justice system.

> Customary law should be allowed and included—if we are able to exercise our own laws then our kids wouldn't be so troubled within the current justice system.[106]

> Those sorts of agreements as well: to give our people the rights to enforce, whether it's through traditional law, mainstream law, we haven't been given the right to impose that. In our society, here we are taught to respect Elders' decisions; we can't do that because mainstream law overrides Elders' decisions.[107]

At the same time, some concerns were raised about recognition of customary law.

> Do you want to have payback? Do you want sharia law?[108]

> Recognition of Aboriginal customary law was a major issue in the drafting of the unsuccessful NT constitution put to referendum in 1998. Would the Panel include consideration of Aboriginal customary law in its report? Even a statement as bland as: 'We recognise Aboriginal people's right to live in accordance with Aboriginal laws and customs' was seen as contentious and problematic: you don't know how it will work and for which sections of the indigenous community. … In past examinations of recognition of customary law, people have said 'this is just too hard'.[109]

Submissions

A number of submissions referred to the matter of sovereignty and customary law. Some saw recognition of sovereignty and customary law as a prerequisite for constitutional recognition. Others argued that they should be considered independently of, or prioritised over, constitutional recognition. Still others argued that constitutional recognition had the potential to compromise sovereignty, and for that reason did not support recognition.

> It is grievously disingenuous for non-Indigenous Australians to acknowledge the injustice associated with the illegitimacy of non-Indigenous occupation of this country, while simultaneously consenting to the continued operation of the Constitution which otherwise formalises the de facto legal reality of non-Indigenous sovereignty over Australia.[110]

Research

Qualitative research undertaken in August 2011 by Newspoll asked participants about acknowledging the sovereignty of Aboriginal and Torres Strait Islander peoples and the right to self-determination in a statement of recognition. The research found that sovereignty and self-determination were poorly understood concepts.

Matters of sovereignty are further considered in Chapter 9.

3.10 The Panel's processes

Consultations

The Panel's processes were a particular focus of comment at consultations. Participants frequently raised the importance of the Panel consulting with Aboriginal and Torres Strait Islander peoples on a local level, and having a comprehensive understanding of the communities it visited.

> A key challenge will be how to make sure that people living in remote/isolated communities have a chance to contribute.[111]

> It would have been good if there was some groundwork carried out with tribal people prior to the consultation. The Panel should have mapped the tribal people living in this country to focus on who should get the message about constitutional change.[112]

> Speaking to Aboriginal and Torres Strait Islanders will give some views on how they would like the amendment to read to their benefit.[113]

> Consultation should happen at the grassroots level by asking community representatives their views. The Land Councils aren't too good as a representative.[114]

Participants frequently mentioned that they did not receive enough notice about the meeting, that there was insufficient time to discuss the issues in full, and that the Panel should return for a follow-up meeting. The timeframe of consultations was raised as a concern for participants at a significant number of consultations.

> What you are talking about is too complex for average people to understand and engage with. There was limited notice and the correct people were not informed about this meeting. Many others would have attended if there had have been more notice.[115]

> The Panel can't hold just one consultation here, you need to come back to allow feedback.[116]

> In my very short time, my experience is that rushing the consultation is a recipe for disaster. Consulting Aboriginal and Torres Strait Islander peoples so that they do feel consulted, and not just a tick box approach, takes more than months.[117]

There was also a suggestion at some consultations that the Panel was not consulting with a broad enough range of communities. Some participants expressed the view that the Panel should have visited all Aboriginal and Torres Strait Islander communities across the country.

> Constitutional recognition consultations should be done in an individual nation-by-nation basis.[118]

> The Panel should have gone to each individual tribe or clan group in Arnhem Land but it didn't happen.[119]

Some concern was also expressed that non-indigenous people were not adequately consulted by the Panel. Some participants suggested that the whole Australian population would need to be adequately consulted and educated in relation to constitutional recognition in order to ensure a successful referendum. Participants at consultations generally stressed the importance of ensuring that all Australians were engaged on the issue.

> There are many chairs here but they're empty. I am a bit concerned about how we are engaging different ethnic groups. They don't have a lot of knowledge about Aboriginal history and culture and they have many stereotypical thoughts.[120]

> It's not going to be Aboriginal people by ourselves who will change the Constitution—we need mainstream white Australia. That's why we need to bring people back together.[121]

Submissions

Around 50 submissions commented on the Panel's consultation processes. In these submissions, some thanked the Panel for its work, and acknowledged the difficult task of synthesising public contributions into concrete proposals for constitutional recognition. Others submissions expressed the view that the processes to date had not sufficiently raised awareness of constitutional recognition among both indigenous and non-indigenous Australians.[122]

A small number of submissions were received from individuals who had attended a public forum and found it to be a positive experience. Others felt that not enough advance notice had been provided about the forums. A few submissions contended that the time given to make submissions was too short, and not enough done to inform people about the submissions process. A few submissions regretted the fact that Aboriginal and Torres Strait Islander peoples did not have the opportunity to select their own representatives to the Panel.

3.11 Process for the referendum

Consultations

An overwhelming message received during consultations was that there was a lack of awareness and education within the Australian community about the Australian Constitution. Many comments highlighted a need for greater education about the Constitution, and the place of Aboriginal and Torres Strait Islander peoples within the Constitution. The need for a wide-ranging awareness campaign reaching all demographics was a recurring theme.

> Everyone should be posted a Constitution—it should be made more clear. Everyone knows about the American Constitution—it's in every building. But here, you go into town halls and parliament and you don't see it.[123]

> There needs to be a big awareness campaign and a high level of grassroots support to make sure we don't miss out on this historic moment. It has taken a long time to get to this point, and it would be disappointing to let it slip through our fingers. This is the first step but the most important one.[124]

The timing of the referendum was frequently raised at consultations. Many people expressed the view that a referendum on recognition of Aboriginal and Torres Strait Islander peoples should not be held at the same time as a referendum on recognition of local government in the Constitution, or any other question, or during a general election.

> I would be concerned if this is attached with another issue like local government or a plebiscite on the carbon tax. It needs to be a stand-alone issue.[125]

A recurring theme was the length of time required to build sufficient public support in order for a referendum question to succeed. Comparisons were drawn with the decade or so of campaigning that took place before the 1967 referendum. Many people, however, felt that the time was right for a referendum, and that the referendum should be held soon to avoid losing the current momentum.

> Need to take a careful look at whether the timeline is too tight for the education and community involvement required for this.[126]

> This process should not be drawn out. If this takes too long to be put before the Australian people then people will lose interest and the momentum for change will be lost.[127]

Another frequently expressed view was that the simplicity of the message of constitutional recognition would be a key for success. A number of participants raised the idea of involving media personalities and sporting stars as ambassadors for recognition to build support in the lead-up to the referendum. There were also a number of comments encouraging faith-based organisations and community groups to promote discussion of constitutional recognition within their networks.

'It is important that the wording of a referendum question be simple and clear and be couched in positive terms that will appeal to the values of all Australians.'

Hornsby Area Residents for Reconciliation, submission no 3439

My plea is not only for simplicity, but also for comprehensibility. As a non lawyer, we need to be mindful of how this is communicated to the general public. We need to have a discussion about race that brings out the best in the community, unlike many of the discussions about race we have these days. It's about equality, not about advantaging one group over another. It's not about special privileges, unlike what some people might think.[128]

Promoting corporate, sporting and arts stars who have Aboriginal and Torres Strait Islander heritage would convey the contribution of Aboriginal and Torres Strait Islander peoples to Australia and assist the educational process around the need for recognition.[129]

Submissions

Many submissions identified a number of elements critical to the success of a referendum on constitutional recognition on Aboriginal and Torres Strait Islander peoples. These included the need for education, the timing of the referendum, the importance of ownership and consent by Aboriginal and Torres Strait Islander peoples, the importance of popular ownership, and the indispensability of leadership and cross-party support.

> I would contend that a highly visible, co-participatory public education campaign waged through public meetings and social and traditional media might be the best way to achieve a positive referenda vote.[130]
>
> Innovative campaigning and engagement options should be utilised so that the process enthuses and encourages participation, discussion and debate. For example, town hall meetings, people's parliaments, school-based preamble writing competitions based on issues proposed by the Panel and social media should play a part in engaging the Australian public in this important national discussion. Civil society organisations should also be harnessed to engage with their constituents and build public support and understanding.[131]
>
> Nothing should be done concerning constitutional recognition of our Indigenous people without a proper, thorough and transparent process of consultation with them in all of their varieties. There must be no more rushed political moves to meet other peoples' agendas ... Our Indigenous peoples walk to a different drum. And if that requires a longer process for accomplishment than two years, then so it must be.[132]
>
> Constitutional reforms need to be seen as coming from the people, not being imposed from on high. It is also important to establish the need for reform and to have a clear narrative that explains what is needed and why.[133]
>
> Bipartisan political support is vital to any chance of a referendum's success. I feel strongly that any proposal which does not have bipartisan support should not be put to the public, as it is doomed to fail. The failure of the proposed referendum, or any part of it related to Indigenous people, could be more detrimental to the cause of reconciliation than not having the referendum at all.[134]

The analysis of submissions undertaken for the Panel also concluded that 'there is a commonly held view that for a referendum on the recognition of Aboriginal and Torres Strait Islander peoples to be successful, there must be a comprehensive, well-resourced and highly visible education campaign'.[135]

A few submissions also recommended reform of Australia's referendum machinery, including to the matters on which expenditure is permitted and to the 'Yes/No' format. One submission recommended implementation of the recommendations contained in the 2009 report by the House of Representatives Standing Committee on Legal and Constitutional Affairs, *A Time for Change: Yes/No? Inquiry into the Machinery of Referendums* (discussed in Chapter 10).

3.12 Other ideas for change

Consultations

As noted above, other ideas for change raised at consultations included recognition of Aboriginal and Torres Strait Islander sacred sites and a 'Welcome to Country' in the Constitution. Further ideas related to recognising the contribution to Australia's armed forces by Aboriginal and Torres Strait Islander people, the education and history curriculums, a public holiday, the national flag, the national anthem and dual naming.

> Aboriginal and Torres Strait Islander peoples have not been recognised for their contribution and efforts during the war; there was no access to entitlements to the military pensions, people were referred to as flora and fauna and were often not educated past grade four. They have been discriminated against in terms of obtaining loans, education and employment for so many years. This needs to be changed—there is strong support by the people for this process to happen.[136]

> I was born during World War II, and lived in Milingimbi when it was bombed. Most Aboriginal people helped the Air Force—but that wasn't recognised. Later, the government declared land from Groote Eylandt to Maningrida as reserved for Aborigines.[137]

There were some calls for constitutional recognition of native title.

> Land rights and native title need to be protected in the Constitution. These are key issues.[138]

Submissions

Some submissions, such as that of the Cape York Institute, suggested a requirement to periodically review laws with regard to Aboriginal and Torres Strait Islander peoples.

A small number of submissions mentioned section 51(xxxi) of the Constitution, which gives the Commonwealth Government power to acquire property for certain purposes, provided such acquisition is on 'just terms'.

Forty-two submissions raised constitutional entrenchment of a Bill of Rights or a Charter of Human Rights. The Law Institute of Victoria supported a constitutionally entrenched national human rights charter protecting the human rights of all Australians, including the rights of Aboriginal and Torres Strait Islander peoples in accordance with the United Nations Declaration on the Rights of Indigenous Peoples, in the longer term.[139] A related issue was whether the United Nations Declaration on the Rights of Indigenous Peoples should be incorporated into the Constitution.[140] Numerous submissions referred to Australia's international human rights obligations.[141]

Thirteen submissions referred to the question of a republic. Some of these argued that any constitutional recognition of Aboriginal and Torres Strait Islander peoples should be framed so as to withstand any move to a republic in the near future.

3.13 Conclusions: A wide-ranging conversation

Comments made at consultations and submissions received by the Panel covered many issues that affect the lives of Aboriginal and Torres Strait Islander peoples. While it was not possible to adequately reflect all these issues and aspirations in this report, the large number of people who participated in the 'national conversation' generated by the discussion paper have helped the Panel understand the context in which it has been tasked to report on constitutional recognition of Aboriginal and Torres Strait Islander peoples.

Personal stories featured heavily at consultations. Experiences of past systematic racial discrimination and exclusion from the broader Australian community were frequently recounted. The issues of 'stolen wages' and the 'Stolen Generations' were commonly raised, although not usually in reference to recognition in the Constitution.

> There is a palpable sadness shared by Aboriginal and Torres Strait Islander people, especially older generations having seen so many of these things come and go and not being able to hand down a legacy of recognition to their children. You have to fight so hard to have it recognised. The mission system had a destructive impact on community and other types of policies not just stolen generations.[142]

Concerns regarding the Northern Territory Emergency Response were a recurring theme in consultations and submissions across the nation.

> The Northern Territory Emergency Response must never be repeated. There must be Constitutional protections in place preventing policy that is designed in a racially discriminatory manner.[143]

> How will constitutional recognition fit with the NT intervention? Will this have any impact?[144]

Constitutional recognition was suggested as a vehicle for acknowledging past wrongs and present disadvantage, and providing a better framework for a positive future for the nation.

> This process should not be about blame for historical wrongs and contemporary inequities. It should acknowledge the past while paving the way for a positive future.[145]

> The historical disadvantage of Aboriginal people including dispossession of land, social exclusion, racism and denial of fundamental human rights has resulted in entrenched, intergenerational trauma that manifests in the multiple and complex issues experienced by many disadvantaged Aboriginal people today. It is this disadvantage and its far-reaching effects that make Constitutional recognition such an important step in redressing these past and present practices.[146]

> We have a clear moral obligation to take all the steps we possibly can to right the historic wrongs that explicitly excluded recognition of the First Australians from the Constitution. The Aboriginal and Torres Strait Islanders have long been recognised as the original inhabitants of this land, contrary to the *terra nullius* declaration at colonisation. Recognition in the Constitution is long overdue.[147]

'We have a clear moral obligation to take all the steps we possibly can to right the historic wrongs that explicitly excluded recognition of the First Australians from the Constitution. The Aboriginal and Torres Strait Islanders have long been recognised as the original inhabitants of this land, contrary to the terra nullius *declaration at colonisation. Recognition in the Constitution is long overdue.'*

Lara Giddings, Premier of Tasmania, submission no 3256

Notes

1 The Kalkaringi Statement was developed by the Combined Aboriginal Nations of Central Australia at the Kalkaringi Constitutional Convention, attended by 700 Aboriginal delegates between 17 to 20 August 1998, at Kalkaringi in Central Australia. Available at www.clc.org.au/media/issues/governance/kalkaringi_statement.html.
2 Mildura, 29 August 2011.
3 Wilcannia, 29 August 2011.
4 Perth, 12 September 2011.
5 Rockhampton, 12 July 2011.
6 Canberra, 21 September 2011.
7 Robinvale, 29 August 2011.
8 Mildura, 29 August 2011.
9 Fremantle, 14 September 2011.
10 Mildura, 29 August 2011.
11 Robinvale, 29 August 2011.
12 Kalgoorlie, 2 August 2011.
13 Urbis Pty Ltd, *Analysis of Public Submissions to the Expert Panel on Constitutional Recognition of Indigenous Australians*, report prepared for the Department of Families, Housing, Community Services and Indigenous Affairs (2011).
14 See also Marg Evans, submission no 1006; David Meddows, submission no 1946; Rex Hesline, submission no 149.
15 Perth, 12 September 2011.
16 Cherbourg, 21 September 2011.
17 Horsham, 21 June 2011.
18 Dubbo, 4 July 2011.
19 Cairns, 12 September 2011.
20 Kununurra, 7 June 2011.
21 Wagga Wagga, 29 June 2011.
22 Mildura, 29 August 2011.
23 Liverpool, 29 September 2011.
24 Canberra, 25 May 2011.
25 Perth, 12 September 2011.
26 Perth, 12 September 2011.
27 Dubbo, 4 July 2011.
28 Kempsey, 5 September 2011.
29 Mildura, 29 August 2011.
30 Bairnsdale, July 2011.
31 Gold Coast, August 2011.
32 Port Augusta, 18 July 2011.
33 Canberra, 21 September 2011.
34 Torres Strait Islands, 19 August 2011.
35 Executive Council of Australian Jewry Inc., submission no 3599.
36 Linley Walker, submission no 1184.
37 Reconciliation Australia, *Effective Communication of Constitutional Changes to Recognise Aboriginal and Torres Strait Islander People: Interim Findings and Recommendations* (2011).
38 Broken Hill, August 2011.
39 Mildura, August 2011.
40 Wagga Wagga, June 2011.
41 Broken Hill, August 2011.
42 Fremantle, 14 September 2011.
43 Wagga Wagga, June 2011.
44 Broken Hill, August 2011.
45 Wurrumiyanga (Nguiu), June 2011.

46 Blacktown, 29 September 2011.
47 Darwin, 27 September 2011.
48 Cape York Institute, submission no 3479.
49 Perth, 13 September 2011
50 Wagga Wagga, 29 June 2011.
51 Sydney, 29 September 2011.
52 Darwin, September 2011.
53 Broome, 29 August 2011.
54 Sydney, 28 September 2011.
55 Sydney, 29 September 2011.
56 Hobart, 22 June 2011.
57 Broken Hill, 28 August 2011.
58 Fremantle, 14 September 2011.
59 Weipa, 15 September 2011.
60 Thursday Island, 19 September 2011.
61 Thursday Island, 19 September 2011.
62 Fremantle, 14 September 2011.
63 Mildura, 29 August 2011.
64 Constitutional Law students, University of Wollongong, submission no 2655.
65 Moreland City Council, Victoria, submission no 3569.
66 Aboriginal and Torres Strait Islander Women's Legal Service North Queensland, submission no 3132.
67 Australian Christian Lobby, submission no 3261.
68 Vanessa Long, submission no 1047.
69 Jenni Harmony, submission no 2611.
70 Don Sargeant, submission no 150.
71 Aquillion Venables, submission no 2901.
72 Reconciliation Australia, *Effective Communication of Constitutional Changes to Recognise Aboriginal and Torres Strait Islander People: Interim Findings and Recommendations* (2011).
73 Maroochydore, August 2011.
74 Sydney, 28 June 2011.
75 Broome, 28 August 2011.
76 Peter Gale, submission no 307.
77 Law Society of New South Wales, submission no 3590.
78 Jeff McMullen, submission no 29.
79 Wagga Wagga, 29 June 2011.
80 Adelaide, August 2011.
81 Melbourne, September 2011.
82 Sydney, 29 September 2011.
83 Sydney, September 2011.
84 Perth, June 2011.
85 Adelaide, May 2011.
86 Wagga Wagga, June 2011.
87 Perth, 16 June 2011.
88 Katherine, 4 July 2007.
89 Palm Island, 13 September 2011.
90 Darwin, 26 June 2011.
91 Darwin, 27 June 2011.
92 Sydney, September 2011.
93 Thursday Island, 19 September 2011.
94 Melbourne, 19 June 2011.
95 Ballarat, 21 June 2011.
96 Cairns, 12 September 2011.
97 George Williams, submission no 3609.
98 Coffs Harbour, 6 September 2011.

99 Perth, 16 June 2011.
100 Newcastle, July 2011.
101 Dubbo, July 2011.
102 Melbourne, 19 September 2011.
103 Halls Creek, 9 June 2011.
104 Tennant Creek, June 2011.
105 Karratha, 12 July 2011.
106 Brewarrina, 29 August 2011.
107 Cairns, 12 September 2011.
108 Coober Pedy, 20 July 2011.
109 Darwin, 4 August 2011.
110 Brett Gulley, submission no 3178.
111 Perth, 19 May 2011.
112 Galiwin'ku, 17 June 2011.
113 Cherbourg, 21 September 2011.
114 Darwin, 26 September 2011.
115 Kununurra, 7 June 2011.
116 Tennant Creek, 21 June 2011.
117 Darwin, 27 September 2011.
118 Kempsey, 5 September 2011.
119 Galiwin'ku, 17 June 2011.
120 Adelaide, 22 August 2011.
121 Kalgoorlie, 2 August 2011.
122 For example, Sisters of St Joseph, New South Wales Province, submission no 3073.
123 Ballarat, 21 June 2011.
124 Wagga Wagga, 29 June 2011.
125 Moree, 4 July 2011.
126 Horsham, 21 June 2011.
127 Mildura, 29 August 2011.
128 Port Augusta, 18 July 2011.
129 Broken Hill, 29 August 2011.
130 Vanessa Long, submission no 1047.
131 Oxfam Australia, submission no 3574.
132 The Hon Michael Kirby AC CMG, submission no 3537.
133 Anne Twomey, submission no 1132.
134 Jane McLachlan, submission no 3426.
135 Urbis, op cit.
136 Mt Isa, 27 June 2011.
137 Galiwin'ku, 17 June 2011.
138 Cherbourg, 14 June 2011.
139 Law Institute of Victoria, submission no 3560.
140 See, for example, Federation of Ethnic Communities' Councils of Australia, submission no 3271; Humanist Society of Victoria, submission no 3523; Aboriginal Catholic Ministry, Sydney, submission no 3071.
141 For example, NSW Aboriginal Land Council, submission no 3575; Human Rights Law Centre, Victoria, submission no 3555; Hunter Valley Quaker Meeting, submission no 3535; Australian Network of Environmental Defender's Offices, submission no 3266.
142 Sydney, 28 September 2011.
143 Broken Hill, 28 August 2011.
144 Perth, 12 September 2011.
145 Mildura, 29 August 2011.
146 Western Australian Council of Social Service, submission no 3550.
147 Lara Giddings, submission no 3256.

4 Forms of recognition

The Expert Panel's terms of reference required it to report to the Government on 'possible options for constitutional change to give effect to Indigenous constitutional recognition'.

From its first meeting in February 2011, the Panel was aware that 'recognition' means different things to different Australians. For some, it means recognition of the distinct and unique cultures of Aboriginal and Torres Strait Islander peoples in a preamble to the Constitution. For others, it means removing the provisions in the Constitution that contemplate discrimination on the ground of race, namely sections 25 and 51(xxvi), and the replacement of those provisions by a power to make laws that advance or benefit Aboriginal and Torres Strait Islander peoples and a provision prohibiting legislative and government action that discriminates on the ground of race.

'Recognition' means different things to different Australians. For some, it means recognition of the distinct and unique cultures of Aboriginal and Torres Strait Islander peoples in a preamble to the Constitution. For others, it means removing the provisions in the Constitution that contemplate discrimination on the ground of race, namely sections 25 and 51(xxvi).

As discussed in Chapter 3, the Panel's discussion paper identified seven ideas for change. These ideas were not intended to limit the suggestions for recognition that might come forward through the consultation and submission process. However, understandably many of the submissions to the Panel were confined to the ideas identified by the Panel in its discussion paper. In particular, in the area of statements of recognition or values, the four ideas identified in the discussion paper influenced the structure of community consultations and public submissions.

In this chapter, the following issues, which emerged at consultations and in submissions in relation to statements of recognition or values, are addressed:

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

4.1 Recognition in the preamble to the Imperial Act

The Australian Constitution does not contain a preamble, although there is a preamble to the Imperial Commonwealth of Australia Constitution Act 1900, by which the Parliament at Westminster enacted the Constitution in 1900. The first eight clauses of the Act, referred to as the 'covering clauses', contain mainly introductory, explanatory and consequential provisions. The ninth clause contains the Australian Constitution. The preamble and the enacting clause provide:

> Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:
>
> And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen:
>
> Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

The orthodox view is that section 128 of the Constitution cannot be used to amend the preamble to the Commonwealth of Australia Constitution Act.

The orthodox view is that section 128 of the Constitution cannot be used to amend the preamble to the Commonwealth of Australia Constitution Act.[1] Numerous submissions to the Panel, including those from Associate Professor Anne Twomey, the Centre for Comparative Constitutional Studies, and the Law Council of Australia, cast doubt on the efficacy of the Commonwealth Parliament and Australian people acting under section 128 of the Constitution to alter the existing preamble to the Commonwealth of Australia Constitution Act 1900.

4.2 Recognition in a new preamble or in a new section of the Constitution

Two further proposals concerning recognition were for recognition in the body of the Australian Constitution:

- in a new preamble at the beginning of the Constitution;[2] or
- in a specific section of the Constitution.

'Idea 2' in the Panel's discussion paper was as follows:

> Rather than place a Statement of Recognition acknowledging Australia's Aboriginal and Torres Strait Islander peoples' distinct cultural identities, prior ownership and custodianship of their lands and waters in a preamble, it could be inserted as a section in the body of the Constitution.

A number of submissions welcomed recognition of Aboriginal and Torres Strait Islander peoples in a new preamble in the body of the Constitution (either at the beginning or in a specific section). These included the submissions from Yarrabah Aboriginal Shire Council, Convent of the Sisters of Mercy Parramatta, and Matthew Baird.[3] However, most submissions indicated no preference about the location of a statement of recognition.

What is a preamble?

A preamble usually appears at the beginning of a constitution or statute before the operative or substantive provisions.

A preamble has been described as:

- an introduction and in a sense a preparatory or explanatory note;[4] and
- an introductory passage or statement that precedes the operative or enforceable parts of the document.[5]

One commentator has identified four elements that can be found in preambles:

- reference to a historical event or fact;
- normative statements about the nature of the polity;
- aspirational statements; and
- inspirational statements.[6]

A preamble can have both symbolic value and a justiciable aspect. The justiciable aspect arises from the fact that a preamble may be used to interpret the body of the document.[7]

How can the Constitution be amended?

Section 128 of the Constitution states that the Constitution can only be amended by a referendum, and sets out the referendum process.

Any proposed alteration to the Constitution must be approved by a double majority, that is:

- a majority of electors in a majority of States (four out of six); and
- a majority of electors across Australia (including electors in the Territories).

‘Mere symbolism’

During consultations, many people expressed concern about preambular recognition being a ‘tokenistic’[8] gesture or ‘merely symbolic’, and argued instead for substantive change to the Constitution.

> We should be in the Constitution, not in the preamble. If we’re not, it’s tokenism.[9]

> My view is that I don’t want to be in a preamble. I want to be in the guts and the crux of the Constitution. A preamble is too much like shades of old when you couldn’t talk about treaties and sovereignty, when we came up with the word ‘Makarrata’.[10]

> Just putting in the front of the Constitution that we ‘recognise Aboriginal and Torres Strait people are the original inhabitants’ isn’t going to change much.[11]

> We don’t want it in the preamble; we want it in the body. You need the legal validity, there’s no point in doing it otherwise. We have to go beyond symbolism. Symbolism is a good starting point (as was the apology) but it should be the starting point, not the finishing point.[12]

> If we are only given the option to vote for a preambular change, I don’t see that as having much value. I don’t just want symbolic changes.[13]

> If the preamble is not law what is the point of having a preamble—we want it in the body so it’s law.[14]

> The preamble is just the outside story—we want to put our story in the main part of the Constitution.[15]

> To be properly respectful, recognition must be in the Constitution.[16]

‘The power of symbolism’

‘[T]he power of symbolism in relation to the reconciliation movement ought not to be dismissed.’

Annie Visser, submission no 3193

On the other hand, some who made submissions to the Panel argued that the Panel should not dismiss the ‘genuine importance of a symbolic preamble … if agreement is elusive with regards to placing text in the body of the Constitution’.[17] Others argued that ‘the power of symbolism in relation to the reconciliation movement ought not to be dismissed’.[18] At consultations, there were also expressions of support for the idea of preambular recognition.

> Re idea of preamble—I think today is a classic example, before we started we had a statement that’s important—its rightful place is up front. (Welcome to Country.) A preamble would be telling people: before you read on, we want to say something. Custodianship is an important word to include in a preamble—ownership is one thing, but custodianship is a responsibility to look after it.[19]

From an Aboriginal perspective, it needs to tell a story at the front, in the preamble, but also have a link between the body as well as the preamble of the Constitution.[20]

Doesn't it set the tone for understanding? It's quite nice for us to have that as a beginning. A preamble influences the way we might see our future, our country.[21]

Thank you for your coming to talk with us today. Many Australians seem to be proud of the fact that the oldest continuing culture in the world resides in Australia. That culture is more than just art. I think that we are at a pivotal point, you need to tell Prime Minister to include Aboriginal people at the start of the Constitution, if we are going to make changes, we need to start at the top and right the wrongs.[22]

Maybe the preamble is a good idea—we need something strong at the beginning, from the start. We might be remiss to scrap the preamble idea—sure, changing the powers is needed, but maybe a preamble will set the scene.[23]

Certain facts need to be recognised in the preamble: people lived here for 40 to 60 thousand years and then Europeans came and dispossessed the land. Also that the Constitution was made to reconcile the competing interests of the states.[24]

'Recognition and acknowledgement of Indigenous Australian peoples' cultures—past and present—in our Constitution would show our valued place as part of our national identity.'

Australian Buddhist Community, submission no 2849

Recognition in both preambular language and a substantive provision

Of those surveyed online, 61.5 per cent supported recognition in both the preamble and the body of the Constitution. Many submissions also supported such an approach. For example, the Australian Buddhist Community stated:

> We support constitutional recognition for Indigenous Australians in the preamble and the body of the Australian Constitution. Recognition and acknowledgement of Indigenous Australian peoples' cultures—past and present—in our Constitution would show our valued place as part of our national identity. We believe these changes will bring our constitution into accord with the values of contemporary Australian society.[25]

A 'no legal effect' clause?

The 1999 referendum on a preamble proposed the insertion of a provision that made it clear that the proposed preamble would have no legal force, and could not be used for the purpose of interpreting the Constitution or other laws.[26]

In recent years, the Queensland, Victorian and New South Wales parliaments have each adopted constitutional amendments to recognise Aboriginal and Torres Strait Islander peoples. All such amendments were enacted by State parliaments without referendums. The Victorian and New South Wales amendments are in the form of substantive provisions in the relevant Constitution Act.[27] In Queensland, recognition is in the preamble to the

Constitution of Queensland 2001. In all three cases, a provision was included to the effect that parliament did not intend (a) to create in any person any legal right or give rise to any civil cause of action; or (b) to affect in any way the interpretation of the Constitution or of any other law in force in the State.[28] New South Wales also included any right to review an administrative action. The Victorian *Constitution Act 1975*, as amended in 2004, provides in section 1A:

1A. Recognition of Aboriginal people

(1) The Parliament acknowledges that the events described in the preamble to this Act occurred without proper consultation, recognition or involvement of the Aboriginal people of Victoria.

(2) The Parliament recognises that Victoria's Aboriginal people, as the original custodians of the land on which the Colony of Victoria was established—

(a) have a unique status as the descendants of Australia's first people; and

(b) have a spiritual, social, cultural and economic relationship with their traditional lands and waters within Victoria; and

(c) have made a unique and irreplaceable contribution to the identity and well-being of Victoria.

(3) The Parliament does not intend by this section—

(a) to create in any person any legal right or give rise to any civil cause of action; or

(b) to affect in any way the interpretation of this Act or of any other law in force in Victoria.

The NSW *Constitution Act 1902*, as amended in 2010, provides in section 2:

2 Recognition of Aboriginal people

(1) Parliament, on behalf of the people of New South Wales, acknowledges and honours the Aboriginal people as the State's first people and nations.

(2) Parliament, on behalf of the people of New South Wales, recognises that Aboriginal people, as the traditional custodians and occupants of the land in New South Wales:

(a) have a spiritual, social, cultural and economic relationship with their traditional lands and waters, and

(b) have made and continue to make a unique and lasting contribution to the identity of the State.

(3) Nothing in this section creates any legal right or liability, or gives rise to or affects any civil cause of action or right to review an administrative action, or affects the interpretation of any Act or law in force in New South Wales.

The preamble to the Constitution of Queensland 2001, as amended in 2009, provides:

> The people of Queensland, free and equal citizens of Australia—
>
> …
>
> (c) honour the Aboriginal peoples and Torres Strait Islander peoples, the First Australians, whose lands, winds and waters we all now share; and pay tribute to their unique values, and their ancient and enduring cultures, which deepen and enrich the life of our community.

Section 3A of the Constitution of Queensland provides:

> The Parliament does not in the preamble—
>
> (a) create in any person any legal right or give rise to any civil cause of action; or
>
> (b) affect in any way the interpretation of this Act or of any other law in force in Queensland.

There was no support at consultations and little if any support in submissions for a 'no legal effect' clause.[29] Twomey cautioned that: 'The potential effect of a preamble may be even more damaging if the form of recognition is half-hearted or undermined by qualifications.' Senior lecturer in law Bede Harris argued that a statement in the Constitution simply 'recognising' the existence of indigenous people would be to state the obvious, and be of no practical benefit.[30] The Centre for Comparative Constitutional Studies was:

> strongly opposed to including a clause limiting the legal effect of a statement of recognition or values. Such a clause is inconsistent with the reason for the inclusion of a statement of recognition or values. To qualify the recognition in this way treats a statement of recognition or values as an exceptional part of the Constitution …[31]

The Law Council of Australia also recommended against any form of disclaimer (or 'no legal effect' clause), such as those found in the New South Wales, Queensland and Victorian constitutions, arguing that 'such a clause would substantially detract from the symbolic value of recognition, and is likely to undermine support for the proposal from all sides'.[32]

The Panel has concluded that any statement of recognition should not be accompanied by a 'no legal effect' clause. The Panel does not consider that it would be appropriate to include some form of recognition of Aboriginal and Torres Strait Islander peoples in the Constitution, and simultaneously to state that such recognition has no legal effect. Such an approach would amount to a giving and taking at the same time, and suggest that the statement of recognition was 'an empty gesture' or even tokenistic. A 'no legal effect' clause would not satisfy at least one of the four principles that have guided the Panel's assessment of proposals, namely that a proposal must 'be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples'.

The Panel has concluded that any statement of recognition should not be accompanied by a 'no legal effect' clause.

Structural issues

During the course of consultations and in submissions, a number of structural issues were raised, especially by lawyers, concerning the placement of a new preamble in the body of the Constitution.

Twomey referred to the spectre of 'two preambles'. Her concern was that preambles are commonly placed before enacting clauses. This means that the preamble is not part of the substantive law, and has no binding legal effect. The preamble is explanatory and interpretive.[33] Inserting a new preamble in the Constitution would mean that the preamble would not precede the words of enactment, and could not be 'truly preambular' because it would be placed after the table of contents and before Chapter I.[34] Twomey argued:

> This is an anomalous position for a preamble and adds uncertainty to its status, as it would be located within the substantive law. Moreover, this anomaly would be made worse if the existing Preamble remained intact, placed prior to the words of enactment while a separate preamble was then placed after the words of enactment. This might suggest a different status for the second preamble as it is located within the substantive part of the Act.[35]

The late Professor George Winterton considered that two preambles, as proposed in the 1999 referendum, would 'look bizarre', and 'present a very muddled and confused picture to the world'.[36]

Concern was also expressed in submissions and at consultations about the insertion of a new preamble without accompanying changes to the substantive text. The concern was that this would create a disconnection between the substantive text of the Constitution and the preamble. Twomey, in particular, argued that the use that a court might make of a preamble which did not explain or introduce anything in the text of the Constitution when interpreting the substantive provisions was unclear and unpredictable.[37] Professor Cheryl Saunders has also argued that a preamble should match the substance of the Constitution.[38] If it does, there is no need for concern about how the preamble might be interpreted. It is only where there is a disconnection between the preamble and the substance of the Constitution that issues of concern might arise as to how the preamble might be interpreted and that there might be a need to limit its application.[39]

The late Professor George Winterton considered that two preambles, as proposed in the 1999 referendum, would 'look bizarre', and 'present a very muddled and confused picture to the world'.

Legal advice obtained by the Panel was that there could be no doubt about the capacity of an amendment under section 128 to insert into the Constitution itself an Australian preamble. However, the Panel was also referred to the legal and political risks of seeking to devise a general preamble text that would not be swamped by other topics urged by some as necessary and by others as contestable. As discussed below, the Panel has decided against recommending that any statement of recognition be accompanied by a statement of values. This is because of the failure of the 1999 referendum and the likelihood of a debate over which values should be included in a statement of values, and which should not.

Further, the legal advice to the Panel described the option of a preamble recognising Aboriginal and Torres Strait Islander peoples, while at the same time retaining the race power in section 51(xxvi), as 'a very bad fit'. The jarring of the new intent with the old but continued power would be an obvious source of considerable difficulty and thus uncertainty in future judicial interpretations.

One of the Panel's guiding principles has been that that any proposal 'must be technically and legally sound'. The Panel is conscious that some uncertainty may arise as a consequence of having two preambles, and a discontinuity between either of those two preambles and the substantive text of the Constitution. Even if the language of the new preamble were relatively uncontentious, there is uncertainty about the use that might be made of it in interpreting other provisions of the Constitution, including, but not limited to, interpreting section 51(xxvi). As one study of constitutional preambles concludes, 'the courts rely, more and more, on preambles as sources of law'.[40]

The High Court has so far mainly used the preamble to the Imperial Act as a statement of historical fact, but has also drawn on it to support implications that can be found elsewhere in the Constitution. Depending on the content of a new preamble, its possible use in interpreting other provisions remains a real possibility with uncertain consequences.[41]

4.3 Placing a statement of recognition together with a new head of power

To avoid such uncertainty, a number of submissions recommended that the statement of recognition be linked to particular operative provisions of the Constitution. In particular, the Centre for Comparative Constitutional Studies recommended that the 'race power' in section 51(xxvi) be repealed, and replaced with a new head of power accompanied by and explicitly linked to a statement of recognition.[42]

The Centre for Comparative Constitutional Studies recommended that the 'race power' in section 51(xxvi) be repealed, and replaced with a new head of power accompanied by and explicitly linked to a statement of recognition.

The Centre argued that the idea of a non-functional statement of recognition or values in the body of the Constitution would sit uneasily with the primary, functional role of constitutions in defining, structuring and limiting political power. The presence of a statement in the operative text of the Constitution would point towards it having some independent legal function or effect:

> As such, we recommend that any statement of values in the body of the constitution should be accompanied by, and explicitly linked to, operative provisions. Combining a statement of recognition or values with functional provisions would create a strong implication that the effects of the statement were confined to those things stipulated in the accompanying operative clauses.[43]

To illustrate how a statement of values or recognition could be linked to an operative provision, the Centre proposed a new section, named 'section 51A', which would involve a new power to replace section 51(xxvi), together with preambular or introductory text. The proposal uses as a model the statement of recognition in section 1A of the Victorian Constitution Act:

> (1) The people of Australia acknowledge that the enactment of this Constitution occurred without proper consultation, recognition or involvement of the Aboriginal and Torres Strait Islander people of Australia.
>
> (2) The people of Australia recognise that Australia's Aboriginal and Torres Strait Islander people, as the original custodians of the land on which Australia was established—
>
> (a) have a unique status as the descendants of Australia's first people; and
>
> (b) have a spiritual, social, cultural and economic relationship with their traditional lands and waters; and
>
> (c) have made a unique and irreplaceable contribution to the identity and well-being of Australia.
>
> (3) Accordingly, the Federal Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to the Aboriginal and Torres Strait Islander people of Australia.[44]

The Law Council of Australia likewise supported 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 commended this option as having the advantage of avoiding the obvious political difficulties of seeking to insert a new preamble to the entire Constitution which addresses only the historical experiences and aspirations of Aboriginal and Torres Strait lslander peoples. The Law Council recalled the failure of the proposal at the 1999 referendum to insert a new preamble, and contended that such an option would promote consistency between the preambular text and the new substantive conferral of power: 'it would be a strange result if there were to be a powerful Preambular statement of recognition and there remained a substantive conferral of power in section 51(xxvi) intended—and held by the High Court—to discriminate and exclude'.[45]

'Section 51A', with its own embedded preamble, should prevent future interpreters of the Constitution from deploying the preamble to alter what would otherwise have been the meaning of other provisions in the Constitution.

