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Inquiry into Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) is pleased to provide the following submission to the Inquiry into Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012. AIATSIS supports the proposal for an act of recognition by the Australian Parliament as part of a campaign towards an eventual constitutional amendment. AIATSIS has concerns, however, about the process and terms of the review proposed in the Bill; the Bill's sunset clause; and the language proposed for the Bill's statements of recognition.

AIATSIS is a Commonwealth statutory authority within the Department of Innovation, Industry, Science and Research, and is the world's premier institution for information and research about the cultures and lifestyles of Aboriginal and Torres Strait Islander peoples, past and present. The Institute undertakes and encourages scholarly, ethical, community-based research and has its own publishing house. Its activities affirm and raise awareness among all Australians, and people of other nations, of the richness and diversity of Australian Indigenous cultures and histories. The Institute's governing Council has a statutory majority of members who are Aboriginal or Torres Strait Islander persons.

AIATSIS has developed a reputation for rigorous, independent research across the breadth of Indigenous studies and affairs. Further, as an integral part of its work, AIATSIS is continually engaged in partnerships with Aboriginal and Torres Strait Islander organisations and communities, in urban, regional and remote areas throughout Australia. This range of experience has informed the views expressed in the submission.

AIATSIS supports the recommendations of the Expert Panel on the Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples in relation to:

i) The removal of ss 25 and 51(xxvi) of the Commonwealth Constitution;

ii) The inclusion in the Commonwealth Constitution of a prohibition on racial discrimination; and

iii) The inclusion of a statement of recognition in the Commonwealth Constitution (although AIATSIS does not necessarily support the precise wording proposed by the Expert Panel – see below [15]-[20]).

AIATSIS' 2011 submission to the Expert Panel contained recommendations that were broadly consistent with those in the Expert Panel's final report (see Appendix 1, attached).

In its submission to the Expert Panel, AIATSIS recommended that 'a referendum should not be scheduled without allowing sufficient time for a sustained and widespread education program and advocacy campaign'. AIATSIS recognises that in the period leading up to an eventual referendum, an act of Parliament containing a statement of recognition may positively contribute to the momentum of such a campaign. Although the Expert Panel rightly noted the risk that a Parliamentary act of recognition might 'be used as a substitute for, or distract from, a referendum',[1] it is also true that with sufficient political leadership such an act can demonstrate the commitment of Australia's major political parties to constitutional reform.

Accordingly, AIATSIS regards s 3 of the *Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012* as a step in the right direction. There are, however, a number of concerns about the Bill that should be addressed.

Review process

1. The most significant question raised by the Bill in its current form is: what purpose is the review in s 4 intended to serve, and is the proposed process well suited to that purpose?

2. In its current form, s 4 largely duplicates the work of the Expert Panel,[2] which has already performed the substantive tasks mentioned by s 4(2)(a)-(d). The Expert Panel's recommendations reflect findings made after extensive consultation, research and deliberation.

3. The Expert Panel's report emphasises the need to build public awareness and support of the proposed changes. Yet s 4 of the Bill only provides for the *measurement* of popular support, not for its *creation*. There is little point in attempting to engage in this measurement process so soon after the Expert Panel has delivered its report, before substantial work has been done in building public support and awareness.

4. AIATSIS recommends that the support-building necessary for a successful referendum would be better achieved by a process similar to that established in the *Council for Aboriginal Reconciliation Act 1991* (Cth). Such

[1] Expert Panel on Constitutional Recognition of Indigenous Australians, 2012, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*: *Report of the Expert Panel*, p224.
[2] Australian Government, 2010, *Expert Panel Terms of Reference*, available online at http://www.youmeunity.org.au/downloads/1573e091bcdf7e2627c8.pdf .

a process would include periodically measuring the impact of the 'Yes' campaign, once the campaign has had an opportunity to gain momentum.

Review terms

5. The terms of the review carry the risk of selecting a less-than-ideal referendum proposal without good reason. Any review should be tasked with finding the best proposal that can succeed, rather than the most popular.

6. The review is directed by s 4(2)(c) to 'identify which of those proposals would be most likely to obtain the support of the Australian people'. If this is intended to select the single most popular proposal to put to referendum, such an approach is misguided. There may be a number of proposals that are capable of attracting sufficient support to pass at referendum; in such a case the relevant task is to identify which proposal is best suited to achieve the objectives of constitutional recognition, not which proposal is the most popular.

