Referendum Council

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

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Introduction

Aboriginal and Torres Strait Islander peoples have lived on the land and seas around the Australian continent for more than 60,000 years. They are the First Peoples.

The rich languages, cultures and traditions of Aboriginal and Torres Strait Islander peoples represent the world's oldest continuous cultural heritage. This unique legacy is recognised internationally and is one of the things that sets Australia apart from the rest of the world.

Those lands and waters were colonised by Europeans, who took them without treaty or consent, and Australia's Constitution, our most important legal document, contains no acknowledgement of the First Peoples of Australia. Aboriginal and Torres Strait Islander people were not given a voice in the convention debates of the 1890s, which led to the drafting of the Constitution in 1901, and few were able to vote for it.

Many laws and policies enacted since 1901 have discriminated against Aboriginal and Torres Strait Islander peoples. Our Constitution could offer protections against unfair treatment. But at present it does not—nor does it recognise the special place of Aboriginal and Torres Strait Islander peoples within the life of the nation.

Australians now have an opportunity to change this situation.

Much work has already been done on what form constitutional change could take, most recently by the Expert Panel appointed by the Australian Government in 2011 and by a Parliamentary Joint Select Committee that completed its work in 2015.

In December 2015, the Australian Government and the Opposition came together to appoint a 16-member Referendum Council to consult widely throughout Australia and take the next steps towards achieving constitutional recognition of the First Australians.

The council wants to hear the views of all Australians on constitutional change regarding Aboriginal and Torres Strait Islander peoples. Through our consultations, we will ask you some fundamental questions, such as: *Do you support constitutional change? And, if you do, What form do you think change should take?* We will also ask what you think about some specific proposals for symbolic and practical reform and how they might ensure that the Constitution treats Aboriginal and Torres Strait Islander peoples more fairly.

Over the same period, the council will hold a series of Indigenous consultations to give Aboriginal and Torres Strait Islander people the chance to say what meaningful recognition is to them. Indigenous people will design and lead these consultations.

The council will report to the Government and the Opposition on what people say and on how the Constitution might best be changed.

This Discussion Paper sets out some of the different options for change and outlines some of the issues to be taken into account. We want to know what you think.

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What is the Constitution and how can it be changed?

The Constitution is the legal and political foundation document of Australia. It was drafted following a series of constitutional conventions held in the 1890s and was passed by the British Parliament in 1900. It took effect on 1 January 1901.

The Constitution is the Australian government's 'rulebook'. It establishes Australia as a federation and defines the national law-making powers of the Commonwealth or federal government. Every law passed by the federal Parliament must be empowered by the Australian Constitution—it must be based on what is a called a *head of power* set down in the Constitution, which is divided into *sections*.

The Constitution distributes power between the Commonwealth and the States and Territories and sets out the roles of the federal Parliament and the executive (the government of the day). It empowers federal courts and establishes the High Court of Australia as the ultimate decision maker on questions about the meaning of the Constitution. It is essentially a structural plan for a federal system of government.

By allocating and also limiting government powers, the Constitution protects certain rights and freedoms, but it is not a charter of human rights.

The Australian Constitution, like all foundation documents, also says something about the values of our society.

The drafters of the Constitution wanted to make sure it could be amended over time, but only with the clear consent of the Australian people. This consent is given through a *referendum*, when all Australians registered on the electoral roll cast a vote. Under section 128, a majority of Australian voters and a majority of voters in a majority of States (that is, in at least four out of the six States) must approve any proposed amendment. This is known as a *double majority*. People cast their votes by writing either a 'yes' or 'no' in response to specific questions put to them.

Indigenous Peoples and the Constitution

Aboriginal people lived on the land when the British arrived, but the British did not recognise their ownership and authority. A legal fiction applied that was later called *terra nullius:* the incorrect belief that the land was owned by nobody. The High Court says Australia was a 'settled' colony and that meant sovereignty passed to the British.