Legal advice obtained by the Panel also considered the removal of section 51(xxvi) and the conferral of legislative power by a new section in Chapter V of the Constitution with its own introductory and explanatory preamble. The main advantages of this approach, referred to as 'section 51A', are that the preambular element would apply specifically and peculiarly to the new 'section 51A' legislative power. 'Section 51A', with its own embedded preamble, should prevent future interpreters of the Constitution from deploying the preamble to alter what would otherwise have been the meaning of other provisions in the Constitution. Advice to the Panel

is that the risks in a 'section 51A' approach are certainly fewer than some of the alternatives such as purporting to amend the preamble to the Commonwealth of Australia Constitution Act 1900, a preamble within section 51, or a preamble at the head of the Constitution.

In the Panel's legal roundtable consultations there was considerable support for a statement of recognition together with a new grant of legislative power. Constitutional lawyers consulted by the Panel commented that, on such an approach, the interpretive relevance of a statement of recognition would be confined to the substantive power. Hence, the consequences would be identifiable and limited, and less unforeseen than if the statement of recognition were located elsewhere in the body of the Constitution.

Another advantage of this approach is that it would ensure that a statement of recognition is directly associated with substantive change to the Constitution. At consultations and in submissions, many were concerned to avoid a statement of recognition that had no substantive legal consequences. A statement of recognition in a preamble without any change to the operative text of the Constitution would be likely to be viewed by, in particular, Aboriginal and Torres Strait Islander peoples as an inadequate form of recognition.

4.4 Recognition in a new preamble accompanied by a statement of values

One of the ideas raised in the Panel's discussion paper was that a statement of recognition be accompanied by a statement of values:

> This idea would include a Statement of Values in a preamble to the Constitution which incorporates recognition of Aboriginal and Torres Strait Islander peoples alongside a description of the Australian people's fundamental values, such as a commitment to democratic beliefs, the rule of law, gender equality and acknowledgement of freedoms, rights and responsibilities. The content could be similar to the pledge that new citizens are required to make when they become naturalised Australians. This approach has been adopted by Queensland (2010) in its State Constitution.[46]

'The idea of a universally accepted "value" is notoriously slippery. … "With hope in God"? What if you are a Buddhist or Aboriginal, or a follower of some other non-monotheistic religion, or an atheist, or an agnostic?'

Marcia Langton, 'Reading the Constitution out Loud' (Summer 2011) *Meanjin*

At the referendum on an Australian republic held on 6 November 1999, one of the questions was whether Australia should alter the Constitution to insert the following preamble:

> **Preamble**
>
> With hope in God, the Commonwealth of Australia is constituted as a democracy with a federal system of government to serve the common good.
>
> We the Australian people commit ourselves to this Constitution:
>
> proud that our national unity has been forged by Australians from many ancestries;

> never forgetting the sacrifices of all who defended our country and our liberty in time of war;
>
> upholding freedom, tolerance, individual dignity and the rule of law;
>
> honouring Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country;
>
> recognising the nation-building contribution of generations of immigrants;
>
> mindful of our responsibility to protect our unique natural environment;
>
> supportive of achievement as well as equality of opportunity for all;
>
> and valuing independence as dearly as the national spirit which binds us together in both adversity and success.

Nationally, 60.66 per cent voted 'No' to the proposed preamble.[47]

During consultations, some spoke in support of a statement of values:

> I think that whatever we end up with needs to link back to values, because this talks about us as Australians no matter what race we are. That's very important; that's why it should be in the Constitution itself. We are moving to be one people and walk together one walk.[48]

Bob Ellicott QC argued that it was important to have both recognition of Aboriginal and Torres Strait Islander peoples and a statement of values in a preamble:

> It does not seem to me to be consistent with the notion of a preamble to amend the Constitution solely for the purpose of inserting a statement in a preamble which only deals with indigenous recognition.[49]

Australians for Native Title and Reconciliation Qld supported a statement of recognition accompanied by a statement describing the Australian people's fundamental values, such as a commitment to democratic beliefs, the rule of law, gender equality, and acknowledgement of freedoms, rights and responsibilities.[50] David Thompson argued that 'the next fundamental and necessary inclusion in the constitution should be the definition of the values of equality, justice and democracy in our society and specified human rights to education, access, participation and freedom of conscience'.[51] The Executive Council of Australian Jewry Inc. suggested that 'it would be important to include in any such statement a commitment to the following values (in no particular order of priority): democracy, personal freedom, the rule of law, human rights, racial and gender equality, social egalitarianism, mateship, [and] the fair go ethic'.[52] The Anglican Diocese of Brisbane also supported a statement of values and recognition as 'a unifying statement which recognises Aboriginal and Torres Strait Islander peoples alongside other peoples'.[53]

'I believe that a general Statement of Values should be postponed for a future referendum and that the focus should clearly be maintained on correcting the silence of the Constitution with respect to Indigenous Australians.'

Brooke Greenwood, submission no 2916

A participant at the Horsham consultation (June 2011) suggested that a statement of values might be a 'statement of what Australia should be'.

Uncle Harry Boyd argued that defining values is 'likely to be so contentious as to fail to obtain the required majorities'.

However, there was also significant caution expressed about the risks of recommending a statement of values. Uncle Harry Boyd argued that defining values is 'likely to be so contentious as to fail to obtain the required majorities'.[54] Another submission counselled that 'defining our "core" values and not understanding the relevance these values may have in the future (say in 200 years' time) puts an unnecessary limit on the ability of Australia to progress and develop its identity as a nation'.[55] The Aboriginal Islander Christian Congress and the Assembly of the Uniting Church in Australia opposed the notion that a preamble should include 'all other people and groups who have contributed to this nation's life':

> We would not support such a move for a number of reasons. First, it would be very difficult to gain agreement on who and which events should be included. Second, and more importantly, this is about honouring a group of people excluded from the Constitution who are First Peoples, and part of the founding history of this land.[56]

Twomey pointed to the difficulty 'in finding a form of words that is supported by the vast majority of Indigenous Australians as well as a majority of Australian voters across the country and in a majority of states'.[57] Twomey argued that a preamble, at best, 'could only set out values shared by a majority, excluding the strongly held views of others, so that rather than being a unifying force, a preamble may be a means of excluding or rejecting the values of minorities'. Twomey also referred to the concepts of the 'rule of law' and 'equality', and the potential for the Constitution to be reinterpreted in accordance with those newly included 'and relatively innocuous statements'.

The Panel's terms of reference provided that the Government has committed to pursue recognition of Aboriginal and Torres Strait Islander peoples in the Constitution. The Panel has concluded that recommending a statement of recognition accompanied by a statement of values is likely to jeopardise the prospects for recognition of Aboriginal and Torres Strait Islander peoples. The Panel considers that any proposal for a statement of recognition together with a broader statement of values would lead to an unhelpful debate over the values that should be included in the statement of values. The failure of the 1999 referendum suggests that there is considerable risk in taking to referendum a proposal to amend the Constitution by inserting a preamble that seeks to define the 'values' of the Australian community. There are potential unintended legal consequences of a broad statement of values, which the Panel considers it unhelpful to explore at the present time. Such a proposal would be unlikely to meet any of the four principles identified by the Panel for its assessment of proposals for constitutional recognition.

There are potential unintended legal consequences of a broad statement of values, which the Panel considers it unhelpful to explore at the present time.

4.5 The content of a statement of recognition

Many submissions to the Panel contained ideas for the content of a statement of recognition. The Queensland Aboriginal and Torres Strait Islander Advisory Council argued that:

> The long awaited recognition of Aboriginal and Torres Strait Islander peoples in our Nation's Constitution should acknowledge Indigenous Australians as Sovereign First Nations Peoples who have an unparalleled enduring physical and spiritual connection to this country …

and suggested a form of wording that would:

> recognise Aboriginal and Torres Strait Islander peoples as Sovereign First Peoples with a statement of values which includes respect of their cultures and diversity of those cultures, and respect for the role of Elders, Aboriginal and Torres Strait Islander peoples' connection to country, connection to family, customary laws and traditions, stories and an acknowledgement that, despite extraordinary disadvantage, Aboriginal and Torres Islander people remain the world's oldest living cultures.[58]

Australians for Native Title and Reconciliation National identified six principles that should be included in a statement of recognition:

- Aboriginal and Torres Strait Islander peoples are the first people of the land and waters that now constitute the nation of Australia;
- Aboriginal and Torres Strait Islander peoples are the traditional owners and custodians of those lands and waters;
- Aboriginal and Torres Strait Islander peoples are historically sovereign, and through colonisation, were dispossessed of their lands and waters, noting that Australia was colonised without consent or treaty;
- Aboriginal and Torres Strait Islander peoples continue to maintain their identities, cultures, languages and connection to their lands and waters;
- Aboriginal and Torres Strait Islander people continue to make a unique and special contribution to the life and future of Australia, as they have in the past;
- As a nation, Australia is committed to preserving and revitalising the history, cultures and languages of Aboriginal and Torres Strait Islander peoples.[59]

'Any inclusion in the Constitution must be as a sovereign First Nations peoples and must highlight an enduring connection to country and culture that has not been severed despite invasion and systemic disadvantage.'

Queensland Aboriginal and Torres Strait Islander Advisory Council, submission no 3487a

Numerous submissions called for recognition of the prior occupation of Australia by sovereign Aboriginal and Torres Strait Islander nations and peoples, the non-consensual settlement of Australia, the history of dispossession, exclusion and discrimination, and the unique cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples. Numerous submissions also called for recognition of the unceded sovereignty of Aboriginal and Torres Strait Islander peoples. Matters of sovereignty are further addressed in Chapter 9.

The Sisters of St Joseph South Australia Reconciliation Circle argued that:

> changes to the Constitution must include a statement which reflects proper recognition of Australia's history and includes recognition of the colonisation of the First Peoples and their subsequent dispossession. We believe it is vitally important that Aboriginal and Torres Strait Islander peoples are recognised as the prior owners of Australia who had sovereign rights which have never been ceded by Aboriginal peoples.[60]

Irene Doutney contended that:

> A Preamble that does not recognise the violent nature of First Settlement for the original inhabitants of this land is worthless. ... There can be no true reconciliation with Aboriginal people unless we acknowledge why we need to be reconciled.[61]

Bryce Hobbs called for 'an acknowledgment that Australia so called at the time of settlement by European peoples was an occupied land of territories of Australian Indigenous Nations with diverse languages, customs and culture'.[62]

Another suggestion was that any statement of recognition should reflect the widespread 'Welcome to Country' that is now given in many different contexts to acknowledge the traditional owners and to pay respect to the elders past and present.

Many submissions called for acknowledgment of the relationship of Aboriginal and Torres Strait Islander peoples with their lands and waters. At the same time, a number of submissions were concerned not to compromise existing rights and entitlements to land and waters that are recognised through native title law and otherwise:

> I would not support a change which speaks in terms of Aboriginal and Torres Strait Islander Peoples' prior ownership of the lands and waters. This may undermine what has been achieved since the High Court's decision in *Mabo* and *Wik*.[63]

Similarly, one participant at a public consultation said: 'All Aboriginal and Torres Strait Islanders will agree that land is the most important thing to them. The way we deal with native title, mining and government—what we put in the Constitution has to make this process stronger or better.'[64]

Many submissions to the Panel contained suggestions for a statement of recognition. For example:

> The First People of this nation are our Traditional owners connected by language and culture to their ancient country.[65]

> We the Australian people, mindful of past injustices and conflict with the Aboriginal people of this land, open our hearts and extend our hands to the first Australians, in friendship accepting them as equals, brothers and sisters, valuing them and their cultural heritage as an integral part of the rich tapestry of this new Australian democracy of peoples.[66]

'We the Australian people, mindful of past injustices and conflict with the Aboriginal people of this land, open our hearts and extend our hands to the first Australians, in friendship accepting them as equals, brothers and sisters, valuing them and their cultural heritage as an integral part of the rich tapestry of this new Australian democracy of peoples.'

Chris Squelch, submission no 121

'We the people of Australia recognise the culturally diverse character of this country. We affirm our commitment to the equality of all who live in this country irrespective of culture, gender or religion. We recognise the rule of law, the principles of democracy and the rights and responsibilities of all Australians.'

Federation of Ethnic Communities' Councils of Australia, submission no 3271

> [I]n the face of this history which has separated us, Indigenous and non-Indigenous Australians commit to a relationship for reconciliation, respect and dialogue, recognising that the health and strength of our nation will be forged in partnership.[67]

> We the people of Australia declare in the year 2013: that the Commonwealth of Australia, having come together in the year 1901, is a sovereign indivisible democracy; and a union of our Indigenous Australian cultures, our British and Irish heritage, and the gifts of Australians drawn from many nations, under this Constitution. God bless Australia.[68]

The Federation of Ethnic Communities' Councils of Australia proposed the following language for inclusion in a preamble:

> We the people of Australia recognise the primacy of the Aboriginal and Torres Strait Islander cultures and languages in Australia. We recognise their distinct cultural identities and prior ownership and custodianship of the land and waters.
>
> We the people of Australia recognise the culturally diverse character of this country. We affirm our commitment to the equality of all who live in this country irrespective of culture, gender or religion. We recognise the rule of law, the principles of democracy and the rights and responsibilities of all Australians.[69]

The Panel's initial analysis of consultations and submissions highlighted a number of themes that could form part of a statement of recognition (see Chapter 3). These were:

- recognition of Aboriginal and Torres Strait Islander peoples as the first Australians or first peoples of Australia;
- recognition of the spiritual, social, cultural and economic relationship of Aboriginal and Torres Strait Islander peoples with their lands and waters, and the continuing rights and entitlements arising from that relationship; and
- recognition of the unique cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples.

The Panel developed some initial language in relation to each of these themes, and received feedback from surveys conducted by Newspoll, focus groups with Aboriginal and Torres Strait Islander leaders, and legal roundtable consultations.

There was wide support at consultations for the expressions 'first peoples' and 'first Australians'. In relation to 'first Australians':

> For it to say, in the Constitution, that Aboriginal people are the first Australians, that would seem to say, in itself that *terra nullius*, is discredited.[70]

> That terminology 'first Australians' does not mean anything unless it is in the Constitution. This would give us that recognition and respect and give us a way forward as a vehicle.[71]

> Recognising Aboriginal people as the first Australians is paramount and this should be in the body of the Constitution, it should be the first thing in the Constitution.[72]

There was also wide support for the expression 'first Australians' in submissions.[73]

Some suggested, however, that the expression was inadequate to capture the fact that Aboriginal and Torres Strait Islander peoples were in Australia at the time of European settlement, and a very long time before that. Others thought the expression suggested a special status, and for that reason did not support it. A survey of the membership of the National Congress of Australia's First Peoples indicated that 'first Australians' was not popular among Aboriginal and Torres Strait Islander peoples.[74] Nor was it popular among non-indigenous Australians, according to Newspoll focus groups. On the other hand, there was wide support for the expression at consultations.

As for language to describe the relationship of Aboriginal and Torres Strait Islander peoples with their lands and waters, there was a variety of opinion about the appropriateness of terms such as 'ownership', 'traditional ownership' or 'custodianship'. John Arneaud felt that the relationship is better described as 'custodianship' rather than 'ownership',[75] but the Panel did not consider the concept of 'custodianship' to be adequate to describe the relationship. Margie Webb argued that the Constitution:

> should recognise the Kinship system as the law framework for Aboriginal people that connects every Aboriginal person in Australia to a family protocol or behaviour that dictates how Indigenous people are connected to the animals, the plants and all living things in our land.[76]

The Victorian Traditional Owner Land Justice Group stated: 'Acknowledgement of traditional ownership does not set one group of Australians over or against other groups, it simply states some key features of the first chapter of the Australian story.'[77]

'Acknowledgement of traditional ownership does not set one group of Australians over or against other groups, it simply states some key features of the first chapter of the Australian story.'

Victorian Traditional Owner Land Justice Group, submission no 3546

There were very high levels of support for including reference to the cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples in any statement of recognition. In consultations, many participants agreed that 'Aboriginal cultures need to receive greater constitutional protection' and that 'recognition must ensure that protection of culture is strengthened'.[78]

During the live chats conducted by Newspoll between 22 and 30 November 2011, participants generally found the first part of the proposed preamble to be clear and concise and to reflect sentiments with which they agreed. This included use of the words 'acknowledge' and 'spiritual and cultural relationship with the land'. 'Respect' was a highly positive word for participants.

There was some concern that the addition of a preamble would be tokenistic. Some participants queried inclusion of the word 'economic' when referring to Aboriginal and Torres Strait Islander peoples' relationship with lands and waters. While the Panel did not agree with the concern about the use of this term, it chose not to use it in its recommendations for changing the Constitution.

4.6 Recognition of Aboriginal and Torres Strait Islander cultures, languages and heritage in the Constitution

'[I]n achieving Indigenous total wellbeing, cultural prosperity is as important as socio-economic prosperity. Maintenance and enjoyment of culture is important for Indigenous happiness and health outcomes. Language is often described as being the key to culture. Languages provide concrete, tangible banks of traditional knowledge that government policies can help promote, protect and develop.'

Cape York Institute, submission no 3479

As noted above, the most frequent suggestions of content for inclusion in a statement of recognition included recognition of the unique cultures and languages of Aboriginal and Torres Strait Islander peoples.[79] During consultations, participants argued that 'recognition of different languages and cultures is very important because that's your identity'.[80] One participant told the Panel:

> I'm representing people from the desert. It's hard for the Australian Constitution to have any relevance for people in the desert, it's not relevant to their everyday needs. But the land and culture is in everyone's mind all the time. Language is a given part of that culture.[81]

A participant at the Bunbury consultation (May 2011) told the Panel:

> We have a responsibility to our Aboriginal children and all children to share our culture, our language. This particularly for people from abroad who know nothing about Aboriginal people at all. There are negative generalisations made about Aboriginal people. Australians need to feel as though there is a unified bond and this will allow us to step forward as one.

Numerous submissions suggested that recognition of culture and languages would be a unifying experience for the nation. A number of submissions referred, in particular, to evidence that Aboriginal and Torres Strait Islander languages are disappearing at an unacceptable rate.[82] The Cape York Institute said:[83]

> [I]n achieving Indigenous total wellbeing, cultural prosperity is as important as socio-economic prosperity. Maintenance and enjoyment of culture is important for Indigenous happiness and health outcomes. Language is often described as being the key to culture. Languages provide concrete, tangible banks of traditional knowledge that government policies can help promote, protect and develop.

One Aboriginal woman from Cherbourg, who was removed from her family in the 1940s, recalled:

> My mother and brother could speak our language and my father could speak his. I can't speak my language. Aboriginal people weren't allowed to speak their language while white people were around. They had to go out into the bush

> or talk their lingoes on their own. Aboriginal customs like initiation were not allowed. We could not leave Cherbourg to go to Aboriginal traditional festivals. We could have a corroboree if the Protector issued a permit. It was completely up to him. I never had a chance to learn about my traditional and customary way of life when I was on the reserves.[84]

In an article translated into Gumbaynggir, Aden Ridgeway, the former Australian Democrat Senator, has written that language:

> goes to the heart and soul of one's identity and gives connection to family, country and community. It instils a sense of enormous pride and provides the strength from which to see the world beyond the fences of your own community—then everything seems possible.[85]

The report of the 2005 National Indigenous Languages Survey recognised that: 'Language, land and culture are as one. Languages are storehouses of cultural knowledge and tradition'.[86] These storehouses of Aboriginal and Torres Strait Islander cultural knowledge and tradition are under threat. Before 1788, Australia was home to more than 250 Aboriginal and Torres Strait Islander languages.[87] The report found that only about 145 indigenous languages are still spoken, and that the vast majority of these, about 110, are in the severely and critically endangered categories.[88] The report concluded that more than a hundred Australian indigenous languages are currently 'in a far-advanced stage of endangerment', and will cease being spoken in the next 10 to 30 years if no decisive action is taken.[89] In his 2010 *Social Justice Report*, Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda said:

> In terms of cultural heritage, the loss of Indigenous languages in Australia is a loss for all Australians. For the Indigenous peoples whose languages are affected, the loss has wide ranging impacts on culture, identity and health. Cultural knowledge and concepts are carried through languages. Where languages are eroded and lost, so too is the cultural knowledge. This in turn has potential to impact on the health and well-being of Indigenous peoples.[90]

The Leader of the Opposition, Tony Abbott, has acknowledged the unique nature of Aboriginal and Torres Strait Islander cultures, arguing that 'because it is unique to our country, support for Aboriginal culture is a responsibility of Australian government in a way that support for other minority cultures clearly is not'.[91] In the February 2008 Apology to Australia's Indigenous Peoples, Prime Minister Kevin Rudd said:

> We embrace with pride, admiration and awe these great and ancient cultures we are truly blessed to have among us—cultures that provide a unique, uninterrupted human thread linking our Australian continent to the most ancient prehistory of our planet.[92]

The Leader of the Opposition, Tony Abbott, has acknowledged the unique nature of Aboriginal and Torres Strait Islander cultures, arguing that 'because it is unique to our country, support for Aboriginal culture is a responsibility of Australian government in a way that support for other minority cultures clearly is not'.

In its submission to the Panel, the Cape York Institute argued that both English and indigenous Australian languages should be recognised in the Constitution, and supported by legislative reform to protect and revitalise indigenous languages and promote English literacy.[93] The Cape York Institute proposed a constitutional amendment, named 'section 127B', as follows:

> **127B**
>
> The national language of the Commonwealth of Australia is English. All Australian citizens shall be provided the opportunity to learn, speak and write English.
>
> The Aboriginal and Torres Strait Islander languages shall be honoured as the original Australian languages, a treasured part of our national heritage.
>
> All Australian citizens shall have the freedom to speak, maintain and transmit the languages of their choice.

A proposal for a new languages provision is considered in 4.8.

4.7 Conclusions in relation to a statement of recognition preceding a new head of power, 'section 51A'

The first and third of the Panel's principles for assessing proposals for constitutional recognition are that they must 'contribute to a more unified and reconciled nation' and 'be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums'. After considering the results of the Newspoll surveys, and the overwhelming support in submissions, the Panel has concluded that a statement of recognition of Aboriginal and Torres Strait Islander peoples in the Constitution would be consistent with both these principles.

A large majority (83 per cent) of the submissions analysed for the Panel by Urbis expressed support for recognition of Aboriginal and Torres Strait Islander peoples in the Constitution (with some 10 per cent not stating a clear view).[94] A total of 97 per cent of submissions received from organisations explicitly supported constitutional recognition, and 82 per cent of submissions received from individuals explicitly support constitutional recognition.

This is not to say that every submission to the Panel was supportive of constitutional recognition of Aboriginal and Torres Strait Islander peoples. As noted in 3.1, a number were not. For example, Rex Hesline could not see 'how changing the Constitution will bring us any closer together? In fact I can see people using it as a further reason to separate us'.[95]

The latest Newspoll survey conducted for the Panel in October 2011 confirmed that 81 per cent of respondents supported recognition, with 73 per cent supporting a statement that recognises the relationship with traditional lands and waters, and rights and entitlements.

Ninety-two per cent of Aboriginal and Torres Strait Islander respondents and 87 per cent of all respondents to questionnaires distributed at public consultations and in information packs indicated that they 'strongly agreed' with constitutional recognition. Some 85 per cent of all respondents 'strongly agreed' with the statement that recognising Aboriginal and Torres Strait Islander peoples would mean that the Constitution better reflected who we are as a nation. Ninety-three per cent of Aboriginal and Torres Strait Islander respondents and 78 per cent of non-indigenous respondents strongly agreed that constitutional recognition of Aboriginal and Torres Strait Islander peoples was important to them.

The second principle is that a proposal 'must be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples'. The Panel has concluded that a majority of Aboriginal and Torres Strait Islander people would support a proposal for constitutional recognition. Such support, however, would depend upon the form of recognition and whether such recognition was also accompanied by a change to the body of the Constitution.

The Panel has concluded that a majority of Aboriginal and Torres Strait Islander people would support a proposal for constitutional recognition.

A survey conducted by the National Congress of Australia's First Peoples during its inaugural meeting (7 to 9 June 2011) found that delegates unanimously supported constitutional recognition. At that time, 68 per cent of delegates felt strongly about recognition in the preamble, 72 per cent strongly supported amending or deleting the 'race power' in section 51(xxvi), and 91 per cent strongly supported the insertion of a prohibition against racial discrimination.[96] A survey of members of Congress conducted between in May and June 2011 concluded that 88.6 per cent of members surveyed considered it 'very important' that Aboriginal and Torres Strait Islander peoples be recognised in the Constitution, with a further 6.7 per cent saying that recognition was 'somewhat important'.[97] In a statement to the Panel dated 7 September 2011, Congress articulated the position of Congress in relation to constitutional recognition as follows:

- Congress wants change in both the body of and Preamble to the Constitution;
- whilst a large majority of Congress members support the recognition of Aboriginal and Torres Strait Islander peoples in the Constitution, the form of that recognition is critically important;
- it is essential that any change to the Constitution not prevent future action that Aboriginal and Torres Strait Islander peoples may seek to pursue; and
- when the Panel releases its final report and the Government has responded, Congress will again seek the views of its members.

Congress members and delegates were not specifically asked about recognition in the body of the Constitution, or about the inclusion of values in a preamble. However, in general terms there was support for the insertion of a preamble 'recognising ownership or custodianship of lands and waters and the spiritual, social, cultural and economic relationship between those lands and waters and the First Nations Peoples, and the unique rights of First Nations Peoples to maintain culture, language and heritage, consistent with the United Nations Declaration on the Rights of Indigenous Peoples'. Further, inclusion of a new clause prohibiting discrimination and guaranteeing equality was a critical element of any constitutional reform recognising Aboriginal and Torres Strait Islander peoples, but further consultation and consideration needed to be given to whether this was limited to race only, or covered other forms of discrimination. According to the Congress statement:

> The fact that these options garnered such high support from Delegates and Members indicates once again that there is a strong preference to substantive rights and protections rather than only recognition.

The fourth of the Panel's principles is that a proposal must be 'technically and legally sound'. Consistent with its legal advice, and the submissions of the Centre for Comparative Constitutional Studies and the Law Council of Australia, the Panel has concluded that the option which would best conform with that principle would be a new grant of legislative power with its own introductory and explanatory preamble to replace section 51(xxvi). The Panel's recommendation that the race power be repealed and replaced with a new 'section 51A' is discussed in Chapter 5.

The Panel considers that a statement of recognition embedded in a new 'section 51A' would be the best option in order to retain a Commonwealth power to legislate in respect of Aboriginal and Torres Strait Islander peoples while eliminating the 'race power' in its current form, and would be the most likely to avoid unintended consequences. Such an approach would incorporate the statement in the body of the Constitution, and ensure that the purpose of the new power was clear. Any current or future High Court would use the language in the adopted preambular or introductory part of 'section 51A' to interpret the new legislative power. This would avoid the risk of a statement of recognition being used to interpret other sections of the Constitution, and avoid a discontinuity between the preamble to and body of the Constitution.

The Panel considers that a statement of recognition embedded in a new 'section 51A' would be the best option in order to retain a Commonwealth power to legislate in respect of Aboriginal and Torres Strait Islander peoples while eliminating the 'race power' in its current form, and would be the most likely to avoid unintended consequences.

This option would also avoid debate about a 'no legal effect' clause. A preamble with a 'no legal effect' clause is unlikely to attract the support of Aboriginal and Torres Strait Islander peoples, or indeed many other Australians, and is not supported by the Panel. The Panel's conclusion is that the legal risks of a new 'section 51A' with its own preamble are certainly fewer than the risks associated with some of the obvious alternatives, such as a preamble in section 51, a preamble at the head of the Constitution, or any attempt to amend the preamble to the Imperial Commonwealth of Australia Constitution Act.

As to the content of the proposed statement of recognition, the Panel has concluded that the statement should address each of the following matters:

- recognition of Aboriginal and Torres Strait Islander peoples as the first peoples of Australia;
- recognition of the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters; and
- recognition of the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples.

The Panel has sought to reflect these three matters in language suitable for inclusion as part of introductory words to a new head of legislative power. In relation to the second of these matters (the relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters), it is important to emphasise that the Panel is not using the adjective 'traditional' in the strict, technical sense which has developed in connection with proof of 'traditional laws and customs' in native title doctrine (that is, cultural continuity). Rather, 'traditional' is used as a synonym for 'long-held' or 'ancestral' or 'historical' or 'pre-existing'.[98]

A fourth matter, discussed in Chapter 5, is whether 'section 51A' ought be textually confined to laws 'for the benefit of' or 'for the advancement of' Aboriginal and Torres Strait Islander peoples, or the like. It is clear to the Panel from its consultations and the submissions received that there is strong support for qualifying any new power to make laws for Aboriginal and Torres Strait Islander peoples so that its beneficial purpose is clear. Consistent with its legal advice, the Panel proposes use of the word 'advancement' in the preambular words to the new substantive power in 'section 51A', rather than in the power itself. This approach should ensure that the purpose is apparent, and would, as a matter of interpretation, be relevant to the scope given to the substantive power.

It is clear to the Panel from its consultations and the submissions received that there is strong support for qualifying any new power to make laws for Aboriginal and Torres Strait Islander peoples so that its beneficial purpose is clear.

4.8 Conclusions in relation to a new languages provision, 'section 127A'

The fourth of the Panel's principles is that a proposal must be 'technically and legally sound'. The Panel has carefully considered the Cape York Institute proposal for a 'section 127B' (see page 128). The Panel considered some elements of the proposal worthy of support. Specifically, the Panel has concluded that recognition of Aboriginal and Torres Strait Islander languages as part of our national heritage gives appropriate recognition to the significance of those languages, especially for Aboriginal and Torres Strait Islander Australians, but for all other Australians as well. The Panel has also concluded that the recognition of English as the national language simply acknowledges the existing and undisputed position.

A separate languages provision would provide an important declaratory statement in relation to the importance of Aboriginal and Torres Strait Islander languages.

To a considerable extent, constitutional recognition of Aboriginal and Torres Strait Islander languages overlaps with the question of the content of a statement of recognition (see 4.7), and the conferral of a head of power to make laws with respect to Aboriginal and Torres Strait Islander peoples (see 5.4). However, a separate languages provision would provide an important declaratory statement in relation to the importance of Aboriginal and Torres Strait Islander languages. The Panel understands that a declaratory provision would be 'technically and legally sound', and would not give rise to implied rights or obligations that could lead to unintended consequences. On this basis, the Panel recommends such a provision to the Government.

In relation to the second sentence of the first paragraph of the proposed 'section 127B', consultations with lawyers and State government officials indicated that an 'opportunity' to learn, speak and write English could give rise to legal proceedings challenging the adequacy of literacy learning. Similarly, the last paragraph in the proposal about recognising a 'freedom' to speak, maintain and transmit languages of choice could lead to argument about the right to deal with government in languages other than English. Such expressions would raise potentially contentious issues for all levels of government. The Panel has concluded that the potential unpredictable legal risks associated with these two sentences are such that they would not be appropriate for inclusion as part of a proposed constitutional amendment.

The Panel has concluded that a languages provision affirming that English is the national language of the Commonwealth of Australia, and declaring that Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage, would also satisfy the first and third of its four principles, namely 'contribute to a more unified and reconciled nation' and 'be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums'.

4.9 Recommendations

1 The Panel recommends that section 51(xxvi) be repealed, and that a new 'section 51A' be inserted after section 51 consisting of operative language (italicised below—see Chapter 5) and preambular language along the following lines:

Section 51A Recognition of Aboriginal and Torres Strait Islander peoples

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

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

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

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

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

2 The Panel recommends the insertion of a new languages provision, 'section 127A', along the following lines:

Section 127A Recognition of languages

The national language of the Commonwealth of Australia is English.

The Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage.

Notes

1 For example, Stephen Gageler and Mark Leeming, 'An Australian Republic: Is a Referendum Enough?' (1996) 7 *Public Law Review*, at 148–149; Anne Twomey, 'Constitutional Recognition of Indigenous Australians in a Preamble' (Report No 2, Constitutional Reform Unit, Sydney Law School, 2011), submission no 1132 (Twomey submission), at 48–49.
2 For example, Council for Aboriginal Reconciliation, *Reconciliation: Australia's Challenge—Final Report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament* (2000), chapter 10, recommendation 3.
3 Submissions no 3517, no 3457 and no 3484 respectively.
4 *Olivier v Buttigieg* [1967] 1 AC 113, 128.
5 Mark McKenna, Amelia Simpson and George Williams, 'First Words: The Preamble to the Australian Constitution' (2001) 24(2) *University of New South Wales Law Journal* 382.
6 George Williams, 'The Republican Preamble: Back to the Drawing Board' (1999) 10 *Public Law Review* 69, 70–71; see also Twomey submission, at 16–19.
7 McKenna, Simpson and Williams, op cit.
8 Ed Story, submission no 3457: 'meaningful and practical change for ATSI peoples, not tokenistic'.
9 Lismore, August 2011.
10 Perth, June 2011.
11 Flinders Island, June 2011.
12 Horsham, 21 June 2011.
13 Sydney, September 2011.
14 Wurrumiyanga (Nguiu), June 2011.
15 Galiwin'ku, June 2011.
16 Lismore, August 2011.
17 Carly Nyst, submission no 2638, at 3.
18 Annie Visser, submission no 3193, at 1.
19 Horsham, June 2011.
20 Tennant Creek, 21 June 2011.
21 Shepparton, June 2011.
22 Fremantle, September 2011.
23 Wagga Wagga, 29 June 2011.
24 Newcastle, July 2011.
25 Australian Buddhist Community, submission no 2849.
26 The Constitution Alteration (Preamble) 1999 would have inserted into the Constitution, in addition to the preamble, section 125A which stated: 'The preamble to this Constitution has no legal force and shall not be considered in interpreting this Constitution or the law in the Commonweal or any part of the Commonwealth.' Twomey notes that this approach has been the subject of sustained criticism: Twomey submission, at 60–61, and authorities there cited.
27 See section 1A of the *Constitution Act 1975* (Vic); section 2 of the *Constitution Act 1902* (NSW).
28 Twomey submission, at 13–14.
29 Queensland Government, submission no 3487.
30 Bede Harris, submission no 988.
31 Centre for Comparative Constitutional Studies, University of Melbourne, submission no 3558, at 4.
32 Law Council of Australia, submission no 3478, at 16. See also ANTaR National, submission no 3432.
33 Twomey submission, at 52–53.
34 Ibid, at 53.
35 Ibid.
36 See *Report of the Constitutional Convention*, vol 4, Transcript of Proceedings, at 793 and 796, cited in Twomey submission, at 54.
37 Twomey submission, at 56.
38 Commonwealth, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Committee Hansard,* 1 May 2008, LCA 60. See also House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Reforming Our Constitution: A Roundtable Discussion* (2008), at 55; cited in Twomey submission, at 56–57.

39 Twomey submission, at 57.
40 Liav Orgad, 'The Preamble in Constitutional Interpretation' (2010) 8(4) *International Journal of Constitutional Law*, at 715, quoted in Twomey submission, at 35. See also the detailed comparative study of the use made of constitutional preambles by courts in the United States, Canada, India and France in Twomey submission, at 26–42.
41 For example, the reference to an 'indissoluble Federal Commonwealth' has been used to support arguments with respect to federalism, the continued independent existence of the States, the role of the Territories in the federal system and cooperation between the constituent parts of the federation. As Twomey notes, another common use of the preamble is as an expression of Australia's nationhood because the agreement was to unite in 'one indissoluble Federal Commonwealth', rather than a conglomeration of States. The preamble has also been used as support for (and against) the conclusion that the basis of federation was 'popular', as the agreement to unite was made by the 'people' rather than the colonies. See discussion and cases cited in Twomey submission, at 42–44. The most controversial use of the preamble occurred in *Leeth v Commonwealth* (1992) 174 CLR 455, at 486, where Deane and Toohey JJ, in dissent, identified a constitutional implication of legal equality, the 'conceptual basis' of which they found in the preamble and covering clause 3. See Twomey submission, at 44.
42 Centre for Comparative Constitutional Studies, University of Melbourne, submission no 3558, at 6–7.
43 Ibid.
44 Ibid.
45 Law Council of Australia, submission no 3478, at 15–16.
46 Expert Panel on Constitutional Recognition of Indigenous Australians, *A National Conversation about Aboriginal and Torres Strait Islander Constitutional Recognition* (Discussion Paper, May 2011), at 17.
47 Australian Electoral Commission, '1999 Referendum Report and Statistics—Key Results' (8 June 2007).
48 Darwin, 27 September 2011.
49 R J Ellicott QC, submission no 3525, at 8.
50 ANTaR Qld, submission no 3445, at 2. See also Humanist Society of Victoria, submission no 3523.
51 David Thompson, submission no 110.
52 Executive Council of Australian Jewry Inc., submission no 3599, at 3. See also Humanist Society of Victoria, submission no 3523: 'It should, as well as recognising the First Australians, set our fundamental values: racial and gender equality, respect for ethnic diversity, personal freedoms, the rule of law, equal opportunities and democratic governance. This is of special importance in the absence of a national bill of rights.'
53 Anglican Diocese of Brisbane, submission no 3366. See also Sisters of Mercy Parramatta, submission no 3547.
54 Uncle Harry Boyd, submission no 3533.
55 David Thompson, submission no 110.
56 Uniting Aboriginal and Islander Christian Congress and Assembly of the Uniting Church in Australia, submission no 3066, at 2.
57 Twomey submission, at 55.
58 Queensland Aboriginal and Torres Strait Islander Advisory Council, submission no 3487a, at 14.
59 ANTaR National, submission no 3432, at 18.
60 Sisters of St Joseph South Australia Reconciliation Circle, submission no 3587, at 2. The Sisters of Mercy Parramatta stated: 'These specific rights should be included in the revised Constitution. Key among them are: 1) the right to enjoy their identity and culture b) to maintain and use their language c) to maintain their kinship ties d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.' Sisters of Mercy Parramatta, submission no 3412.
61 Irene Doutney, submission no 3434.
62 Bryce Hobbs, submission no 1894.
63 Mark Green, submission no 3145, at 2.
64 Kununurra, June 2011.
65 Jeff McMullen, submission no 29, at 1.
66 Chris Squelch, submission no 121.