7. The logical approach would be to gauge the likely level of popular support for those proposals recommended by the Expert Panel to determine whether support is sufficient to pass at a referendum. If not, then other proposals should be assessed.

8. **Above all, an optimum proposal should not be rejected on the grounds that a different proposal enjoys greater public support, provided that the optimum proposal is capable of gathering sufficient support to satisfy the requirements of s 128 of the Commonwealth Constitution**.

Sunset clause

9. Care must be taken to ensure that s 5 of the Bill does not have the effect of withdrawing Parliament's recognition of Aboriginal and Torres Strait Islander peoples after the 2 year period has expired.

10. The note to s 5 indicates that the sunset clause is intended to provide a date by which 'the readiness of Australians' to amend the Constitution should be considered. Such a mechanism, however, is neither necessary nor sufficient to achieve that objective.

11. The sunset clause is unnecessary because neither of the substantive provisions of the Bill (ss 3 and 4) will have any ongoing operation that would be inconsistent with further progress on a referendum. Section 4 simply sets a timeline for the review, specifies its mandatory terms, and obliges the Minister to table the resulting report. Once those actions are complete, the section's operation is complete, and a sunset clause applicable to it would be redundant. Section 3 constitutes an act of recognition by the Parliament of Australia, an act that would have a different status and would serve a different purpose to any subsequent constitutional amendment. Such recognition is valuable in itself, and should not be simply withdrawn at the end of two years. There is no inconsistency between the holding of a referendum on one hand and Parliament's continued recognition on the other.

12. The sunset clause is insufficient to prompt further action towards a referendum because once the sunset clause took effect, the situation would simply revert to its current state prior to the passage of the Bill. There would be no continuing obligation on any party to do anything. And while the withdrawal of s 3's recognition would certainly be damaging to the relations between Australia's first peoples and the Commonwealth, the threat of such damage is unlikely to spur people into action by itself.

13. Timing is also an issue: even if the intention of s 5 is to use the threat of withdrawing Parliament's recognition as the catalyst for further action towards a referendum, such a referendum would not occur for years *after* the withdrawal of Parliament's recognition. This means that there would be an interval of time where progress on Indigenous recognition would go backwards: Parliament's recognition would be withdrawn but with no constitutional amendment to take its place. So action on a referendum, even if it did come, would come too late to avert the damage done by withdrawing Parliament's recognition.

14. **AIATSIS recommends that s 5 be removed from the Bill. If the government is seeking to create a 'commitment mechanism' to prevent the issue from sliding off the agenda in years to come, a better option would be to set a date for the referendum – in 2019, for example – with the option of extending the date if necessary**.

Language of recognition

15. Stronger language in s 3 would more effectively progress the national conversation on constitutional recognition, and would be valuable in its own right.

16. The wording of s 3 is apparently modelled on the recommendations of the Expert Panel, except that s 3 omits the acknowledgement of the 'need to secure the advancement of Aboriginal and Torres Strait Islander peoples'.

17. The Expert Panel's recommendations related to language to be included in a referendum for constitutional amendment. This introduces two limitations that are not relevant to an act of Parliament:

    (i) The wording must be appropriate to unique functions of the Commonwealth Constitution; and

    (ii) The wording must be capable of attracting the support of a majority of voters in a majority of States and across the nation as a whole.

18. An act of Parliament can tread more boldly, because it is not subject to these limitations. The wording is a matter for the government, and the Parliament more broadly.

19. The Bill should recognise that Aboriginal and Torres Strait Islander peoples possess distinct collective identities whose origins predate the Crown's assertion of sovereignty. In doing so, the Bill should emphasise that Australia has a hybrid political and legal history, reflecting Indigenous and non-Indigenous traditions. So much is already acknowledged in the native

title decisions of Australian courts and in the *Native Title Act 1993* (Cth), but there is value in the Parliament making such recognition voluntarily rather than in response to litigation.