The Joint Select Committee cited legal advice obtained by the Expert Panel on the relationship between settlement and sovereignty:

> Given the previous presence of all the different indigenous inhabitants and owners of all the different countries now comprising the territory of the nation Australia, contemporary legal doctrine implies acceptance 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. They did not ask permission to settle. No-one consented, no-one ceded. Sovereignty was not passed from the aboriginal peoples to the settlers by any actions of legal significance voluntarily taken by or on behalf of the former or any of them.[1]

Six Australian colonies were eventually established. The Constitution united these colonies in a federal system and was approved by popular vote in each colony. The position on settlement and sovereignty was taken for granted and did not arise. As Professor Patrick Dodson has observed, the Constitution of 1901 was drafted 'in the spirit of *terra nullius*'.[2]

The process of writing the Constitution excluded Aboriginal and Torres Strait Islander peoples. The Constitution made no direct mention of them, except for two references designed to exclude them:

- section 51 (xxvi) gave the federal government the power to make national laws for 'the people of any race for whom it is deemed necessary to make special laws'— the 'race power'. But the wording excluded Aboriginal people from the power. That meant outside the Northern Territory, the States remained in control of Indigenous affairs
- section 127 said that when calculating the 'people of the Commonwealth' Aboriginal people were not to be counted.

In 1967, after a long period of advocacy and protest by both Indigenous people and non-Indigenous Australians, a referendum was held to determine whether these two references, which were seen to discriminate against Aboriginal people, should be deleted. More than 90% of Australians voted 'yes' to change the Constitution by:

- amending section 51 (xxvi) so that federal laws under the race power could apply to Aboriginal and Torres Strait Islander people
- deleting section 127 so that Aboriginal and Torres Strait Islander peoples could be counted in the national population.

1 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Final Report, June 2015, p. 72.
2 Patrick Dodson, 'Welcoming Speech', Position of Indigenous People in National Constitutions Conference, Canberra, 4 June 1993, quoted in Bain Attwood and Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (2nd edn, 2007), pp. 146–7. {'edn' (no full point) is correct according the *Style manual*—it's a contraction.}

But the 1967 referendum also left unresolved issues. It did not implement any constitutional guarantee of fair treatment, nor any specific recognition for Indigenous people and their rights. It left section 25 in the Constitution, which contemplates that certain races could be banned from voting in State elections. As a result, Aboriginal and Torres Strait Islander advocacy for constitutional change continued.

What does 'recognition' mean?

Much of the recent debate over constitutional change has used the word 'recognition', but that can mean different things to different people. Recognition might be as basic as acknowledging the existence of people, their history and their culture. Or it might mean confirming their legal rights and freedoms, or giving them a voice and political representation, or making a treaty or agreement with them—or all of these things. Recognition in one way or another is common around the world in countries with Indigenous populations. It can happen within a national constitution, or outside it.

Aboriginal and Torres Strait Islander advocacy for constitutional recognition has emphasised the importance of a constitutional guarantee of fairer treatment, because the Constitution is where binding and enduring guarantees can be made. Many Aboriginal and Torres Strait Islander leaders have sought constitutional recognition to ensure that Australian governments treat Aboriginal and Torres Strait Islander peoples more fairly. As Yolngu leader Galarrwuy Yunupingu explained in 1998:

> Our Yolgnu law is more like your Balanda Constitution than Balanda legislation or statutory law. It doesn't change at the whim of short-term political expediency. It protects the principles which go to make up the very essence of who we are and how we should manage the most precious things about our culture and our society. Changing it is a very serious business ...
>
> If our Indigenous rights were recognised in the Constitution, it would not be so easy for Governments to change the laws all the time, and wipe out our rights ...[3]

Professor Patrick Dodson has similarly noted:

> It may be a harsh thing to say, but many actions of Australian Governments have given Aboriginal people little faith in the promises Governments make in relation to protecting and defending the rights of Indigenous Australians. That is why we need a formal Agreement that recognises and guarantees the rights of Indigenous Australians within the Australian Constitution.[4]

Noel Pearson has also called for a national 'promise', in the form of a constitutional guarantee that the discrimination of the past will not be repeated.[5]

Recognition can also happen outside the Constitution. In Australia, the Mabo decision was a form of recognition in common law, and the official Apology to Aboriginal and Torres Strait Islander peoples was a form of political recognition.

In the Mabo decision, the High Court ruled in 1992 that the lands of this continent were not *terra nullius* or 'land belonging to no-one' when European settlement occurred, and that the Meriam people, the traditional owners, were 'entitled as against the whole world to possession, occupation, use and enjoyment of (most of) the lands of the Murray Islands'. This recognition was then incorporated into legislation in the *Native Title Act 1993* (Cth).