67 Brooke Jane Greenwood, submission no 2916, at 3.
68 Cape York Institute, submission no 3479, at 7. See also Western Australian Network of Alcohol & other Drug Agencies, submission no 3531, at 2.
69 Federation of Ethnic Communities' Councils of Australia, submission no 3271.
70 Grafton, August 2011.
71 Cairns, September 2011.
72 Broome, July 2011.
73 For example, Marcia Danielson, submission no 524; Hilary Parsons, submission no 953; Andrew Partos, submission no 1958; Victoria O'Connor, submission no 2484; Grant Scarborough, submission no 2671; James Hunter, submission no 3070; Cath Brokenborough, Lend Indigenous Engagement Employee Resource Group, submission no 3207; Joseph Kennedy, submission no 21; Sharon Murakami, submission no 154; Linley Walker, submission no 1184; Human Rights Law Centre, submission no 3555; Yarrabah Shire Council, submission no 3517; Law Council of Australia, submission no 3478.
74 National Congress of Australia's First Peoples, *Members' Survey Report* (2011).
75 John Arneaud, submission no 1042, at 2.
76 Margie Webb, submission no 2018.
77 Victorian Traditional Owner Land Justice Group, submission no 3546.
78 For example, at Broken Hill, August 2011.
79 Urbis Pty Ltd, *Analysis of Public Submissions to the Expert Panel on Constitutional Recognition of Indigenous Australians*, report prepared for the Department of Families, Housing, Community Services and Indigenous Affairs (2011).
80 Port Augusta, July 2011.
81 Port Augusta, July 2011.
82 Aboriginal and Torres Strait Islander Social Justice Commissioner, 'The Perilous State of Indigenous Languages in Australia' in *Social Justice Report 2009* (Australian Human Rights Commission, 2009) 57, at 57–58; also Cape York Institute, submission no 3479, at 42.
83 Cape York Institute, submission no 3479, at 39.
84 Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997), at 154.
85 Aden Ridgeway, 'Language Is Power; Let Us Have Ours', *Sydney Morning Herald*, 26 November 2009.
86 Australian Institute of Aboriginal and Torres Strait Islander Studies and Federation of Aboriginal and Torres Strait Islander Languages, *National Indigenous Languages Survey Report 2005* (Department of Communications, Information Technology and the Arts, 2005), at 21.
87 Ibid, at 3.
88 Ibid.
89 Ibid, at 67.
90 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2010* (Australian Human Rights Commission, 2011), at 58.
91 Quoted in Noel Pearson, *Radical Hope: Education and Equality in Australia* (Black Inc., 2011), at 166.
92 Commonwealth, *Parliamentary Debates,* House of Representatives, 13 February 2008, at 171.
93 Cape York Institute, submission no 3479, at 39–40.
94 Urbis, op cit, at 14.
95 Rex Hesline, submission no 1946.
96 National Congress of Australia's First Peoples, *National Congress Report 2011: Building Our Foundations* (2011).
97 National Congress of Australia's First Peoples, *Members' Survey Report*, op cit.
98 On the notion of 'traditional' in the context of native title doctrine, see Simon Young, 'Law and Custom—"Traditional": The Assembly of a Legal Microscope' (Presentation at Section 223 Native Title Act Workshop, 'Agreements, Treaties and Negotiated Settlements (ATNS) Project', 14 May 2009); also Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (Federation Press, 2008).

5 The 'race' provisions

5.1 The concept of race in the Constitution

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

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

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

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

The last of these options is considered in Chapter 6.

Chapter 1 considered the history of the Australian Constitution, including the sentiments that accompanied proposals for section 25 and 51(xxvi), and the attitudes of the framers of the Constitution to the 'aboriginal natives' and people of 'coloured races'.

As there recounted, section 25 is a racially discriminatory provision that contemplates the disqualification of all persons 'of any race' from voting in State elections. Likewise, a reading of the Constitutional Convention debates of the 1890s makes clear that the framers intended section 51(xxvi) to be a source of power for the enactment by the Commonwealth Parliament of racially discriminatory laws with respect to the people 'of any race … for whom it is deemed necessary to make special laws'. In post-1967 High Court jurisprudence relating to section 51(xxvi), culminating in *Kartinyeri v Commonwealth*,[1] the so-called Hindmarsh Bridge decision, the proposition that 'the power may be used to discriminate against or for the benefit of the people of any race' is now reasonably established.[2]

Both section 25 and section 51(xxvi), as they stand, allow for the making of laws by reference to the concept of 'race'—in the case of section 25, State laws; and in the case of section 51(xxvi), Commonwealth laws.

The Panel's consultations, and submissions to the Panel, overwhelmingly supported the repeal of section 25. Of the 280 submissions that referred to section 25, 97.5 per cent supported its repeal.[3] Among these, a considerable number, such as that of Anglicare Western Australia, supported a substantive guarantee of racial equality and non-discrimination to replace section 25.[4]

'It is important that the races power not simply be repealed. An important achievement of the 1967 referendum was to ensure that the Federal Parliament can pass laws for Indigenous peoples in areas like land rights, health and the protection of sacred sites.'

George Williams, submission no 3609

In relation to section 51(xxvi), a large majority supported change. Of those who referred to the head of power in submissions, some 94 per cent supported change.[5] Many supported the insertion of a new head of power to make laws with respect to Aboriginal and Torres Strait Islander peoples. An example is the Aboriginal Peak Organisations of the Northern Territory, an alliance of the Central Land Council, Northern Land Council, Central Australian Aboriginal Legal Aid Service, Northern Australian Aboriginal Justice Agency, and Aboriginal Medical Services Alliance Northern Territory.[6] Likewise, Professor George Williams argued:

> It is important that the races power not simply be repealed. An important achievement of the 1967 referendum was to ensure that the Federal Parliament can pass laws for Indigenous peoples in areas like land rights, health and the protection of sacred sites. … The most appropriate way of 'fixing' the races power is to grant power to the Federal Parliament to pass laws for 'Aboriginal and Torres Strait Islanders'. Such a grant, consistent with the way that the High Court interprets the Constitution, would be broad enough to cover laws enacted in the past, and those that might be enacted in the future, for Indigenous peoples.[7]

Various Anglican organisations proposed the repeal of the race power as it stands and its replacement with a specific power to make laws 'with respect to the culture, historical disadvantage and unique place of Aboriginal and Torres Strait Islander peoples'.[8] The organisations urged that 'the drafting of the power should make it as clear as possible that the power should only be to make laws which are objectively beneficial and supported by Aboriginal and Torres Strait Islander Peoples'.[9] Similarly, Oxfam Australia recommended that section 51(xxvi) be deleted and the Commonwealth Parliament be empowered to make laws aimed 'at addressing historical disadvantage or preserving language, identity or culture'.[10] The Law Institute of Victoria stated:

> The enactment of a new section to permit laws that are beneficial to Australia's Aboriginal and Torres Strait Islander peoples would not relate to Aboriginal and Torres Strait Islander peoples because of their race. It would relate to Aboriginal and Torres Strait Islander peoples because of their unique status as Australia's first peoples and based on their disadvantage. These are significant and important distinctions.[11]

As noted in Chapter 1, Newspoll has conducted national surveys of Australians on the topic of constitutional recognition of Aboriginal and Torres Strait Islander peoples and related issues of constitutional reform. The final Newspoll survey confirmed that, as at 28 October 2011, 73 per cent of respondents were in favour of amending the Constitution to remove the race provisions.

It became clear to the Panel during the course of its work that Australians have increasingly rejected the concept of 'race' as having any place in the Constitution. As Noel Pearson argued:

> As long as the allowance of racial discrimination remains in our Constitution, it continues, in both subtle and unsubtle ways, to affect our relationships with each other. Though it has historically hurt my people more than others, racial categorisations dehumanise us all. It dehumanises us because we are each individuals, and we should be judged as individuals. We should be rewarded on our merits and assisted in our needs. Race should not matter.[12]

5.2 The notion of race

Numerous submissions to the Panel challenged the scientific basis of 'race', and contended that the concept has no place in the Constitution. For example, Elizabeth Jones said:

Numerous submissions to the Panel challenged the scientific basis of 'race', and contended that the concept has no place in the Constitution.

> The phrase race is a biologically and scientifically defunct term which no longer provides an accurate means of describing differences between people. Furthermore, historically the phrase race has been used to assert some form of superiority between different groups of people. There is no scientific or other justification to continue using such a phrase in our Constitution.[13]

The Victorian Aboriginal Child Care Agency and the Victorian Statewide/Peak Aboriginal Community Controlled Organisations Forum both argued that race is a social construct and should not be used in legislation.[14]

In contemporary practice and scholarship, the dominant view among biological scientists, anthropologists and social theorists is that the concept of 'race' is socially constructed, imprecise, arbitrary and incapable of definition or scientific demonstration.[15] The anthropologist Professor Ashley Montagu, who conducted research with Aboriginal groups in the 1930s, has described 'race' as 'man's most dangerous myth':

> The myth of race refers not to the fact that physically distinguishable populations of humans exist, but rather to the belief that races are significant populations or peoples whose physical differences are innately linked with significant differences in mental capacities, and that these innate hierarchical differences are measurable by the cultural achievements of such populations, as well as by standardised intelligence (IQ) tests. This belief is thoroughly and dangerously unsound.[16]

'No reference to "race" should be in the Australian Constitution. There is only one human race and there is no scientific evidence for racial differences between humans from any part of the world. The concept "race" is extremely divisive and has caused great sufferings and injustice in the world.'

Dr Boris Martinac, submission no 3223

From around the beginning of the nineteenth century, the concept of race became a prominent part of narratives about science, the nation and the state in Europe and North America.[17] The concept subsumed 'a growing ideology of inequality devised to rationalize European attitudes and treatment of the conquered and enslaved peoples … a strategy for dividing, ranking, and controlling colonized people used by colonial powers everywhere'.[18] In North America, proponents of slavery used race to justify its retention.[19] In Europe, the superiority of the European (or English or 'white') race was cited as an explanation for European prosperity and success, and a justification for colonial expansion.

In his 1877 'Confession of Faith', Cecil Rhodes, the British colonial statesman and prime minister of Cape Colony, South Africa (1890–96), stated:

> I contend that we are the finest first race in the world, and that the more of the world we inhabit the better it is for the human race. Just fancy those parts that are at present inhabited by the most despicable specimens of human beings what an alteration there would be if they were brought under Anglo-Saxon influence, look again at the extra employment a new country added to our dominions gives. I contend that every acre added to our territory means in the future birth to some more of the English race who otherwise would not be brought into existence.

In 1894, British public international lawyer John Westlake wrote:

> When people of the European race come into contact with American or African tribes, the prime necessity is a government under the protection of which the former may carry on the complex life to which they have been accustomed in their homes ... Can the natives furnish such a government ... ? In the answer to that question lies, for international law, the difference between civilisation and the want of it. ... The inflow of the white race cannot be stopped where there is land to cultivate, ore to be mined, commerce to be developed, sport to enjoy, curiosity to be satisfied. ... [I]nternational law has to treat such natives as uncivilised.[20]

A 1948 United Nations Economic and Social Council resolution called upon the United Nations Educational, Scientific and Cultural Organization (UNESCO) to consider the timeliness of 'proposing and recommending the general adoption of a programme of dissemination of scientific facts designed to bring about the disappearance of that which is commonly called race prejudice'. UNESCO subsequently initiated a program to 'study and collect scientific materials concerning questions of race'. The results of the work of experts convened by UNESCO were summarised in four statements on the question of 'race' adopted between 1950 and 1967.[21] The 1950 UNESCO *Statement on Race* argued that 'it would be better … to drop the term "race" altogether':

> National, religious, geographic, linguistic and cultural groups do not necessarily coincide with racial groups: and the cultural traits of such groups have no demonstrated genetic connection with racial traits. Because serious errors of this kind are habitually committed when the term 'race' is used in popular parlance, it would be better when speaking of human races to drop the term 'race' altogether and speak of ethnic groups.

The 1951 UNESCO *Statement on the Nature of Race and Race Differences* noted, among other things, that the available scientific material did not justify the conclusion that inherited genetic differences are a major factor in producing the differences between the cultures and cultural achievements of different peoples or groups. It did indicate, on the contrary, 'that a major factor in explaining such differences is the cultural experience which each group has undergone'. The 1964 *Proposals on the Biological Aspects of Race*, adopted in Moscow, concluded that '[t]he peoples of the world today appear to possess equal biological potentialities for attaining any civilizational level', and that '[d]ifferences in the achievements of different peoples must be attributed solely to their cultural history'. Neither in the field of hereditary potentialities concerning the overall intelligence and the capacity for cultural development, nor in that of physical traits, was there any justification for the concept of 'inferior' and 'superior' races.

The 1967 UNESCO *Statement on Race and Racial Prejudice*, adopted at a fourth multidisciplinary experts' meeting convened by UNESCO in Paris, described the genesis of racist theories and racial prejudice. The statement confirmed that the 'human problems' arising from so-called 'race relations' were social in origin rather than biological. A basic problem was racism, 'namely, antisocial belief and acts which are based on the fallacy that discriminatory intergroup relations are justifiable on biological grounds'.

In 1978, the General Conference of UNESCO adopted the UNESCO *Declaration on Race and Racial Prejudice*. The declaration provides in article 1(1) that: 'All human beings belong to a single species and are descended from a common stock. They are born equal in dignity and rights and all form an integral part of humanity.' Article 1(4) provides that: 'All peoples of the world possess equal faculties for attaining the highest level in intellectual, technical, social, economic, cultural and political development.' Article 1(5) affirms that: 'The differences between the achievements of the different peoples are entirely attributable to geographical, historical, political, economic, social and cultural factors.'

Contemporary anthropological theory suggests that race is culturally and socially constructed.[22] It is 'not a self-evident and natural category',[23] but a dynamic and unstable construct that has changed and been used differently over time and from place to place. Current research suggests that much of the visible variation among people from different places is due to adaptation to local conditions (such as disease or climate) that does not correlate to other characteristics or broad racial categories, or to fundamental attributes such as ability or personality.[24] The most significant recent development that has influenced scientific thinking about the biological concept of race is the mapping of the human genome. Scientists have collected data about the genetic constitutions of populations around

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Although the concept of 'race' is incapable of scientific definition or demonstration, in Australia (as elsewhere) it persists as a powerful and persistent focus of social identity and exclusion, and remains a constitutionally available ground for legislation.

the world in an effort to provide the link between ancestry and patterns of disease. Michael Bahsad and Steve Olson have concluded that traits affected by natural selection may be poor predictors of group membership, and may imply genetic relatedness when, in fact, little exists.[25]

In Australia, Professor Marcia Langton has commented:

> [T]he rapid accumulation of evidence concerning the genetic variation in and between human populations has led to the recognition that there are likely to be more similarities between people of different groups, traditionally called 'races', than between members of these races … the criteria for the division of the world's population into 'races'—skin, hair and eye colour, and a few other physiological characteristics … were associated, without any scientific evidence, with social characteristics.[26]

Langton has concluded that 'there is no reliable evidence that any physical reality conforms to the notions of "race" … assumed in our language and our legal doctrines and texts', and that 'many Australians, including some influential academics, are not aware that the concept of "race" has been rejected by most reputable scientists and social scientists as a valid marker of human physiological and other social differences'.[27]

Increasingly, contemporary scholarship on race relations has focused on 'the way race serves power relations, rather than in the concept of race per se'.[28] A National Roundtable of the Australian Psychological Society and Australian Indigenous Psychologists Association concluded that 'racism against Aboriginal and Torres Strait Islander peoples exists in various forms and in all systems in Australia today' and is having 'a destructive impact on Aboriginal and Torres Strait Islander peoples' education, health and wellbeing, well beyond its immediate impact'.[29]

'How can we say we have achieved … equality, when Section 25 of our constitution specifically references the ability of the states to prevent people from voting in state elections on the basis of their race?'

Mark Textor, 'Time for Conservatives to Do the Right Thing', *Sydney Morning Herald*, 29 October 2011

Accordingly, although the concept of 'race' is incapable of scientific definition or demonstration, in Australia (as elsewhere) it persists as a powerful and persistent focus of social identity and exclusion, and remains a constitutionally available ground for legislation.[30] In Chapter 6, the Panel discusses the option of a constitutional prohibition on racial discrimination.

5.3 Conclusions in relation to section 25

Consistent with the four principles it has identified to guide its assessment of proposals for constitutional change, the Panel recommends the repeal of section 25 of the Constitution. As Allens Arthur Robinson noted in its submission to the Panel, 'it would be inherently contradictory to amend the Constitution to recognise Indigenous Australians but maintain a provision that contemplates state laws excluding Indigenous Australians, among other races, from voting'.[31]

The Panel has concluded that the repeal of section 25 would 'contribute to a more unified and reconciled nation'. The University of Melbourne Centre for Comparative Constitutional Studies submission stated: 'In our view section 25 ought to be repealed. There should not be a provision in our Constitution that expressly acknowledges that State governments can pass racially discriminatory laws.'[32] Oxfam Australia referred to the provision as 'odious'.[33]

To similar effect, the Catholic Justice and Peace Commission of the Archdiocese of Brisbane stated: 'There is no place in contemporary Australia for constitutional provisions which permit discrimination against Aboriginal and Torres Strait Islander peoples or, indeed, people of any other race.'[34]

The Panel has also concluded that the repeal of section 25 would be 'of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples'. The National Aboriginal Community Controlled Health Organisation made the following submission:

> NACCHO supports the repeal of Section 25 … as we believe it is totally unacceptable to allow provision in the constitution for state governments to preclude people from voting on the basis of race whether they are Aboriginal people or people of any other race. The Australian nation should have moved beyond this type of provision and hopefully there will be broad agreement to repeal this section.[35]

The staff of the Fred Hollows Foundation argued as follows:

> The removal of Section 25 of the Constitution—this section clearly countenances racist actions by the States and serves no useful purpose in modern times. It has the capacity to be used to allow actions that are detrimental to Aboriginal and Torres Strait Islander people.[36]

The Panel considers that the removal of section 25 is 'capable of being supported by an overwhelming majority of Australians from across the political and social spectrums'. The repeal of section 25 was supported in 97.5 per cent of submissions.[37] In a nationally representative survey conducted for the Panel in September 2011, 82 per cent of respondents expressed support for removing section 25, with 53 per cent strongly supporting its removal.

The Panel is satisfied that a constitutional amendment to remove section 25 would be 'technically and legally sound'. The Panel's legal advice is that there are no legal risks in removing section 25. No structural or other interpretative problems would follow. The review of the history of section 25 in Chapter 1 demonstrates that the section no longer serves any useful purpose. There are no State laws that disenfranchise people on the basis of race. Because of the *Racial Discrimination Act 1975* (Cth), and section 109 of the Constitution, section 25 is now a dead letter. Any attempt by a State to enact such laws would be invalid, given the Racial Discrimination Act and section 109 of the Constitution.

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In his submission, former Commonwealth Attorney-General Bob Ellicott QC contended that section 25 has no useful role to play in the Constitution and should be repealed. He proposed that consideration be given to a new section 25 consisting of two historical (or preambular) paragraphs reciting historical matters, and a new paragraph, as follows:

> 25(1) The Aboriginal and Torres Strait Islander people were for many thousands of years prior to 1788 the occupiers and custodians of the Australian continent and adjacent islands and throughout that period they developed their own distinct cultural identities which have become part of and enriched the life of the Australian people.
>
> (2) The provisions of the Constitution as originally framed which permitted the Aboriginal and Torres Strait Islander people to be excluded from reckoning the number of people of the Commonwealth or of a State for which this provision is substituted were discriminatory.
>
> (3) In relation to voting the Aboriginal and Torres Strait Islander peoples have equal rights with other Australian citizens.[38]

The Panel recommends that section 25 be deleted altogether, rather than replaced by a guarantee of equality of suffrage to Aboriginal and Torres Strait Islander peoples. However, as the Ellicott proposal recognises, there is much to be said for amending the Constitution beyond the mere removal of section 25. Professor Hilary Charlesworth has recently commented:

> [Section 25] is a startling provision in a modern constitution, contemplating governmental discrimination on the basis of race. It reflects a perspective that is at odds with Australia's national narrative and its international obligations. I suggest … that repeal of the current section 25 and its replacement by an equality provision would be an important step.[39]

Likewise, Anglicare Western Australia, in its submission to the Panel, supported a substantive guarantee of racial equality and non-discrimination to replace section 25: 'This would benefit all Australians as it would not be specific to Aboriginal people.'[40] The Federation of Ethnic Communities' Councils of Australia similarly argued that the repeal of section 25 would protect all Australians against racial discrimination.[41]

Together with the repeal of section 25, the Panel has recommended a related but separate amendment to the Constitution, called new 'section 116A', to proscribe laws and executive actions that discriminate on the basis of race.

Together with the repeal of section 25, the Panel has recommended a related but separate amendment to the Constitution, called new 'section 116A', to proscribe laws and executive actions that discriminate on the basis of race. This recommendation is considered in Chapter 6.

5.4 Conclusions in relation to section 51(xxvi)

For the same reasons the Panel recommends the removal of section 25, it also recommends the removal of section 51(xxvi). This is subject to the caveat that any repeal of section 51(xxvi) be accompanied by the conferral of a new head of power in Chapter V of the Constitution to make laws with

respect to Aboriginal and Torres Strait Islander peoples.[42] The Panel has called this new head of power 'section 51A'.

The need for a specific head of power with respect to Aboriginal and Torres Strait Islander peoples arises because of their unique place in the history of the country and their prior and continuing existence.

As the history and jurisprudence set out in Chapter 1 demonstrates, notwithstanding the 1967 referendum, section 51(xxvi) retains its original discriminatory character: it is able to be turned to the advantage or disadvantage of any group identified in or affected by relevant legislation by reference to 'race'. In a recent speech, the Hon Michael Kirby stated:

> [Section 51(xxvi)] lies in wait for the exercise of federal legislative power not only 'for' Aboriginals, but 'against' their equal rights with Australians of other races. Today, in this chamber, it behoves us as Australians to reflect upon such a shocking outcome of the idealistic aspirations of 1967 … The lesson is that, so long as racist provisions exist in the Australian Constitution, they stand at risk of being used.[43]

In 1988, the Constitutional Commission recommended that the race power be deleted and replaced by a provision empowering the Commonwealth Parliament to make laws with respect to Aboriginal and Torres Strait Islander peoples:

> It is inappropriate to retain section 51(xxvi.) because the purposes for which, historically, it was inserted no longer apply in this country. Australia has joined the many nations which have rejected race as a legitimate criterion on which legislation can be based. The attitudes now officially adopted to discrimination on the basis of race are in striking contrast to those which motivated the Framers of the Constitution. It is appropriate that the change in attitude be reflected in the omission of section 51(xxvi.).[44]

The Hon Robert French, writing non-judicially, has supported the commission's recommendation for a new head of power, concluding that: 'Such laws are based not on race but on the special place of those peoples in the history of the nation.'[45] The Panel also concurs with the recommendation of the commission. The need for a specific head of power with respect to Aboriginal and Torres Strait Islander peoples arises because of their unique place in the history of the country and their prior and continuing existence.

Consistent with the four principles it has identified to guide its assessment of proposals for constitutional change, the Panel recommends the repeal of the race power in section 51(xxvi) of the Constitution, together with the conferral of a new head of power in 'section 51A' to make laws with respect to Aboriginal and Torres Strait Islander peoples.

The Panel is satisfied that the repeal of section 51(xxvi), together with the conferral of a new head of power in 'section 51A', could, if supported by a well-resourced public education campaign, be consistent with its first three principles, having regard to:

- the views expressed to members of the Panel at community consultations;
- the results of the surveys of delegates and members conducted by the National Congress of Australia's First Peoples;

- the results of the surveys conducted by Newspoll for the Panel; and
- the review of submissions to the Panel.

A nationally representative survey conducted for the Panel in September 2011 found that more than two-thirds of respondents (67 per cent) were in favour of removing or changing the race power. During the live chats conducted by Newspoll between 22 and 30 November 2011, participants generally preferred a shorter version of a proposed section 51A amendment that avoided reference to 'rights and entitlements' and economic matters. Most recognised the need to support Aboriginal and Torres Strait Islander peoples, but saw the singling out of one group of Australians as a 'stumbling block'. This suggests to the Panel the particular importance of a properly resourced public education and awareness campaign in the lead-up to the referendum (see Chapter 10).

The Panel recommends the repeal of section 51(xxvi), together with the conferral of a new head of power, 'section 51A', and emphasises the particular importance of a properly resourced public education and awareness campaign in the lead-up to the referendum.

The Panel is also satisfied that the repeal of section 51(xxvi), together with the conferral of a new head of power in 'section 51A', would be technically and legally sound, and thus consistent with its fourth principle.

For the reasons given below, the recommendation of the Panel is that section 51(xxvi) be repealed but that Parliament continue to have power under section 51A to legislate with respect to Aboriginal and Torres Strait Islander peoples. Based on legal advice, the Panel has concluded that such an approach would ensure that existing laws applicable to Aboriginal and Torres Strait Islander peoples would continue to operate. It would remove unacceptable references to 'race', and provide a broad Commonwealth competence—consistent with the aspirations of the Australian people in 1967—to legislate with respect to Aboriginal and Torres Strait Islander peoples.

The Panel is not aware of any piece of Commonwealth legislation currently enacted in reliance on section 51(xxvi) that is applicable to a 'race' of people, other than Aboriginal and Torres Strait Islander peoples. As Professor Geoffrey Sawer commented in 1966,[46] everything Sir Samuel Griffith was concerned about in 1891 when he first proposed the clause[47] could have been achieved under the immigration power in section 51(xxvii), the aliens power in section 51(xix), and the external affairs power in section 51(xxix) (not to mention section 51(xxviii) relating to the influx of criminals).

Since 1967, the Commonwealth Parliament has enacted laws pursuant to section 51(xxvi) specifically applicable to Aboriginal and Torres Strait Islander Australians in the areas of cultural heritage,[48] corporations[49] and native title.[50] The risks of the removal of section 51(xxvi), without the conferral of a new head of power, are that important existing or future laws:

- might no longer be supported by a grant of legislative competence;[51] or
- might no longer be able to be validly enacted by the Commonwealth Parliament in certain areas.

In relation to the first of these risks, the Panel is not aware of the High Court ever having been asked to consider its position in relation to legislation validly enacted in reliance on a head of power that was subsequently removed. This scenario presents difficult and untested questions, including as to the power to amend legislation where the power supporting its enactment no longer exists.

In relation to the second risk, an example is that Aboriginal and Torres Strait Islander corporations would no longer be able to be incorporated under legislation enacted using the corporations power in section 51(xx) of the Constitution. Section 51(xx) gives the Commonwealth Parliament the right to legislate with respect to 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'. In *New South Wales v Commonwealth*,[52] a majority of the High Court (six to one) interpreted the power in section 51(xx) as covering the regulation of corporations, not their incorporation.

Another example is the provision of benefits. Some benefits, such as the Aboriginal Study Assistance Scheme, may continue to be supported under the social security power in section 51(xxiiiA), but this section may not support all measures designed to address Aboriginal and Torres Strait Islander disadvantage. It may well be that the external affairs power in section 51(xxix) of the Constitution would be held to support legislation providing such benefits, in particular where such laws are 'special measures' required by the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).[53] However, again there is a risk of a Commonwealth loss of legislative competence in the absence of the conferral of a new head of power.

In relation to heritage protection and native title legislation, it may also be that the external affairs power in section 51(xxix) of the Constitution would be held to support such laws, in particular when an international convention is implemented domestically by legislation.[54] However, CERD does not particularise the rights of indigenous peoples, as the United Nations Declaration on the Rights of Indigenous Peoples does. The declaration, in contrast to CERD, is a declaration of the General Assembly, not a treaty to which Australia is a party. Again, there are untested questions about the extent to which the external affairs power can be used as a 'hook' in relation to matters of international concern, as opposed to international obligation.

Without a specific head of power to make laws with respect to Aboriginal and Torres Strait Islander peoples, then apart from the territories power in section 122, the grants power in section 96 and a referral of power to the Commonwealth by the States, there remains only the external affairs power as a source of federal legislative competence. The Panel considers that there is considerable risk that the external affairs power, used to support the *Racial Discrimination Act 1975* to give effect to CERD, would not support the range of laws that can currently be enacted in reliance on section 51(xxvi) to benefit Aboriginal and Torres Strait Islander peoples.

'The repeal of the race power and the insertion of a new head of power should be proposed together in one referendum question.'

Allens Arthur Robinson, submission no 3447

Those who made submissions to the Panel supporting the repeal of section 51(xxvi) together with the conferral of a new head of power included Allens Arthur Robinson, which cautioned that the race power currently supports important Commonwealth laws such as the *Native Title Act 1993* and the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* that may not be supported by other heads of power. The Allens submission noted that if the repeal and replacement of section 51(xxvi) were proposed as separate referendum questions, there would be a risk that one could be accepted and the other rejected, leaving either two powers or none. Accordingly, Allens recommended that '[t]he repeal of the race power and the insertion of a new head of power should be proposed together in one referendum question'.[55]

Australians for Native Title and Reconciliation National cautioned that a 'simple repeal of the Race Power, without replacement, may compromise beneficial laws that have been enacted under the power, such as federal laws that protect rights relating to land, health, or the preservation of sacred sites'.[56] The Anglican Diocese of Brisbane likewise recommended that any repeal of the race power be approached cautiously 'because the *Native Title Act (1993)* is presently based, at least in part, on the race power'. Noting that 'special measures' under CERD are only allowed if they do not lead to the maintenance of separate rights for different groups and are not continued indefinitely, the Anglican Diocese cautioned that the external affairs power may not prove satisfactory as a basis for indigenous legislation, especially on native title.[57] The Castan Centre for Human Rights Law similarly argued that it would not be sufficient to simply delete section 51(xxvi) as 'the Commonwealth would face a deficit of legislative power'.[58]

The Executive Council of Australian Jewry Inc. argued that it is appropriate to delete references in the Constitution to 'race' as a basis for the exercise of federal legislative power, but noted the need for Parliament to be empowered 'to pass laws to prevent, reduce or remedy the disadvantages still suffered by Aboriginal and Torres Strait Islander peoples in connection with land ownership, and in accessing housing, health, education and other government services'. The Executive Council contended that any such power should be qualified by the requirement that any laws passed under it 'be for the benefit and advancement of Aboriginal and Torres Strait Islander peoples'.[59] Similar submissions were made to the Panel by, among others, Anglicare Western Australia,[60] Oxfam Australia,[61] Victorian Aboriginal Child Care Agency,[62] the Aboriginal Peak Organisations of the Northern Territory,[63] Sean Brennan,[64] the Law Council of Australia,[65] Victorian Traditional Owner Land Justice Group,[66] John Pyke[67] and the National Indigenous Lawyers Corporation of Australia.[68]

The New South Wales Aboriginal Land Council proposed the removal of section 51(xxvi) and its replacement with a new power to make laws with respect to 'matters beneficial to Aboriginal and Torres Strait Islander peoples in that such laws are only enacted for the sole purpose of securing the adequate advancement and the equal enjoyment or exercise of human rights and fundamental freedoms for Aboriginal and Torres Strait Islander peoples'.[69] Such language was proposed to conform with the international standard for 'special measures' under CERD.

Likewise, the Cape York Institute argued that '[t]he existence of the race power in the Australian Constitution, 'without any protection against adverse discrimination, is incompatible with our values and our obligations to eliminate racial discrimination'.[70] The Cape York Institute submission notes that the concept of race is difficult to define accurately, and has mostly been discredited. At the same time, while classifications according to race may be scientifically dubious, they exist as a social construct, and racial discrimination based on the social construct remains all too familiar to Aboriginal and Torres Strait Islander Australians. Accordingly, the Cape York Institute called for reforms including the removal of section 25, the removal of section 51(xxvi), a new power to pass laws with respect to Aboriginal and Torres Strait Islander peoples, and a new provision proscribing discrimination 'on the basis of race, colour or ethnicity'.[71] A participant at one of the Melbourne consultations (September 2011) said:

> We must focus on the most egregious parts of the Constitution. It is entirely shocking that we have a section 25 that contemplates discrimination; it is entirely shocking that we have section 51(xxvi), that was put in to allow racial discrimination ...

The Cape York Institute submission also contained a proposal for a new section, 'section 127A', to provide for a mechanism for periodic review of laws with respect to Aboriginal and Torres Strait Islander peoples 'to assess the effectiveness of the laws in achieving their intended objectives'. The proposed text of 'section 127A' provides:

> In assessing the effectiveness of laws with respect to Aboriginal and Torres Strait Islander peoples, whether enacted under s 51(xxvi) or any other power, the views and aspirations of the Aboriginal and Torres Strait Islander people affected by the laws shall be taken into account.[72]

The Panel has concluded that the enforceability of such a constitutional provision would be problematic. Nonetheless, the Panel considers that special measures that are intended to be temporary in nature should be subject to periodic review. The intent of such a proposal could be legislated by the Commonwealth Parliament.

'Far from suggesting that Parliament should pay no attention to individual differences and diversity, it should eschew a constitution which makes laws based on race and instead make them on the basis of such things as culture and need.'

Mark Textor, 'Time for Conservatives to Do the Right Thing', *Sydney Morning Herald*, 29 October 2011

The Panel's recommendation is for a new 'section 51A' consisting of operative language to grant and define legislative competence. The Panel recommends that such express conferral of legislative power should extend to the making of laws 'with respect to Aboriginal and Torres Strait Islander peoples'.

A significant issue raised during the course of the Panel's consultations, and in submissions to it, is whether such power ought be textually confined to laws 'for the benefit of' or 'for the advancement of' Aboriginal and Torres Strait Islander peoples, or the like.[73] At present, the power given by section 51(xxvi) is 'to make special laws' for the 'people of any race for whom it is deemed necessary'—'laws for the peace, order, and good government of the Commonwealth'. The High Court has held, very clearly, that the deeming is for the Parliament, not for the High Court, except in possible but as yet undemonstrated cases of extremity or abuse.[74] The unsuccessful arguments in *Kartinyeri* included an attempt to require that a section 51(xxvi) law be 'for the benefit and/or advancement of Aborigines',[75] and the successful argument asserted that it allowed 'adverse laws' and remained 'a power with an element of prejudice inherent'.[76] In relation to section 51(xxvi), there is little reason to doubt that the far-reaching judicial deference to the legislative judgment of Parliament concerning the merit of proposed laws, including their supposed beneficial effect in favour of Aboriginal and Torres Strait Islander peoples, is very likely to be followed for the foreseeable future.[77]

Would the new 'section 51A' invite the courts to a significantly greater engagement with 'the merits' of legislation in determining whether it is authorised by the proposed new legislative power? There is clearly strong support for qualifying any new power to make laws for Aboriginal and Torres Strait Islander peoples so that its beneficial purpose is clear.[78] Inevitably, to confine the power in this way may require a court to make judgments as to the purpose or effect of a law. Based on the Panel's legal advice, the preambular language proposed by the Panel for 'section 51A' would make it clear that a law passed pursuant to that power would be assessed according to whether, taken as a whole, it would operate broadly for the benefit of the group of people concerned, rather than whether each and every provision was beneficial or whether each and every member of the group benefited. The Panel does not believe that this would create any particular difficulty or uncertainty for Parliament, or create any real risk of excessive court challenges.

There is clearly strong support for qualifying any new power to make laws for Aboriginal and Torres Strait Islander peoples so that its beneficial purpose is clear.

The Panel proposes use of the word 'advancement' in the preambular or introductory words to the new substantive power in 'section 51A', rather than in the power itself. This approach should ensure that the purpose of the power is apparent and would, as a matter of interpretation, be relevant to the scope given to the substantive power. The Panel considers that this approach would achieve a satisfactory balance between making the purpose of a law justiciable, and at the same time allowing a court to defer

to legislative judgment. It should not enable individual provisions in a broad scheme to be attacked as not beneficial if the law as a whole were able to be judged beneficial. The term 'advancement' is widely used in legal contexts, particularly in the area of trusts and testamentary provisions, and provides a legal criterion with which courts are familiar. The preamble to the Native Title Act also provides, among other things, that the people of Australia intend '(a) to rectify the consequences of past injustices by the special measures contained in this Act … for securing the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders'.

There would be less need to qualify the power in the preambular language to 'section 51A' by a word like 'advancement' if a racial non-discrimination provision with a special measures exception were to be included as part of the constitutional alterations.

There would be less need to qualify the power in the preambular language to 'section 51A' by a word like 'advancement' if a racial non-discrimination provision with a special measures exception were to be included as part of the constitutional alterations (see Chapter 6 and the language of proposed 'section 116A(2)'). An alternative approach, suggested in the submission of Allens Arthur Robinson, is for a new power to make laws with respect to 'the culture, historical disadvantage and unique place of Aboriginal and Torres Strait Islander peoples'.[79] This approach has the virtue of focusing on subject matter, and thus potentially avoiding the issue of 'advancement' or 'benefit'.

An issue raised during the Panel's legal consultations was whether a new power to legislate for the benefit of Aboriginal and Torres Strait Islander peoples would prevent other heads of power being used to enact laws applicable to them. On the basis of legal advice, the Panel does not consider that any express words would need to be included to make clear that laws enacted in reliance on other heads of power would apply on a non-discriminatory basis to Aboriginal and Torres Strait Islander Australians and all other Australians alike. Further, the Panel is satisfied that such a power would not enlarge Commonwealth powers beyond those already possessed under section 51(xxvi) and hence would not impact in any way on State powers.

Another issue which arises for consideration is whether the repeal of section 51(xxvi) (together with the insertion of a new head of power, 'section 51A') might result in the invalidity of legislation previously enacted in reliance on section 51(xxvi). If so, arguably Parliament would have to re-enact or ratify legislation previously enacted pursuant to section 51(xxvi). It would be an unfortunate result if Parliament were required to re-enact (and possibly re-debate) important and potentially controversial legislation such as the Native Title Act. This raises the question as to whether a savings clause ought be included as part of the proposed repeal provision.

The Panel has considered this issue and does not consider that a transitional provision would be necessary. The Panel's view, based on advice, is that repeal and replacement would not invalidate or require re-enactment of legislation originally passed in reliance on section 51(xxvi). Rather, as a seamless exercise, such laws would continue to be supported by the new power ('section 51A') from the time of repeal of the old power (section 51(xxvi)), which would occur at the same time. However, this

is a matter which the Government may wish to consider further. Paths to resolution would include a savings clause or a general omnibus Bill re-enacting existing legislation.

A further issue raised in legal consultations was whether the proposed new power in 'section 51A' would qualify or detract from the scope of the territories power in section 122 of the Constitution. In *Wurridjal v Commonwealth* the High Court held that the territories power in section 122 was constrained by section 51(xxxi) and the requirement for acquisition of property on just terms.[80] The Court overruled its earlier unanimous 1969 decision in *Teori Tau v Commonwealth*.[81] Accordingly, the Panel considers that there are reasonable arguments for concluding that the territories power in section 122 would also be interpreted to be constrained by 'section 51A'; that is, that the territories power would not be available to permit legislation to be enacted in respect of Aboriginal people in the Northern Territory that could not be validly enacted under 'section 51A'.

The Panel's preferred option for such new grant of legislative competence to replace section 51(xxvi) is that it have its own introductory and explanatory preamble. The advantage of having a preambular element as part and parcel of a 'section 51A' is the avoidance of unintended consequences.

On the other hand, the proposed new 'section 51A' is not drafted in the same way as section 51(xxxi). One option for removing any doubt would be to amend section 122 to make it subject to 'section 51A'. Further, a racial non-discrimination provision, along the lines of that proposed in Chapter 6, would ensure that neither section 122 nor any other legislative power could be used to enact laws discriminating against Aboriginal and Torres Strait Islander peoples, or any other group, on the grounds of race, colour or ethnic or national origin.