20. Consistently with Australia's endorsement of the United Nations Declaration on the Rights of Indigenous Peoples, the Bill should recognise that Aboriginal and Torres Strait Islander peoples are Indigenous peoples having the right to self-determination, and that by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Conclusion

21. The Commonwealth Constitution emerged from a process of negotiation between the various Australian colonies, but negotiations with Aboriginal and Torres Strait Islander peoples were not considered necessary at the time. Constitutional recognition of Australia's first peoples is one critical part of reconfiguring the relationship between Australia's dominant political and legal system and the Indigenous polities which preceded it and which continue to exist today.

22. Recognising the unique place of Aboriginal and Torres Strait Islander peoples in Australia's political and legal system is necessary to combat the current Constitution's damaging effects on the 'self-esteem [and] sense of self-worth' of Aboriginal and Torres Strait Islander people, especially young people.[3]

23. AIATSIS commends the government's proposal to further this process through an act of Parliament, and strongly encourages the Committee to consider the concerns and recommendations put in this submission. Strong national leadership and a sustained public campaign are critical to building the necessary public awareness and support for a constitutional referendum to succeed.

24. If you would like further information concerning this submission, please contact Nick Duff (Senior Project Manager, Native Title Research Unit, AIATSIS)

Yours sincerely,

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Other contributors to this submission

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[3] Gooda, M 2010, 'Indigenous inclusion is good for our constitution', *Sydney Morning Herald*, 9 July, available at http://www.smh.com.au/opinion/society-andculture/indigenous-inclusion-is-good-for-our-constitution-20100708-10275.html.

Appendix 1

AIATSIS Submission to Expert Panel on Constitutional Recognition of Indigenous Australians (2011)

AIATSIS

AUSTRALIAN INSTITUTE OF
ABORIGINAL AND TORRES STRAIT
ISLANDER STUDIES

Submission to the Expert Panel on the Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples

4 October 2011

Introduction

The Commonwealth government's commitment to pursuing the recognition of Aboriginal and Torres Strait Islander peoples in the Commonwealth Constitution presents an exciting and overdue opportunity to close a sorry chapter of the history of this country.

Constitutional recognition can contribute to the establishment of a definition of Australian nationhood that is substantively inclusive, that acknowledges the prior and continuing existence of Indigenous political and legal entities in this country. It is an essential part of dealing with the unfinished business left over from Australia's history of colonisation and dispossession.

If the constitutional amendment process is conducted appropriately, and if sufficient electoral support can be built around proposed amendments, constitutional reform can constitute a substantial and positive step towards re-aligning the relationship between government and Aboriginal and Torres Strait Islander peoples. The effectiveness of government, and its legitimacy in the eyes of many Aboriginal and Torres Strait Islander peoples, would be enhanced by an appropriate recognition of the existence of distinct Indigenous political, cultural, and legal entities which predate European colonisation and which continue to exist today.

The law of Australia already recognises the distinct nature of Aboriginal and Torres Strait Islander peoples to some extent, particularly through native title. The common law, since *Mabo (No 2)*,[1] and Commonwealth legislation, through the *Native Title Act* 1993 (Cth), recognises the continuing legal effect of rights and interests in relation to land and waters, held under Indigenous law and custom. In painstaking detail, native title applicants demonstrate that their politico-legal systems have continued side by side with the dominant Anglo-Australian system of law, and that politico-legal status is given official recognition through native title determinations. Indigenous decision-making processes are given direct and binding legal effect through the authorisation procedures set out in the *Native Title Act* 1993. Constitutional recognition would go a step further than native title – which is limited to property law or land management – and engage with the full implications of the continued existence of distinct Indigenous political identities whose place in the broader Australian political system has never been negotiated or agreed, or even clearly articulated.

This is not a matter of 'mere' symbolism, to be contrasted with 'real', substantive change. The re-alignment of the relationship between government and Aboriginal and Torres Strait Islander peoples involves an integral combination of symbolic and substantive changes. The changes to substantive legal rights and institutional structures will have profound symbolic resonance,

[1] *Mabo v Queensland (No 2)* [1992] HCA 23.

and in turn the symbolic aspects of reform are likely to have demonstrable, concrete impacts on the well-being of Aboriginal and Torres Strait Islander communities and individuals. There is also the strong potential for a significant educative effect on society at large, in terms of establishing a fuller understanding of and respect for the place of Aboriginal and Torres Strait Islanders in the history and contemporary life of this country.

