



THE UNIVERSITY OF
NEW SOUTH WALES



FACULTY OF LAW

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Committee Secretary
Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait
Islander Peoples
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Secretary

Inquiry into the Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples

Thank you for the opportunity to make a submission to the Committee's inquiry into the constitutional recognition of Aboriginal and Torres Strait Islander peoples. I am making this submission in my capacity as Director of the Referendums Project at the Gilbert + Tobin Centre of Public Law and as a member of the University of New South Wales Law School. I am solely responsible for its contents.

In summary, this submission recommends that:

- a people's convention be held in 2015 to debate constitutional recognition and how it might be achieved;
- delegates to the convention be randomly selected from the general population; and
- the convention be 2-3 days in duration and be held a week prior to a special day of parliamentary sittings devoted to constitutional recognition.

The importance of popular ownership and public education

Popular ownership and public education are recognised as central to achieving a successful referendum.¹ On this front, there are some worrying signs. As of August 2014, public awareness of the referendum was only 34 per cent, down from 42 per cent a year earlier.² Of those aware of the referendum, very few (17 per cent) felt that they had a good understanding of the issues.³ Also, for some time now the main conversations about constitutional recognition have been taking place among politicians and experts. Since the release of the Expert Panel report in January 2012, there have been few structured opportunities for citizen input into debates about the desirability of recognition, and how it might be achieved.

In September 2014 the Aboriginal and Torres Strait Islander Recognition Act Review Panel concluded that there was ‘clear evidence of drift’ on the issue of constitutional recognition, that the Australian public was not ready for a referendum, and that a “circuit-breaker” is needed to cut through the debates on the model and settle a final proposition’.⁴

Why a people’s convention on constitutional recognition?

A people’s convention has the potential to be this circuit-breaker. It would help to refocus the debate and breathe new life into it, while promoting public ownership and public education.

By ‘people’s convention’ I mean a constitutional convention that brings together a diverse group of Australians to debate whether constitutional recognition is worth pursuing and how it might be achieved. It would place ordinary citizens at the centre of the national conversation about recognising Australia’s first peoples, rather than being mere observers to debates among politicians and experts.

While a convention would be a spectacle, it would also provide substance. It would create a space for careful and informed discussion about the merits, weaknesses and complexities of the various options for reform. It would also produce a concrete outcome in the form of recommendations to government about which reform proposals (if any) should proceed to a referendum.

¹ George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010) 246-54.

² Aboriginal and Torres Strait Islander Recognition Act Review Panel, *Final Report* (September 2014) 15.

³ Ibid.

⁴ Ibid 25, 21.

Importantly, a people's convention would be a major national event. Conventions held elsewhere in the world have been broadcast on television and covered widely in all forms of media. Exposure of this kind would bring unprecedented attention to the constitutional recognition issue, and substantially promote public awareness and understanding.

In the next section I outline some international and local examples of constitutional conventions and other assemblies that have considered constitutional reform. I then make suggestions for how to go about designing a people's convention on constitutional recognition.

Constitutional conventions & deliberative assemblies: International and local examples

Across the globe there is a growing trend towards the use of conventions and deliberative assemblies in constitutional reform processes. Some recent examples include:

- **Irish Constitutional Convention (2012-2014):** established by the Irish government in December 2012 to consider reform in eight areas, including marriage equality, the electoral system, and the length of the president's term of office. The Convention's 99 delegates were a mix of citizens selected at random (66) and politicians (33). The Convention completed its work in March 2014, and made 38 recommendations for constitutional change.⁵ The Irish government has committed to holding referendums on some of these.
- **Iceland – National Forums and Constitutional Assembly (2009-2012):** in the wake of the upheaval caused by the 2008 financial crisis, Iceland held two National Forums (in 2009 and 2010) to identify values and priorities for government renewal and constitutional reform. These forums comprised large numbers of citizens (1500 and 950, respectively) selected at random. After the second forum, a Constitutional Council was established to draft a new constitution and present it to Parliament. The Council comprised 25 delegates, all of whom were directly elected by Icelandic

⁵ For more detail see the Convention website: <<https://www.constitution.ie>>, and discussion in Iseult Honohan, 'What can the UK learn from the Irish Constitutional Convention?', *openDemocracy*, 8 October 2014 <<https://www.opendemocracy.net/ourkingdom/iseult-honohan/what-can-uk-learn-from-irish-constitutional-convention>>.