As discussed in Chapter 4, the Panel's preferred option for such a new grant of legislative competence to replace section 51(xxvi) is that it have its own introductory and explanatory preamble. The advantage of having a preambular element as part and parcel of a 'section 51A' is the avoidance of unintended consequences. By separating the new provision, and especially its preambular element, from the existing section 51, the approach would ensure that the preambular element applies specifically and peculiarly to the new 'section 51A' legislative power. For the reasons given in Chapter 4, and consistent with its legal advice, the Panel considers that 'section 51A' with its own embedded preamble should prevent future interpreters of the Constitution from deploying the wording of the preamble to the new section so as to alter what would otherwise have been the meaning of other provisions in the Constitution. As discussed in Chapter 4, the legal risks of a 'section 51A' with its own preamble are certainly fewer than the risks associated with some of the obvious alternatives, such as a preamble in section 51, a preamble at the head of the Constitution, or any attempt to amend the preamble to the Imperial Commonwealth of Australia Constitution Act.

The Panel has concluded that the proposed 'section 51A' is technically and legally sound, and satisfies the other principles against which the Panel has assessed its recommendations.

5.5 Recommendations

1 The Panel recommends that section 25 be repealed.

2 The Panel recommends that section 51(xxvi) be repealed, and that a new 'section 51A' be inserted after section 51 consisting of preambular or introductory language (italicised below—see Chapter 4) and operative language along the following lines:

Section 51A Recognition of Aboriginal and Torres Strait Islander peoples

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

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

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

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

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

3 The Panel further recommends that the repeal of section 51(xxvi) and the insertion of a new head of power, 'section 51A', be proposed together, that is, in a single referendum question.

Notes

1 *Kartinyeri v Commonwealth* (1998) 195 CLR 337.
2 Robert French, 'The Race Power: A Constitutional Chimera' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003), at 206.
3 Urbis Pty Ltd, *Analysis of Public Submissions to the Expert Panel on Constitutional Recognition of Indigenous Australians*, report prepared for the Department of Families, Housing, Community Services and Indigenous Affairs (2011).
4 Anglicare Western Australia, submission no 3129, at 2.
5 Urbis, op cit.
6 Aboriginal Peak Organisations of the Northern Territory, submission no 3583, at 5.
7 George Williams, submission no 3609, at 5.
8 Various Anglican organisations, submission no 3528, at 5.
9 Ibid.
10 Oxfam Australia, submission no 3574, at 2.
11 Law Institute of Victoria, submission no 3560, at 15, citing French, op cit, at 208.
12 Noel Pearson, 'A Letter to the Australian People', submission no 3619.
13 Elizabeth Jones, submission no 3154; see also John Arneaud, submission no 1042; Dr Boris Martinac, submission no 3223.
14 Victorian Aboriginal Child Care Agency, submission no 1874; Victorian Statewide/Peak Aboriginal Community Controlled Organisations Forum, submission no 1875.
15 See discussion in Anne-Marie Mooney Cotter, *Race Matters: An International Legal Analysis of Race Discrimination* (Ashgate, 2006), at 6–8.
16 Ashley Montagu (ed), *The Concept of Race* (Free Press, 1964).
17 Ivan Hannaford, *Race: The History of an Idea in the West* (Johns Hopkins University Press, 1996).
18 American Anthropological Association, 'American Anthropological Association Statement on "Race"' (1999) 100 *American Anthropologist*, at 712–713.
19 Ibid.
20 John Westlake, *Chapters on the Principles of International Law* (Cambridge University Press, 1894), at 141–43. See also John Westlake, 'Territorial Sovereignty, Especially with Relation to Uncivilised Regions' in L Oppenheim, (ed), *The Collected Papers* (Cambridge University Press, 1914) vol 1, at 143–45; Thomas J Lawrence, *The Principles of International Law* (Macmillan, 7th ed, 1925), at 156.
21 United Nations Educational, Scientific and Cultural Organization, *Four Statements on the Race Question* (1969).
22 Barry Morris, 'Racism, Egalitarianism and Aborigines' in Gillian Cowlishaw and Barry Morris (eds), *Race Matters*: *Indigenous Australians and 'Our' Society* (Aboriginal Studies Press, 1997), at 164.
23 Gillian Cowlishaw and Barry Morris, 'Introduction' in ibid, at 3.
24 American Anthropological Association, op cit.
25 Michael J Bamshad and Steve E Olson, 'Does Race Exist?' (2003) 289 (6) *Scientific American*, at 79–84; also Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (Federation Press, 2008), at [5.1.2.7].
26 Marcia Langton, 'Why "Race" Is a Central Idea in Australia's Construction of the Idea of a Nation' (1999) 18 *Australian Cultural History*, at 26.
27 Ibid.
28 Cowlishaw and Morris, 'Introduction' in *Race Matters*, op cit, at 3.
29 Heather Gridley and Pat Dudgeon, 'National Roundtable on Research on Racism towards Indigenous Australians—Experiences of the Racism Roundtable' (2009) 31(4) *InPsych* 36.
30 Deborah Bird Rose, 'Nature and Gender in Outback Australia' (1992) 5 *Anthropology and History* 403, at 403–25. Julie Marcus, 'Bicentenary Follies: Australians in Search of Themselves' (1988) *Anthropology Today* 4, at 4–6; Andrew Lattas, 'Savagery and Civilisation: Towards a Genealogy of Racism in Australian Society' (1987) *Social Analysis* 21, at 39–58.
31 Allens Arthur Robinson, submission no 3447, at 9.
32 Centre for Comparative Constitutional Studies, University of Melbourne, submission no 3558, at 9. See also Castan Centre for Human Rights Law, submission no 3554, at 8.

33 Oxfam Australia, submission no 3574.
34 Catholic Justice and Peace Commission of the Archdiocese of Brisbane, submission no 3428, at 1.
35 National Aboriginal Community Controlled Health Organisation, submission no 3449. See also Family Violence Service Legal Corporation, South Australia, submission no 970.
36 Fred Hollows Foundation Staff, submission no 3552.
37 Urbis, op cit.
38 Bob Ellicott QC, submission no 3525, at 13–14.
39 Hilary Charlesworth, 'A New Section 25? Equality for Indigenous Australians in the Australian Constitution' (Paper presented at the Workshop on Indigenous Constitutional Reform, Indigenous Law Centre and Gilbert & Tobin Centre of Public Law, University of New South Wales, 1 July 2011). See also Sean Brennan, submission no 3351, at 9.
40 Anglicare Western Australia, submission no 3129, at 2.
41 Federation of Ethnic Communities' Councils of Australia, submission no 3271.
42 Submissions that supported such an approach included those of ANTaR National, submission no 3432, at 5; Professor Peter Bailey, submission no 3107, at 1; Women's International League for Peace and Freedom, submission no 3541, at 3; Dr Boris Martinac, submission no 3223, at 3; Yola Frank-Gray, submission no 3239.
43 Michael Kirby, 'Constitutional Law and Indigenous Australians: Challenge for a Parched Continent' (Speech delivered at the Law Council of Australia Discussion Forum, 'Constitutional Change: Recognition or Substantive Rights', Old Parliament House, Canberra, 22 July 2011), at 5, 16.
44 Constitutional Commission, 'Summary', *Final Report of the Constitutional Commission* (Australian Government Publishing Service, 1988), at 54; also vol 1, at [10.372].
45 French, op cit, at 208.
46 Geoffrey Sawer, 'The Australian Constitution and the Australian Aborigines' (1966–67) 2(1) *Federal Law Review* 17, at 22.
47 Constitutional Commission, 'Summary', op cit, at 55.
48 *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).
49 *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).
50 *Native Title Act 1993* (Cth).
51 Dylan Lino, submission no 3467, identifies a range of Commonwealth laws the constitutionality of which would be rendered doubtful if section 51(xxiv) were repealed.
52 (1990) 169 CLR 482 (*Incorporation case*).
53 See the discussion of 'special measures' and Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination in Chapter 6.
54 See *Commonwealth v Tasmania* (1983) 158 CLR 1 in relation to the availability of the external affairs power to support the *World Heritage Properties Conservation Act 1983* (Cth).
55 Allens Arthur Robinson, submission no 3447, at 11. At Annexure 2, the submission lists Commonwealth laws supported by the race power.
56 ANTaR National, submission no 3432, at 23.
57 Anglican Diocese of Brisbane, submission no 3366, at 18.
58 Castan Centre for Human Rights Law, submission no 3554, at 10.
59 Executive Council of Australian Jewry Inc., submission no 3559, at 7.
60 Anglicare Western Australia, submission no 3129.
61 Oxfam Australia, submission no 3574, at 5–7.
62 Victorian Aboriginal Child Care Agency, submission no 1874.
63 Aboriginal Peak Organisations of the Northern Territory, submission no 3583, at 8.
64 Sean Brennan, submission no 3351, at 4.
65 Law Council of Australia, submission no 3478.
66 Victorian Traditional Owner Land Justice Group, submission no 3546.
67 John Pyke, submission no 3101.
68 National Indigenous Lawyers Corporation of Australia, submission no 3561, at 4–5.
69 New South Wales Aboriginal Land Council, submission no 3575, at 9.
70 Cape York Institute, submission no 3479, at 27.
71 Ibid, at 28.

72 Ibid, at 29.
73 For example, Hunter Valley Quaker Meeting, submission no 3535; various Anglican organisations, submission no 3528; Women for an Australian Republic, submission no 3201.
74 See *Western Australia v Commonwealth* (1995) 183 CLR 373 (*Native Title Act case*), especially at 460–462, and *Kartinyeri v Commonwealth* (1998) 195 CLR 337 (also *Commonwealth v Tasmania* (1983) 158 CLR 1, at 272–273 per Deane J).
75 Per Spigelman QC, at 195 CLR 340.
76 Per Griffith QC, at 195 CLR 343.
77 As illustrated by the reasoning of Gummow and Hayne JJ in *Kartinyeri v Commonwealth*, at 195 CLR 378–381 [79]–[89].
78 Bob Ellicott QC suggested that it would be unwise to limit section 51(xxvi), and that 'there are broad circumstances where a law may need to discriminate in a non-beneficial way in order to achieve some proposal which is of wider benefit to indigenous people'. Bob Ellicott QC, submission no 3525, at 11–12.
79 Allens Arthur Robinson, submission no 3447, at 13.
80 (2009) 237 CLR 309, at 357–9 (French CJ), at 385–8 (Gummow and Hayne JJ), at 418–19 (Kirby J).
81 (1969) 119 CLR 564.



Panel members Marcia Langton (centre), Timmy Djawa Burarrwanga (at right, third from front) and Lauren Ganley (at left, in white shirt) meet with interpreters at Nguiu in preparation for a public consultation, June 2011

6 Racial non-discrimination

At its early meetings, the Expert Panel came to the view that there was a case for moving on from the history of constitutional non-recognition of Aboriginal and Torres Strait Islander peoples and racial discrimination, detailed in Chapter 1, and affirming that racially discriminatory laws and executive actions have no place in contemporary Australia. One idea raised in the Panel's discussion paper was the possibility of a new racial non-discrimination provision in the Constitution to strengthen protection against discrimination for Australians of all ethnic backgrounds. The Panel was, however, clear from the outset that any discussion of a bill or statement of rights was well outside its remit.

There is a case for moving on from the history of constitutional non-recognition of Aboriginal and Torres Strait Islander peoples and racial discrimination and instead affirming that racially discriminatory laws and executive actions have no place in contemporary Australia.

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

Many submissions argued that:

- allowance for measures to address disadvantage and ameliorate the effects of past discrimination is a necessary aspect of a racial non-discrimination provision;[1] and
- recognition of the distinct rights of Aboriginal and Torres Strait Islander peoples is a necessary part of ensuring equality before the law.[2]

As noted in previous chapters, Newspoll conducted national surveys of Australians on the topic of constitutional recognition of Aboriginal and Torres Strait Islander peoples and related issues of constitutional reform. The final Newspoll survey confirmed that, as at 28 October 2011, 80 per cent of respondents were in favour of amending the Constitution so that there is a new guarantee against laws that discriminate on the basis of race, colour or ethnic origin.

6.1 Australia's commitment to racial non-discrimination

Australia's commitment to the principle of racial non-discrimination is accepted in legislation and policy in all Australian jurisdictions.

Nationally, this commitment is reflected in the *Racial Discrimination Act 1975* (Cth). The provisions of the Act relate to discrimination by reason of 'race, colour, descent or national or ethnic origin'[3] and 'race, colour or national or ethnic origin'.[4] In each of the States and Territories, there is also legislation prohibiting discrimination on the ground of race, as variously defined, and with varying areas of coverage: *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1996* (NT);

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

The States and Territories are already effectively subject to a constitutional prohibition on legislative or executive action which discriminates on the ground of race. The Commonwealth Parliament, on the other hand, is not.

Anti-Discrimination Act 1991 (Qld); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (Tas); *Equal Opportunity Act 1995* (Vic); *Equal Opportunity Act 1984* (WA). While the detail of these laws differs, it is unlawful in every Australian jurisdiction to discriminate against people on the ground of race in various areas of public life.[5]

The Panel has concluded that there is widespread support in the Australian community for a constitutional amendment to entrench the prohibition of racial discrimination. By operation of the Racial Discrimination Act and section 109 of the Constitution, the States and Territories are already effectively subject to a constitutional prohibition on legislative or executive action which discriminates on the ground of race. The Commonwealth Parliament, on the other hand, is not.

Having regard to the Act, the High Court has held on two occasions that State legislation seeking to extinguish native title could not be validly enacted. In 1988, in *Mabo (No 1)*, the Court held that Queensland legislation that purported to extinguish the traditional legal rights of the Meriam people which might otherwise have survived annexation in 1879, was inconsistent with the Act, and therefore ineffective by reason of section 109 of the Constitution.[6] In 1995, the High Court held that Western Australian legislation that sought to extinguish native title, and instead confer statutory rights of traditional usage, was also inconsistent with the Act, and hence also invalid by operation of section 109.[7]

Noel Pearson has argued:

> I believe that the very strong message for all of those who are concerned about the integrity of the [Racial Discrimination Act] is this country's need to move towards constitutional protection against racial discrimination. That is an agenda that needs to be embraced not only by the Indigenous community, but by all of those sections of the community who are concerned about racial discrimination.[8]

Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda has suggested that: '[I]f Australians were aware that their Constitution did not protect its citizens from discrimination, the nation would take collective action to bring about reform to enshrine the principles of non-discrimination and equality.'[9]

6.2 Early calls for a prohibition against racial discrimination

As discussed in Chapter 1, calls for some constitutional protection against racial discrimination go back to the debate during the constitutional conventions in the 1890s in relation to a due protection clause. Tasmanian Attorney-General Andrew Inglis Clark was particularly concerned with the need for safeguards against discrimination by States. During the Constitutional Convention in Melbourne in 1898, the original due protection

clause of 1891 ran into complications, and attention was directed to the proposal for a new clause by Inglis Clark.[10] Richard O'Connor proposed a similar clause in Melbourne in 1898.[11] The proposal was narrowly defeated by a vote of 23 to 19.[12]

As noted in Chapter 1, in March 1966, Liberal backbencher William (Billy) Wentworth introduced a Private Member's Bill that proposed the deletion of section 51(xxvi) and the insertion of a new power to make laws 'for the advancement of the aboriginal natives of the Commonwealth of Australia'. Wentworth also proposed a new 'section 117A' to prevent the Commonwealth and States from making or maintaining any law 'which subjects any person who has been born or naturalised within the Commonwealth of Australia to any discrimination or disability within the Commonwealth by reason of his racial origin'. The proposed 'section 117A' included a proviso to ensure that it would not operate 'to preclude the making of laws for the special benefit of the aboriginal natives of the Commonwealth of Australia'.[13] Neither proposal was put to the Australian people at the 1967 referendum. Wentworth's proposal for a protection against racial discrimination in the Constitution was supported by former Prime Minister Malcolm Fraser in a recent speech.[14]

As discussed in chapters 1 and 5, in 1988 the Constitutional Commission recommended the insertion of a new paragraph (xxvi) to give the Commonwealth Parliament express power to make laws with respect to 'Aborigines and Torres Strait Islanders'. Consistent with such an approach, the commission recommended the insertion of a new 'section 124G' that would give everyone the right to freedom from discrimination on the ground of race.[15] In relation to equality rights, the commission recommended that the Constitution be altered as follows:

> 124G (1) Everyone has the right to freedom from discrimination on the ground of race, colour, ethnic or national origin, sex, marital status, or political, religious or ethical belief.
>
> (2) Sub-section (1) is not infringed by measures taken to overcome disadvantages arising from race, colour, ethnic or national origin, sex, marital status, or political, religious or ethical belief.[16]

In its final report to the prime minister and the Commonwealth Parliament in December 2000, the Council for Aboriginal Reconciliation made, among others, the following recommendation in relation to the manner of giving effect to its reconciliation documents:

> 3. The Commonwealth Parliament prepare legislation for a referendum which seeks to:
>
> - recognise Aboriginal and Torres Strait Islander peoples as the first peoples of Australia in a new preamble to the Constitution; and
> - remove section 25 of the Constitution and introduce a new section making it unlawful to adversely discriminate against any people on the grounds of race.[17]

Calls for some constitutional protection against racial discrimination go back to the debate during the constitutional conventions in the 1890s.

6.3 International experience

Following the Second World War, Australia played a leading role in the establishment of the United Nations, and in the further development of the international legal system. The Charter of the United Nations, adopted on 26 June 1945 in San Francisco, provides a clear foundation for the international prohibition of racial discrimination. A principal purpose of the United Nations is achievement of 'international co-operation in … promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'.[18] The prohibition of racial discrimination is recognised in all the major human rights instruments that have been adopted under the auspices of the United Nations.

Consistent with international legal usage, 'special measures' are laws, policies and programs that take into account disadvantage created by systemic or longstanding discrimination, and seek ultimately to achieve more equal outcomes. The commitment to substantive equality, on the other hand, seeks to attain an equality of outcomes, or at least to address disadvantage that has been produced by past discrimination.

In 1965, the United Nations General Assembly adopted the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which entered into force on 4 January 1969 and was ratified by Australia on 30 September 1975. CERD specifies a range of obligations in relation to the elimination of racial discrimination. The concept of 'special measures' is central to the convention's approach to the principle of non-discrimination. The term refers to measures 'taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms'. These measures are not deemed to be racial discrimination, provided that they do not lead to the maintenance of separate rights for different racial groups, and are not continued after the objectives for which they were taken have been achieved.[19] States parties are required, when the circumstances warrant, to take 'special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms'.[20]

Consistent with international legal usage, special measures are laws, policies and programs that take into account disadvantage created by systemic or longstanding discrimination, and seek ultimately to achieve more equal outcomes. They focus on alleviating the discrimination suffered by historically disadvantaged groups, and enhancing opportunities for improved political, economic, social and cultural outcomes. This involves a broader view of equality than one of formal equality embodied by formal equal treatment. The concept of formal equality is one according to which individuals are treated alike according to racially neutral laws, and which lacks a normative commitment to reducing longstanding economic and social inequalities between groups. The commitment to substantive equality, on the other hand, seeks to attain an equality of outcomes, or at least to address disadvantage that has been produced by past discrimination.

In 1966, the two principal human rights covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Political and Cultural Rights were adopted by the UN General Assembly. The ICCPR requires states parties to respect and to ensure the rights recognised by the covenant 'without distinction of any kind, such as race, colour, sex, language, political or other opinion, national or social origin, property, birth or other status'.[21] It also contains a guarantee of equality, which provides:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect the law shall prohibit any discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[22]

In 1991, Australia committed itself to the First Optional Protocol to the ICCPR, which enables the UN Human Rights Committee to receive and examine individual complaints that Australia has failed to comply with the human rights standards recognised in the covenant. In 1992, in *Mabo (No 2)* the High Court explicitly endorsed the development of Australian law in conformity with the expectations of the international community. Justice Brennan, with whom Chief Justice Mason and Justice McHugh agreed, said:

> [I]t is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination. …
>
> Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. *The expectations of the international community accord in this respect with the contemporary values of the Australian people.* The opening up of international remedies to individuals pursuant to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law ...[23] (emphasis added)

The provisions of CERD, and international thinking about racial non-discrimination, the concept of equality and the protection of minorities, go back at least to the adoption of a system of treaties for the protection of minorities as part of the Paris Peace Settlement at the conclusion of the First World War. The League of Nations' system for the protection of minorities produced a number of important judgments. In its 1935 advisory opinion on *Minority Schools in Albania*, the Permanent Court of International Justice stated that the idea underlying the minorities treaties was to secure for the minorities concerned the possibility of living

The concept of formal equality is one according to which individuals are treated alike according to racially neutral laws, and which lacks a normative commitment to reducing longstanding economic and social inequalities between groups. The commitment to substantive equality, on the other hand, seeks to attain an equality of outcomes, or at least to address disadvantage that has been produced by past discrimination.

peaceably alongside the rest of the population, while preserving their own characteristics. To attain this objective, measures were necessary:

> to ensure that members of racial, religious or linguistic minorities should be placed in every respect on a footing of perfect equality with the other nationals of the State [and] … to ensure for the minority elements suitable means for the preservation of their own characteristics and traditions.[24]

According to the court:

> These two requirements are indeed closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority.[25]

Likewise, in a famous passage in the 1965 decision of the International Court of Justice in the *South West Africa* case, Judge Tanaka stated:

> The principle of equality before the law does not mean the absolute equality, namely the equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal.
>
> To treat unequal matters differently according to their inequality is not only permitted but required.

Judge Tanaka distinguished permissible from impermissible discrimination as follows:

> In the case of the minorities treaties the norm of non-discrimination as a reverse side of the notion of equality before the law prohibits a State to exclude members of a minority group from participating in rights, interests and opportunities which a majority population group can enjoy. On the other hand, a minority group shall be guaranteed the exercise of their own religious and education activities. This guarantee is conferred on the members of a minority group, for the purpose of protection of their interests and not from the motive of discrimination itself. By reason of protection of the minority this protection cannot be imposed upon members of minority groups, and consequently they have the choice to accept it or not.[26]

'The principle of equality before the law does not mean the absolute equality, namely the equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal.

'To treat unequal matters differently according to their inequality is not only permitted but required.'

Judge Tanaka, 1965

It follows that in international legal usage, references to 'race' are discriminatory only where they lack an objective and reasonable basis or a legitimate purpose. A test of reasonable or legitimate classification seeks to ensure substantive, rather than formal equality before the law.[27] The Australian Law Reform Commission has endorsed such an approach, concluding that the prohibition of racial discrimination 'does not preclude reasonable measures distinguishing particular groups and responding in a proportionate way to their special characteristics, provided that basic rights and freedoms are assured to members of such groups'. Nor does it preclude 'special measures', such as for the economic or educational advancement of groups or individuals, so long as the measures were 'designed for the sole purpose of achieving that advancement, and are not continued after their objectives have been achieved'.[28]

Successive Commonwealth Parliaments have recognised that laws with respect to Aboriginal and Torres Strait Islander peoples do not necessarily contravene the prohibition of racial discrimination. Much legislation confirms that it is intended to be a 'special law' or 'special measure' for Aboriginal and Torres Strait Islander peoples. For example, the preamble to the *Native Title Act 1993* confirms that the law is 'intended … to be a special measure for the advancement and protection of Aboriginal peoples and Torres Strait Islanders, and is intended to further advance the process of reconciliation among all Australians'. The preamble to the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* provides that the Parliament of Australia 'intends that the following law will take effect according to its terms and be a special law for the descendants of the original inhabitants of Australia'. Such characterisation is intended to invoke the special measures exception in CERD to the prohibition of racial discrimination.[29]

Successive Commonwealth Parliaments have recognised that laws with respect to Aboriginal and Torres Strait Islander peoples do not necessarily contravene the prohibition of racial discrimination.

In 1997, the UN Committee on the Elimination of Racial Discrimination adopted a general recommendation on indigenous peoples confirming that discrimination against indigenous peoples falls under the scope of the convention.[30] The committee confirmed that in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms, and that the preservation of their culture and historical identity has been and still is jeopardised. The committee called upon states parties to:

(a) Recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;

(b) Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;

(c) Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;

(d) Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent;

(e) Ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.

In particular, the committee called upon states parties:

> to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories.[31]

As discussed in Chapter 2, on 3 April 2009, Australia expressed formal support for the United Nations Declaration on the Rights of Indigenous Peoples. Australia's support for the declaration represents a further important step in the recognition, protection and promotion of the rights of Aboriginal and Torres Strait Islander peoples. Many of the articles in the declaration address issues of racial non-discrimination. For example, article 2 provides that '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'.

Consistent with the international legal approach to concepts of non-discrimination and equality, the declaration recognises that these rights include both:

- special measures to ensure continuing improvement of their economic and social conditions including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security (article 21); and
- the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the state (article 5).

In 2009, the UN Committee on the Elimination of Racial Discrimination confirmed the role of temporary special measures, when circumstances warrant, to secure to disadvantaged groups the full and equal enjoyment of human rights and fundamental freedoms.[32] The committee drew a distinction between special measures and the specific rights of indigenous peoples and emphasised that special measures are not intended to be permanent rights:

> Special measures should not be confused with specific rights pertaining to certain categories of person or community, such as, for example the rights of persons belonging to minorities to enjoy their own culture, profess and practise their own religion and use their own language, [or] the rights of indigenous peoples, including rights to lands traditionally occupied by them … Such rights are permanent rights …[33]

On 3 April 2009, Australia expressed formal support for the United Nations Declaration on the Rights of Indigenous Peoples. Australia's support for the declaration represents a further important step in the recognition, protection and promotion of the rights of Aboriginal and Torres Strait Islander peoples.

6.4 Comparative experience

At consultations, people frequently asked the Panel about the situation in other countries. Experience in other countries was also referred to in submissions to the Panel, and is addressed in Chapter 2.

The Panel found it helpful to review the experiences of countries with a constitutional and common law history similar to that of Australia in relation to racial non-discrimination and equality. Constitutional guarantees against

racial discrimination are common. The constitutions of Canada, South Africa and India prohibit discrimination. In Aotearoa/New Zealand, the prohibition is contained in the Bill of Rights Act 1990. Constitutional and statutory language and case law differ between these jurisdictions, but each has faced the challenge of ensuring that a non-discrimination guarantee is compatible with the enactment of laws, and adoption of policies and programs, that seek to ameliorate historical disadvantage of ethnic groups.

The Panel found it helpful to review the experiences of countries with a constitutional and common law history similar to that of Australia in relation to racial non-discrimination and equality.

Canada

In Canada, the Charter of Rights and Freedoms was enshrined in the Canadian Constitution in 1982. The charter is a part of the Constitution Act 1982. As discussed in Chapter 2, the aboriginal and treaty rights of the aboriginal peoples of Canada receive direct constitutional protection under section 35 of the Constitution Act.

Section 15(1) of the charter provides:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 15(2) of the charter provides:

> Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[34]

The purpose of section 15(2) is to authorise programs and policies designed to achieve substantive equality. If such a program or policy 'were attacked on equality grounds by a person who was not a member of the favoured (disadvantaged) group, subsection 2 provides the answer'.[35] In the leading case on section 15(2),[36] the Supreme Court of Canada held that a communal fishing licence granted exclusively to aboriginal bands to fish for salmon in the mouth of the Fraser River for a period of 24 hours did not violate section 15. The Court held:

> We have concluded that where a program makes a distinction on one of the grounds enumerated under s. 15 or an analogous ground but has as its object the amelioration of the conditions of a disadvantaged group, s. 15's guarantee of substantive equality is furthered, and the claim of discrimination must fail.[37]

The Canadian Charter of Rights and Freedoms also contains a 'non-abrogation' or 'non-derogation' clause. Section 25 provides that: 'The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada …'

Section 25 seeks to ensure that the charter is enforced in a way that does not diminish aboriginal rights. In Canada, the courts have held that section 25 of the charter protects aboriginal and treaty rights recognised and affirmed by section 35(1) of the Constitution.[38] The Court of Appeal for Ontario held that section 25 'confers no new rights', but instead 'shields' old ones.[39]

India

Since its adoption in 1950, the Constitution of India has been amended by the Parliament many times. In its current form, the Indian Constitution contains two key provisions in relation to non-discrimination. Article 14 guarantees equality before the law and the equal protection of the laws to all persons within the territory of India. Article 15(1) contains an express prohibition on discrimination against any citizen on grounds of religion, race, caste, sex, place of birth, or any of them. Articles 15(4)[40] and 15(5)[41] provide that:

> (4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.
>
> (5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institution referred to in clause (1) of article 30.

The Indian Supreme Court has 'read the general equality provisions as themselves being compatible with (or even requiring) affirmative action to provide an equalizing lift to those who are members of historically disadvantaged social classes'.[42]

South Africa

The Constitution of South Africa came into effect on 4 February 1997. Chapter 2 of the Constitution is a bill of rights that lists the civil, political, economic, social and cultural human rights of the people of South Africa.[43] Section 9(1) provides that everyone is equal before the law and has the right to equal protection and benefit of the law. Section 9(3) provides that the state may not discriminate 'directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience,

belief, culture, language and birth'. Section 9(2) is designed to protect special measures from constitutional challenge. Section 9(2) provides:

> Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

Aotearoa/New Zealand

The New Zealand Bill of Rights Act 1990 is an Act of the Parliament of New Zealand. In its current form,[44] section 19(1) of the Bill of Rights Act guarantees freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.[45] The prohibited grounds of discrimination in section 21(1) of the Human Rights Act include colour, race, and ethnic or national origin, which includes nationality or citizenship.

Section 19(2) of the Bill of Rights Act provides as follows in relation to special measures: 'Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part 2 of the Human Rights Act 1993 do not constitute discrimination.'

Section 20 provides in relevantly similar terms to article 27 of the ICCPR in relation to the rights of minorities as follows:

> A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.

6.5 Conclusions

The Panel has concluded that recognition of Aboriginal and Torres Strait Islander peoples will be incomplete without a constitutional prohibition of laws that discriminate on the basis of race. Such a prohibition is seen by many with whom the Panel consulted as being a necessary complement to the repeal of the race-based provisions of the Constitution. As Noel Pearson has argued:

The Panel has concluded that recognition of Aboriginal and Torres Strait Islander peoples will be incomplete without a constitutional prohibition of laws that discriminate on the basis of race.

> Elimination of racial discrimination is inherently related to Indigenous recognition because Indigenous people in Australia, more than any other group, suffered much racial discrimination in the past. So extreme was the discrimination against Indigenous people, it initially even denied that we existed. Hence, Indigenous Australians were not *recognised*. Then, Indigenous people were explicitly excluded in our Constitution. Still today, we are subject to racially targeted laws with no requirement that such laws be beneficial, and no prohibition against adverse discrimination.[46]

The Panel considers that a constitutional prohibition of racially discriminatory laws and executive actions would contribute to a more unified and reconciled nation by moving on from the history detailed in Chapter 1, and remove race as a criterion for discrimination by legislative or executive action in all Australian jurisdictions.

In the face of the historical record of racially discriminatory attitudes that prevailed at the time when the Constitution was framed in the late nineteenth century, the echoes of which continue to resonate in sections 25 and 51(xxvi), the Panel strongly believes that a clear and unambiguous renunciation of racial discrimination is essential if our Constitution is to reflect the values of contemporary Australia. Repeal of these provisions would remove the remnants of this discrimination from the Constitution. Renunciation of laws that discriminate on the basis of race, colour or ethnic or national origin would be consistent with the contemporary values of our nation. Accordingly, the Panel considers that the proposed 'section 116A' is an integral part of the package of reforms necessary to give appropriate recognition to Aboriginal and Torres Strait Islander peoples as well as to the people from many ethnic backgrounds who are now loyal and valued citizens of the nation.

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

Specifically, the Panel considers that such a provision would 'contribute to a more unified and reconciled nation' by moving on from the history detailed in Chapter 1, and remove race as a criterion for discrimination by legislative or executive action in all Australian jurisdictions. This would be a logical step. Parliaments in every Australian jurisdiction have enacted legislation prohibiting discrimination on the ground of race. Since 1975, laws enacted by the States and Territories that are inconsistent with the Racial Discrimination Act have been rendered invalid by section 109 of the Constitution. A constitutional non-discrimination provision would entrench that position in relation to State and Territory laws, and subject Commonwealth law-making to the same prohibition. Such a clause would qualify the territories power in section 122 of the Constitution, as well as other heads of legislative power.

The Panel is also satisfied that such a provision would 'be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples'. This is evident in submissions to the Panel by Aboriginal and Torres Strait Islander organisations and was apparent to members of the Panel at community consultations.

> I would support a clause guaranteeing freedom from any form of discrimination, with allowance for special measures.[47]

> We shouldn't forget that travesties still happen now, people are still strongly discriminated against now. Taking children away from families is still happening. It wouldn't happen if they weren't Aboriginal.[48]

> Currently I do not feel like an Australian citizen and I do not feel like I have equal rights.[49]

The survey conducted during the inaugural meeting of the National Congress of Australia's First Peoples in June 2011 found that 91 per cent of members strongly supported the insertion of a prohibition against racial discrimination.[50]

The Panel also considers that such a provision would 'be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums'. This is confirmed by the final Newspoll survey, which reported that as at 28 October 2011, 80 per cent of respondents were in favour of amending the Constitution so that there is a new guarantee that prevents laws that discriminate on the basis of race, colour or ethnic origin. During the live chats conducted by Newspoll between 22 and 30 November 2011, there was a positive reaction to the general concept of a non-discrimination guarantee. Some participants noted that other potential types of discrimination were excluded, such as religion/faith, gender, and political beliefs, and queried the implications of this omission.

Many submissions to the Panel were supportive of a racial non-discrimination provision. Life without Barriers, New South Wales, stated that freedom from discrimination is 'a core element of citizenship'.[51] The Sisters of St Joseph, Victorian Province, Peace, Justice and Social Issues Group, supported an amendment eliminating the possibility of discrimination on the basis of race 'not only in relation to Aboriginal and Torres Strait Islander people, but for any cultural group of Australians'.[52] Australians for Native Title and Reconciliation National supported a prohibition on:

> the enactment of laws by any Australian Parliament or the exercise of power by any Australian government that discriminates on the basis of race (while also providing that this does not prevent laws that redress disadvantage, or protect the culture, identity and language of any group).[53]

The Cape York Institute proposed a new section, 'section 127', which would provide as follows:

> No law shall discriminate on the basis of race, colour or ethnicity.
>
> Laws to redress disadvantage, ameliorate the effects of past discrimination, or to recognise or protect the culture, language and identity of any group do not constitute discrimination.[54]

The Law Council of Australia argued that a prohibition of racial discrimination or a guarantee of racial equality should be expressed so as to protect the recognised rights of Aboriginal and Torres Strait Islander peoples (such as land rights, native title rights and heritage protection rights), as well as rights that might be negotiated and recognised in the future (through agreements, decisions of the High Court or other means). The Law Council reasoned that:

> [I]t is one thing to prevent the singling out of Indigenous Australians for adverse treatment by a general guarantee of racial non-discrimination and equality. It is another thing to ensure that special or advantageous or beneficial treatment of Indigenous Australians is not susceptible to invalidation on the ground of infringing a general guarantee of racial equality and racial non-discrimination.[55]

Since 1975, laws enacted by the States and Territories that are inconsistent with the Racial Discrimination Act have been rendered invalid by section 109 of the Constitution. A constitutional non-discrimination provision would entrench that position in relation to State and Territory laws, and subject Commonwealth law-making to the same prohibition. Such a clause would qualify the territories power in section 122 of the Constitution, as well as other heads of legislative power.

The Executive Council of Australian Jewry Inc. supported a provision guaranteeing racial equality and prohibiting the singling out of indigenous Australians or any other group for adverse treatment on the basis of race.

The Law Council's suggestions included (a) confining the constitutional conferral of a new head of power by an express limitation—for example to make laws with respect to 'matters beneficial to Aboriginal and Torres Strait Islander peoples' or with respect to 'the benefit of Aboriginal and Torres Strait Islander peoples'; (b) making the power to make laws with respect to Aboriginal and Torres Strait Islander peoples part and parcel of the equality and non-discrimination guarantee so that it could not 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 adoption of a non-derogation clause similar to section 25 of the Canadian Constitution.[56]

The Victorian Traditional Owner Land Justice Group recommended that:

- s51(xxvi) be repealed and replaced with a new power authorising laws made with respect to Aboriginal and Torres Strait Islander peoples;
- a general guarantee of freedom from racial discrimination in all laws and programs be inserted in the Constitution which also allows for affirmative action taken to address the legacies of discrimination against Aboriginal and Torres Strait Islander peoples.[57]

The Executive Council of Australian Jewry Inc. supported a provision guaranteeing racial equality and prohibiting the singling out of indigenous Australians or any other group for adverse treatment on the basis of race. The Executive Council recognised that in the case of Aboriginal and Torres Strait Islander peoples, the redressing of historical injustices would necessarily involve differential treatment even if it was for their benefit and advancement. The Executive Council proposed provisions to preclude the risk of the invalidation of special (albeit beneficial) laws, and current laws recognising the rights of Aboriginal and Torres Strait Islander peoples (such as land rights, native title rights and heritage protection rights), as well as rights that might be negotiated and recognised in the future, on the ground of infringing the general guarantee against racial discrimination.

The Castan Centre for Human Rights Law suggested that an anti-discrimination clause prohibiting racial discrimination should be adopted, together with a proviso that the Commonwealth, States and Territories are still able to make laws that redress disadvantage, or are protective of indigenous culture, language and identity.[58]

Sean Brennan, senior lecturer in law at the University of New South Wales, noted that every jurisdiction in Australia has legislated for the principle of racial non-discrimination, and suggested that putting the principle into the Constitution could 'make a material improvement in the lives of Aboriginal and Torres Strait Islander people'. The task of finding the right words to clarify the relationship between a national power to make indigenous-specific law on the one hand and the non-discrimination principle on the

other was identified as 'challenging'.[59] Brennan proposed a racial non-discrimination clause that would apply to all Commonwealth, State and Territory legislative and executive powers, and a 'carve-out' from the clause along the following lines:

(1) No law or government action may discriminate on the basis of race.

(2) Subsection (1) does not apply to laws or actions which support or promote the identity, culture or language of a particular group or which address disadvantage in a reasonable, proportionate and necessary way.[60]

A number of submissions to the Panel proposed the insertion of a general guarantee of non-discrimination on grounds such as age, gender, race, religion, culture, disability and sexuality.[61] The Panel does not recommend a general guarantee of non-discrimination. Such a guarantee would be beyond the Panel's terms of reference, and would not accord with the four principles set by the Panel for its assessment of proposals for constitutional recognition. Any such proposal would shift the focus of the national conversation away from constitutional recognition of Aboriginal and Torres Strait Islander peoples.[62] The likelihood of obtaining the necessary support for a general non-discrimination clause at a referendum is highly uncertain. As noted at the beginning of this chapter, the Panel is not advocating a bill or statement of rights. However, a non-discrimination clause is an integral part of a package of amendments to eliminate racial discrimination from the Constitution.

Legal advice to the Panel and comparative and international experience suggest that a racial non-discrimination provision would be 'technically and legally sound'. The Panel considers that such a provision should be structured as a prohibition of legislative or executive action on the part of the Commonwealth or under any law of the Commonwealth, and on the part of the States and Territories and under any of their laws, under which the real, supposed or imputed race, colour or ethnic or national origin of any person is a criterion for different treatment.