Structure of this submission

This submission will commence with a summary of AIATSIS' recommendations to the Panel, before giving detailed consideration to specific proposals for reform. A separate section will then consider the merits of particular combinations of proposed amendments. The submission will end with some comments on procedural issues.

Summary of recommendations

Proposed reforms

Please note that the recommendations for each individual proposal are subject to what is said below in the section headed 'Assessing different constitutional reform packages'.

Recommendation 1: AIATSIS supports the proposal for a statement of recognition, whether in a preamble or in the body of the Constitution, provided such a statement is not accompanied by any legal disclaimer. AIATSIS does not support the inclusion in the proposal of a statement of values.

Recommendation 2: AIATSIS recommends that the repeal of s 25 be put to referendum.

Recommendation 3: AIATSIS considers that, provided certain legal complexities can be resolved, the removal of s 51(xxvi) and its replacement with a power to make laws only for the benefit of Aboriginal and Torres Strait Islander peoples, would be a workable solution to a serious problem in the Constitution's current grant of powers.

Recommendation 4: AIATSIS recommends that the Panel propose a new section prohibiting racial discrimination in the exercise of the legislative, executive or judicial powers of the Commonwealth.

Recommendation 5: AIATSIS supports a proposed reform that would create a constitutional framework for the making, and incorporation into binding law, of agreements between the Commonwealth and Aboriginal and Torres Strait Islander peoples.

Assessing different constitutional reform packages

Recommendation 6.1: AIATSIS recommends that a package combining a statement of recognition, unaccompanied by any legal disclaimer, with other substantive changes to the body of the Constitution, could both meet some of the aspirations of Aboriginal and Torres Strait Islander peoples and secure sufficient support in the broader community.

Recommendation 6.2: If the Panel were to determine that the most extensive proposal capable of garnering sufficient support were a statement of recognition, with no more substantive reforms, AIATSIS considers that it would be preferable not to put any proposal to referendum. The expense and the potential damage to the longer-term project of securing more substantial recognition would justify postponing the matter altogether.

Recommendation 6.3: AIATSIS recommendd that a reform package grounded solely on grounds of non-discrimination should be clearly distinguished from the question of the recognition of Aboriginal and Torres Strait Islander peoples. If this distinction is not clearly made, the non-discrimination-only proposal would risk setting back the broader goal of recognising the distinct cultural, historical, legal and political status of Aboriginal and Torres Strait Islander peoples.

Process Issues

Recommendation 7: AIATSIS recommends that a referendum on the constitutional recognition of Aboriginal and Torres Strait Islander peoples should not be held in conjunction with a referendum question relating to the status of local governments, nor with a general election.

Recommendation 8: AIATSIS further recommends that a referendum should not be scheduled without allowing sufficient time for a sustained and widespread education program and advocacy campaign.

Proposed reforms

A. Statement of recognition, statement of values

Recommendation 1: **AIATSIS supports the proposal for a statement of recognition, whether in a preamble or in the body of the Constitution, provided such a statement is not accompanied by any legal disclaimer. AIATSIS does not support the inclusion in the proposal of a statement of values.**

Purpose

A statement of recognition in or preceding the Constitution is one critical part of reconfiguring the relationship between Australia's dominant politico-legal system and the Indigenous polities which preceded it and which continue to exist today. Such a statement could contribute to a broader process of placing the relationship between Australia's distinct politico-legal traditions on a more equal footing.

The State constitutions and the Commonwealth constitution were drafted on the assumption that new legitimate political structures could be created without any reference to the existing political, legal or cultural terrain in this country. Whether this was based on judgments about the place of Indigenous cultures on some 'scale of social organisation', or simply on the pragmatic realisation that the relative power positions between Indigenous and non-Indigenous people made such non-recognition possible, the outcome was that there has never been any negotiation, agreement or even clear articulation, whether in treaties or in constitutional instruments, of how the States and Commonwealth would sit in relation to Aboriginal and Torres Strait Islander political and cultural systems.

The detrimental effects of this non-recognition on the wellbeing of many Aboriginal and Torres Strait Islander people have been well established.[2] The Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda, has emphasised that the Constitution's failure to recognise Aboriginal and Torres Strait Islander peoples sends important, almost subliminal, messages. These, he says, 'cannot be good for our self-esteem, sense of self-worth and value', particularly for younger Aboriginal and Torres Strait Islander people.[3] That impact, as well as the inequality of the broader system as a whole, can have serious flow-on effects on physical and mental health and livelihoods.