3 See Galarrwuy Yunupingu, Vincent Lingiari Memorial Lecture, Darwin, 20 August 1998. 'Balanda' means European/Western
4 Patrick Dodson, 'Until the Chains are Broken', Vincent Lingiari Memorial Lecture, Darwin, 8 September 1999.
5 Noel Pearson, 'Next step for the nation is to leave race behind', *The Australian*, 25 May 2013.

The formal Apology by then Prime Minister Kevin Rudd in 2008 recognised the damage that had been done to Indigenous peoples, and particularly members of the Stolen Generations, by past government policies of forced child removal and Indigenous assimilation.

In deciding what constitutes a fair form of recognition, Aboriginal and Torres Strait Islander views are important. There would be no point proceeding with a form of recognition that Aboriginal and Torres Strait Islander peoples do not support. This is why the Referendum Council is consulting Aboriginal and Torres Strait Islander peoples on what is meaningful recognition to them.

Recent steps on the path to a referendum

Over the decades, there has been a lot of discussion and many proposals for recognition, from both Indigenous people and non-Indigenous Australians. Many of the earlier suggestions have themes that we see again in the options presented in this paper:

- giving Indigenous people a **voice in federal Parliament** and **a role in making decisions** about matters that affect them directly
- a guarantee against **discrimination** by the Parliament
- **acknowledgement** of status as First Peoples.

The most detailed recent discussion on constitutional recognition was by the Expert Panel, set up by former Prime Minister Julia Gillard. Its report, presented in January 2012, contained a number of recommendations that combined symbolic and practical change, including a racial non-discrimination clause.

There was no formal government response to the recommendations in the report, although the federal Parliament did pass an Act in 2013 that recognised the unique and special place of Aboriginal and Torres Strait Islander peoples in the nation. In 2014, a review panel convened under this Act recommended that the Government proceed towards a referendum, provided certain preconditions were met.

The Parliamentary Joint Select Committee set up in 2013 to consider options for reform also recommended that a referendum be held on constitutional recognition and set out a range of options for change largely in line with the Expert Panel's recommendations.

Throughout the discussion Aboriginal and Torres Strait Islander communities have made it clear that they seek substantive and practical recognition. On 6 July 2015, then Prime Minister Tony Abbott and Opposition Leader Bill Shorten hosted a meeting in Sydney with 40 Indigenous leaders to discuss constitutional recognition.

After the meeting, the leaders submitted a statement to the Prime Minister and the Opposition Leader saying that a 'minimalist' approach—one that provided symbolic recognition in a constitutional preamble, removed section 25 and moderated the race power (section 51 (xxvi))—would not be acceptable to Aboriginal and Torres Strait Islander peoples. They sought substantive changes to the Constitution that would lay the foundation for fair treatment of Aboriginal and Torres Strait Islander peoples into the future.

It was later agreed that further meetings and consultations—designed and led by Indigenous leaders—would be held to settle on a proposal containing options for recognition that were meaningful to Indigenous people. The Referendum Council was set up to lead further national consultations and promote community engagement.

Constitutional recognition and treaty issues

Many people ask where treaties and sovereignty fit in with the discussion of constitutional recognition. Talking about the Constitution draws our attention to basic questions about power in society. For many Aboriginal and Torres Strait Islander people, that brings up topics like treaty-making and sovereignty because it connects with the process of colonisation.

When people talk about a treaty, they generally mean an agreement between Indigenous people and government that has legal effect. The emphasis is on resolving difficult problems by negotiation rather than fighting things out in court or governments imposing top–down legislation. Treaties were common in the past in the United States. In New Zealand, the Treaty of Waitangi was signed long ago but still plays a central role in law and government administration today. In Canada, a modern treaty-making process is going on right now. In each of these countries, treaties form the basis for relationships between governments and First Peoples, even though each side might disagree over the definition of sovereignty. As long ago as 1983, an Australian Senate committee put forward a proposal for an agreement-making provision in the Australian Constitution.

Both the Expert Panel and the Parliamentary Joint Select Committee acknowledged strong community interest in a treaty or an agreement-making process with constitutional backing. But both bodies put it on a longer timeline, saying it needed more discussion.

In the meantime, Aboriginal and Torres Strait Islander groups are already making significant and legally binding agreements with governments and other parties. For example, native title legislation supports wide-ranging negotiations and hundreds of agreements have been registered. The historic Noongar Agreement in Western Australia has been described by many as being akin to a modern treaty. In Victoria, the State government has entered into treaty discussions with Aboriginal people and the new Northern Territory government plans to do so as well. The Expert Panel suggested that the Commonwealth could start negotiations for a treaty or similar agreement using its existing powers, and that a constitutional amendment down the track could help to give any agreement greater legal force.