The grounds 'race, colour or ethnic or national origin' appear in sections 10–13 of the Racial Discrimination Act. In that context, it is well established that 'national origin' and 'nationality' are entirely different concepts.[63] 'Nationality' has the same meaning as citizenship, and is a legal status that can be changed. 'National origin', on the other hand, like 'ethnic origin', is in the nature of an inherited characteristic that a person cannot change.[64]

The Panel is not advocating a bill or statement of rights. However, a non-discrimination clause is an integral part of a package of amendments to eliminate racial discrimination from the Constitution.

The Panel has concluded that a racial non-discrimination provision should extend to both legislative and executive or government action. This would effectively prohibit legislative or executive action on the part of the Commonwealth or under any law 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. A prohibition on legislative as well as executive or government action would be entirely

consistent with the approach of the Commonwealth Racial Discrimination Act and State and Territory anti-discrimination legislation. Indeed, the reach of Commonwealth, State and Territory anti-discrimination legislation extends beyond government actions to the private sector. The Panel's recommendations do not extend so far.

Legislation enacted under other heads of power, such as those relating to defence, naturalisation and aliens, immigration and emigration and influx of criminals, would not discriminate on the ground of race or national or ethnic origin, but rather citizenship or nationality. The proposed racial non-discrimination provision does not proscribe discrimination on the ground of citizenship or nationality. Nor would it impede government regulatory activity (such as customs services and intelligence-based surveillance). That is because such activities do not subject people to adverse legal consequences by reason of their real, supposed or imputed 'race, colour or ethnic or national origin'. In any event, Australia has assumed international obligations (reflected in the Racial Discrimination Act) which require that racial discrimination has no place in the way government administers laws and programs.

The Panel has carefully considered the relationship between a racial non-discrimination provision, the race power in section 51(xxvi), and the proposed replacement power, 'section 51A'. In order to minimise the risk of invalidating laws with respect to Aboriginal and Torres Strait Islander peoples, the proposed racial non-discrimination provision needs to be qualified.

The inclusion of an exception for 'special measures' would minimise the risk that a general non-discrimination clause would invalidate laws for the benefit of Aboriginal and Torres Strait Islander peoples. While Australians are wary of the overuse of affirmative action policies which are perceived to unfairly favour one group of people over others, the approach proposed by the Panel is one that is needs-based, rather than one based on Aboriginal or Torres Strait Islander identity.

The racial non-discrimination provision proposed by the Panel includes an exception for 'special measures' in order to minimise the risk that a general non-discrimination clause would invalidate laws for the benefit of Aboriginal and Torres Strait Islander peoples. As discussed earlier in this chapter, such an exception is recognised in the Racial Discrimination Act, was proposed by the 1988 Constitutional Commission, and has been adopted in the constitutions and laws of Canada, India, South Africa and Aotearoa/New Zealand. An exception for positive measures to promote a level playing field is a standard feature of non-discrimination and equality provisions around the world. While Australians are wary of the overuse of affirmative action policies which are perceived to unfairly favour one group of people over others, the approach proposed by the Panel is one that is needs-based, rather than one based on Aboriginal or Torres Strait Islander identity. The proposed 'section 116A' saves positive laws and measures designed to address socio-economic disadvantage on the basis of need. This approach is a non-discriminatory one that benefits all Australians—Aboriginal and Torres Strait Islander and other Australians—alike.

The racial non-discrimination provision proposed by the Panel also includes an exception extending beyond addressing disadvantage and saving laws and executive actions designed to protect cultures, languages and heritage. The provised provision would not impose any obligation on Parliament to

adopt such laws and actions, but would ensure that they were not struck down as being discriminatory. Such an approach would be consistent with the international non-discrimination and equality jurisprudence considered above, and with the Canadian approach to aboriginal rights. It is also consistent with the recognition of the special position of Aboriginal and Torres Strait Islander peoples in the nation, and their particular cultures, languages and heritage.

6.6 Recommendation

The Panel recommends an amendment to the Constitution to provide for a new section, possibly numbered 'section 116A', along the following lines:

Section 116A Prohibition of racial discrimination

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

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

Notes

1 For example, Cape York Institute, submission no 3479, at 30.
2 Ibid, at 32.
3 For example, section 9.
4 For example, sections 10–13.
5 Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (Federation Press, 2008), at 162–163.
6 In *Mabo v Queensland* (1988) 166 CLR 186, Brennan, Toohey and Gaudron JJ in a joint judgment held that the *Queensland Coast Islands Declaratory Act 1985*, which was enacted some three years after Eddie Mabo and others filed their statement of claim, and which purported to extinguish the traditional legal rights of the Meriam people which might otherwise have survived annexation in 1879, was inconsistent with the Racial Discrimination Act, and therefore ineffective by reason of section 109 of the Constitution.
7 In 1993, after the High Court's 1992 decision in *Mabo (No 2)*, the Western Australian Parliament passed the *Land (Titles and Traditional Usage) Act 1993*, which purported not only to extinguish native title, but in an attempt to avoid *Mabo (No 1)* sought at the same time to confer statutory rights of traditional usage in replacement of native title. In *Western Australia v Commonwealth* (1995) 183 CLR 373, the High Court (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ, Dawson J agreeing) held that the WA legislation was also inconsistent with section 10(1) of the Racial Discrimination Act, and hence invalid by operation of section 109 of the Constitution.
8 Noel Pearson, 'Racism: The Current Australian Experience' (1995) 8 *Without Prejudice* 10.
9 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2010* (Australian Human Rights Commission, 2011), at 44.
10 John La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972), at 230. See also Chapter 1; John Williams, 'Race, Citizenship and the Formation of the Australian Constitution: Andrew Inglis Clark and the 14th Amendment' (2008) 42 *Australian Journal of Politics and History* 10; John Williams, 'With Eyes Open: Andrew Inglis Clark and Our Republican Tradition' (1995) 23 *Federal Law Review* 149.
11 *Official Record of the Debates of the Australasian Federal Convention*, Third Session, Melbourne, 20 January – 17 March 1898, vol 4, at 671, 682, 688; vol 5, at 1795, 1797, 1800, 1801.
12 Convention Debates, vol 4, Melbourne, 1898, at 664–690. See La Nauze, op cit, at 230.
13 Commonwealth, *Parliamentary Debates*, House of Representatives, 10 March 1966; Constitution Alteration (Aborigines) Bill 1966 (Cth).
14 Recognising Indigenous Australians in the Constitution: Panel Discussion, University of Melbourne, 12 October 2011.
15 Constitutional Commission, *Final Report of the Constitutional Commission* (Australian Government Publishing Service, 1988), vol 1, at [10.372].
16 Ibid, at [9.438].
17 Council for Aboriginal Reconciliation, *Reconciliation: Australia's Challenge—Final Report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament* (2000).
18 Charter of the United Nations, article 1(3).
19 United Nations, International Convention on the Elimination of All Forms of Racial Discrimination, article 1(4).
20 Ibid, article 2(2).
21 International Covenant on Civil and Political Rights, article 2(1).
22 See ibid, article 26.
23 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, at 42.
24 *Minority Schools in Albania* (1935) PCIJ Ser A/B No 64, at 17.
25 Ibid.
26 *South West Africa Second Phase, Judgment*, ICJ Rep 1966, at 303–04, 305.
27 W McKean, 'The Meaning of Discrimination in International and Municipal Law' (1970) 44 *British Yearbook of International Law*, at 185–186; also L Lustgarten, *Legal Control of Racial Discrimination* (Macmillan, 1980), at 3–37; E Vierdag, *The Concept of Discrimination in International Law* (Springer, 1973), at 86–89.27.

28 Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (Report No 31, 1986), at [150], [158]. In 1993, the United Nations Committee on the Elimination of Racial Discrimination, the body established to supervise compliance by states parties with their obligations under the convention, adopted a general recommendation on the definition of discrimination. The committee confirmed that 'a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within the scope of Article 1, paragraph 4, of the Convention'. Committee on the Elimination of Racial Discrimination, General Recommendation No 14, *Definition of Discrimination* (1993).

29 There is a debate about whether such laws should properly be described as 'special measures' or simply as laws which recognise the traditional cultural rights of indigenous peoples, such as their rights to land, in a way that ensures equal protection of the law. In *Gerhardy v Brown* (1985) 159 CLR 70, the High Court characterised entry restrictions upon Pitjantjatjara lands under the *Pitjantjatjara Land Rights Act 1981* (SA) as 'special measures' for the purposes of articles 1(1) and 2(4) of CERD, and section 8(1) of the Racial Discrimination Act. The High Court did not accede to the submission that the Pitjantjatjara Land Rights Act merely recognised and gave effect to traditional ownership, and that there was no inconsistency between it and the Commonwealth Act: see the argument of the Solicitor-General of South Australia, and the Solicitor-General for the Commonwealth (1985) 159 CLR 70, at 72. Rather, the Court endorsed an approach according to which references to race, however benign and reasonable, are *prima facie* discriminatory, unless they come within the special measures exception: for example, Mason J at 103. In *Western Australia v Commonwealth* (1995) 183 CLR 373 (the so-called Native Title Act case), the High Court placed a question mark over the conceptualisation of the Native Title Act as a special measure. In that case, Western Australia argued that the Native Title Act discriminates in favour of Aborigines and Torres Strait Islanders, and thus offends the Racial Discrimination Act. The Commonwealth submitted that the Native Title Act was 'a seminal example of the way in which traditional cultural rights of indigenous minorities, particularly their right to land, can be protected and accommodated in a way that ensures equal protection of the law for that minority'. The Court neither endorsed nor rejected the approach contended by the Commonwealth: 183 CLR, at 434.

30 Committee on the Elimination of Racial Discrimination, General Recommendation No 23, *Indigenous Peoples* (1997).

31 Ibid, at [5].

32 Ibid, at [11].

33 Ibid, at [15].

34 Tarnopolsky has noted that the drafters of section 15 added section 15(2) out of 'excessive caution', intending to bolster the substantive equality approach in section 15(1), since, at the time the charter was being drafted, there was a worry that affirmative action programs would be overturned on the basis of reverse discrimination: Walter Tarnopolsky, 'The Equality Rights in the Canadian Charter of Rights and Freedoms' (1983) 61 *Canadian Bar Review* 242.

35 Peter W Hogg, *Constitutional Law of Canada* (Carswell, 5th ed, 2007), at 654–655.

36 *R v Kapp* [2008] 2 SCR 483.

37 McLachlin CJ and Abella J (Binnie, LeBel, Deschamps, Fish, Charron and Rothstein JJ concurring).

38 Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (University of Toronto Press, 2001), at 224.

39 *R v Agawa* (1988) 43 CCC (3d) 266 (Ont CA). Pentney has commented that section 25 is intended to protect the rights of aboriginal peoples from 'obliteration' by the equality rights guaranteed in section 15: William Pentney, 'Rights of the Aboriginal Peoples of Canada and the Constitution Act, 1982—Part 1: The Interpretive Prism of Section 25' (1987) 22 *University of British Columbia Law Review*, at 28.

40 Added by the Constitution (First Amendment) Act 1951, section 2.

41 Inserted by the Constitution (Ninety-third Amendment) Act 2005, section 2.

42 Vicki C Jackson, *Constitutional Engagement in a Transnational Era* (Oxford University Press, 2010), at 224.

43 Sections 7 to 39.

44 Section 19 in its present form was substituted on 1 February 1994 by section 145 of the Human Rights Act 1993 (1993 No 82).

45 The Human Rights Act 1993 is a consolidation and amendment of the Race Relations Act 1971 and the Human Rights Commission Act 1977.
46 Noel Pearson, 'A Letter to the Australian People', submission no 3619.
47 Broken Hill, 28 August 2011.
48 Horsham, June 2011.
49 Mildura, August 2011.
50 National Congress of Australia's First Peoples, *National Congress Report 2011: Building Our Foundations* (2011).
51 Life without Barriers, submission no 3548.
52 Sisters of St Joseph, Victorian Province, Peace, Justice and Social Issues Group, submission no 3258.
53 ANTaR National, submission no 3432, at 25. ANTaR's proposal draws on George Williams, 'Recognising Indigenous Peoples in the Constitution: What the Constitution Should Say and How the Referendum Can Be Won' (2011) 5(1) *Land, Rights, Laws: Issues of Native Title*, at 7.
54 Cape York Institute, submission no 3479, at 6.
55 Law Council of Australia, submission no 3478, at 17–18.
56 Ibid, at 18.
57 Victorian Traditional Owner Land Justice Group, submission no 3546.
58 Castan Centre for Human Rights Law, submission no 3554, at 11.
59 Sean Brennan, submission no 3351, at 6.
60 Ibid, at 8.
61 For example, Jeff McMullen, submission no 29, at 20.
62 See, for example, Law Council of Australia, submission no 3478, at 19.
63 *Ealing London Borough Council v Race Relations Board* [1972] AC 342; *Australian Medical Council v Wilson* (1999) 68 FCR 46; *Macabenta v Minister for Immigration and Multicultural Affairs* (1998) 90 FCR 202 per Carr, Sundberg and North JJ, at 212E; also *De Silva v Ruddock in his capacity as Minister for Immigration and Multicultural Affairs* [1998] FCA 95.
64 *Ealing London Borough Council v Race Relations Board* [1972] AC 342 per Lord Kilbrandon, at 368, in a frequently cited passage although dissenting in the result.

7 Governance and political participation

7.1 Aboriginal and Torres Strait Islander peoples and governance

An issue raised at consultations and in submissions to the Expert Panel was the historical exclusion of Aboriginal and Torres Strait Islander peoples from participation in the processes of government in Australia—nationally, in the States and Territories, and in local government—and the perceived lack of accountability of the institutions of government to Aboriginal and Torres Strait Islander peoples, who constitute 2.5 per cent of the population.

A number of submissions to the Panel raised the possibility of dedicated or reserved seats in the Commonwealth Parliament for representatives of Aboriginal and Torres Strait Islander peoples.[1] Aotearoa/New Zealand was frequently cited as a positive example. As discussed in Chapter 2, since the enactment of the Maori Representation Act 1867 (NZ) there have been reserved Māori seats in Parliament. In 1993, New Zealand introduced the mixed-member proportional representation voting system. Also, as discussed in Chapter 2, in the late 1980s and early 1990s, there were constitutional reforms in Norway, Finland and Sweden to recognise the rights of the Sámi people. At around the same time, legislation was enacted in Norway, Finland and Sweden to establish Sámi parliaments. These developments were referred to in a number of submissions (including that of the Law Council of Australia) and at consultations.

> The whole world has participated in having seats for their indigenous people in Parliament; because that's the only way we're going to change things. … If possible, I would like to see designated seats for Aboriginal and Torres Strait Islanders enshrined within the Constitution.[2]

The submission of the Cape York Institute proposed a new interface between Aboriginal and Torres Strait Islander peoples and governments in Australia, involving both constitutional amendment and legislative reform, to create an Equal Rights and Responsibilities Commission. The proposal of the Cape York Institute is considered below.

A number of submissions to the Panel raised the possibility of dedicated or reserved seats in the Commonwealth Parliament for representatives of Aboriginal and Torres Strait Islander peoples.

Other proposals included provision for Aboriginal and Torres Strait Islander senators, a council of indigenous elders in the Senate, and the creation of an 'Indigenous General Council' including a minimum of four 'special indigenous advisors' nominated by Aboriginal and Torres Strait Islander peoples and appointed by both Houses of Parliament to advise the Parliament on laws and policies affecting Aboriginal and Torres Strait Islander peoples.

Another proposal was for the creation of the ceremonial position of 'First Australian', similar to that of the Governor-General.[3] The Panel's attention was also drawn to the recent creation of a customary Senate of Chiefs in New Caledonia.

This chapter of the Panel's report addresses:

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

7.2 Participation and representation

The Panel notes that since the 1967 referendum an increasing number of Aboriginal and Torres Strait Islander people have been elected to Australian parliaments and otherwise participated in political life. The Panel welcomes positive developments towards greater inclusion and representation of Aboriginal and Torres Strait Islander people in political decision-making and public life.

In 1971, Neville Bonner became the first Aboriginal person to sit in the Commonwealth Parliament when he was selected to fill a casual vacancy in the Senate. Subsequently, he was the first Aboriginal person to be elected to the Commonwealth Parliament when he was elected as a Liberal Senator for Queensland in 1972, 1974, 1975 and 1980. Yorta Yorta man Sir Douglas Nicholls was the first Aboriginal person to be knighted and the first Aboriginal person appointed to vice-regal office, serving as Governor of South Australia from 1 December 1976 until his resignation on 30 April 1977 due to poor health.

The Panel welcomes positive developments towards greater inclusion and representation of indigenous Australians in political decision-making and public life.

In 1988, Aden Ridgeway was elected as a Democrat Senator for New South Wales. As the Australian Democrats' deputy leader from 2001 to 2002, he became Australia's first indigenous person to be elected as a parliamentary leader. Ken Wyatt AM, who has Noongar, Yamatji and Wongi heritage, became the first Aboriginal member of the House of Representatives in 2010, when he was elected Liberal member for Hasluck in Western Australia.

Aboriginal and Torres Strait Islander representation in State and Territory parliaments

Numerous Aboriginal and Torres Strait Islander Australians have been elected as members of State and Territory legislative assemblies and legislative councils, including the following:

Australian Capital Territory Legislative Assembly: Chris Bourke* (2011–)

New South Wales Legislative Assembly: Linda Burney* (2003–)

Northern Territory Legislative Assembly: Hyacinth Tungutalum (1974–77); Neville Perkins* (1977–81); Wesley Lanhupuy (1983–95); Stanley Tipiloura (1987–92); Maurice Rioli (1992–2001); John Ah Kit* (1995–2005); Matthew Bonson* (2001–); Elliot McAdam* (2001–); Marion Scrymgour* (2001–); Alison Anderson* (2005–); Malarndirri McCarthy* (2005–); Karl Hampton* (2006–); Adam Giles* (2008–)

Queensland Legislative Assembly: Eric Deeral (1974–77)

Tasmanian House of Assembly: Kathryn Hay (2002–06)

Tasmanian Legislative Council: Paul Harriss (1996–)

Western Australian Legislative Assembly: Carol Martin (2001–); Ben Wyatt* (2006–); Ernie Bridge* (1980–2001).

* Has served or is serving as a minister or shadow minister.

By proclamation made on 14 July 1995 under the *Flags Act 1953* (Cth), the Aboriginal Flag and the Torres Strait Islander Flag were recognised as Australian flags. Both are increasingly flown in Australian parliaments. In 2011, at the initiative of the then Liberal Opposition, the Aboriginal Flag was raised for the first time in the New South Wales Legislative Assembly. Opposition leader Barry O'Farrell welcomed the hanging of the flag following a ceremony in the Legislative Assembly, saying:

> It's only appropriate we acknowledge in the NSW Parliament the history and contribution made by Aboriginal people and flying the Aboriginal Flag is a great way to do that.
>
> This is a welcome addition to the Legislative Assembly Chamber and comes just a month after MPs unanimously agreed to recognise Aboriginal people in the State's Constitution for the first time.
>
> Like the State Flag, it serves as a reminder to all MPs about where we've come from and where we are heading.

Increasingly, as well, there are Aboriginal and Torres Strait Islander liaison officers in Commonwealth and State and Territory parliaments.

By proclamation made on 14 July 1995 under the Flags Act 1953 (Cth), the Aboriginal Flag and the Torres Strait Islander Flag were recognised as Australian flags.

Members of the Panel also welcome the increasing participation of Aboriginal and Torres Strait Islander councillors in local government.

At consultations and in submissions to the Panel, the significance to both indigenous and non-indigenous Australians of the motion of Apology to Australia's Indigenous Peoples, which passed with bipartisan support from the Parliament and received a standing ovation from the floor of the House of Representatives as well as from the public gallery on 13 February 2008, was also frequently raised.

Members of the Panel also welcome the increasing participation of Aboriginal and Torres Strait Islander councillors in local government.

7.3 Aboriginal and Torres Strait Islander representative structures

As well as the increasing representation of Aboriginal and Torres Strait Islander Australians in parliaments and public life, there are a range of representative structures that provide some elements of self-governance to Aboriginal and Torres Strait Islander peoples, and which seek to mediate the interface with Australian governments. These have been established at the national, regional and local levels.

The desire for such structures was raised with the Panel in a number of submissions and at consultations.

The Panel was informed that some Aboriginal and Torres Strait Islander peoples identify as 'peoples' in the international law sense, and invoke the provisions of the United Nations Declaration on the Rights of Indigenous Peoples relating to indigenous decision-making and representative institutions. Those provisions include article 3 in relation to self-determination, and article 4 in relation to autonomy. As discussed in Chapter 2, the declaration was referred to in almost a quarter of the submissions made by organisations to the Panel. The Anglican Diocese of Brisbane endorsed the 'vision of self-determination' found in the declaration, contending that 'Aboriginal and Torres Strait Islander people must determine their own lives and futures'.[4] A number of submissions referred in particular to article 18 in relation to 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 the right to maintain and develop their own indigenous decision-making structures. There was also reference to article 19, which provides that states shall consult with indigenous peoples 'in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them'.

At the national level, there have been significant attempts since the 1970s to establish Aboriginal and Torres Strait Islander representative structures.

The first were the National Aboriginal Consultative Committee (1973–77) and the National Aboriginal Conference (1977–85). These were administrative creations of the government of the day, and their roles were advisory.

In 1990, the Aboriginal and Torres Strait Islander Commission (ATSIC) was created as a Commonwealth statutory authority with real, though limited, executive decision-making powers.[5] The statutory powers and functions of ATSIC included advising the Commonwealth on policy matters, and developing and delivering a range of Commonwealth-funded programs for Aboriginal and Torres Strait Islander peoples.[6] These powers and functions were shared with, and overseen by, a Commonwealth minister. The ATSIC structure originally consisted of 60 directly elected regional councils (with almost 800 members),[7] and an indirectly elected 20-member national board of commissioners. Regions were grouped into 17 zones, with each zone selecting one national commissioner from its elected regional councillors.

Until 1999, the chairperson of the ATSIC board of commissioners was appointed by the federal government. After 1999, the chairperson was elected by the commissioners from among themselves. Every three years from 1990 to 2002, Aboriginal and Torres Strait Islander people elected local representatives to regional councils. The ATSIC elections were conducted by the Australian Electoral Commission according to procedures that were similar to those for parliamentary elections.[8] On 28 May 2004 the Howard Government introduced into federal Parliament legislation to abolish ATSIC. From 1 July 2004, responsibility for ATSIC programs and services was transferred to mainstream agencies. In November 2004, the National Indigenous Council was established as an appointed advisory body to the federal government. The legislation abolishing ATSIC was passed on 16 March 2005, with support of the Labor Opposition. The ATSIC board was abolished on 24 March 2005, and the regional councils ceased to exist on 30 June 2005.[9]

On 1 July 1994, the Torres Strait Regional Authority (TSRA) was established to represent Torres Strait Islanders and Aboriginal people living in the Torres Strait area. The TSRA was initially under the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth), with a commissioner on the national ATSIC board. Following the abolition of ATSIC, the TSRA remains a Commonwealth statutory authority.[10] The TSRA board is made up of 20 members, 18 of whom hold the office because they have been elected chairperson of their local island council through the *Community Services (Torres Strait) Act 1984* (Qld). The other two members, who represent areas not covered by that Act, are elected through separate elections conducted by the Australian Electoral Commission. The 20 board members elect a chairperson, deputy chairperson and alternate deputy chairperson in separate elections also conducted by the Australian Electoral Commission.

As a Torres Strait Islander, I am proud of my distinct culture and identity. To be meaningfully recognised in the Constitution acknowledges our distinct cultures, languages and identities and our ongoing relationship with the sea and islands of the Torres Strait. Torres Strait Islanders on the mainland and Torres Strait Islanders who continue to live in the region and protect our traditional lands all have shared histories, customs and vibrant cultures. It is essential that our people and communities are supported to manage and govern the business of our everyday lives.

Josephine Bourne, Expert Panel member

There have been recent renewed calls for self-government in the Torres Strait, following three years of community consultations, and supported by Torres Strait Islander Regional Council Mayor Fred Gela, Torres Shire Council Mayor Pedro Stephen, and the Torres Strait Regional Authority.

Mr Gela has said that the preferred model is a two-tiered government, with a federal level and a Torres Strait territory level, mirroring the Queensland state government but with only one house of parliament. Following a community Cabinet meeting on Thursday Island on 28 August 2011, Queensland Premier Anna Bligh announced support for the 'aspiration of Torres Strait residents for greater political autonomy', and has recently written to Prime Minister Julia Gillard seeking talks on autonomy in the Torres Strait.

In December 2008, the Aboriginal and Torres Strait Islander Social Justice Commissioner convened an independent steering committee to research a new model for a national representative body for Aboriginal and Torres Strait Islander peoples. Consultations resulted in the establishment of the National Congress of Australia's First Peoples. Congress is a non-government organisation, established as a company limited by guarantee in April 2010. Membership of Congress is open to Aboriginal and Torres Strait Islander individuals and organisations. Its national board consists of six directors and two chairpersons elected by the membership. While funded by the Australian Government until 2013, Congress aims to become financially sustainable by raising funds, and gaining sponsorships. The annual Congress forum has three chambers made up of 40 delegates in each chamber: Chamber 1—Aboriginal and Torres Strait Islander peak bodies and national organisations; Chamber 2—Aboriginal and Torres Strait Islander organisations; and Chamber 3—Aboriginal and Torres Strait Islander individuals. Critical elements of the Congress model are an Ethics Council, and the principle of gender equity.

On 28 August 2011, Queensland Premier Anna Bligh announced support for the 'aspiration of Torres Strait residents for greater political autonomy'.

In addition to national representative structures, there is an increasing range of regional and local Aboriginal and Torres Strait Islander–controlled structures that provide elements of governance. In 2008, the Australian

Capital Territory Aboriginal and Torres Strait Islander Elected Body was established as a statutory body under the *Aboriginal and Torres Strait Islander Elected Body Act 2008* (ACT). It has seven members who are elected by Aboriginal and Torres Strait Islander people living in the Territory. Their functions include receiving and passing on to the minister the views of Aboriginal and Torres Strait Islander people living in the Territory on issues of concern to them; proposing programs and designing services for consideration by the government and its agencies; and monitoring and reporting on the effectiveness and accessibility of programs and services.

Another frequently cited example is the Murdi Paaki Regional Assembly, the peak representative structure that represents the interests of Aboriginal and Torres Strait Islander people in 16 communities across western New South Wales. The Regional Assembly's governance model 'promotes the practice of good governance, responsible leadership and empowerment'. The Regional Assembly and its membership of community working parties form the governance framework that provides strategic engagement and coordination for the delivery of services and programs against priorities determined by Aboriginal and Torres Strait Islander people.

The Murdi Paaki Regional Partnership Agreement (the first in New South Wales) was signed on 28 January 2009 by the Murdi Paaki Regional Assembly, the Commonwealth Government and the New South Wales Government. Clause 1.3 of the agreement describes its purpose as enabling the parties to 'work together to deliver outcomes that make a difference in the lives of Aboriginal and Torres Strait Islander people and communities in the Murdi Paaki'.[11]

At almost all consultations and in many submissions, Aboriginal and Torres Strait Islander Australians expressed anguish, hurt and anger at the extent of their economic and social disempowerment, and their current circumstances.

7.4 Government interaction with Aboriginal and Torres Strait Islander communities

The third issue that arises in relation to governance is how governments go about dealing with Aboriginal and Torres Strait Islander communities.

At almost all consultations and in many submissions, Aboriginal and Torres Strait Islander Australians expressed anguish, hurt and anger at the extent of their economic and social disempowerment, and their current circumstances. At one consultation, it was said that '[p]eople are worried about shelter and fresh food on a daily basis and therefore it will be difficult to engage many in this consultation'.[12] There were expressions of frustration in relation to past and present attempts to remedy disadvantage, and of cynicism in relation to past consultations, which have not led to change.

> It is absolutely essential that changes to the constitution are made, for generations after generations of our people have felt nothing but hopelessness and disparity.[13]

> You talk about taking control of our families and lives and yet we have found it very difficult, where government wants to come in and take over, welfare and others.[14]

> Locally we can't see that we are closing the gap. There are no real pathways, it's the same old story. We can't get an education, lots of money is going to non-indigenous services, we don't get the jobs, the funding, or local decision-making and without a local community council I can't see that we will progress. We are selling out our young people as a community. I am totally sad that I have to send my kids away to get an education to break the cycle.[15]

> Can I just say that Indigenous Australians rate lowest across all indicators. Few of us have a strong economic base to participate in society as a citizen with full rights. Because of that we are still at the mercy of government. If government decides that this part of the country won't get particular grants or social services, we miss out. How then are we as a people supposed to be able to facilitate our own empowerment? Where do we go? We are completely at the mercy of government, particularly the Commonwealth Government. We should be able to have access to resources without having to go cap in hand to government. I don't believe that we will ever progress unless we have these rights. All Australians are the beneficiaries. Unless there is some teeth in there that says that traditional groups get funds or resources to roll out programs they believe will be practical, rather than transplanting something from the NTER [Northern Territory Emergency Response], we are given the right to make decisions to progress.[16]

At community consultations, members of the Panel frequently heard concerns expressed about the practices of bureaucracies in their interactions with Aboriginal and Torres Strait Islander communities. At one consultation, a participant said:

> I'm getting sick of documents and policies coming down from Parliament with a rush on the time frame for input from us. There needs to be more time in the consultation. It's not fair to have things start, to be rushed and have us digest it all, and expect positive, constructive input from us.[17]

'My experience of the Commonwealth suggests to me that the culture of the Commonwealth public service, regardless of the party in power, is one of micro regulation which manifests itself in a desire to control every detail of matters within Commonwealth power.'

Michael Stokes, submission no 3096

During the course of the Panel's deliberations, Panel member Ken Wyatt raised the need for public servants and parliamentarians to change their practices in dealing with Aboriginal and Torres Strait Islander communities. He argued for an approach based on negotiations with communities on a consensual basis.

Michael Dillon and Neil Westbury have suggested consideration of the architecture of government from the perspective of a resident of a remote community: 'Looking "up" into the edifice above, it must resemble a swirling vortex of policies, programs, politicians, public servants and politics; all in all, a strong dose of what Stanner referred to in 1972 as "humbug".'[18]

The submission of the Cape York Institute to the Panel argued the case for structural reform. The submission draws on the writings and speeches of its director, Noel Pearson. In 2007, Pearson wrote:

> The principal structural problem faced by indigenous people concerns our power relationship with the rest of Australian society through its structures of government: judicial, legislative and executive. Australian democracy just does not work to enable the solution of our problems.[19]

The mechanism proposed in the Cape York Institute submission to manage the interface between indigenous Australians and governments intending to pass laws for their benefit is an Equal Rights and Responsibilities Commission.[20] A related mechanism, involving a proposed constitutional amendment through the insertion of a new 'section 127A', is a new review requirement for laws with respect to Aboriginal and Torres Strait Islander peoples. The submission proposes that under 'section 127A', any targeted measures for indigenous Australians must be periodically reviewed to ensure the measures are effective in achieving their aims, in addressing disadvantage, in ameliorating the effects of past discrimination, and in enabling equal rights. In assessing whether laws for indigenous people are effective, the views and aspirations of indigenous people must be taken into account.[21] The proposed 'section 127A' mechanism has been addressed in Chapter 5.

The Cape York Institute submission also calls for a Rights and Responsibilities Commission Act to establish the proposed commission to monitor and review all laws for indigenous Australians in accordance with the proposed 'section 127A' mechanism. The commission would be a high-level, independent research body similar to the Productivity Commission, and make regular recommendations to Parliament as to how any indigenous-specific laws should be improved.[22]

The concerns raised at community consultations, and the views of Ken Wyatt, are consistent with the officially measured and recorded position, and with current understandings within Australian governments about continuing disadvantage and the slow progress in remedying it. As noted in Chapter 1, since 2007 the Commonwealth, State and Territory governments have been committed to six ambitious targets to close the gap in disadvantage:

- closing the life expectancy gap within a generation;
- halving the gap in the mortality rate for indigenous children under five within a decade;
- ensuring all indigenous four-year-olds in remote communities have access to quality early childhood programs within five years;
- halving the gap in reading, writing and numeracy achievements for indigenous children within a decade;
- halving the gap for indigenous students in year 12 attainment rates or equivalent attainment by 2020; and
- halving the gap in employment outcomes within a decade.[23]

The concerns raised at community consultations, and the views of Ken Wyatt on the need for public servants and parliamentarians to change their practices in dealing with Aboriginal and Torres Strait Islander communities, are consistent with the officially measured and recorded position, and with current understandings within Australian governments about continuing disadvantage and the slow progress in remedying it.

According to the 2011 report of the Steering Committee for the Review of Government Service Provision:

> Across virtually all the indicators in this report, there are wide gaps in outcomes between Indigenous and other Australians. The report shows that the challenge is not impossible—in a few areas, the gaps are narrowing. However, many indicators show that outcomes are not improving, or are even deteriorating. There is still a considerable way to go to achieve COAG's commitment to close the gap in Indigenous disadvantage.[24]

The Steering Committee's 2011 report notes that disadvantage can have multiple causes, and that some actions can have multiple effects. The complexity of such issues has led to them being characterised as 'wicked problems'.[25] The Steering Committee's 2011 report suggests the following 'success factors':

- cooperative approaches between indigenous people and government—often with the non-profit and private sectors as well
- community involvement in program design and decision making—a 'bottom-up' rather than 'top-down' approach
- good governance—at organisation, community and government levels
- ongoing government support—including human, financial and physical resources.[26]

How governments go about dealing with Aboriginal and Torres Strait Islander communities is critical to achieving change. All Australian governments have acknowledged the principle that engagement of indigenous men, women and children and communities should be central to the design and delivery of programs and services. The National Partnership Agreement on Remote Service Delivery provides that in such engagement attention should be given to:

(a) recognising that strong relationships/partnerships between government, community and service providers increase the capacity to achieve identified outcomes and work towards building these relationships;

(b) engaging and empowering Indigenous people who use Government services, and the broader Indigenous community in the design and delivery of programs and services as appropriate;

(c) recognising local circumstances;

How governments go about dealing with Aboriginal and Torres Strait Islander communities is critical to achieving change.

(d) ensuring Indigenous representation is appropriate, having regard to local representation as required;

(e) being transparent regarding the role and level of Indigenous engagement along the continuum from information sharing to decision-making; and

(f) recognising Indigenous culture, language and identity.[27]

The Panel has not been tasked to report on the way government is organised to deliver on policy objectives. However, the concerns raised at consultations and by Ken Wyatt point to structural barriers to the involvement of Aboriginal and Torres Strait Islander peoples in the development and implementation of legislation, policies and services that affect them. The demands for nationally uniform policy approaches, election cycles, departmental silos, centralisation of government decision-making, overlapping jurisdictions and a multiplicity of programs stifle innovation and flexibility. There appears to be a gulf between government intentions and the delivery of acceptable outcomes for Aboriginal and Torres Strait Islander peoples.

The demands for nationally uniform policy approaches, election cycles, departmental silos, centralisation of government decision-making, overlapping jurisdictions and a multiplicity of programs stifle innovation and flexibility. There appears to be a gulf between government intentions and the delivery of acceptable outcomes for Aboriginal and Torres Strait Islander peoples.

7.5 Conclusions

This chapter of the Panel's report has considered issues relating to governance and political participation. The Panel welcomes the increasing participation of Aboriginal and Torres Strait Islander people in Australian parliaments and public life, as well as moves to autonomous Aboriginal and Torres Strait Islander representative structures and institutions.

At this time, the Panel does not recommend further consideration of dedicated or reserved seats in federal Parliament for Aboriginal and Torres Strait Islander peoples. As discussed in Chapter 3, in its statement of 17 September 2011 to the Panel, the National Congress of Australia's First Peoples noted that while more than 50 per cent of Congress members supported the proposal, delegates provided the highest level of negative response. Accordingly, the Congress statement concluded: 'It may be that this particular proposition requires much more development to be fully supported or understood within the context of political representation and/or status of Aboriginal and Torres Strait Islander peoples.' The proposal would not therefore satisfy the principle that any proposal for constitutional recognition 'be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples'. Given the uncertainties surrounding its implementation, it is also unlikely to satisfy the principle that it 'be technically and legally sound'.

Likewise, having regard to the infrequent references to the idea in submissions to the Panel, and Newspoll survey results suggesting limited support for the proposal within the general community, such a proposal would not satisfy two of the Panel's other principles for assessment of proposals, namely that they 'contribute to a more unified and reconciled nation', and 'be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums'. The Panel has concluded that any recommendation relating to dedicated seats in Parliament for Aboriginal and Torres Strait Islander people would be contested by many Australians.[28]

It would be remiss of the Panel not to comment on the often cited failures of Australian governments at all levels to deliver better outcomes for Aboriginal and Torres Strait Islander peoples.

The third issue considered in this chapter concerns the way governments deal with Aboriginal and Torres Strait Islander communities. The economic and social disempowerment of many Aboriginal and Torres Strait Islander communities, raised so frequently and with such anguish, hurt and anger at consultations, requires attention beyond amendment of the Constitution. The Panel has concluded, however, that it would be remiss not to comment on the failures of Australian governments at all levels to deliver better outcomes for Aboriginal and Torres Strait Islander peoples.

Likewise, while it is clear that constitutional recognition of Aboriginal and Torres Strait Islander peoples would not directly address many of the issues that are of concern to communities and governments, many of those consulted by the Panel supported the idea that constitutional recognition could provide a more positive framework within which the issues collected under the heading 'closing the gap' could be addressed more successfully.