[2] See eg Royal Commission into Aboriginal Deaths in Custody 1991, Final Report; Aboriginal and Torres Strait Islander Social Justice Commissioner 2000, *Social Report 2000*.
[3] Gooda, M 2010, 'Indigenous inclusion is good for our constitution', *Sydney Morning Herald*, 9 July, available at http://www.smh.com.au/opinion/society-and-culture/indigenous-inclusion-is-good-for-our-constitution-20100708-10275.html.

This means that the recurring debate between 'symbolic' and 'substantive' change is misplaced – there are important symbolic problems in the current constitutional order, which have important substantive effects. Reconfiguring the symbolic foundation for the Commonwealth as an inclusive political structure could, if accompanied by other steps forward, have real and wide-ranging benefits on the wellbeing of Aboriginal and Torres Strait Islander peoples.

Content

The language of 'recognition', in order to achieve the beneficial effects described above, should reflect the ways in which Aboriginal and Torres Strait Islander people experience their history of dispossession.

A statement of recognition should aim to articulate how the Indigenous political and cultural identities of Aboriginal and Torres Strait Islander peoples can be accommodated within the broader Australian political structure without denying their distinct status as first peoples.

It should set out a basis upon which Aboriginal and Torres Strait Islander peoples can accept a place within the broader Australian political system, in light of their historical experience of dispossession. Aboriginal and Torres Strait Islander people reading the statement should be able regard the Commonwealth both as representing them and their interests, and also respecting their continuing membership of distinct politico-cultural entities whose origins predated the Crown's assertion of sovereignty.

Accordingly, the statement should go further than honouring Aboriginal and Torres Strait Islander peoples for their unique cultures, their relationship with the land, and their contribution to national life. A statement of recognition should recognise the distinct status of Australia's first peoples and set out what that recognition means for us as a country today. It should highlight the country's joint identity.

- An appropriate formulation of the entities to be recognised would be "Australia's first peoples, the Aboriginal and Torres Strait Islander peoples".
- Words such as 'ownership' or 'custodianship' would be appropriate to describe the relationship between Aboriginal and Torres Strait Islander peoples and their lands and waters.

The statement should make it clear that recognition of Aboriginal and Torres Strait Islander peoples is something which is required by considerations of equality, rather than being in some way in tension with equality.

Statement of values?

There is a strong risk that the inclusion of a statement of values would unnecessarily complicate the proposed statement of recognition. There are two aspects to this risk:

- Firstly, the project of distilling a common set of values for the entire country is a large and extremely fraught undertaking. A multitude of societal groups and organisations would have specific and often conflicting views about what values should or should not be included, and it is possible that no single proposal would be capable of generating sufficient support. The contentious nature of a values statement would limit the prospect of a statement of recognition being passed at referendum.
- Secondly, the inclusion of a statement of values is a separate project to the recognition of Australia's first peoples. The important benefits, described above, that could be gained by recasting the symbolic foundation of the Commonwealth, may be diminished if the statement of recognition is combined with the quite separate issue of national values.

In light of that two-fold risk, AIATSIS recommends that any proposed statement of recognition *not* be accompanied by a statement of values.

Legal effect and disclaimer

It is important, in order to achieve the beneficial effects described above, that the statement of recognition is not weakened or qualified by a legal disclaimer.

Where statements of recognition have been included in State constitutions, and have been accompanied by clauses which negate any potential legal effect of such statements, many Aboriginal and Torres Strait Islander people have questioned the need for such caveats and criticised the symbolism of such an approach.

In Queensland, for example, Les Malezer – the spokesman for the Foundation for Aboriginal and Islander Research Action – described the legal disclaimer to the Queensland preamble as offensive:

> It's meant to be a symbolic gesture… after 150 years of colonisation finally acknowledging that Aboriginal and Torres Strait Islander peoples were here first. But it goes much further than that … it goes on to say 'and we have no rights as a result of that' and that's what's offensive about it.[4]

[4] Binnie, K 2010, 'Constitutional preamble opposed by Indigenous leaders and Opposition', *ABC News*, 24 February, available at http://www.abc.net.au/news/2010-02-23/constitutional-preamble-opposed-by-indigenous/341300.