All this suggests that constitutional recognition and treaty discussions are complementary processes and one is not a legal impediment to the other. Existing and enhanced agreement-making may be considered an important form of recognition.

What are some key proposals for reform?

We are interested in what you think about proposals for constitutional reform in the near future. As well as delivering reports, both the Expert Panel and the Joint Select Committee conducted extensive public consultations, and debate has continued since. Here are some of the key proposals to emerge from that process:

- drafting a **statement** acknowledging Aboriginal and Torres Strait Islander peoples as the First Australians, and inserting it either in the Constitution or outside the Constitution, either as a preamble in a new head of power or in a statutory Declaration of Recognition
- **amending or deleting the 'race power', section 51 (xxvi)** and replacing it with a new head of power (which might contain a statement of acknowledgement as a preamble to that power) to enable the continuation of necessary laws with respect to Indigenous issues
- **inserting a constitutional prohibition against racial discrimination** into the Constitution
- providing for an **Indigenous voice** to be heard by Parliament, and the right to be consulted on legislation and policy that affect Aboriginal and Torres Strait Islander people
- **deleting section 25**, which contemplates the possibility of a State government excluding some Australians from voting in State elections on the basis of their race.

Let's look more closely at each of these options, remembering that both the Expert Panel and the Joint Select Committee favoured a **package** of amendments rather than a single change to the Constitution.

Statement of acknowledgement

A statement of acknowledgement is a statement of facts. It could acknowledge that the continent was occupied by Aboriginal and Torres Strait Islander peoples before the arrival of the British. It could acknowledge that there is a continuing relationship between Aboriginal and Torres Strait Islander peoples, their lands and waters, and their cultures, languages and heritage. Some suggest a broader statement that acknowledges Australia's ancient Indigenous heritage, its British institutional inheritance, and its multicultural achievement.

The Expert Panel recommended a statement of acknowledgement as an introduction (preamble) to a proposed new law-making power along the following lines:

> ***Recognising*** *that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;*
>
> ***Acknowledging th****e 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 ... [etc.]*

Another suggestion is that a statement of acknowledgement could be enshrined in a Declaration outside the Constitution, perhaps in legislation enacted by all parliaments—federal, State and Territory—at the same time to create a national defining moment of reconciliation. This would not require a referendum.

Power to make laws for Aboriginal and Torres Strait Islander peoples

Section 51 is the part of the Constitution that contains the powers to make national laws on various matters, such as taxation, foreign affairs and social security. To pass a law on anything, the federal government needs to identify a head of power.

The head of power that allows the federal Parliament to make laws regarding Aboriginal and Torres Strait Islander peoples on issues such as native title and heritage protection, is known as the 'race power'. Section 51 (xxvi) currently states:

> *Section 51. 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:*
>
> *... (xxvi) The people of any race for whom it is deemed necessary to make special laws*

One of the options for reform is to delete this head of power and insert a new head of power elsewhere in the Constitution that avoids the word 'race' and more accurately describe who the power is to be used for. It would be a power to make laws with respect to 'Aboriginal and Torres Strait Islander peoples'. Locating the power outside section 51 would make it easier to insert a *preambular* statement of acknowledgement. If the power were simply deleted, with no replacement, then we would go back to the situation before the 1967 referendum. Outside the Northern Territory, the States would be left in charge of Aboriginal and Torres Strait Islander affairs and the Commonwealth would lack power to make national laws dealing with native title and so on.

Another approach, with a similar effect, would be to amend, rather than delete, the current power in section 51 (xxvi) so that it authorises laws with respect to 'Aboriginal and Torres Strait Islander peoples' and the concept of 'race' is removed.

'Race' is a concept that belongs to the 19th century rather than the 21st. But removing the word 'race' and replacing it with the words 'Aboriginal and Torres Strait Islander peoples' in a new or amended power does not solve the problem of Parliament having the power to pass racially discriminatory laws. This is why a guarantee against racial discrimination by the federal Parliament is another option (see next section).

A new or amended power could also list some of the things that communities would like to see created in the future, for example, an Indigenous voice in the Parliament (see below) or an agreement-making process.