Panel members Rachel Siewert (left) and Fred Chaney (right) with Teddy Biljabu, Warralong, 14 July 2011

Notes

1 For example, Victorian Aboriginal Child Care Agency, submission no 1874, at 10.
2 Adelaide, 22 August 2011.
3 Sue Garlick, submission no 30.
4 Anglican Diocese of Brisbane, submission no 3366.
5 See generally William Sanders, 'Towards an Indigenous Order of Australian Government: Rethinking Self-Determination as Indigenous Affairs Policy' (Discussion Paper No 230, Centre for Aboriginal Economic Policy Research, Australian National University, 2002); William Sanders, 'ATSIC's Achievements and Strengths: Implications for Institutional Reform' (Topical Issue No 10, Centre for Aboriginal Economic Policy Research, Australian National University, 2004).
6 This was pursuant to the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth).
7 This number was reduced in 1993 to 36 regional councils with around 600 members, and in 1996 to around 400 members.
8 Australian Electoral Commission, *History of the Indigenous Vote* (2006), at 11.
9 Ibid.
10 The Torres Strait Regional Authority is governed by the *Aboriginal and Torres Strait Islander Act 2005* (Cth).
11 For detail, see the website of the Agreements, Treaties and Negotiated Settlements database, at www.atns.net.au.
12 Newman, July 2011.
13 Danielle Teo, submission no 3493.
14 Perth, September 2011.
15 Moree, July 2011.
16 Rockhampton, July 2011.
17 Lismore, August 2011.
18 Michael C Dillon and Neil D Westbury, *Beyond Humbug: Transforming Government Engagement with Indigenous Australia* (Seaview Press, 2007), at 65. See also Patrick Sullivan, *The Aboriginal Community Sector and the Effective Delivery of Services: Acknowledging the Role of Indigenous Sector Organisations* (Desert Knowledge CRC Working Paper 73, 2010), at 1; Patrick Sullivan, 'Bureaucratic Process as Morris Dance: An Ethnographic Approach to the Culture of Bureaucracy in Australian Aboriginal Affairs Administration' (2008) 4(2–3) *Critical Perspectives on International Business*, at 139.
19 Noel Pearson, 'A Structure for Empowerment', *The Weekend Australian*, 16–17 June 2007.
20 Cape York Institute, submission no 3479, at 33.
21 Ibid, at 29.
22 Ibid, at 7.
23 Letter from Kevin Rudd, Prime Minister, to Gary Banks, Chairman of the Steering Committee for the Review of Government Service Provision, 11 March 2009.
24 Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2011* (Productivity Commission, 2011), at 3.
25 'Wicked problems' were first described by Horst Rittel and Melvin Webber, 'Dilemmas in a General Theory of Planning' (1973) 4 *Policy Sciences* 155. See also, for example, Management Advisory Committee, *Connecting Government: Whole of Government Responses to Australia's Priority Challenges* (2004) and Australian Public Service Commission, *Tackling Wicked Problems: A Public Policy Perspective* (2007).
26 Steering Committee for the Review of Government Service Provision, op cit, at 3.16.
27 Schedule C to National Partnership Agreement on Remote Service Delivery.
28 For example, in her submission, Wendy Radford suggested that reserved seats in Parliament would be the most contentious aspect of any constitutional change, and that such a provision should not be coupled with the eradication of discriminatory provisions in the Constitution 'as this would ensure the failure of the anti-discriminatory changes': Wendy Radford, submission no 3608.



Panel members Rob Oakeshott and Janelle Saffin (seated, second row, third and fourth from left), Lismore consultation, 30 August 2011

8 Agreement-making

8.1 Agreement-making in Australia

The aspirations of many Aboriginal and Torres Strait Islander peoples in relation to agreement-making was another issue that was raised at community consultations and in submissions to the Expert Panel. It was also apparent that there is strong support among the non-indigenous community for forms of binding agreements between Aboriginal and Torres Strait Islander communities and governmental and non-governmental parties.

> Healing is only possible if we not only acknowledge dispossession and its negative consequences, but also do what should have been done in the first instance i.e. Governments sitting down with the traditional owners of this land and negotiating agreements with them about how we live together in this land.[1]

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

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

In Australia, the only historical example of a treaty is the 1835 Batman Treaty, an agreement between the grazier John Batman and a group of Wurundjeri elders for the rental of 600,000 acres of land around Port Phillip near the current site of Melbourne.[2] The document was signed on 6 June 1835.[3] Significantly, it records the only occasion on which a colonist is known to have negotiated the occupation of Aboriginal land with the traditional owners. The Batman Treaty was declared void on 26 August 1835 by the Governor of New South Wales, Richard Bourke, on the basis that the Wurundjeri people did not have a right to deal with land that belonged to the Crown.[4] Justice Willis, while acknowledging the illegality of the agreement, considered it to be 'regretted' that the Government had not made a treaty with the Aboriginal people of Port Phillip.[5]

In Australia, the only historical example of a treaty is the 1835 Batman Treaty, an agreement between the grazier John Batman and a group of Wurundjeri elders for the rental of 600,000 acres of land around Port Phillip near the current site of Melbourne.

In 1913, in the decision of the High Court in *Williams v Attorney-General for New South Wales*, Justice Isaacs referred to Bourke's proclamation, approved by the Colonial Office, refusing to recognise Batman's 1835 treaty with the local Aboriginal elders.[6] Justice Isaacs considered the proclamation to be a 'very practical application' of the doctrine that the Crown had acquired full legal and beneficial ownership of all the lands of Australia.

In 1837, the idea of a treaty with Aboriginal people was promoted by Saxe Bannister, the first attorney-general of New South Wales, in a submission to the Select Committee of the House of Commons on Aborigines. Retired Governor George Arthur of Tasmania also urged the same committee to consider treaties with the Aboriginal people of Australia.[7]

Some 140 years later, the question of a treaty attained national prominence and some support from the Commonwealth Government following the establishment of the National Aboriginal Conference (NAC) to provide a forum for the views of Aboriginal people. On 12 November 1977, 35 members representing electorates throughout Australia were elected to the NAC. In April 1979, at its second national conference, the NAC called for a 'Treaty of Commitment' to be negotiated between the Commonwealth and the Aboriginal people:

> [W]e, as representatives of the Aboriginal Nation (NAC) request that a Treaty of Commitment be executed between the Aboriginal Nation and the Australian Government. The NAC requests, as representatives of the Aboriginal people, that the Treaty should be negotiated by the National Aboriginal Conference. Accordingly resolved that we immediately convey our moral, legal and traditional rights to the Australian Government and that we immediately proceed to carry from our people the suggested areas to which the Treaty should be relevant and that we proceed also to draft a Treaty and copies of the Motion be sent to the Prime Minister and all members of the Australian Parliament.[8]

On 16 August 1979, the Aboriginal Treaty Committee was established by a group of non-indigenous Australians to promote the idea of a treaty. The committee called for a 'treaty, covenant or convention' to include provisions relating to:

- the protection of Aboriginal identity, languages, law and culture;
- the recognition and restoration of rights to land by applying, throughout Australia, the recommendations of the Woodward Commission in its 1974 report;
- the conditions governing mining and exploitation of other natural resources on Aboriginal land;
- compensation to Aboriginal Australians for the loss of and damage to traditional lands and to their traditional way of life; and
- the right of Aboriginal Australians to control their own affairs and to establish their own associations for this purpose.[9]

On 21 August 1979, in response to the NAC resolution of April 1979, Prime Minister Malcolm Fraser indicated that the Minister for Aboriginal Affairs was examining the NAC proposal, and confirmed his preparedness to discuss the concept of a treaty with the NAC at a mutually convenient time.[10] On 12 November 1979, the NAC resolved to adopt the term 'Makarrata' in place of the expression 'Treaty of Commitment' used in the

April 1979 resolution. 'Makarrata' is a Yolngu word from north-eastern Arnhem Land sometimes translated as 'things are alright again after a conflict' or 'coming together after a struggle'.[11]

On 13 November 1979, the Minister for Aboriginal Affairs in the Fraser Government, Fred Chaney, issued a press statement on behalf of the Government welcoming the NAC initiatives with respect to the Makarrata proposal, and confirming its willingness to 'join any discussions as the proposal moves forward'.[12] In 1981, the Senate Standing Committee on Constitutional and Legal Affairs was instructed to conduct an inquiry into the feasibility of a Makarrata between the Commonwealth and Aboriginal people. In its 1983 report, *Two Hundred Years Later …*, the committee recommended a constitutional amendment along the lines of section 105A, which was inserted into the Constitution in 1929 in order to give the Commonwealth power to enter into financial agreements with the States. Section 105A provides as follows:

> 105A.—(1.) The Commonwealth may make agreements with the States with respect to the public debts of the States, including—
>
> (a) the taking over of such debts by the Commonwealth;
>
> (b) the management of such debts;
>
> (c) the payment of interest and the provision and management of sinking funds in respect of such debts;
>
> (d) the consolidation, renewal, conversion, and redemption of such debts;
>
> (e) the indemnification of the Commonwealth by the States in respect of debts taken over by the Commonwealth; and
>
> (f) the borrowing of money by the States or by the Commonwealth, or by the Commonwealth for the States.

The committee's recommendation was that:

> The Government should, in consultation with Aboriginal people, give consideration, as the preferred method of legal implementation of a compact, to the insertion within the Constitution of a provision along the lines of section 105A, which would confer a broad power on the Commonwealth to enter into a compact with representatives of the Aboriginal people. Such a provision would contain a non-exclusive list of those matters which would form an important part of the terms of the compact, expressing in broad language the types of subjects to be dealt with.[13]

The renewed calls in 1988, the bicentenary of Captain Arthur Phillip's arrival in 1788, for a treaty by the *Aboriginal Sovereign Treaty '88 Campaign* are discussed in Chapter 9.[14] In 1988, as well, the Barunga Statement called upon the Australian Government and people to recognise rights of the indigenous owners and occupiers of Australia, and on the Commonwealth Parliament 'to negotiate a Treaty recognising our prior ownership, continued occupation and sovereignty and affirming our human rights and freedoms'.[15]

The Constitutional Commission confirmed that '[t]here is no doubt that the Commonwealth has sufficient constitutional powers to take appropriate action to assist in the promotion of reconciliation with Aboriginal and Torres Strait Islander citizens and to recognise their special place in the Commonwealth of Australia'.

As discussed in Chapter 1, in 1988 the Constitutional Commission reconsidered the 1983 recommendation of the Standing Committee on Constitutional and Legal Affairs for a constitutional amendment modelled on section 105A of the Constitution. In its final report, the commission noted that during the period in which it had been conducting its review of the Constitution, there had been a revival of interest in the possibility of some sort of formal agreement being entered into between the Commonwealth of Australia and representatives of Aboriginal and Torres Strait Islander peoples. The commission confirmed that '[t]here is no doubt that the Commonwealth has sufficient constitutional powers to take appropriate action to assist in the promotion of reconciliation with Aboriginal and Torres Strait Islander citizens and to recognise their special place in the Commonwealth of Australia'. However, the commission was not persuaded that an amendment modelled on section 105A should be made prior to the negotiation of an agreement:

> [A]ny alteration should not be made until an agreement has been negotiated and constitutional alteration is thought necessary or desirable. Section 105A, on which a possible alteration may be modelled, was approved at a referendum in 1928 after the Financial Agreement had been entered into between the Commonwealth and the States in 1927. The electors, therefore, were in a position to know precisely what was being approved.[16]

On 4 December 2000, the Council for Aboriginal Reconciliation presented its final report to Parliament. The council recommended, among other things: 'That the Commonwealth Parliament enact legislation … to put in place a process which will unite all Australians by way of an agreement, or treaty, through which unresolved issues of reconciliation can be resolved.'[17]

Marcia Langton and Lisa Palmer have commented that '[t]o treat is to negotiate the terms of a relationship. These terms may subsequently be defined and formalised by a treaty or agreement which gives rise to mutually binding obligations.'[18]

> As Indigenous people engage in agreement making in Australia, the parties with which they engage, particularly governments, are constructing by default the terms and conditions of such a 'new deal'. Because negotiated agreements involve Indigenous peoples as consensual parties, rather than as 'stakeholders', the terms and conditions of their agreements are the building blocks of arrangements that are inherently more just than the imposed administrative solutions to which Aboriginal people had so long been subjected.[19]

'To treat is to negotiate the terms of a relationship. These terms may subsequently be defined and formalised by a treaty or agreement which gives rise to mutually binding obligations.'

Marcia Langton and Lisa Palmer

Langton and Palmer noted that in the United States, Canada and New Zealand, and perhaps elsewhere, negotiated agreements have replaced treaties as the modern arrangement for engagement with indigenous peoples with respect to resource use.[20] In Canada, at least, such agreements function to handle the interface between indigenous and non-indigenous governments long into the future, and 'manage the just apportionment of resources and create institutions which govern territory, rather than ruling on specific proprietary interests'.[21]

Agreement-making with Aboriginal and Torres Strait Islander peoples has been a feature of the Australian policy landscape since the first agreements made under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth): the Ranger Uranium Project Agreement and the Kakadu National Park Lease Agreement, which were signed on 3 November 1978.[22] Since then, there has been a proliferation of agreements between Aboriginal and Torres Strait Islander peoples and resource extraction companies, railway, pipeline and other major infrastructure project proponents, local governments, State and Territory governments, farming and grazing representative bodies, universities, publishers, arts organisations and other institutions and agencies.[23] Some of these agreements have statutory status, such as those concluded under the Aboriginal Land Rights (Northern Territory) Act.

There has been a proliferation of agreements between Aboriginal and Torres Strait Islander peoples and resource extraction companies, railway, pipeline and other major infrastructure project proponents, local governments, State and Territory governments, farming and grazing representative bodies, universities, publishers, arts organisations and other institutions and agencies.

Some have been the subject of consent determinations under the *Native Title Act 1993* (Cth). Sections 87 and 87A of the Act empower the Federal Court to make a determination of native title where parties have reached agreement (provided the orders sought are within the court's power to make). In 2009, the Act was amended to give the Federal Court power to make orders about matters beyond native title where parties have reached agreement. These amendments recognise the potentially broad nature of agreements being negotiated between some parties, and confirm the power of the Federal Court to make orders resolving a range of native title and related issues through consent determinations.

Other agreements are registered as indigenous land use agreements under Division 3 of the Native Title Act. Under section 24EA of the Act, indigenous land use agreements can be negotiated whether or not native title has been determined to exist, and once registered on the Register of Indigenous Land Use Agreements have contractual effect. An example is the 2005 Ord Final Agreement, which was entered into between the State of Western Australia, the Miriuwung Gajerrong people and other parties in relation to the proposed second stage development of the Ord River Irrigation Area Project (Ord Stage 2). The development of Ord Stage 2 for irrigated agriculture could not have proceeded without the agreement of the Miriuwung Gajerrong people. On 16 August 2006, the Ord Final Agreement was registered as an indigenous land use agreement by the National Native Title Tribunal. The agreement contains an Aboriginal Development Package that provides a range of initiatives focusing on developing the capacity of the Miriuwung Gajerrong people to engage in the local economy, to participate in and benefit from the Stage 2 development and to participate in planning and management in the region.

Other agreements have been negotiated outside the native title framework. In 2004, the State of Victoria entered into a cooperative management agreement with the Yorta Yorta people to facilitate greater cooperation in the management of their country.[24] The agreement applies to designated

areas of Crown land in Yorta Yorta country in north central Victoria. The Yorta Yorta Joint Body was established to provide advice and recommendations to the Minister for Environment on the management of Yorta Yorta country.

In 2010, Victoria introduced an alternative system for resolving native title claims. The *Traditional Owners Settlement Act 2010* (Vic) provides for out-of-court settlement of native title and delivery of land justice. The Act is intended to facilitate the making of agreements recognising traditional owners and their rights in Crown land in return for agreement to withdraw current native title claims and not to lodge claims in the future. While the Commonwealth *Native Title Act 1993* continues to apply to Victoria and native title claimants can pursue native title claims through the Federal Court, the new system provides an alternative to court processes. The Gunaikurnai settlement agreement was the first settlement in Victoria under the Traditional Owners Settlement Act. In 2010, the Victorian Government and the Gunaikurnai people entered into an agreement formally recognising the Gunaikurnai people as the traditional owners of much of Gippsland.[25]

The Commonwealth Government has initiated a system of regional partnership agreements designed to establish a uniform Commonwealth Government investment strategy across a region with respect to Aboriginal and Torres Strait Islander affairs. They can also include State and Territory investment. Some regional partnership agreements have provided effective mechanisms to commit government at all levels and local Aboriginal authorities to targets aimed at overcoming disadvantage and more effective delivery of services. The Oxfam Australia submission argued:

> Changing our nation's Constitution to enable the Commonwealth to enter into constitutionally supported agreements with Aboriginal and Torres Strait Islander peoples offers the nation a circuit breaker to rebuild and truly reset the relationship. It will involve reconsidering how the Commonwealth relates to Aboriginal and Torres Strait Islander peoples and re-structuring the relationship to one based on agreement and participation, not imposition.[26]

The Ngarrindjeri Regional Partnership Agreement, for example, was agreed between the Ngarrindjeri Regional Authority and the Commonwealth and South Australian governments on 18 July 2008 at Camp Coorong. The agreement establishes the Ngarrindjeri Regional Authority, which has engaged in a number of activities related to the representation of the Ngarrindjeri clans and the development of sustainable economic opportunities for the Ngarrindjeri people. Pursuant to the agreement, the Ngarrindjeri Regional Authority has established a subsidiary company,

Ngarrindjeri Enterprises Pty Ltd, to identify and pursue business objectives and develop regional tourism.[27] In a submission to the Panel, the chairperson of the authority said:

> The Ngarrindjeri experience with the South Australian Government is that respectful agreements where each recognises the other and agrees to a relationship of mutual respect and exchange of information directed to culturally appropriate decisions is possible. The framework provides a basis upon which sometime extraordinary complex matters can be worked through in an environment of mutual respect.[28]

'The Ngarrindjeri experience with the South Australian Government is that respectful agreements where each recognises the other and agrees to a relationship of mutual respect and exchange of information directed to culturally appropriate decisions is possible. The framework provides a basis upon which sometime extraordinary complex matters can be worked through in an environment of mutual respect.'

Ngarrindjeri People, submission no 3576

8.2 Comparative experience

As discussed in Chapter 2, in different settler societies, different conceptual approaches have been taken to relationships between indigenous and non-indigenous peoples.

In the United States, between 1776 and 1871, the US Government entered into more than 350 written treaties with American Indian nations. US courts have upheld indigenous sovereignty, and affirmed inherent powers of self-government. On 29 April 1994, at a historic meeting with the heads of tribal governments, President Clinton reaffirmed the United States' 'unique legal relationship with Native American tribal governments' and confirmed the commitment of the US Government to respect 'the rights of self-government due the sovereign tribal governments'.

In Greenland, the Inuit have exercised home rule since 1978. Since 1979, Greenland has been governed by all-Inuit cabinets. As discussed in Chapter 2, there are Sámi Parliaments in Finland, Norway and Sweden. Constitutional reform in Norway has resulted in recognition of the country as bi-cultural—Norwegian and Sámi—and a guarantee to the Sámi people of means to maintain their distinct culture. In Aotearoa/New Zealand, the Waitangi Tribunal investigates claims of infringement of Māori rights under the 1830 Treaty of Waitangi.

In Canada, there have been several rounds of treaty negotiations. The first round resulted in 11 early Indian treaties between 1871 and 1921. A second round resulted in treaties in areas not covered by historical treaties. This round followed the Canadian Supreme Court's recognition of native title in 1972 in *Calder v Attorney General of British Columbia* [1973] SCR 313. The treaties that have resulted include the 1998 Nisga'a Treaty, which aims to reconcile the aboriginal rights of the Nisga'a people and the sovereignty of the Crown, and to provide the basis for future dealings between the Nisga'a, the province of British Columbia and Canada. The Nisga'a Treaty addresses land title, public access, roads and rights of way, forest resources, fisheries, environmental assessment and protection, Nisga'a government, dispute resolution and fiscal relations. While federal and provincial laws apply to Nisga'a lands and people, there are also areas of concurrent jurisdiction.[29]

A third round of treaty negotiations in Canada has produced a series of agreements, including the 1993 Nunavut Final Agreement, which resulted in the creation of a new indigenous territory in northern Canada. In 1996, the Canadian Royal Commission on Aboriginal Peoples made detailed recommendations on processes for making new treaties, matters for negotiation, treaty institutions and public education about treaties with indigenous peoples. The Canadian Government has affirmed that treaties, both historic and modern, will continue as a key basis of the future relationship:

> In *Gathering Strength—Canada's Aboriginal Action Plan*, announced January 7, 1998, the Government of Canada affirmed that both historic and modern-day treaties will continue to be key elements in the future relationship between Aboriginal people and the Crown. The federal government believes that the treaties, and the relationship they represent, can guide the way to a shared future. The continuing treaty relationship provides a context of mutual rights and responsibilities that will ensure Aboriginal and non-Aboriginal people can together enjoy Canada's benefits.[30]

As discussed in Chapter 2, constitutional reform initiated in Canada in 1978 has resulted in amendments that became law in 1982. Constitutional reform has meant that aboriginal and treaty rights can only be altered or terminated by consent or by constitutional amendment. Section 35(1) of the Constitution Act 1982 provides: 'The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.' Laws contravening section 35(1) can be set aside under section 52(1) of the Act. Section 35(2) provides that the reference in section 35(1) to 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired. This provision has served as the basis upon which regional agreements negotiated by aboriginal peoples in Canada have been invested with constitutional status. Section 25 of the Constitution Act 1982 ensures that the prohibition of racial discrimination in section 15 of the Canadian Charter is not interpreted as abrogating aboriginal or treaty rights. It provides a shield against diminishing aboriginal and treaty rights where non-aboriginal people challenge the particular status and rights of aboriginal people as contrary to equality guarantees.

In 1989, the United Nations appointed a Special Rapporteur on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Populations. The Special Rapporteur has described a 'constructive arrangement' as 'any legal text and other document which are evidence of consensual participation by all parties to a legal or quasi-legal relationship'. The most important element is 'proof of the free and informed consent of all parties concerned to the arrangement'. In his final report, submitted to the UN Working Group on Indigenous Populations in 1998, the Special Rapporteur emphasised the importance of not making oneself a prisoner of existing terminology. A narrow definition of 'treaty' or 'treaty-making'

would hinder or pre-empt innovative thinking on the potential of treaties and other consensual legal instruments and negotiated practical mechanisms in ensuring better relations between indigenous peoples and states.[31]

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8.3 Conclusions

The four principles agreed to by the Panel for its assessment of proposals for constitutional recognition include that a proposal 'must be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples'. For this reason, the Panel has recorded the voices of those who have called for some form of constitutional backing for a treaty or other agreements with Aboriginal and Torres Strait Islander peoples.

> Agreement making will be important in paving out a future and leaving a strong legacy.[32]

> Agreement-making power would give us the ability to negotiate directly with government. It would give us more protection for our children and grandchildren.[33]

The Victorian Aboriginal Child Care Agency suggested that an agreement-making power could help enable the development of a national treaty framework.[34] Aboriginal and Torres Strait Islander Women's Legal Service North Queensland Inc. also supported a provision similar to section 105A of the Constitution.[35] Australians for Native Title and Reconciliation National argued that an agreement-making power, framed along the lines of section 105A, would signify a clear statement of the political support and expectation of the Australian people 'that they wish to see formal agreements concluded with Aboriginal and Torres Strait Islander peoples recognising their position and rights'.[36] The Centre for Comparative Constitutional Studies referred to the 1983 Senate Committee proposal modelled on section 105A. The centre's model provides that agreements should bind the Commonwealth and States, and override all other Commonwealth and State constitutional and statutory provisions.[37]

The Castan Centre for Human Rights Law argued that enshrining an agreement-making power in a section modelled on section 105A would permit the Commonwealth to make a comprehensive settlement agreement without recourse to a second referendum.[38]

Professor George Williams suggested that the Constitution should contain a provision that permits the making of agreements between governments and indigenous peoples, and that it should give those agreements, once ratified by the relevant parliament, the full force of the law.[39]

The Law Council of Australia contended that a provision like section 105A could vest in the Commonwealth power to make agreements with Aboriginal

and Torres Strait Islander peoples on a range of subjects, and that it might provide, like section 105A, for the agreement to override other laws. The Law Council reasoned that:

> This approach would obviate the need to put to referendum an extensive catalogue of rights or detailed arrangements and provide, at the same time, a source of Constitutional authority for such agreement/agreements. It would also provide opportunities for properly resourced consultations with Aboriginal and Torres Strait Islander communities and organisations, and wider community education, in relation to appropriate arrangements for addressing much of the unfinished business, including in relation to sovereignty, self-determination, political representation (including through guaranteed seats in Parliament), recognition of customary law and land rights.[40]

Allens Arthur Robinson argued that an agreement-making power which makes provision for an agreement to have the effect of Commonwealth law once it has been ratified by Parliament should be inserted into the Constitution.

Allens Arthur Robinson argued that an agreement-making power which makes provision for an agreement to have the effect of Commonwealth law once it has been ratified by Parliament should be inserted into the Constitution, and that such an approach 'would offer strong protection of Indigenous rights provided by agreements made under this power, while simultaneously allowing significant flexibility regarding the details of such agreements'. Allens identified five objectives for such agreements: (a) establishing a consensual basis for non-Indigenous settlement in Australia; (b) recognising and affirming 'an inherent right of "self-governance"'; (c) creating a framework for practical action that requires negotiation with Indigenous peoples; (d) bringing Australia in line with its international law commitments; and (e) recognising Indigenous rights and interests where native title and other laws cannot. Allens also recommended that an agreement-making power should only facilitate the making of agreements, and not prescribe any terms to be included.[41]

The Centre for Comparative Constitutional Studies noted in its submission that 'agreements may also relate to the delivery of social services, land and resources rights'. Quoting Langton and Palmer, the submission stated that such agreements are geared towards concrete and practical outcomes and 'may encompass the hard, rather than soft, edges of a meaningful reconciliation process'.[42]

The National Indigenous Lawyers Corporation of Australia noted that, although there is currently no impediment to the making of agreements, 'the opportunity exists for the Government to be given an unambiguous mandate for the entry into agreements with Aboriginal people and Torres Strait Islanders'.[43] Other submissions to the Panel supported the practice of agreement-making generally.

Of the 164 submissions to the Panel that mentioned agreement-making, 141 (86 per cent) supported the inclusion of an agreement-making power in the Constitution. The reasons cited included that it would help redress past wrongs and heal the relationship between indigenous and non-indigenous Australians, facilitate the making of a treaty or agreements at national, State and Territory, and regional levels, and go some way towards recognising the sovereignty and self-determination rights of Aboriginal and Torres Strait Islander peoples. Another reason was that agreements might lead to improved outcomes in areas such as education and health.

Some 66 submissions supported a treaty between the Commonwealth and Aboriginal and Torres Strait Islander peoples.[44] A number of submissions referred to other countries that have treaty arrangements with indigenous peoples, such as Aotearoa/New Zealand, Canada and the United States. Many used the expressions 'agreement-making power' and 'treaty' interchangeably, suggesting that there is some confusion about the meaning of the two terms.

While calls for an amendment along the lines of section 105A to confer constitutional backing to such agreements are likely to continue, the Panel does not consider that these questions can be resolved or advanced at this time by inclusion in a constitutional referendum proposal. However, the Panel was interested in a mechanism for conferring constitutional backing to an agreement or agreements with Aboriginal and Torres Strait Islander peoples that might be negotiated with them in the future. Like the Constitutional Commission in 1988, the Panel was not persuaded that any alteration to the Constitution should be attempted until such agreement or agreements had been negotiated in a process involving Aboriginal and Torres Strait Islander peoples, the Commonwealth and the States and Territories. The Panel considered that no proposal for an agreement should be taken to the Australian people at referendum until they were in a position to know what they were being asked to approve. This is a challenge for the future.

At the present time, any proposal for a form of constitutional backing for a treaty or other negotiated agreements with Aboriginal and Torres Strait Islander peoples would be likely to confuse many Australians, and hence could jeopardise broad public support for the Panel's other recommendations. This concern was also shared in the submission of Reconciliation South Australia, which argued that an agreement-making power might represent a step too far and result in a 'No' vote.[45] At this time, such a proposal would not therefore satisfy two of the Panel's principles for assessment, namely that a proposal must 'contribute to a more unified and reconciled nation', and 'be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums'. In the absence of further debate and reflection about the issues raised by the Constitutional Commission in relation to such a proposal

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While particular agreements have been the subject of criticism by the Aboriginal and Torres Strait Islander parties to them, the Panel welcomed the negotiation of agreements as representing an important shift in doing business with communities.

(such as who would be parties to negotiations), it is doubtful whether any such proposal would satisfy the Panel's fourth requirement that it be technically and legally sound.

In any event, and perhaps more significantly, the Panel is satisfied that the Commonwealth currently has sufficient power under sections 51(xxvi) and 61 of the Constitution to take appropriate action to advance agreement-making with Aboriginal and Torres Strait Islander peoples.[46] The Panel is also satisfied that such power would continue to exist if section 51(xxvi) were to be repealed and replaced with a new section along the lines of the proposed 'section 51A' considered in Chapter 5.

However, the Panel recognises the importance of negotiated agreements more generally in governing relations between Aboriginal and Torres Strait Islander communities and organisations and the government and non-government bodies with which they interact. In recent years, there has been a significant increase in the negotiation of binding agreements that bring Aboriginal and Torres Strait Islander peoples to the table. While particular agreements have been the subject of criticism by the Aboriginal and Torres Strait Islander parties to them, the Panel welcomed the negotiation of agreements as representing an important shift in doing business with communities.

The Panel has concluded that agreements that are negotiated on the basis of consent and that give rise to mutually binding obligations have a critical role to play in improving relations between Aboriginal and Torres Strait Islander peoples and the broader Australian community, and in providing more constructive and equitable relationships between Aboriginal and Torres Strait Islander peoples and Australian governments, local government bodies, non-government bodies and corporations.

Notes

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3 Ibid.
4 National Archives of the United Kingdom, *Governor Bourke's Proclamation 1835*.
5 Larissa Behrendt, Chris Cuneen and Terri Libesman, *Indigenous Legal Relations in Australia* (Oxford University Press, 2009), at 15–16.
6 (1913) 16 CLR 404, at 439.
7 Council for Aboriginal Reconciliation, *Documents of Reconciliation*, 'Terra Nullius and Sovereignty' (18 June 2002), at www.austlii.edu.au/au/orgs/car/docrec/policy/brief/terran.htm; also the Hon David K Malcolm AC, 'Treaty Issues: Agenda and the Way Forward' (Keynote speech delivered at the National Conference on Racism, Land and Reconciliation in a Global Context, 'Treaty: Advancing Reconciliation', Murdoch University, 26 June 2002), at 3.
8 Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *Two Hundred Years Later: The Feasibility of a Compact or 'Makarrata' between the Commonwealth and Aboriginal People* (Australian Government Publishing Service, 1983), at [2.14].
9 Stewart Harris, *'It's Coming Yet …' An Aboriginal Treaty within Australia between Australians* (Aboriginal Treaty Committee, 1979), at 77–78.
10 *Two Hundred Years Later* …, op cit, at [2.15].
11 L R Hiatt, 'Treaty, Compact, Makarrata…?' (1987) 58 *Oceania* 140.
12 *Two Hundred Years Later* …, op cit, at [2.17].
13 Ibid, at 155.
14 Kevin Gilbert, 'Sovereign Treaty to Enshrine Our Rights' in *Aboriginal Sovereignty: Justice, the Law and Land* (Treaty '88, 1988); also Treaty '88 Campaign, 'Aboriginal Sovereignty—Never Ceded' (1988) 91 *Australian Historical Studies* 1.
15 Council for Aboriginal Reconciliation, *Documents of Reconciliation*, 'Attachment A—The Barunga Statement' (1988), at http://www.austlii.edu.au/au/orgs/car/docrec/policy/brief/attach.htm#A.
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18 Marcia Langton and Lisa Palmer, 'Modern Agreement Making and Indigenous People in Australia: Issues and Trends' (2003) 8(1) *Australian Indigenous Law Reporter* 1. Further detail about agreements, treaties and negotiated settlements can be found at www.atns.net.au.
19 Langton and Palmer, 'Modern Agreement Making …', op cit.
20 Marcia Langton and Lisa Palmer, 'Negotiating Settlements: Indigenous Peoples, Settler States and the Significance of Treaties and Agreement' in *Treaty: Let's Get it Right* (Aboriginal Studies Press, 2003).
21 Marcia Langton and Lisa Palmer, 'Negotiating Settlements: Indigenous Peoples, Settler States and the Significance of Treaties and Agreements: Overview of the Series' (Paper presented at the Institute of Postcolonial Studies, Melbourne, 17 March 2002), citing J Webber, 'Foundations of the Modern Treaty Process in Canada: The Relationship to Native Title' (Australian Institute of Aboriginal and Torres Strait Islander Studies seminar series, 'The Limits and Possibilities of a Treaty Process in Australia', 2001, Canberra).
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23 Ibid.

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25 Ibid.
26 Oxfam Australia, submission no 3305.
27 For detail, see the website of the Agreements, Treaties and Negotiated Settlements database at www.atns.net.au.
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32 Port Hedland, 15 July 2011.
33 Cherbourg, 15 June 2011.
34 Victorian Aboriginal Child Care Agency, submission no 1874, at 9.
35 Aboriginal and Torres Strait Islander Women's Legal Service North Queensland Inc., submission no 3132.
36 ANTaR National, submission no 3432, at 27.
37 Centre for Comparative Constitutional Studies, University of Melbourne, submission no 3558.
38 Castan Centre for Human Rights Law, submission no 3554, at 11–12.
39 George Williams, submission no 3609, at 6.
40 Law Council of Australia, submission no 3478, at 20.
41 Allens Arthur Robinson, submission no 3447, at 15–17.
42 Centre for Comparative Constitutional Studies, University of Melbourne, submission no 3558.
43 National Indigenous Lawyers Corporation of Australia, submission no 3561, at 5.
44 For example, Humanist Society of Victoria, submission no 3523.
45 Reconciliation South Australia, submission no 2998.
46 Lindell, op cit.

9 The question of sovereignty

9.1 Historical issues

At consultations and in submissions to the Panel, there were numerous calls for a reappraisal of currently accepted perceptions of the historical relationship between indigenous and non-indigenous Australians from the time of European settlement. One of the significant issues that emerged was the aspiration of some Aboriginal and Torres Strait Islander peoples for recognition of their sovereign status.[1]

Numerous commentators have observed that before colonisation, Aboriginal and Torres Strait Islander nations and peoples lived under laws and customs that governed their relationships with their lands and waters, with each other, and with other nations and peoples. They were self-governing peoples exercising sovereignty over their lands and waters.[2] On what basis, then, did British colonisation proceed in the several colonies?[3] As noted in Chapter 1, when Captain James Cook first visited the east coast of Australia in 1770, he carried instructions from the Admiralty, issued in 1768, that provided, among other things: 'You are also with the consent of the natives to take possession of Convenient Situations in the Country in the Name of the King of Great Britain.'[4] By the time Arthur Phillip was commissioned to lead the First Fleet and establish a settlement in Australia, his instructions were silent in relation to the 'consent of the natives'.[5] Phillip's instructions authorised the grant of land to those who would 'improve it'.[6] The instructions assumed that Australia was *terra nullius* or belonged to no-one. As discussed in Chapter 1, the subsequent occupation of the country and land law in the colony proceeded on the fiction of *terra nullius*.

While the doctrine of *terra nullius* meant that the colonial authorities did not recognise Aboriginal and Torres Strait Islander legal systems, the day-to-day lives of many Aboriginal and Torres Strait Islander peoples continued to be regulated by their distinct laws and cultural practices.[7] In a number of early decisions of the Supreme Court of New South Wales, it was held that Aboriginal people were not subject to colonial criminal laws for crimes committed by themselves upon themselves. In 1829, in *R v Ballard* Justice Dowling held:

> Until the aboriginal natives of this Country shall consent, either actually or by implication, to the interposition of our laws in the administration of justice for acts committed by themselves upon themselves, I know of no reason human, or divine, which ought to justify us in interfering with their institutions even if such interference were practicable.[8]

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Justice Dowling, 1829

In 1841, in *R v Bonjon* the defendant argued that 'the Aborigines of New South Wales were a domestic dependent nation, internally self-governing' as were the American Indians.[9] Justice Willis held that the Supreme Court of New South Wales had no jurisdiction to proceed with the trial of Bonjon, who had been accused of the murder of another Aboriginal person, observing as follows:

> Europeans have entered their borders uninvited, and when there, have not only acted as if they were the undoubted lords of the soil, but have punished the natives as aggressors if they evinced a disposition to live in their own country. If they have been found upon their own property (and this is said with reference to the Australian Aborigines) they have been hunted as thieves and robbers—they have been driven back into the interiors as if they were dogs or kangaroos.[10]

Justice Willis also observed that the Aboriginal people 'had laws which should have been operative', and that 'the Colony … was neither an occupied place, nor was it obtained by right of conquest and driving out the natives, nor by treaties'. Rather, Aboriginal people's enjoyment of their customary rights was associated with their status as a domestic dependent nation. Justice Willis regretted that no treaty was made with the Aboriginal people, 'no terms defined for their internal government, civilisation and protection'. He reasoned that Aboriginal people remained 'unconquered and free, but dependent tribes', entitled to be regarded as 'self-governing communities'. Their rights 'as distinct people' could not be considered to have been 'tacitly surrendered'. As they were 'by no means devoid of legal capacity' and had 'laws and usages of their own', 'treaties should be made with them'. The colonists were 'uninvited intruders', the Aborigines 'the native sovereigns of the soil'.[11]

These early decisions of the New South Wales Supreme Court suggest a familiarity with the 'domestic dependent nations' jurisprudence originating in what has been called the 'Marshall trilogy' of decisions of the United States Supreme Court. In the first of the trilogy, *Johnson v M'Intosh*,[12] Chief Justice Marshall upheld the jurisdiction of the Supreme Court to decide who held title to Indian land. In the second of the trilogy, *Cherokee Nation v Georgia*,[13] the Court found the Cherokee to be a 'domestic dependent nation'. The concept of domestic dependent nations was developed in subsequent cases, including the third of the Marshall trilogy, *Worcester v Georgia*.[14]

Unlike Justices Dowling and Willis in *Ballard* and *Bonjon*, in 1836 in *R v Murrell* Justice Burton rejected the defendant's argument that 'New South Wales was neither conquered, ceded, nor a British settlement by occupation', and that Aboriginal people were not 'bound by laws which gave them no protection'.[15] Justice Burton held that 'the aboriginal natives of this Colony are amenable to the laws of the Colony for offences committed within it against the persons of each other and against the peace of our Lord—the King'.[16] Justice Burton also appears to have been aware of

the American authorities in relation to domestic dependent nations, but declined to apply them to the 'Aboriginal natives of New Holland':

> Although it be granted that the Aboriginal natives of New Holland are entitled to be regarded by civilised nations as a free and independent people, and are entitled to the possession of those rights which are so valuable to them, yet the various tribes have not attained at the first settlement of the English people amongst them to such a position in point of numbers and civilisation and to such a form of government and laws, as to be entitled to be recognised as so many sovereign states governed by laws of their own.

The other members of the Court, Chief Justice Forbes and Justice Bowling, concurred with the views of Justice Burton.[17] In 1889, the Privy Council determined in *Cooper v Stuart* that in 1788 Australia had consisted of 'a tract of territory practically unoccupied without settled inhabitants'.[18]

In *The Treaty Project*, academics Sean Brennan, Brenda Gunn and George Williams referred to the voices in Aboriginal and Torres Strait Islander communities who contend that they 'were sovereign before the colonisation of Australia and that their sovereignty was never extinguished (and thus remains intact today)'.[19] Brennan, Gunn and Williams note a sense of grievance, felt by many indigenous people (and shared by many other Australians), that 'legitimate political and legal authority—or "sovereignty"—was never properly secured over the Australian landmass'.[20]

In more recent times, visual expressions of sovereignty can be traced to the establishment of the Aboriginal Tent Embassy outside Old Parliament House on Australia Day, 26 January 1972.[21] The founders of the tent embassy likened themselves to 'aliens in our own lands'. In August 1979, the tent embassy called for a bill of Aboriginal rights and recognition of Aboriginal sovereignty. In its 40-year history, the Aboriginal Tent Embassy has maintained its calls for recognition of Aboriginal sovereignty, including in its submission to the Panel.[22] According to the tent embassy submission: 'Recognition of Aboriginal Peoples in the constitution must not usurp our continuing Sovereignty. The only resolution of the constitutional issue is by way of negotiated Sovereign Treaties under the supervision of the international community.'[23]

In proceedings instituted in the High Court in 1978, Wiradjuri man Paul Coe and others applied for leave to amend a statement of claim to allege, among other things, that the proclamations by Cook, Phillip and others and the settlement that followed 'wrongfully treated the continent now known as Australia as *terra nullius* whereas it was occupied by the sovereign aboriginal nation', and that 'the aboriginal people … were entitled not to be dispossessed … without bilateral treaty, lawful compensation and/or lawful international intervention'. In refusing the application, Justice Gibbs held that '[t]he contention that there is in Australia an aboriginal nation exercising sovereignty, even of a limited kind, is quite impossible in law to maintain'.[24]

In more recent times, visual expressions of sovereignty can be traced to the establishment of the Aboriginal Tent Embassy outside Old Parliament House on Australia Day, 26 January 1972.