citizens. In October 2012, voters approved the Council's draft constitution at a non-binding referendum, but to date the Parliament has not enacted it.⁶

- **British Columbia Citizens' Assembly (2004):** established by the government of British Columbia to consider reforms to the province's electoral system. The Assembly's membership comprised 160 citizens selected at random. After several months of public meetings and deliberations that were broadcast on television, delegates recommended the adoption of a new electoral system based around a single transferable vote. The government put this recommendation to a referendum; it attracted 58 per cent of the vote, falling short of the super-majority required for its adoption. Citizens' assemblies on electoral reform have also been held in Ontario (2006) and the Netherlands (2006).⁷

In addition, there is currently widespread support in the United Kingdom to hold a convention on devolution and the constitutional future of Scotland.⁸

In Australia, conventions and deliberative assemblies have been used to inform debate on political and constitutional reform on several occasions. Examples include:

- **Australian Citizens' Parliament (2009):** organised by the newDemocracy Foundation, this assembly comprised 150 citizens selected at random (one for each federal electorate) and was tasked with identifying ways in which Australia's political system could be strengthened.⁹ The assembly made several recommendations for reform and presented these to the Prime Minister's Parliamentary Secretary.
- **Deliberative poll (1999):** the 'Australia Deliberates' Deliberative Poll on the republic was organised by Issues Deliberation Australia and held over the weekend of 22–24 October 1999, two weeks before the republic referendum. It was attended by a representative sample of 347 Australians, who were asked to learn about and deliberate upon issues relevant to the proposed republic reforms. Over the course of

⁶ For a detailed discussion of the Icelandic reform process see Helene Landemore, 'Inclusive Constitution-Making: The Icelandic Experiment' (2014) *The Journal of Political Philosophy* (first published online 25 February).

⁷ Patrick Fournier et al, *When Citizens Decide: Lessons from Citizens Assemblies on Electoral Reform* (Oxford University Press, 2011).

⁸ See, eg, Alan Renwick, *After the Referendum: Options for a Constitutional Convention* (The Constitution Society, 2014).

⁹ See John Dryzek, 'The Australian Citizens' Parliament: A World First' in *Papers on Parliament No 51* (Department of the Senate, Parliament of Australia, 2009).

the weekend, participants discussed various questions in small groups and had the chance to question panels of experts in plenary sessions. The participants were surveyed both before and after the weekend to assess changes in knowledge and opinions.

- **Local constitutional conventions (1997-98):** a series of 58 small-scale deliberative forums, held at a local level to discuss issues such as the republic, preamble reform, the federal system and human rights. The forums were open to the general public and overall attracted more than 3,000 participants. Each convention involved a combination of expert speeches, facilitated small group discussion and plenary debate. Participants developed a communiqué summarising those positions that received broad support. The conventions were organised by the Constitutional Centenary Foundation in conjunction with the Australian Local Government Association and participating local councils.¹⁰
- **Constitutional Convention (1998):** organised by the Australian government, this body comprised 152 delegates (half-elected, half-appointed) and met over two weeks in February 1998 to debate the republic issue. The Convention's main recommendation for a minimalist model of republic, involving the appointment of the President by two-thirds of federal Parliament, was later put to voters at the 1999 referendum.

A people's convention on constitutional recognition: Issues to consider

As the above discussion demonstrates, conventions and assemblies come in all shapes and sizes – 'one size does not fit all'. Choosing the best design for a people's convention on constitutional recognition will involve weighing up a range of contextual factors. Getting the design right is critical if the convention is to be effective, and accepted by the public and politicians as credible and legitimate.

¹⁰ See Constitutional Centenary Foundation, *Report on a Decade of Experience* (2000); Paul Kildea, 'A Little More Conversation?: Assessing the Capacity of Citizens to Deliberate About Constitutional Reform in Australia' (2013) 22(2) *Griffith Law Review* 291.

The following issues would need to be considered in the design of a people's convention on constitutional recognition:

1. Purpose
2. Timing and duration
3. Size
4. Selection of participants
5. Wider public involvement
6. Roles of politicians, experts and interest groups
7. Agenda
8. Procedures
9. Outcomes

1. Purpose

The convention must have a clear purpose (or purposes) if it is to be successful. Two key objectives come to mind: informing the federal government's decision about which reform proposals should proceed to a referendum; and improving public awareness and understanding of the issues.