A constitutional prohibition against racial discrimination

The proposal to insert a guarantee in the Constitution to stop the federal Parliament from discriminating against a people of any race or cultural background has been made many times since 1901. A racial non-discrimination clause was discussed in the lead up to the 1967 referendum but the government did not include it in the proposal put to the vote. Advocacy for a prohibition against racial discrimination grew among Indigenous people following a High Court decision in 1998 that the race power can likely be used to support racially discriminatory laws that single them out for adverse treatment.

Australia's commitment to the principle of racial non-discrimination is accepted in legislation and policy in all the States and Territories. There has also been a national law since 1975, the Racial Discrimination Act. Only the federal Parliament is not bound. A constitutional guarantee against racial discrimination would change this: it would bind the federal Parliament.

A non-discrimination clause could be inserted as a new section of the Constitution. Or it could be included as a limit inside the wording of a new or amended Commonwealth power to make laws for Aboriginal and Torres Strait Islander peoples. Either way it would need to allow for laws that are specific to Aboriginal and Torres Strait Islander peoples but which don't discriminate against them.

An Indigenous voice to Parliament

Aboriginal and Torres Strait Islander peoples are the First Peoples, but they are less than 3% of the Australian population. In Australia's representative democracy, which works by majority vote at the ballot box and in Parliament, it is difficult for their voice to be heard and for them to influence laws that are made about them. Indigenous people have long advocated for better political representation and fairer consultation.

Australia has acceded to the United Nations Declaration on the Rights of Indigenous Peoples, which emphasises the importance of genuine Indigenous participation and consultation in political decisions made about their rights—but no formal processes for this to occur have yet been implemented.

If section 51 (xxvi) were to be replaced or amended, Aboriginal people and Torres Strait Islanders would need some assurance that any new or amended power could only be used for their advancement or benefit. This is the reasoning behind the suggestion of providing for an Indigenous voice in Parliament.

It is critical that Aboriginal and Torres Strait Islander peoples are engaged in the development and implementation of laws, policies and programs that affect them and their rights. This is important in achieving better policies and outcomes for Indigenous peoples, and a fairer relationship with government. It may also help prevent discriminatory laws and policies being enacted.

The Constitution could be amended by establishing an Indigenous body—as many other countries have—to advise Parliament on laws and policies with respect to Indigenous affairs. Such an amendment could ensure that the views of First Peoples are heard by lawmakers and could help Parliament to enact better and more effective laws.

Deleting section 25

Section 25 contemplates that the States might pass a law banning people from voting at a State election, on the basis of their race.

Under this section, if a racial group were denied the right to vote in State elections, the people of that race would not be counted in working out the number of seats which that State has in the Commonwealth House of Representatives. By reducing federal representation, in theory it acts as a penalty against race-based voting laws at the State level. But people and politicians on all sides have long said that section 25 should be deleted.

The problem is not State voting laws—the Racial Discrimination Act would take care of them. In that sense, section 25 is a dead letter. The problem is that, with section 25, our Constitution still contemplates that a government would ban an Australian from voting on the basis of their race.

Now have your say

Australians now face a historic opportunity to engage in a national discussion about improving the relationship between Indigenous peoples and Australian governments. We have an opportunity to amend the Constitution to ensure Indigenous peoples are treated more fairly than in the past, and to recognise the important place of Aboriginal and Torres Strait Islander peoples within our national life.

This is our chance to make real the advocacy of so many Indigenous activists over the decades, and to come together as Australians to make our great country even greater.

Join in the conversation. Have your say. Let's all work together to come up with the right solutions and make recognition a reality.

Here are some questions to help you frame your response to this Discussion Paper.

What do you think?

General

1. Do you support constitutional or other legal change to deal with the question of recognition?
2. If you do, what form do you think change should take?

What about the specific proposals for reform?

Statement of acknowledgement

3. Should we have a statement of acknowledgement in Australian law?
4. To effect an inspiring statement of recognition, should it be within the Constitution or outside it?
5. If it is to be within the Constitution, is the statement best placed as an introduction to a *head of power* to make laws with respect to the people it acknowledges?
6. What should be included in a statement of acknowledgement?

A federal power to make laws for Aboriginal and Torres Strait Islander peoples

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

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

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

A constitutional prohibition against racial discrimination

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

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

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

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

An Indigenous voice

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

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

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

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

Deleting section 25

18. What would be achieved by deleting section 25?

19. Is there any point in retaining it?

In conclusion

20. Do you have any other comments?

To make a submission, visit: www.referendumcouncil.org.au.