Referring to the dispossession of the Aboriginal peoples of most of their traditional lands, Justices Deane and Gaudron commented that '[t]he acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of the nation'.

Justice Jacobs concluded that 'the Crown's proclamation of sovereignty and sovereign possession … are not cognizable in a court exercising jurisdiction under that sovereignty which is sought to be challenged'.[25]

In a submission to the 1983 Senate Standing Committee on Constitutional and Legal Affairs inquiry on the feasibility of a compact or 'Makarrata' between the Commonwealth and Aboriginal people, the Central Australian Aboriginal organisations contended:

> We have never conceded defeat and will continue to resist this ongoing attempt to subjugate us. The Aboriginal people have never surrendered to the European invasion and assert that sovereignty over all of Australia lies with them. The settler state has been set up on Aboriginal land. We demand that the colonial settlers who have seized the land recognise this sovereignty and on that basis negotiate their rights to be there.[26]

In 1988, coinciding with the bicentennial of Phillip's arrival with the First Fleet in Sydney Harbour in 1788, and the founding of the colony of New South Wales, the *Aboriginal Sovereign Treaty '88 Campaign* renewed calls for recognition of the sovereign rights of Aboriginal nations and peoples, and their ownership of Australia, and for the Commonwealth Government to treat with Aboriginal sovereign nations through the mechanisms of international law.[27]

In June 1988, the chairpersons of the Northern and Central Land Councils, Galarrwuy Yunupingu and Wenten Rubuntja, presented Prime Minister Bob Hawke with a statement of national Aboriginal political objectives at the Barunga cultural and sporting festival run by the Bamyili Community Council. The statement, known as the 'Barunga Statement', drew inspiration from the Yirrkala Bark Petition sent to the House of Representatives 20 years earlier by a previous generation of Yolngu leaders in protest against mining on the Gove Peninsula (see 8.1).

On 16 July 1990, the Aboriginal Provisional Government was formed, with the aim of establishing an Aboriginal state 'with all of the essential control being vested back into Aboriginal communities'. The model is for an Aboriginal nation 'exercising total jurisdiction over its communities to the exclusion of all others'. The work of the Aboriginal Provisional Government has continued—for example with the call by Michael Mansell in 2002 for a treaty to 'recognise the status of Aboriginal people as sovereign' and to 'describe the limits of the exercise of that sovereignty'.[28]

As discussed in Chapter 1, in *Mabo (No 2)* the High Court held that the fiction of *terra nullius* 'by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country'.[29] Referring to the dispossession of the Aboriginal peoples of most of their traditional lands, Justices Deane and Gaudron commented that '[t]he acts and events by which that dispossession in legal theory was carried into practical effect

constitute the darkest aspect of the history of the nation'. While rejecting the fiction of *terra nullius* and recognising native title to land according to the laws and customs of people with a connection to particular land, the High Court held that the Crown's acquisition of sovereignty 'over the several parts of Australia cannot be challenged in a municipal court'.[30]

In relation to the methods for acquiring sovereignty of territories already inhabited, Justice Brennan commented as follows:

> International law recognized conquest, cession, and occupation of territory that was terra nullius as three of the effective ways of acquiring sovereignty. No other way is presently relevant … The great voyages of European discovery opened to European nations the prospect of occupying new and valuable territories that were already inhabited. … To these territories the European colonial nations applied the doctrines relating to acquisition of territory that was terra nullius. They recognized the sovereignty of the respective European nations over the territory of 'backward peoples' and, by State practice, permitted the acquisition of sovereignty of such territory by occupation rather than by conquest.[31]

Referring to the decision in *Mabo (No 2)*, Professor Mick Dodson has commented that '[t]he sovereign pillars of the Australian state are arguably, at the very least, a little legally shaky'.[32] Given that the High Court has rejected the fiction of *terra nullius*, the question arises: What was the basis in international law for the acquisition of sovereignty by the Crown over the several parts of Australia? Professor Marcia Langton has queried:

> So how can it be explained that native title to land that pre-existed sovereignty and survived it, as the High Court of Australia explained, has been recognised, and yet the full body of ancestral Indigenous Australian laws and jurisdiction are deemed by a narrow, historically distorted notion of sovereignty to be incapable of recognition.[33]

Since *Mabo (No 2)*, the High Court has not entertained challenges to the Crown's proclamation of sovereignty and sovereign possession. In *Coe v Commonwealth* Chief Justice Mason held that *Mabo (No 2)* was 'entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia'. The decision was:

> equally at odds with the notion that there resides in the Aboriginal people a limited kind of sovereignty embraced in the notion that they are 'a domestic dependent nation' entitled to self-government and full rights (save the right of alienation) or that as a free and independent people they are entitled to any rights and interests other than those created or recognized by the laws of the Commonwealth, the State of New South Wales and the common law.[34]

Since Mabo (No 2)*, the High Court has not entertained challenges to the Crown's proclamation of sovereignty and sovereign possession.*

In *Walker v New South Wales*, Chief Justice Mason rejected the suggestion that Australian criminal law accommodates an alternative body of law operating alongside it.[35] There was nothing in *Mabo (No 2)* 'to provide any support at all for the proposition that criminal laws of general application do not apply to Aboriginal people'.[36]

'No liberal democracy can flourish when it is founded upon injustice and inequality. … [T]he way forward must … involve … Aboriginal people articulating with greater specificity than we have in the past what we actually mean by sovereignty and self-determination.'

Megan Davis, 'Responses to Henry Reynolds' (2006) *6 Macquarie Law Journal* 13

In 2002, in *Members of the Yorta Yorta Aboriginal Community v Victoria*, Chief Justice Gleeson, Justice Gummow and Justice Hayne held that 'what the assertion of sovereignty by the British Crown necessarily entailed was that there could thereafter be no parallel law-making system in the territory over which it asserted sovereignty'.[37] Upon the Crown acquiring sovereignty, the normative or law-making system which then existed could not thereafter validly create new rights, duties or interests. According to the majority: 'Rights or interests in land created after sovereignty and which owed their origin and continued existence only to a normative system other than that of the new sovereign power, would not and will not be given effect by the legal order of the new sovereign.'

9.2 Views on sovereignty

In a survey conducted by the National Congress of Australia's First Peoples in July 2011, the three most important policy areas for members were health, education and sovereignty; 88 per cent of Congress members identified constitutional recognition and sovereignty as a top priority. Unsurprisingly, it was apparent from consultations and submissions that sovereignty means different things to different Aboriginal and Torres Strait Islander communities.

The Galiwin'ku Constitution Consultation Meeting provided a collection of documents as 'a representation of our desires in terms of constitution change which might support increased rights for Yolngu people and indigenous Australians'.[38] The documents included a paper by the Reverend Dr Djiniyini Gondarra, Senior Elder of the Dhurili Clan Nation and Chairman of the Arnhem Land Progress Aboriginal Corporation, renewing calls for recognition of the traditional law of the Yolngu people of north-east Arnhem Land:

> There is no recognition of the fact that we have assented to our law for many thousands of years and we still consider ourselves a sovereign people who belong to different Ringitj Nation States.
>
> It is the Ringitj Nation States that hold the government for our yirralka estates and our people and they should be approached in the right legal way. Then we should hold our own legal meetings according to the correct Madayin processes and then give our legal response back to the government in our own time. …
>
> We believe we have never been conquered and we are not subject to the Australian or British law but still maintain our sovereignty. We still have our language and practice our Madayin Law and as one of the first peoples we assent to the Madayin law not Australian law. Still we want to find a way forward. So, if the Law we have always assented to is not recognised then there can never be a real rule of Law only lawlessness and true justice can never exist for our people and the communities we live in. So we will continue to fill up NT hospitals and jails.[39]

The documents also included a letter from the Makharr Dhuni Women's Forum to the UN High Commissioner for Human Rights, which stated:

> We are concerned that our Federal and Territory governments are not acknowledging that we are still subject to our own *djalkirri rom* [foundation law] created by the *wangarr* [god] since time immemorial. For this reason we wish to reassure you that there are many laws, practices, and protocols that we must adhere to as strong Yolngu women according to the *djalkirri rom*.[40]

The statement of Expert Panel member Timmy Djawa Burarrwanga in relation to Yolngu law and constitutional perspectives is reproduced on page xx of this report.[41]

Among Aboriginal and Torres Strait Islander people, there is a diversity of understanding in relation to the meaning of sovereignty, and its significance. Tasmanian Aboriginal lawyer Michael Mansell, one of the co-founders in August 1990 of the Aboriginal Provisional Government, has been critical of current proposals for constitutional recognition being considered by the Panel. Mansell has observed that the Panel, in its discussion paper, makes no mention of sovereignty or self-determination, and 'is pushing political assimilation'.[42] Aboriginal lawyer Professor Larissa Behrendt has argued that for many people, recognition of sovereignty is a starting point for recognition of rights and inclusion in social processes.[43] Behrendt has explained that sovereignty can be used 'as a catch phrase for Indigenous peoples expressing their vision for the future'.[44] Noel Pearson has argued that apart from being unachievable, 'full-blown sovereignty' may not be necessary, and that 'local indigenous sovereignty' could exist internally within a nation–state 'provided that the fullest rights of self-determination are accorded'.[45]

In a submission to the Panel, Tom Trevorrow, the chairperson of the Ngarrindjeri Regional Authority in South Australia, agreed that sovereignty should be among the principles driving discussion of constitutional change, but said that for him the term sovereignty had a broader meaning: 'Ngarrindjeri will continue to assert to Government its own sovereignty over its own people, place and knowledge.'[46]

Another submission, from the Sisters of St Joseph South Australia Reconciliation Circle, argued:

> Changes to the Constitution must include a statement which reflects proper recognition of Australia's history and includes recognition of the colonisation of the First Peoples and their subsequent dispossession. We believe it is vitally important that Aboriginal and Torres Strait Islander peoples are recognised as the prior owners of Australia who had sovereign rights which have never been ceded by Aboriginal peoples.[47]

Submissions in relation to sovereignty were also made by Kaiyu Bayles, Shane Derschow and Brett Gulley.[48] A participant at the Grafton consultation on 29 August 2011 said: 'Aboriginal people never ceded sovereignty, but should be included in the Constitution.'

'We are concerned that our Federal and Territory governments are not acknowledging that we are still subject to our own djalkirri rom [foundation law] created by the wangarr [god] since time immemorial. For this reason we wish to reassure you that there are many laws, practices, and protocols that we must adhere to as strong Yolngu women according to the djalkirri rom.'

Makharr Dhuni Women's Forum, in submission no 3526

Hunter Valley Quaker Meeting likewise stated:

> There is also a tension arising from the taking of sovereignty of Australia by Great Britain, and the sovereignty of First Peoples, which cannot have been extinguished on the principle of Terra Nullius. We recognize that many Aboriginal organizations seek recognition of the invasion of their lands by the British in the Constitution. We encourage a creative approach to the issue of sovereignty in the light of contemporary concerns about whether the model of the unitary state (including federal states) is the only way to deliver good government.[49]

These views were not shared by all who made submissions to the Panel. For example, William Cole stated:

> I would refer the Panel to the argument made by former High Court Chief Justice Sir Harry Gibbs, where he suggested that accepting elements of other legal systems into the current one would make the current arrangement unworkable. Personally I think that there should be one legal system applicable to all Australians.[50]

9.3 Conclusions

The four principles agreed to by the Panel for its assessment of proposals for constitutional recognition include that a proposal 'must be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples'. For this reason, the Panel has recorded the voices of those who have raised questions about the continuing sovereign status of Aboriginal and Torres Strait Islander peoples.

As the National Indigenous Lawyers Corporation of Australia noted in its submission, recognition or attribution of sovereign status is unlikely to be given any serious consideration in this round of reform. It counselled, however, that it would 'be remiss of the Panel not to state clearly in its report that recognition of our sovereign status is an aspiration of Aboriginal people and Torres Strait Islanders and an issue that will need to be confronted at some stage in the not too distant future'.[51]

Advice received by the Panel is that the sovereignty of the Commonwealth of Australia and its constituent and subordinate polities, the States and Territories, like that of their predecessors, the Imperial British Crown and its Australian colonies, does not depend on any act of original or confirmatory acquiescence by or on behalf of Aboriginal and Torres Strait Islander peoples. It derives from the majority view of the High Court in *Mabo v Queensland (No 2)*[52] that the basis of settlement of Australia is and always has been, ultimately, the exertion of force by and on behalf of the British arrivals. Advice to the Panel is that recognition of Aboriginal and Torres Strait Islander peoples in the Constitution as equal citizens could not foreclose on the question of how Australia was settled. Nor should constitutional recognition in general have any detrimental effect, beyond what may already have been suffered, on future projects aimed at a greater place for customary law in the governance of Australia.

Any proposal relating to constitutional recognition of the sovereign status of Aboriginal and Torres Strait Islander peoples would be highly contested by many Australians, and likely to jeopardise broad public support for the Panel's recommendations. Such a proposal would not therefore satisfy at least two of the Panel's principles for assessment of proposals, namely 'contribute to a more unified and reconciled nation', and 'be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums'.

While questions relating to sovereignty are likely to continue to be the subject of debate in the community, including among Aboriginal and Torres Strait Islander Australians, the Panel does not consider that these questions can be resolved or advanced at this time by inclusion in a constitutional referendum proposal.

Qualitative research undertaken for the Panel in August 2011 found that 'sovereignty' and 'self-determination' were poorly understood concepts. Given the apparent diversity of current understanding in relation to the meaning of sovereignty and its significance, any such proposal is also unlikely to satisfy the fourth of the Panel's principles, namely the requirement that it be 'technically and legally sound'.

While questions relating to sovereignty are likely to continue to be the subject of debate in the community, including among Aboriginal and Torres Strait Islander Australians, the Panel does not consider that these questions can be resolved or advanced at this time by inclusion in a constitutional referendum proposal.



Panel member Alison Page, Coffs Harbour consultation, 6 September 2011

Notes

1 See discussion in Patrick Dodson, 1999 Lingiari Memorial Lecture, 'Until the Chains Are Broken' (2000) 5(2) *Australian Indigenous Law Reporter* 73.
2 Heather McRae, Garth Nettheim and Laura Beacroft (eds), *Indigenous Legal Issues: Commentary and Materials* (Lawbook, 4th ed, 2009), at [3.10].
3 Ibid.
4 'Secret Instructions for Lieutenant James Cook Appointed to Command His Majesty's Bark the Endeavour', 30 July 1768, National Library of Australia.
5 See generally, McRae, Nettheim and Beacroft, op cit, at [1.150].
6 'Draught Instructions for Governor Phillip', 25 April 1787, British Public Records Office.
7 McRae, Nettheim and Beacroft, op cit, at 66.
8 Larissa Behrendt, Chris Cunneen and Terri Libesman, *Indigenous Legal Relations in Australia* (Oxford University Press, 2009), at 13.
9 McRae, Nettheim and Beacroft, op cit, at 51.
10 Behrendt, Cunneen and Libesman, op cit, at 15.
11 Ibid, at 16.
12 21 US (8 Wheat) 543 (1823).
13 30 US (5 Pet) 1 (1831).
14 31 US 515 (1832).
15 McRae, Nettheim and Beacroft, op cit, at 150.
16 Ibid.
17 See John Hookey, 'Settlement and Sovereignty' in Peter Hanks and Bryan Keon-Cohen (eds), *Aborigines and the Law* (Allen & Unwin, 1984), at 2–8.
18 (1889) 14 AC 286.
19 Sean Brennan, Brenda Gunn and George Williams, 'Treaty—What's Sovereignty Got to Do with It?' (Issues Paper No 2, Gilbert & Tobin Centre of Public Law, *The Treaty Project*, 2004), at 2.
20 Ibid, at 1.
21 Coral Dow, 'Aboriginal Tent Embassy: Icon or Eyesore?' (2000) *Social Policy Group* 1.
22 Aboriginal Tent Embassy, submission no 3591.
23 Ibid.
24 *Coe v Commonwealth* (1979) 24 ALR 118, at 129.
25 Ibid, at 132.
26 Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *Two Hundred Years Later: The Feasibility of a Compact or 'Makarrata' between the Commonwealth and Aboriginal People* (Australian Government Publishing Service, 1983), at 10.
27 Kevin Gilbert, 'Sovereign Treaty to Enshrine Our Rights' in *Aboriginal Sovereignty: Justice, the Law and Land* (Treaty '88, 1988); also Treaty '88 Campaign, 'Aboriginal Sovereignty—Never Ceded' (1988) 91 *Australian Historical Studies* 1.
28 Michael Mansell, *Aboriginal Provisional Government: Finding the Foundation for a Treaty with the Indigenous Peoples of Australia* (2002), at http://esvc000200.wic061u.server-web.com/issues/apg05.html#TSI.
29 *Mabo v The State of Queensland (No 2)* (1992) 175 CLR 1 per Brennan J, at 40–42 (Mason CJ and McHugh J agreeing).
30 (1992) 175 CLR 1 per Brennan J, at 69 (Mason CJ and McHugh J agreeing); see also, at 15, 31–32, 78–79, 122, 179–180.
31 Ibid, at 32–33.
32 Michael Dodson, 'Sovereignty' (2002) 4 *Balayi: Culture, Law and Colonisation* 13, at 18.
33 M Langton, 'Ancient Jurisdictions, Aboriginal Polities and Sovereignty' (Speech delivered at the Indigenous Governance Conference, Canberra, 3–5 April 2002), at 1. See also 'Aboriginal people have continued to argue that not only customary property rights in land but also ancient jurisdictions survive, on the grounds that, just as British sovereignty did not wipe away Aboriginal title, neither did it wipe away Aboriginal jurisdiction. Aboriginal governance under the full body of Aboriginal customary laws, by the same logic as that that led to the recognition of native title at common law, must, even if in some qualified way, have

survived the annexation of Australia by the Crown': Marcia Langton and Lisa Palmer, 'Modern Agreement Making and Indigenous People in Australia: Issues and Trends' (2003) 8(1) *Australian Indigenous Law Reporter* 1. See also discussion in Dodson, op cit.

34 *Coe v Commonwealth (No 2)* (1993) 118 ALR 193.

35 (1994) 182 CLR 45.

36 Ibid, at 47–50.

37 (2002) 214 CLR 422, at 443–444 [44].

38 Galiwin'ku Constitution Consultation Meeting, submission no 3526.

39 Dr Djiniyini Gondarra OAM and Richard Trudgen, 'The Assent Law of the First People: Principles of an Effective Legal System in Aboriginal Communities', 22 February 2011, in Galiwin'ku Constitution Consultation Meeting, submission no 3526.

40 Makharr Dhuni Women's Forum letter, in Galiwin'ku Constitution Consultation Meeting, submission no 3526.

41 See also A Corn and N Gumbula, 'Now Balanda Say We Lost Our Law in 1788: Challenges to the Recognition of Yolngu Law in Contemporary Australia' (unpublished manuscript, University of Melbourne, 2011).

42 Michael Mansell, 'A Doomed Exercise: Why the Proposed Recognition of Indigenous Peoples in the Australian Constitution Will Fail' (Paper presented at 6th National Indigenous Legal Conference, Sydney, 12 August 2011), at 6.

43 Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Federation Press, 2003), at 99.

44 Ibid, at 95.

45 Noel Pearson, 'Reconciliation: To Be or Not to Be—Nationhood, Self-Determination or Self-Government' (1993) 3(61) *Aboriginal Law Bulletin* 17.

46 Ngarrindjeri People, submission no 3576.

47 Sisters of St Joseph South Australia Reconciliation Circle, submission no 3247.

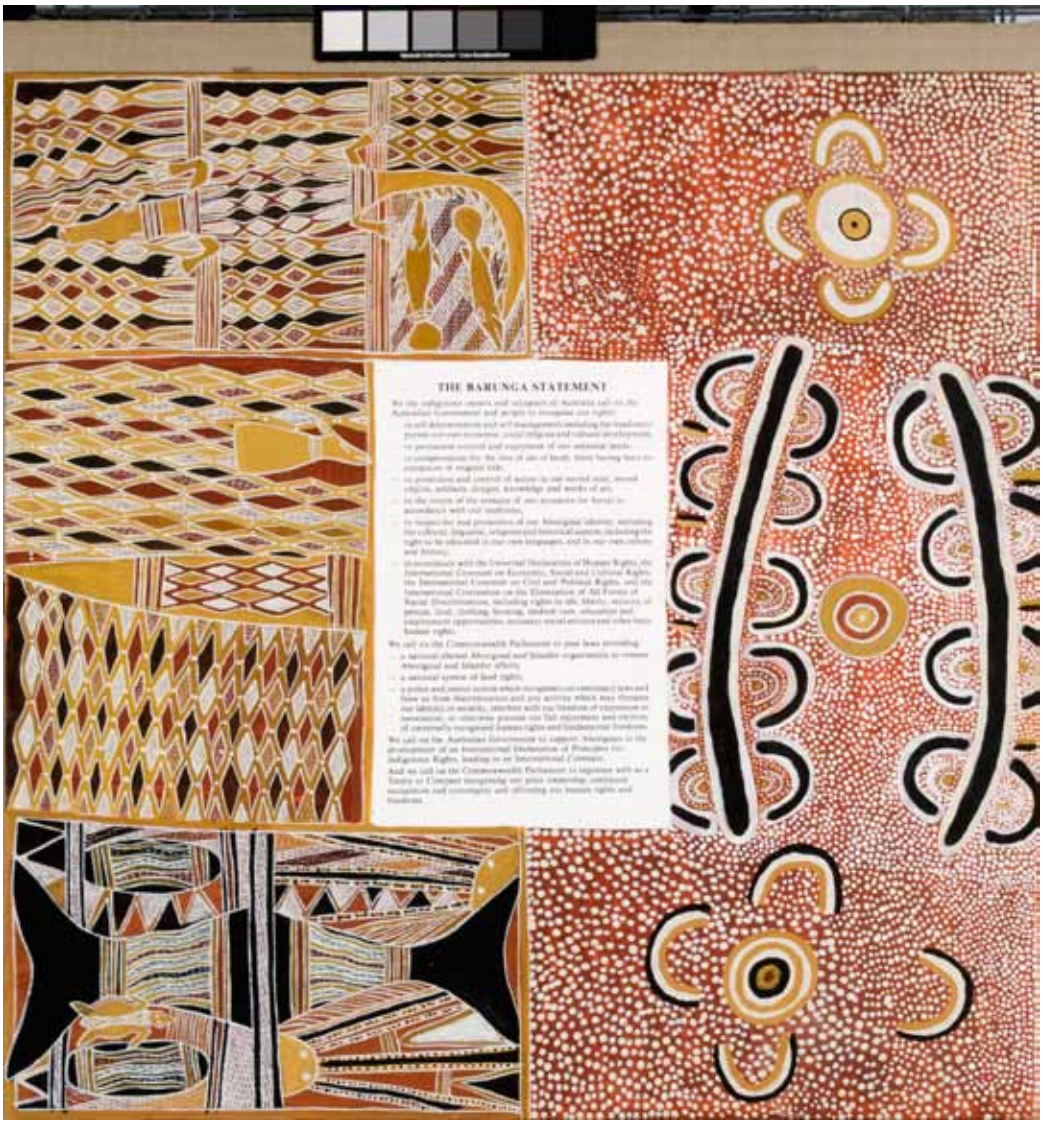
48 Submissions no 2887, no 990 and no 3178 respectively.

49 Hunter Valley Quaker Meeting, submission no 3535.

50 William Cole, submission no 97, at 1.

51 National Indigenous Lawyers Corporation of Australia, submission no 3561.

52 (1992) 175 CLR 1, and see per Brennan J, at 31–43, 57, 69.



The *Barunga Statement* is an ochre painting, a composition of ancestral Aboriginal designs, or deeds, around a central panel of printed text. It is the work of eight Aboriginal artists from across the Northern Territory, and symbolises how different clan groups came together to formulate the words of the statement itself, which called on the Commonwealth Government to recognise key indigenous rights and work towards the negotiation of a treaty (see page 193). The statement was presented to Prime Minister Bob Hawke on 12 June 1988, during Australia's bicentennial year, at the annual Barunga cultural and sporting festival.

Barunga Statement, 1988, Galarrwuy Yunupingu, Wenten Rubuntja, Lindsay Turner Jampijinpa, Dennis Williams Japanangka, Bakulangay Marawili, Djambawa Marawili, Marrirra Marawili and Djewiny Ngurruwuthun, reproduced by permission of the Northern and Central Land Councils.

Gifts Collection, courtesy of Parliament House Art Collection, Canberra.

10 Approaches to the referendum

10.1 Australia's referendum record

Since Federation in 1901, relatively few referendum proposals have been approved by the necessary double majority of electors as a whole and electors in a majority of the States.

The Expert Panel has concluded that the options for constitutional recognition of Aboriginal and Torres Strait Islander peoples recommended in chapters 4, 5 and 6 are capable of succeeding at referendum. Each has been the subject of consultations, submissions, and quantitative and qualitative research, and each has been assessed against the Panel's four principles. The success of the 1967 referendum, at which a record high of 90 per cent support was secured, is a reminder that constitutional change in relation to Aboriginal and Torres Strait Islander peoples can gain the support of a significant majority of Australians.

At the same time, the Panel is conscious of the record of unsuccessful referendum attempts in Australia. Since Federation in 1901, relatively few referendum proposals have been approved by the necessary double majority of electors as a whole and electors in a majority of the States. The first referendum was held in 1906, and the most recent in 1999. Of the 44 referendum proposals that were put to the Australian people between 1906 and 1999, only eight have obtained the requisite double majority. A further five proposals received a majority of overall votes, but failed to achieve a majority in four States, although three proposals received an overall majority and a majority in three out of six States.[1]

The last successful referendum was held in 1977, when Australian electors voted, among other things, to set a retirement age for High Court judges. Accordingly, in 2012, some 35 years will have passed since Australians last altered the Constitution.[2] This is approximately one-third of the life of the nation and by far the longest period Australia has gone without amending the Constitution.[3]

In his submission to the Panel, Professor George Williams argued that, for a referendum on constitutional recognition of Aboriginal and Torres Strait Islander peoples to succeed, the process must be based on five pillars:

- bipartisanship;
- popular ownership;
- popular education;
- a sound and sensible proposal; and
- a modern referendum process.[4]

The referendum process

Section 128 of the Constitution states that the Constitution can only be amended by a referendum, and sets out the referendum process.

A double majority: Any proposed alteration to the Constitution must be approved by:

- a majority of electors in a majority of States (four out of six); and
- a majority of electors across Australia (including electors in the Territories).

The Bill: Before a referendum can be held, a Bill containing the proposed alterations must be passed by an absolute majority of both houses of Parliament, or alternatively passed twice in either the House of Representatives or the Senate.

Timing of the referendum: After the Bill has been passed, the Governor-General must submit the proposed alterations to the electors at a referendum. The referendum must be held no sooner than two months, and no later than six months, after the Bill is passed.

The 'Yes' case: In the four weeks after the Bill is passed, the 'Yes' case is prepared by the members and senators who support the proposed alterations. The 'No' case is prepared by the members and senators who oppose the proposed alterations. If there is no opposition to the alterations, only a 'Yes' case needs to be prepared.

'Yes/No' information booklets: The Australian Electoral Commission organises the preparation and distribution of an information booklet to every elector outlining the proposed alternations to the Constitution, and the 'Yes' and 'No' cases provided by Parliament. The booklet must be posted to each elector not later than 14 days before the referendum.[5]

Paul Kildea, drawing on a diverse literature on participatory and deliberative democracy, suggested that a process of popular engagement in 2012 should consist of four elements:

- broad participation;
- sound judgment;
- inclusiveness; and
- popular influence.[6]

At consultations and in submissions, the three issues most frequently raised with the Panel in relation to the referendum were the need for simplicity of proposals for recognition, the timing of the referendum and a lack of knowledge about the Constitution.

The need for a comprehensive education campaign was mentioned in 99 submissions, some of which also referred to the need to avoid complexity in the proposals for recognition. The timing of the referendum was raised in 62 submissions. Fifty-one submissions mentioned the need for cross-party support, and 48 submissions the need for popular ownership of the process, as factors critical to achieving success at a referendum.

10.2 Simplicity of proposals for recognition

The need for a comprehensive education campaign was mentioned in 99 submissions, some of which also referred to the need to avoid complexity in the proposals for recognition.

There were numerous references at consultations and in submissions to the importance of simplicity of proposals for recognition (see 3.11).

> To understand what we are talking about ordinary people need to understand and tick the right box. Simplicity is what it has to be. One question. Get to the people who are disengaged and have no information.[7]

> The Republic debate was defeated due to complexity—this process must be simple and clear.[8]

> It must be easy to understand; this needs to be done really carefully. Crafting of the question must be simple and straightforward.[9]

> It is important that the wording of a referendum question be simple and clear and be couched in positive terms that will appeal to the values of all Australians.[10]

> It would be unfortunate to have referendum questions that were complicated and too ambitious.[11]

10.3 Timing of the referendum

The Panel has deliberated on the timing of the referendum on constitutional recognition and, in particular, whether a referendum held at the same time as a federal election could discourage electors from focusing on the referendum proposals, or otherwise become the subject of partisan politics. The Panel has also considered whether putting questions in relation to the recognition of local government at the same referendum could negatively affect the outcome of a proposal to recognise Aboriginal and Torres Strait Islander peoples in the Constitution.

After the 2010 election, Prime Minister Julia Gillard agreed to hold referendums on constitutional recognition of Aboriginal and Torres Strait Islander peoples and on the recognition of local government in the Constitution during the life of the current Parliament or at the next federal election.

In its submission, the Law Institute of Victoria cautioned that there is a risk that holding a referendum on recognition of Aboriginal and Torres Strait Islander peoples at the same time as a referendum on other issues (such as recognition of local government) would blur and confuse the debate. It also noted that holding the referendum at the same time as a federal election would risk losing the current multiparty support for constitutional recognition of Aboriginal and Torres Strait Islander peoples because of the pressures of political campaigning.[12]

Professor George Williams has advised the Panel that roughly the same number of referendums held at the same time as a general election have succeeded as those held separately. An equal number of referendums

Arguments against holding referendums on election day include that they politicise the questions, make bipartisan consensus difficult and enable the 'No' case to assert that the government is using election day to avoid scrutiny of the question. Further, there is inadequate space in the crowded agenda for public education.

have been held mid-term as on election day (22 each), although in recent decades there has been a tendency to hold referendums in mid-term. The success rate for mid-term referendums is identical to that of election-time referendums (four successes at each). The social services referendum in 1946 was the last successful election-day referendum.[13] Williams also advised that, based on past referendums, electors have voted differently on different questions posed at a single referendum.

Arguments against holding referendums on election day include that they politicise the questions, make bipartisan consensus difficult and enable the 'No' case to assert that the government is using election day to avoid scrutiny of the question. Further, there is inadequate space in the crowded agenda for public education.

On the other hand, arguments against mid-term referendums include that they encourage oppositions to treat them as a 'by-election on the government' and therefore oppose the questions, regardless of the merits. Holding a mid-term referendum can also encourage opportunistic opponents to use the 'No' case to build a profile that would not be possible in an election campaign. There is also a considerable additional expense involved.

Consultations and submissions confirmed widespread concerns about holding the referendum on constitutional recognition of Aboriginal and Torres Strait Islander peoples at the same time as an election. Various views were put forward, but most who commented considered that an election would detract from the issue of constitutional recognition, and possibly risk the multiparty support it currently holds.

> If it is asked in conjunction with a federal election it will put more pressure on.[14]
>
> It is vital that this not be coupled with the election—propose the new constitution separate from this to maximise the opportunity for its success.[15]
>
> We must not allow the referendum to be held hostage to partisan politics. We believe that community discussion and consideration of an issue as foundational and fundamental for our nation should not be diluted by having an election being contested simultaneously. We also believe that the chances of success will be enhanced by holding a referendum at a time separate from a general Federal election.[16]

Consultations and submissions also confirmed widespread concern about holding the referendum on constitutional recognition of Aboriginal and Torres Strait Islander peoples at the same time as a referendum on recognition of local government.

> Multiple referenda issues will take the focus away. This should be front and centre.[17]
>
> The number of topics being considered on the next referendum polling day may make success less likely.[18]

There was also concern about the length of time required to build sufficient public support to see the referendum proposals succeed. Many comments were made about the campaign of more than 10 years that preceded the 1967 referendum.

> Need to take a careful look at whether the timeline is too tight for the education and community involvement required for this.[19]

> There was a grassroots movement for over a decade leading into 1967. I am concerned that the timeframe that has been allocated may be insufficient to generate the level of support and education that is required.[20]

> Why are they rushing it through? We have waited 200 years, and now rush change in six months?[21]

The staff of the Fred Hollows Foundation supported a referendum held in a timeframe that the Panel considers likely to maximise the likelihood of success. Noting the Government's commitment to hold a referendum during the term of the current Parliament, the Fred Hollows staff stated that 'if this timing would compromise the ability to gain widespread support' they would support a longer timeframe.[22] The Sisters of St Joseph, New South Wales Province, were concerned that to attempt a referendum prematurely without sufficient time or ownership 'might be the source for Aboriginal people to be given yet another "kick in the guts"'.[23]

There was also concern about the length of time required to build sufficient public support to see the referendum proposals succeed. Many comments were made about the campaign of more than 10 years that preceded the 1967 referendum.

The Panel has concluded that the timing of the referendum could have significant consequences for the outcome of a proposal to recognise Aboriginal and Torres Strait Islander peoples in the Constitution. In particular, the Panel does not consider that the referendum on constitutional recognition of Aboriginal and Torres Strait Islander peoples should be held at the same time as a referendum on constitutional recognition of local government.

The Panel's further conclusions and recommendations in relation to matters of timing are set out in 10.5 and 10.6.

10.4 Education

Many participants in consultations spoke of the need for greater education about the Constitution and about the processes for altering it at a referendum.

Qualitative research conducted for the Panel in August 2011 by Newspoll and a separate study by Reconciliation Australia found there is little knowledge among Australian voters of the Constitution's role and importance, or about the processes involved in moving towards and achieving success at a referendum.[24] A 1987 survey for the Constitutional Commission found that 47 per cent of Australians were unaware that Australia has a written Constitution.[25] The 1994 report of the Civics Expert Group, *Whereas the People ... Civics and Citizenship Education*, found that only one in five people had some understanding of what the Constitution contains.[26]

Consultations and submissions confirmed this widespread lack of education on and awareness of the Constitution among Australians. Many participants in consultations spoke of the need for greater education about the Constitution and about the processes for altering it at a referendum.

> There must be a focus on public education. People need to be informed about the Constitution, what it is, and its place in Australian governance. Many people do not have a good understanding of the Constitution.[27]

> Everyone should be posted a Constitution—it should be made more clear. Everyone knows about the American Constitution—it's in every building. But here, you go into town halls and parliament and you don't see it.[28]

Participants also emphasised the importance of a wide-scale education and awareness campaign if the referendum on constitutional recognition of Aboriginal and Torres Strait Islander peoples is to succeed. A participant at the consultation in Wagga Wagga in June 2011 said:

> There needs to be a big awareness campaign and a high level of grassroots support to make sure we don't miss out on this historic moment. It has taken a long time to get to this point, and it would be disappointing to let it slip through our fingers. This is the first step but the most important one.

Noting the difficulties that are inherent in changing the Australian Constitution, the Business Council of Australia's submission stated that 'promoting community buy-in will be critical to [the referendum's] success'.

Noting the difficulties that are inherent in changing the Australian Constitution, the Business Council of Australia's submission stated that 'promoting community buy-in will be critical to [the referendum's] success'.[29] Anne Twomey wrote that constitutional reforms need to be seen as coming from the people, not being imposed from on high, and that it is important 'to establish the need for reform and to have a clear narrative that explains what is needed and why'.[30]

Numerous submissions identified the importance of utilising innovative campaigning and engagement options.[31]

Participants at consultations referred to the need for a campaign using all media platforms, including television, print and social media.[32]

While it was suggested that the campaign would need to address all age demographics, particular emphasis was placed on the importance of educating and mobilising young people, particularly those in high school who will be eligible to vote at the referendum, and the elderly, some of whom do not have the same access to social media and internet platforms as other demographics.

> I don't think we are hitting enough of the voters, including the kids in years 10–12. They will be turning 18 and they will be voting on this. I want to be certain that you have some strategy in place to target Aboriginal and non-Aboriginal and those who will be turning 18 to ensure they are given every opportunity to put their mark on the paper to have a turn at history.[33]

> What are you doing to inform young people of these choices? I am 27 so what are you doing to reach young people 18–30? You are asking us to make a decision who are uninformed and that's wrong—get some young people and tell them what it's about.[34]

It will be equally important to ensure that electors understand any proposal being put to them so that they can make an informed decision about whether to vote 'Yes' or 'No'.[35] Overall, the record shows that when electors do not understand or have no opinion on a proposal, they tend to vote 'No'.[36] It is also clear that lack of understanding plays a part in the decision to vote 'Yes' or 'No'.[37] An example was the campaign leading up to the 1999 republic referendum, where the 'No Committee' used the slogan 'Don't know—Vote no'.[38] As one submission argued:

> We as a minority race in our own country are depending on the rest of the country (state by state) to give us the YES verdict. That's why it is so very important that Australia in its entirety are educated well in this exercise and for those Australians who have a conscience to vote in our favour, so we can rightfully be recognised in not only the Constitution but also the Preamble.[39]

Paul Kildea's submission suggested that the Government, as part of a process of public education and awareness in 2012, hold a citizens' assembly, run a series of local deliberative forums, conduct a preamble writing competition, and establish a website that invites citizens to engage with experts on reform options.[40] Kildea argued that a citizens' assembly has the potential to significantly advance both popular ownership of and popular education on the referendum proposal.

Paul Kildea argued that a citizens' assembly has the potential to significantly advance both popular ownership of and popular education on the referendum proposal.

A citizens' assembly operates like a short-term 'parliament' of ordinary citizens brought together to deliberate on, and make recommendations about, a specific issue of public policy. The membership (usually around 150 people) is randomly selected from the electoral roll, adjusted to ensure adequate representation across gender, age and geography. Over a period of months, the assembly delegates, or 'citizen representatives', undertake an intensive education program, conduct public hearings, and engage in a combination of small group discussions and plenary debates that are

broadcast on radio and television. At the end of the process, the assembly makes recommendations to the government about potential reforms. According to Kildea:

> [A] citizens' assembly would provide a forum for the careful and deliberate consideration of the merits of each [option for reform]. While it is true that federal Parliament could perform this task, the citizens' assembly has the advantage of being removed from the adversarialism and short-term thinking of parliamentary debate, and is thus more capable of being seen as 'people-driven' and creating a sense of popular ownership. The citizens' assembly model is also well-suited to this particular issue because it has the potential to spark the widespread public awareness, and informed public debate, that has not yet been achieved. [41]

'[T]he NSW Aboriginal Land Council urges the Gov[ernmen]t to invest in education campaigns specifically targeting areas that have lower rates of appreciation that constitutional reform to recognise Aboriginal and Torres Strait Islander peoples is important.'