2. Timing and duration

The timing of the people's convention will affect what impact it can have on public debate. For maximum impact it should be held in 2015. If held any later than this, the federal government would have very little time to take the convention's recommendations into account in drafting the referendum questions. Another consideration is that a 2016 convention would compete with the federal election.

The profile and impact of the convention would be enhanced if it were held a short time (eg, one week) before a special day of parliamentary sittings devoted to debate about constitutional recognition.¹¹ This would give parliament an opportunity to discuss the convention's recommendations while they are still fresh in the public mind. This sequence of events – people's convention, followed shortly thereafter by special parliamentary sittings – would also create a period of intense public focus on constitutional recognition that would foster popular awareness and understanding.

¹¹ Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Progress Report* (October 2014) Recommendation 1.

As to duration, a convention of 2-3 days, held over a weekend, would be appropriate. This would allow sufficient time for participants to engage in meaningful discussion and debate about a range of issues. The Deliberative Poll on the republic and the Australian Citizens' Parliament (described above) were of a similar duration.

3. Size

The optimal size for a constitutional convention is between 75 and 150 participants – large enough to ensure that a diversity of views is represented, but not so large that participants begin to 'tune out' because they feel that their contributions are inconsequential.

4. Selection of participants

The method of selecting participants will have a big impact on the nature of the convention and how the community views it. There are three main selection methods:

- *Random selection:* this involves identifying people at random from the electoral roll and inviting them to attend the forum. Random selection has a long heritage – it was used to select political leaders in Athenian democracy. It would generate a broad cross-section of citizens with diverse perspectives. Adjustments could (and should) be made to ensure sufficient representation of Aboriginal and Torres Strait Islander peoples, and diversity across gender, age and geography. Random selection has been used to select delegates to several conventions and assemblies, including the Irish Constitutional Convention and the 1999 Deliberative Poll on the republic. For the Australian Citizens' Parliament, one participant was randomly selected from each of the 150 federal House of Representatives electorates, ensuring a rough geographic spread.
- *Direct election:* this involves asking Australians to vote on who should participate in the convention. There is an obvious democratic appeal to this approach: as in ordinary elections, voters could choose candidates whom they felt represented their views and interests. This method was used to select one-half of the delegates to the 1998 Constitutional Convention (a voluntary postal ballot was held a few months before the event); the remainder were appointed by the Howard government.
- *Appointment:* this involves the government nominating individuals to participate in the convention. Appointment could be used as a supplementary method to random

selection or direct election. It would enable the government to include individuals with particular expertise, and representatives of certain groups or interests, should their presence be considered beneficial to the convention. At the Irish Constitutional Convention, for example, 33 politicians were appointed to participate alongside 66 randomly selected citizens. At the 1998 Constitutional Convention, the Howard government appointed federal and State politicians and young people (among others) to sit alongside elected delegates.

Of the three methods, I favour random selection on this particular constitutional issue. It is more likely to foster popular ownership and public education than the other two methods. Random selection would produce a true ‘people’s convention’ in the sense that delegates would be ordinary citizens rather than politicians or well-known public figures. The spectacle of ordinary citizens debating an issue of national importance would inspire broad public interest in constitutional recognition.

Direct election would not produce the same result. As a selection method it narrows the pool of potential participants: elections favour individuals who already have a public profile, and attract only the most confident of individuals. The risk is that the convention would be populated by another set of elites. Another consideration is that elections encourage candidates to adopt particular views and, once elected, they may feel less free to change their minds, even when presented with sound arguments to the contrary. In that sense, direct election could undermine the deliberative nature of a people’s convention.

A common concern about randomly selected conventions is that participants will not be sufficiently knowledgeable to make sensible recommendations. However, the experience of several such conventions shows that good design and preparation enable participants to engage in well-informed debate and make sound suggestions for reform. In line with the practice of previous assemblies, a people’s convention on constitutional recognition should give participants access to accurate and reliable information, permit them to question experts, and allow them to hear from advocacy groups with a variety of perspectives.