New South Wales Aboriginal Land Council, submission no 3575

Another proposal raised with the Panel was to provide recognition of Aboriginal and Torres Strait Islander peoples by some form of legislative process rather than through a constitutional amendment. Unlike a constitutional statement of recognition, an Act of Parliament would not be entrenched, and a later Parliament could repeal or amend any statement contained in the Act. It was suggested that legislative recognition could have a useful role in public education in the lead-up to a referendum. Having regard to its terms of reference, the history of constitutional non-recognition set out in Chapter 1, and matters raised in consultations and submissions, the Panel does not recommend this approach. The Panel would be concerned if legislative action were to be used as a substitute for, or distract from, a referendum on constitutional recognition.

10.5 Conclusions: Process considerations

At consultations and in submissions, concern was frequently expressed that failure of a referendum on the constitutional recognition of Aboriginal and Torres Strait Islander peoples would represent a major setback in the development of a more unified and reconciled nation. For example, Australians for Native Title and Reconciliation National commented that, just as a successful referendum would be a tremendous step forward, failure could seriously harm national unity and our capacity to achieve lasting reconciliation. It could also cause deep hurt to Aboriginal and Torres Strait Islander people.[42]

> If a referendum on this fundamental issue were held prematurely, it could prejudice the prospects of a positive outcome, which could set back the agenda for decades, if not permanently. For this reason, it is imperative that a sufficient and realistic timeframe is put in place.[43]

> It does need popular support. If it is put up and fails, it is the worst possible result.[44]

> You won't get a second chance. Don't go to referendum if you won't take the time needed to get it right—we can't afford to lose.[45]

> Concern that if this doesn't succeed that we will be left nowhere. We are concerned of a negative outcome, but we are confident that we can be successful.[46]

Many pointed to the material change in the self-respect and sense of belonging of Aboriginal and Torres Strait Islander peoples engendered by the 2008 Apology. There was concern that an unsuccessful referendum could jeopardise the healing process that was started by the National Apology. This would be exacerbated if the referendum failed after a divisive public debate, or if the proposal generated opposition from substantial political minorities or from Aboriginal and Torres Strait Islander communities or their leaders.

At consultations and in submissions, concern was frequently expressed that failure of a referendum on the constitutional recognition of Aboriginal and Torres Strait Islander peoples would represent a major setback in the development of a more unified and reconciled nation.

The record suggests that the referendum proposal would almost certainly fail without the full support of both major political parties. Numerous submissions referred to the importance of bipartisan political support if the referendum is to have any real chance of success. Jane McLachlan argued that any proposal that did not have bipartisan support should not be put to the public, as it would be doomed to fail: 'The failure of the proposed referendum, or any part of it related to Indigenous people, could be more detrimental to the cause of reconciliation than not having the referendum at all.'[47]

> [S]hould the referendum question be defeated by the voters, it would not be put before the Australian voters again in my own lifetime. There is also the disappointment and bitterness that such a defeat would engender throughout Aboriginal Australia. Another reason is that to set the standard too low—to appear to be complicit in a referendum question that proposed only a preamble with no legal effect and, indeed, if such a question succeeded—would be a slap in the face for many Aboriginal Australians whose aspirations are for so much more.
>
> Marcia Langton, 'Reading the Constitution out Loud' (Summer 2011) *Meanjin*

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

- whether there is strong support for the proposals to be put at referendum across the political spectrum;
- whether the referendum proposals are likely to be vigorously opposed by significant and influential groups;
- the likelihood of opposition to the referendum proposals from one or more State governments;
- whether the Government has done all it can to lay the groundwork for public support for the referendum proposals;

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

- whether there would be sufficient time to build public awareness and support for the referendum proposals;
- whether the referendum would be conducted in a political environment conducive to sympathetic consideration by the electorate of the referendum proposals; and
- whether the referendum proposals would be seen by electors as genuine and meaningful so as to avoid the risk of rejection on the basis that they represent an inadequate or 'tokenistic' response to the profound questions raised by constitutional recognition of Aboriginal and Torres Strait Islander peoples.

While the Panel is confident that the proposals for constitutional recognition set out in chapters 4, 5 and 6 are capable of succeeding at a referendum, the Panel urges the Government to consider carefully the risks of an unsuccessful outcome. For many Australians, the failure of a referendum on recognition of Aboriginal and Torres Strait Islander peoples would result in confusion about Australia's values, commitment to racial non-discrimination, and sense of national identity. The negative impact on Aboriginal and Torres Strait Islander peoples would be profound.

In the Panel's view, achieving a successful referendum outcome should be the primary consideration of the Government and Parliament.

A final matter is whether the Panel's proposals for constitutional recognition should be put as a single question or as separate questions at the referendum. For two reasons, the Panel has concluded that the proposals should be put as a single question. The first reason relates to simplicity. As set out in 3.11 and 10.2, a recurring theme at consultations and in submissions was the importance of simplicity in the wording of the referendum question—a single question.

In the Panel's view, achieving a successful referendum outcome should be the primary consideration of the Government and Parliament.

A second and more fundamental reason relates to the interconnected nature of the Panel's package of proposals for constitutional recognition. First, the Panel proposes removing those provisions from the Constitution that exclude Aboriginal and Torres Strait Islander peoples and contemplate racial discrimination (sections 25 and 51(xxvi)). Second, there is the matter of recognition of Aboriginal and Torres Strait Islander peoples in the Constitution—through a new head of power to make laws accompanied by new introductory or preambular language to inform the interpretation of the new power ('section 51A'), together with a new provision specifically relating to recognition of Aboriginal and Torres Strait Islander languages ('section 127A'). Finally, the Panel proposes removing any capacity on the part of the Commonwealth, the States or the Territories in the future to discriminate on the imputed ground of 'race' ('section 116A'). Together, these proposals constitute an integrated approach to constitutional recognition of Aboriginal and Torres Strait Islander peoples and the removal of race-based discrimination from the Constitution. The Panel recommends them as a package.

10.6 Recommendations

The Panel's recommendations in relation to the process for the referendum are as follows:

a. In the interests of simplicity, there should be a single referendum question in relation to the package of proposals on constitutional recognition of Aboriginal and Torres Strait Islander peoples set out in the draft Bill (Chapter 11).

b. Before making a decision to proceed to a referendum, the Government should consult with the Opposition, the Greens and the independent members of Parliament, and with State and Territory governments and oppositions, in relation to the timing of the referendum and the content of the proposals.

c. The referendum should only proceed when it is likely to be supported by all major political parties, and a majority of State governments.

d. The referendum should not be held at the same time as a referendum on constitutional recognition of local government.

e. Before the referendum is held, there should be a properly resourced public education and awareness program. If necessary, legislative change should occur to allow adequate funding of such a program.

f. The Government should take steps, including through commitment of adequate financial resources, to maintain the momentum for recognition, including the widespread public support established through the *YouMeUnity* website, and to educate Australians about the Constitution and the importance of constitutional recognition of Aboriginal and Torres Strait Islander peoples. Reconciliation Australia could be involved in this process.

g. If the Government decides to put to referendum a proposal for constitutional recognition of Aboriginal and Torres Strait Islander peoples other than the proposals recommended by the Panel, it should consult further with Aboriginal and Torres Strait Islander peoples and their representative organisations to ascertain their views in relation to any such alternative proposal.

h. Immediately after the Panel's report is presented to the Prime Minister, copies should be made available to the leader of the Opposition, the leader of the Greens, and the independent members of Parliament. The report should be released publicly as soon as practicable after it is presented to the Prime Minister.

Notes

1 George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (University of New South Wales Press, 2010), at 90–1.
2 George Williams, submission no 3609, at 6.
3 Williams and Hume, op cit, at 93.
4 George Williams, submission no 3609, at 7–10; see also Williams and Hume, op cit.
5 Section 11 of the *Referendum (Machinery Provisions) Act 1984* (Cth) provides for the distribution of a Yes/No pamphlet prior to a referendum. See generally, House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *A Time for Change: Yes/No?—Inquiry into the Machinery of Referendums* (2009), at [1.7].
6 Paul Kildea, submission no 3477, at 3.
7 Sydney, September 2011.
8 Albany, May 2011.
9 Wagga Wagga, June 2011.
10 Hornsby Area Residents for Reconciliation, submission no 3439.
11 Reconciliation South Australia, submission no 2998.
12 Law Institute of Victoria, submission no 3560.
13 Williams and Hume, op cit, at 88, 95–96.
14 Rockhampton, July 2011.
15 Mt Isa, June 2011.
16 ANTaR National, submission no 3432.
17 Wagga Wagga, June 2011.
18 Alice Springs, May 2011.
19 Horsham, June 2011.
20 Broken Hill, August 2011.
21 Wagga Wagga, June 2011.
22 Staff of the Fred Hollows Foundation, submission no 3552, at 1.
23 Sisters of St Joseph, New South Wales Province, submission no 3073.
24 Reconciliation Australia, *Effective Communication of Constitutional Changes to Recognise Aboriginal and Torres Strait Islander People: Interim Findings and Recommendations* (2011).
25 George Williams, submission no 3609, at 8.
26 Civics Expert Group, *Whereas the People: Civics and Citizenship Education—Report of the Civics Expert Group* (Australian Government Publishing Service, 1994).
27 Mildura, August 2011.
28 Ballarat, June 2011.
29 Business Council of Australia, submission no 3438.
30 Anne Twomey, submission no 1132.
31 For example, Oxfam Australia, submission no 3574.
32 See, for example, the following comments by participants at consultations: 'In terms of getting a message out you need to tap into and use social media platforms and embrace them, they will not be restrained' (Darwin, April 2011); 'Other than paper, other than internet, there needs to be powerpoints/DVD, seeing and understanding how the issues being discussed relate to the individuals. Mail out a copy of the DVD to all organisations consulted' (Albany, May 2011).
33 Dubbo, July 2011.
34 Kempsey, September 2011.
35 *A Time for Change*, op cit, at vi.
36 George Williams submission no 3609, at 8.
37 *A Time for Change*, op cit, at vi.
38 Ibid.
39 Gerry de la Cruz, submission no 2427.

40 Paul Kildea, submission no 3477.
41 Ibid, at 4.
42 ANTaR National, submission no 3432.
43 Australian Institute of Aboriginal and Torres Strait Islander Studies, submission no 3553.
44 Albany, May 2011.
45 Kalgoorlie, August 2011.
46 Geraldton, May 2011.
47 Jane McLachlan, submission no 3426.

11 Draft Bill

A Bill for an Act to alter the Constitution to recognise Aboriginal and Torres Strait Islander peoples and their cultures, languages and heritage, to replace racially discriminatory provisions and to include a prohibition of racial discrimination.

The Parliament of Australia, with the approval of the electors as required by the Constitution, enacts:

1 Short title

This Act may be cited as the *Constitution Alteration (Recognition of Aboriginal and Torres Strait Islander Peoples) 2013*.

2 Commencement

This Act commences on Royal Assent.

3 Amendment of the Constitution

The Constitution is altered in the ways set out in the Schedule to this Act.

Schedule

Item 1

Repeal section 25 and section 51(xxvi) of the Constitution.

Item 2

Insert after section 51:

Section 51A Recognition of Aboriginal and Torres Strait Islander peoples

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

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

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

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

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

Item 3

Insert after section 116:

Section 116A Prohibition of racial discrimination

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

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

Item 4

Insert as section 127A:

Section 127A Recognition of languages

(1) The national language of the Commonwealth of Australia is English.

(2) The Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage.

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A Membership of the Expert Panel



Expert Panel members at Parliament House at the first Panel meeting, February 2011. Left to right: Fred Chaney, Timmy Djawa Burarrwanga, Janelle Saffin, Rob Oakeshott, Mick Gooda, Alison Page, Glen Ferguson, Marcia Langton, Lauren Ganley, Ken Wyatt, Mark Leibler, Patrick Dodson, Noel Pearson, Graham Bradley, Bill Lawson, Megan Davis, Henry Burmester, Josephine Bourne, Rachel Siewert and Sam Jeffries. Not pictured are Jody Broun and Les Malezer.

Co-chairs

Patrick Dodson

Professor Patrick Dodson is a Yawuru man from Broome, Western Australia. He has dedicated his life work to advocating for a constructive relationship between indigenous and non-indigenous people based on mutual respect, understanding and dialogue. He is a former Royal Commissioner into Aboriginal Deaths in Custody, and former chair of the Council for Aboriginal Reconciliation. Professor Dodson lives in Broome with his family, where he is involved in social, cultural, economic and environmental sustainability through his roles as chair of the Lingiari Foundation and executive chair of Nyamba Buru Yawuru. He is currently adjunct professor at the University of Notre Dame Australia. In 2008, Professor Dodson was awarded the Sydney Peace Prize for his courageous advocacy of the human rights of indigenous people and his significant contribution to peace and reconciliation.

Mark Leibler

Mr Mark Leibler AC is the senior partner in the leading Australian law firm Arnold Bloch Leibler and a prominent leader of the Australian and international Jewish community. From 2005 to 2011, Mr Leibler was co-chair of Reconciliation Australia. He is an activist in the areas of social justice and public affairs and is a supporter of indigenous rights. Mr Leibler graduated

from the University of Melbourne's Law School with first class honours, sharing the Supreme Court Prize awarded to the year's top law graduate, and has a Master of Laws with honours from Yale University. In 2005 he was appointed a Companion in the General Division of the Order of Australia in recognition of his service to business, to the law particularly in the areas of taxation and commercial law, to the Jewish community internationally and in Australia, and to reconciliation and the promotion of understanding between indigenous and non-indigenous Australians.

Non-parliamentary members

Josephine Bourne

Ms Josephine Bourne is a mainland Torres Strait Islander born in Townsville, Queensland. Her mother's ancestry is from Mabuiag Island and the Murray Islands and her father's ancestry is from Mabuiag Island and Moa Island. Ms Bourne was co-chair of the National Congress of Australia's First Peoples until July 2011 and was an inaugural director of Congress from its incorporation in April 2010. Ms Bourne also worked with the National Indigenous Representative Body Steering Committee. She has made a significant contribution to many local, regional, state and national agencies through program development and management, committees and working groups dealing with indigenous education, community capacity building, multimedia development and youth leadership.

Graham Bradley

Mr Graham Bradley AM is a lawyer and professional company director. His directorships include roles as chair of HSBC Bank Australia, Stockland Corporation, Anglo American Australia and several other companies. He was the president of the Business Council of Australia for two years to November 2011. Mr Bradley is a member of the advisory boards of the Crawford School of Government at the Australian National University and the Australian School of Business at the University of New South Wales and a director of the European Australian Business Council. He also devotes time to several non-profit organisations, including the Australian Brandenburg Orchestra and the State Library of New South Wales.

Timmy Djawa Burarrwanga

Mr Timmy Djawa Burarrwanga belongs to the Gumatj Clan. He was born at Yirrkala and his homeland is Bawaka in Port Bradshaw, North East Arnhem Land. He is currently the chair of the Yirrkala Dhanbul Aboriginal Corporation, a community development organisation; director of Lanyhapuy Homelands Association; a board member of the Gumatj Association; and chair of Lirrwi Yolngu Tourism Aboriginal Corporation. He also serves on the boards of numerous other Aboriginal organisations. He and his family operate a successful tourism venture on their ancestral land and he sees tourism as a culturally appropriate way of Aboriginal people earning a living. Mr Burarrwanga has a keen interest in indigenous health, education and social issues, particularly substance abuse, domestic violence and family health.

Henry Burmester

Mr Henry Burmester AO QC is a graduate of the Australian National University and the University of Virginia and a Foundation Fellow of the Australian Academy of Law. He was Chief General Counsel in the Australian Government Solicitor for over a decade and before that head of the Office of International Law in the Attorney-General's Department.

Mr Burmester has appeared as counsel for the Commonwealth in many leading constitutional cases before the High Court and has written extensively on constitutional and international law matters. He is now a consultant counsel to the Australian Government Solicitor.

Fred Chaney

The Hon Fred Chaney AO was born in Perth, Western Australia and was awarded an Order of Australia in 1997. He is chair of Desert Knowledge Australia and a board director with Reconciliation Australia. Formerly a lawyer, Mr Chaney served as a Liberal Senator for Western Australia (1974–90) and a Member of the House of Representatives (1990–93). He held various ministerial appointments in the Fraser government, including Aboriginal Affairs. After leaving Parliament in 1993, he undertook research into Aboriginal affairs policy and administration as a Research Fellow at the University of Western Australia. He was Chancellor of Murdoch University for eight years until early 2003, and retired as a deputy president of the National Native Title Tribunal in April 2007.

Megan Davis

Professor Megan Davis is from Eagleby in south-east Queensland and grew up in the Burnett region of Queensland. Professor Davis is of Aboriginal (Cobble Cobble) and South Sea Islander background. She is a Professor of Law and Director of the Indigenous Law Centre, Faculty of Law at the University of New South Wales, a member of the United Nations Permanent Forum on Indigenous Issues and a commissioner of the New South Wales Land and Environment Court. She has a PhD from the Australian National University; her dissertation topic was the limitations on the right to self-determination for Aboriginal women.

Glenn Ferguson

Queensland solicitor Mr Glenn Ferguson is managing partner of Ferguson Cannon Lawyers with offices in Brisbane and the Sunshine Coast, Queensland. Mr Ferguson is the current president of the Law Council of Australia and chair of the Law Council of Australia's Indigenous Legal Issues Committee. He is a former president of the law association for Asia and the Pacific (LAWASIA) and the Queensland Law Society. He is also an active member of a number of legal bodies, including the Queensland College of Law, the Queensland Law Foundation, and the federal Attorney-General's International Legal Services Advisory Council, and has served on a number of federal and state advisory boards. He also has extensive board experience in the not-for-profit, education, medical and charity sectors. Mr Ferguson practises mainly in the areas of commercial litigation, insurance and migration law.

Lauren Ganley

Ms Lauren Ganley is a descendant of the Kamilaroi people. She was raised in the Northern Territory, where she began her career with Telstra Corporation in 1982. As the general manager of Telstra's National Indigenous Directorate, she leads business activities that make a positive difference for indigenous communities across Australia. Ms Ganley is a member of the Northern Territory Indigenous Economic Development Taskforce, the Business Council of Australia Business Indigenous Network and the Indigenous Financial Services Network, and inaugural co-convenor of the Australian Indigenous Corporate Network.

Sam Jeffries

Mr Sam Jeffries is a member of the Murrawari nation from north-west New South Wales and southern Queensland and was born and raised in Brewarrina, New South Wales. He was an inaugural co-chair of the National Congress of Australia's First Peoples. Active in indigenous affairs for more than 25 years, Mr Jeffries has worked in the cotton, hotel and meat industries, in the public service, and in a range of community organisations. His previous roles include board member of the New South Wales Aboriginal Housing Office and chair of the Murdi Paaki ATSIC Regional Council. He is currently a director of the Indigenous Land Corporation, co-chair of the National Centre of Indigenous Excellence, and chair of the Murdi Paaki Regional Assembly.

Marcia Langton

Professor Marcia Langton is a descendant of the Yiman and Bidjara nations and was born and raised in Queensland. Her PhD was awarded by Macquarie University for her study of a customary Aboriginal land tenure system of eastern Cape York. Professor Langton has held the Foundation Chair of Australian Indigenous Studies at the University of Melbourne since February 2000. She has made a significant contribution to indigenous studies, as well as to government and non-government policy throughout her career. Her contributions as an Aboriginal rights advocate and anthropologist were recognised in 1993 when she was made a Member of the Order of Australia. Professor Langton became a Fellow of the Academy of Social Sciences in Australia in 2001 and was awarded the inaugural Neville Bonner Award for Indigenous Teacher of the Year in 2002. She is a member of the board of the Cape York Institute for Policy and Leadership and chair of the Museums and Galleries of the Northern Territory Board.

Bill Lawson

Mr Bill Lawson AM is an engineer and a principal of Sinclair Knight Merz, where he is manager of the Indigenous Sector and group manager of the company's global Corporate Social Responsibility Program. In 2006 Mr Lawson was awarded an Order of Australia for his development of the national youth assistance initiative, the Beacon Foundation. He was also named the 2003 Australian Professional Engineer of the year, and has worked on major projects in Tasmania and the Antarctic. Mr Lawson is based in Tasmania.

Alison Page

Ms Alison Page is a descendant of the Walbanga and Wadi Wadi people of the Yuin nation. She is an award-winning Aboriginal designer and executive officer of the Saltwater Freshwater Arts Alliance on the mid–north coast of New South Wales. Since 1997, Ms Page has worked with various urban and rural Aboriginal communities in the delivery of culturally appropriate architectural and design services in association with Merrima Design. Exploring links between cultural identity, art and design, her work spans architecture, interiors, jewellery and public art. For eight years Ms Page was a regular panellist of the ABC program *The New Inventors*. She is a board member of Ninti One Ltd and the Cooperative Research Centre for Remote Economic Participation.

Noel Pearson

Mr Noel Pearson is a descendant of the Bagaarrmugu and the Guggu Yalanji peoples. He was born in Cooktown and grew up at Hope Vale Mission, Cape York Peninsula. Mr Pearson has been strongly involved in campaigning for the rights of Cape York Aboriginal people and played a pivotal role in the establishment of the Cape York Land Council in 1990. He has worked on native title cases, including the historic *Wik* decision. In 2004, he became the director of the Cape York Institute for Policy and Leadership. Mr Pearson's current work with the institute and Cape York Partnerships is focused on breaking down passive welfare dependency and reinstating the rights of Aboriginal people to take responsibility for their lives.

Parliamentary members

Rob Oakeshott

Mr Rob Oakeshott lives in regional Port Macquarie, traditional Birpai land, and is married to and has four children with Sara-Jane, who is of Bailai and South Sea Islander heritage. His agreement with the Government in the 43rd Parliament included constitutional recognition and daily acknowledgment in the Australian Parliament. He is currently chair of the Joint Committee of Public Accounts and Audit and chair of the Joint Standing Committee on the National Broadband Network. He holds a Bachelor of Arts (Hons) and Bachelor of Laws.

Janelle Saffin

Ms Janelle Saffin has served as the Federal Member for Page in rural New South Wales since 2007. She has been active in the Australian Labor Party since 1982 and served in the New South Wales Legislative Council from 1995 to 2003. Ms Saffin holds qualifications in teaching and law, and her legal career has included work as a solicitor and advocate from local to international level with a particular focus on human rights. From 2004 to 2007 she was senior political adviser to His Excellency Dr José Ramos-Horta while the Nobel Laureate was Timor-Leste's Foreign Minister, Defence Minister, Prime Minister and then President.

Rachel Siewert

Before being elected as Australian Greens Senator for Western Australia in 2005, Ms Rachel Siewert spent 16 years as the coordinator of the Conservation Council of Western Australia and played a role in a number of national and state forums tackling pressing environmental and social justice issues. Senator Siewert is chair of the Senate Standing Committee on Community Affairs and serves as party whip for the Australian Greens and as the Australian Greens spokesperson on Aboriginal and Torres Strait Islander issues.

Ken Wyatt

Mr Ken Wyatt has Noongar, Yamatji and Wongi heritage. In 2010 he was elected as the Liberal Member for Hasluck, Western Australia in the House of Representatives. He worked as a primary school teacher for 16 years before moving into leadership roles in the public sector in health and education. He co-chaired the Council of Australian Governments' Indigenous Health Working Group, achieving a $1.6 billion commitment from all jurisdictions to improve indigenous health outcomes.

Ex-officio members

Co-chairs, National Congress of Australia's First Peoples



Jody Broun

Ms Jody Broun is a Yindjibarndi woman from the Pilbara. Ms Broun has dedicated herself to the service of Australia's first peoples in her 25-year career, spending much of that time in senior public service positions. She has been the Executive Director of Aboriginal Housing and Infrastructure at the Department of Housing and Works (WA), Director of Equal Opportunity in Public Employment (WA), Executive Director of Policy and Coordination at the Aboriginal Affairs Planning Authority (WA) and Director General of the NSW Department of Aboriginal Affairs. Ms Broun is also a well-known and respected artist. She explores the stories of her family and country in her art and was the winner of the National Aboriginal and Torres Strait Islander Art Award in 1998 and the Canberra Art Award in 2005. In July 2011, Ms Broun was elected co-chair of the National Congress of Australia's First Peoples.



Les Malezer

Mr Les Malezer is from the Butchulla/Gubbi Gubbi peoples in south-east Queensland. He has extensive experience in campaigning for Aboriginal and Torres Strait Islander rights and has represented community interests at the local, state and national levels. Mr Malezer is a former head of the Queensland Department of Aboriginal and Islander Affairs. Until recently he was chair of the Foundation for Aboriginal and Islander Research Action and in that role he was a delegate to United Nations forums on indigenous issues. In 2008 he won the Australian Human Rights Award, and his contribution to coordinating indigenous peoples' advocacy for the adoption of the UN Declaration on the Rights of Indigenous Peoples by the UN General Assembly is well known and respected. In July 2011, Mr Malezer was elected co-chair of the National Congress of Australia's First Peoples.

Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission

Mick Gooda

Mr Mick Gooda is a descendant of the Gangulu people of central Queensland. He is the Aboriginal and Torres Strait Islander Social Justice Commissioner with the Australian Human Rights Commission. He is also a board member of the Centre for Rural and Remote Mental Health Queensland, and is the Australian representative on the International Indigenous Council which focuses on healing and addictions. He has an interest in the Lateral Violence Program in Canada and has been working closely with the First Nations Peoples of Canada on the relevance of this program to Australia.

B Advertisements

The following template for a newspaper advertisement was used to publicise the consultations.



Consultations on the Constitutional Recognition of Aboriginal and Torres Strait Islander peoples

Over the coming months the Australian people will be asked to share their views on how Aboriginal and Torres Strait Islander peoples could be recognised in the Australian Constitution.

The Prime Minister has appointed a Panel made up of Indigenous and non-Indigenous leaders from urban, regional and remote areas to go out and consult the Australian people on the most appropriate way to recognise Aboriginal and Torres Strait Islander peoples in the Constitution.

[Number] members of the Panel on the Constitutional Recognition of Aboriginal and Torres Strait Islander peoples, [Names], will be in [Town/Community] to hold a public meeting to discuss constitutional recognition.

This will give the people of [Town/Community] the opportunity to contribute to this national conversation.

WHEN:

WHERE:

TIME:

You can find out more about the Panel's work and ideas for change by downloading the discussion paper from the website www.youmeunity.org.au.

The Panel members want to speak directly to as many Australian people as possible but if you can't get along to the meeting you can still have your say by writing a letter or email or a submission or by visiting our website.

Drawing on the results of these consultations, along with surveys and legal advice, the Panel will report to the Prime Minister in December 2011 on options to change the Constitution which could be put to the Australian people at a referendum.

The following national print advertisement was used to publicise the call for submissions.

YOU ME UNITY

The Australian Government has asked a Panel of community leaders to explore options for recognising Aboriginal and Torres Strait Islander Peoples in the Australian Constitution.

All Australians are invited to have their say on this important issue.

The Panel is seeking your views on how the Australian Constitution might be changed. **Submissions close on 30 September 2011.** You can lodge a submission online at **www.youmeunity.org.au** or you can write to PO Box 7576, Canberra Business Centre, ACT, 2610.

Public meetings are also being held in each major capital city.

Adelaide	22–23 August
Brisbane	25 August
Perth	14–15 September
Melbourne	19 September
Canberra	20 September
Darwin	26–27 September
Sydney	28–29 September

You can find more details on the public meetings at www.youmeunity.org.au.

For more information email **Contact@youmeunity.org.au** or call 1800 836 422.

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D Urbis report: Executive summary

In September 2011, Urbis was commissioned by the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) to conduct an analysis of public submissions to the Expert Panel on the Constitutional Recognition of Indigenous Australians ('the Panel'). A total of 3,464 public submissions were received in time to be included in this analysis, including 3321 submissions from individuals and 143 submissions from organisations.

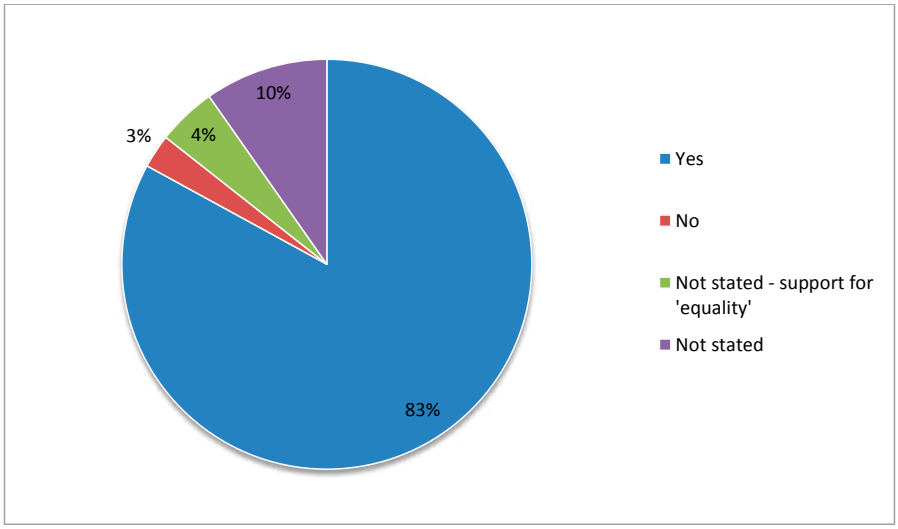
This report sets out Urbis' findings on the level of support for constitutional recognition of Aboriginal and Torres Strait Islander peoples. It outlines the level of support for various reform options, and provides a detailed analysis of the themes and issues surrounding each of these options.

All submissions received were analysed according to an analytical framework and coding schema, which ensured the level of support and the themes and issues raised in submissions were captured in a structured and methodologically sound way.

LEVEL OF SUPPORT FOR CONSTITUTIONAL RECOGNITION

The large majority (83%) of submissions to the Panel support constitutional recognition of Aboriginal and Torres Strait Islander peoples. A few submissions do not state a clear view (10%) or make general statements about 'equality' (4%). Only a small number of submissions (3%) do not support constitutional recognition of Aboriginal and Torres Strait Islander peoples.

FIGURE 1 – LEVEL OF SUPPORT FOR CONSTITUTIONAL RECOGNITION (N=3464)



Organisations are more likely than individuals to support constitutional recognition. A total of 97% of all organisations support constitutional recognition, whereas this figure for individuals is 82%.

Non-Indigenous individuals are more likely than individuals who identify as Aboriginal and/or Torres Strait Islander to support constitutional recognition. A total of 88% of non-Indigenous individuals support constitutional recognition, whereas this figure for Aboriginal and/or Torres Strait Islander individuals is 80%.

Submissions by individuals in the Australian Capital Territory most commonly state support for constitutional recognition, closely followed by submissions from individuals in New South Wales (84%) and Victoria (84%). Submissions by individuals in Western Australia are least likely to support

constitutional recognition (78%). Support for constitutional recognition by organisational respondents in all states and territories is overwhelming, with levels of support ranging from 93% to 100%.

The overall level of support for constitutional recognition is fairly consistent across major cities (83%) and regional areas (81%), but lower in remote areas (71%).

In supporting constitutional recognition, approximately 4% of all submissions list a pre-requisite for constitutional change. The most commonly cited pre-requisites are that constitutional recognition should deliver substantive benefits to Aboriginal and Torres Strait Islander peoples; should have a significant chance of being accepted by the Australian public; and should recognise Aboriginal customary law and sovereignty.

REASONS FOR SUPPORTING CONSTITUTIONAL CHANGE

The most common reasons for supporting constitutional recognition of Aboriginal and Torres Strait Islander peoples are that:

- the unique status of Aboriginal and Torres Strait Islanders as the 'First Australians' should be enshrined in our nation's founding legal document
- the Constitution should be amended to ensure the equality of all Australians, and to remove potentially discriminatory clauses
- constitutional recognition is well overdue and will more accurately reflect Australia's national identity
- constitutional recognition is important for recognising Aboriginal and Torres Strait Islander peoples as custodians of the world's oldest continuing culture, and is needed to protect Indigenous heritage, cultures and languages
- constitutional recognition will go some way to redressing past wrongs and improving relations between Indigenous and non-Indigenous Australians.

The most common reasons for not supporting constitutional recognition are that:

- all Australians should be treated equally and no one race should be given special treatment
- constitutional change is not necessary because the rights of Aboriginal and Torres Strait Islander peoples are already adequately protected
- constitutional recognition will not result in any real change for Aboriginal and Torres Strait Islander peoples
- constitutional recognition may involve incorporating Aboriginal and Torres Strait Islander peoples, who never ceded their sovereignty, into Westminster systems.

PREFERRED FORM OF CONSTITUTIONAL RECOGNITION

The figure below demonstrates the level of explicit support for the various options to recognise Aboriginal and Torres Strait Islander peoples in the Constitution. The inclusion of a statement of recognition has the highest level of support (15% of all submissions), followed by a change to section 51(xxvi) (9%), the deletion of section 25 (8%), the insertion of an agreement-making power (4%), the insertion of a statement of values (3%) and the negotiation of a treaty (2%).

Caution, however, should be taken in interpreting these figures. The fact that 15% of people explicitly support a statement of recognition should not be interpreted as meaning that 85% of submissions do not support such an option. Many submissions are short and make general statements of support for constitutional recognition, but do not delve into the detail of what constitutional recognition might look like.

FIGURE 2 – LEVEL OF SUPPORT FOR VARIOUS REFORM OPTIONS (N=3464)

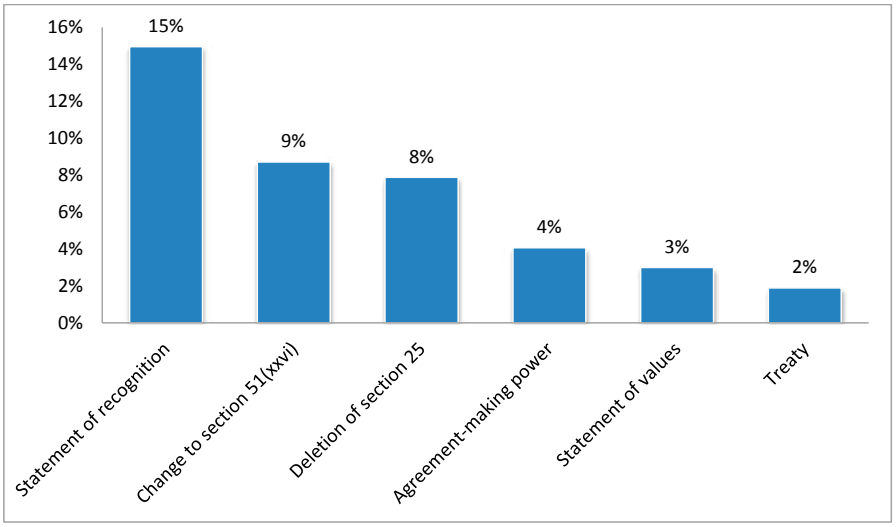
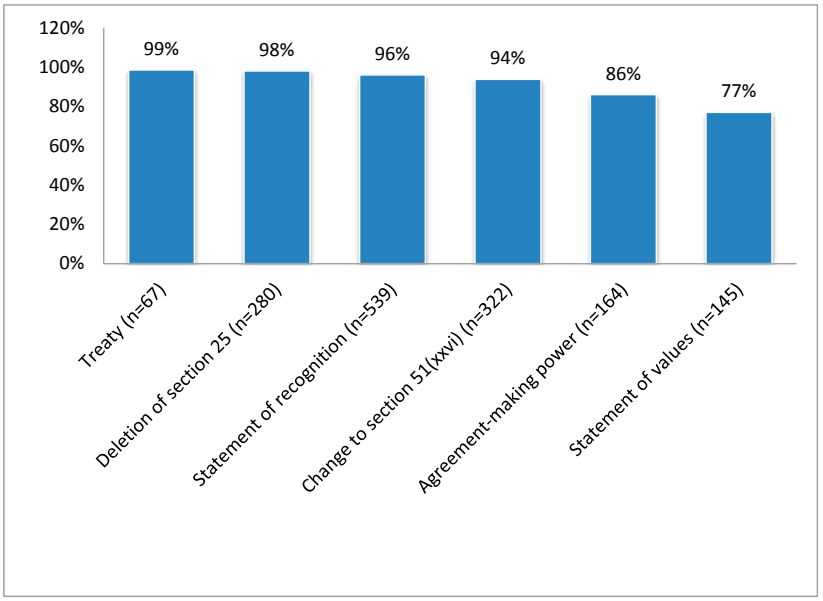


Figure 3 provides an alternate method of analysing support for the various options to recognise Aboriginal and Torres Strait Islander peoples in the Constitution. It outlines the level of support for the various reform options *among the submissions that specifically mention the reform options*.

Of the submissions that mention a treaty, 99% support the negotiation of a treaty, There are similarly high levels of support for deleting section 25, inserting a statement of recognition, and changing section 51(xxvi) among submissions that mention these reform options. The level of support for an agreement-making power and a statement of values among submissions that mention these options is lower (86% and 77% respectively).

FIGURE 3 – LEVEL OF SUPPORT FOR VARIOUS REFORM OPTIONS AMONG SUBMISSIONS THAT MENTION THOSE OPTIONS



The majority of the 302 submissions that support a change to section 51(xxvi) support a repeal of the section (57%). Just under half (49%) support the insertion of a non-discrimination and racial equality clause, a substantial minority support an amendment to section 51(xxvi) (32%), and some support the insertion of a new power to make laws for Aboriginal and Torres Strait Islander peoples (28%). Again, caution should be taken in interpreting these figures, because some submissions support a change to section 51(xxvi) but do not comment on the preferred form of change, and other submissions support more than one form of change (for example, the repeal of section 51(xxvi) and the insertion of a non-discrimination and racial equality clause).

Other options for constitutional recognition of Aboriginal and Torres Strait Islanders mentioned in the submissions include: incorporating the rights and principles enshrined in the United Nations Declaration on the Rights of Indigenous Peoples; recognising Indigenous sovereignty and customary law, and reserving seats in the Parliament for Aboriginal and Torres Strait Islander representatives.

PROCESS FOR CONSTITUTIONAL REFORM

A few submissions comment on the process for constitutional reform. There is a view that getting the process for achieving success at referendum right is perhaps as important as getting the content of constitutional recognition right, because a failed referendum could be very detrimental to reconciliation efforts.

The submissions suggest the key elements to achieving referendum success include:

- a comprehensive, well-resourced and highly visible education campaign
- Aboriginal and Torres Strait Islander ownership and consent
- popular ownership
- referendum questions that are simple, clear and easy to understand
- cross-party support.

Timing is also raised in submissions as another factor critical to referendum success. There is a view that a referendum on constitutional recognition of Aboriginal and Torres Strait Islander peoples should not coincide with a federal election or a referendum on any other issue (eg the status of local governments).

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