One consideration with random selection is that, even with appropriate adjustments, it may result in only a small number of Aboriginal and Torres Strait Islander peoples being represented at the convention. This would not be appropriate given the special relevance and significance of constitutional recognition to Indigenous Australians. One solution would be to

oversample Indigenous representation to ensure an adequate presence at the convention. A second solution would be to hold a separate convention comprising entirely of Aboriginal and Torres Strait Islander delegates.

5. Wider public involvement

To ensure genuine popular ownership, it is important to provide opportunities for the wider public to contribute to the work of the convention. Public access to the convention proceedings via television broadcast would be one element of this. In addition, members of the public should be given opportunities to have their own say on the issues under discussion. Possible avenues for this include written submissions and the making of comments on a designated Facebook page.

A more creative approach would involve running a series of mini-conventions around Australia at the same time as the main convention. These parallel conventions could be set up in a way that allowed them to communicate with each other.¹² These mini-conventions could be organised by local councils and be open to any and all interested people to attend. It would enable multiple sites of participation and debate across the country and create a strong sense of public ownership over the issue of constitutional recognition.

6. Roles of politicians, experts and interest groups

Some conventions have a ‘hybrid’ membership – the Irish Constitutional Convention, for example, was mix of randomly selected citizens and appointed politicians. The benefit of this arrangement is political ‘buy-in’: the politicians who are involved feel like they have a say, and they can report back to their colleagues on their experience of the convention proceedings.

This arrangement would be suitable if a people’s convention on constitutional recognition were a stand-alone event. However, if it is to be held prior to a special day of parliamentary sittings, it is preferable for the convention to consist entirely of randomly selected citizens. Were politicians to participate in both the convention and the parliamentary sittings, they would effectively get to influence the outcomes of both processes – both in terms of votes cast, and arguments made to persuade others. Also, the outcomes of the convention could be

¹² The use of technology to enable interaction between large numbers of participants was pioneered in the United States: Graham Smith, *Democratic Innovations: Designing Institutions for Citizen Participation* (CUP, 2009), ch 5.

criticised for not truly reflecting the voice of ‘the people’. Nevertheless, it would be valuable to grant politicians observer status so that they could watch proceedings and get a first-hand appreciation of the convention’s operation.

Similarly, neither experts nor interest group representatives should sit as convention delegates (unless they happen to be chosen through the process of random selection). However, some experts and interest groups should be invited to address the convention. Their input would help ensure that delegates were exposed to reliable and accurate information and a diversity of perspectives.

7. Agenda

Setting an appropriate agenda would be an important consideration when designing a people’s convention. If the agenda were too narrow, participants and the wider public could feel that important issues had been left unaddressed or, worse, suspect that the government had deliberately suppressed discussion of some matters. An overly broad agenda, on the other hand, could prevent delegates from discussing issues in sufficient detail.

A natural starting point for a people’s convention would be discussion about the desirability of constitutional recognition. From there, the recommendations of the Expert Panel, coupled with those of the Joint Select Committee, should form the basis of the agenda. They could be covered reasonably well over a period of 2-3 days.

Within that timeframe, a half-day should be set aside for discussion of issues of the delegates’ choosing. This would give delegates a sense of ownership over the convention agenda.

8. Procedures

Adopting sound procedures is essential if a people’s convention is to be successful. In particular, it is important to develop procedures that aid deliberation. Information booklets should be prepared and distributed to delegates in advance of the convention. At the convention itself there should be a mixture of information sessions, small group discussions and plenary sessions. Skilled and impartial facilitators should oversee small group discussions to help ensure that everyone has an equal opportunity to have their say.

There should also be a clear understanding of how the preferences of the convention will be registered and recorded – for example, by majority vote, and in a communiqué.

9. Outcomes

The ultimate effectiveness of a people's convention will depend on the extent to which its recommendations feed into subsequent debate and decision-making on constitutional recognition.

Convention recommendations should be advisory. In other words, they should not bind the federal government but should instead assist it in making decisions about which reform proposals should proceed to a referendum. What must be avoided is a situation where the convention recommendations are issued but then ignored altogether – this would deepen public cynicism and undermine any sense of popular ownership that the convention had achieved.

The federal government should be clear, in advance, about how convention recommendations will feed back into debate and decision-making. For instance, the government might formally table the recommendations at the commencement of the special day of sittings, thus setting the scene for parliament to discuss them. In addition, the Prime Minister could commit to giving a formal response to the convention recommendations within a reasonable period of time.

Yours sincerely,

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