In Mr Malezer's view, if a statement of recognition is accompanied by this kind of caveat, '[i]t's not about acknowledging our rights, it's actually about denying our rights and affirming that we have no rights and that's completely wrong'.[5]

Even if there are legal arguments that a preamble could conceivably affect the rights of Aboriginal and Torres Strait Islander peoples, or the interpretation of the Constitution or Commonwealth statutes,[6] the insertion of a disclaimer should not be seen merely as a matter of prudence or convenience. It would have considerable costs, both in terms of:

- diminishing, and potentially negating altogether, any positive symbolic impacts that the statement of recognition might otherwise have; and
- actually creating a negative symbolic impact, through the reinforcement of perceptions that governments are willing to make 'easy' or 'safe' gestures but are not prepared to go further and enact real change.

The potential for a statement of recognition to have substantive legal effects must not be overstated.[7] Likewise, the ability for the Commonwealth Parliament to deal, as it sees fit, with any unexpected implications should not be understated. Moreover, if any legal outcomes *were* to follow from a mere declaration of certain facts about the history of this country, it is arguable that it would not be appropriate to avoid those outcomes through the use of a disclaimer.

Preamble or in-body section

In light of the foregoing discussion, AIATSIS recommends that the decision about whether to insert a statement of recognition as a preamble or as a substantive section in the body of the Constitution, should be made so as to avoid the insertion of a legal disclaimer.

If either of the options raised such a great concern among the Panel and among the public about the potential legal impact that a legal disclaimer were thought necessary, then the other option ought to be preferred.

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[5] Binnie, K 2010, 'Constitutional preamble opposed by Indigenous leaders and Opposition', *ABC News*, 24 February, available at http://www.abc.net.au/news/2010-02-23/constitutional-preamble-opposed-by-indigenous/341300.

[6] Law Council of Australia 2011, *Constitutional Change: Recognition or Substantive Rights?*, Transcript of proceedings, at p.31. Available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=DFC9E8FF-EB34-AB69-8659-BAC87B391D40&siteName=lca.

[7] See *New South Wales v The Commonwealth* (1975) 135 CLR at 388; *Mabo v Queensland (No 2)* [1992] HCA 23, per Brennan J at [31]-[32], [83], per Deane and Gaudron JJ at [4]; *Coe v Commonwealth* [1993] HCA 42.

If neither a preambular statement nor a substantive section is to considered without an accompanying disclaimer, then AIATSIS recommends making no proposal at all.

B. Section 25 – 'Provision as to races disqualified from voting'

Recommendation 2: **AIATSIS recommends that the repeal of s 25 be put to referendum.**

Section 25 of the Constitution provides that the formula for determining the number of seats in the House of Representatives for each of the States, which is based on the relative population of each State, must not take into account the population of any racial group excluded from voting by State laws.

This provision is a vestigial left-over from the time when the Constitution was drafted. This was a time in which it was considered acceptable, in some States at least, to exclude people from democratic participation on account of their race. Thus the Constitution contemplates, and accommodates, racism within the federal structure it creates.

Such a provision clearly has no place within the Constitution of a nation which holds equality as a core value.

That is so even if no State currently disqualifies voters on racial grounds, and even if such disqualification is unlikely in the future.

C. Race power and 'beneficial-only' grant of power

Recommendation 3: **AIATSIS considers that, provided certain legal complexities can be resolved, the removal of s 51(xxvi) and its replacement with a power to make laws only for the benefit of Aboriginal and Torres Strait Islander peoples, would be a workable solution to a serious problem in the Constitution's current grant of powers.**

Although debate continues, there is substantial support for the proposition that the Parliament's power under s 51(xxvi) extends to the making of laws which are adverse to the rights and interests of Aboriginal and Torres Strait Islander peoples as well laws that are beneficial.[8]

[8] *Kartinyeri v Commonwealth* (1998) 195 CLR 337; French, RS 2003, 'The Race Power: A Constitutional Chimera', in *Australian Constitutional Landmarks,* edited by Lee and Winterton, Cambridge University Press, Cambridge, at p.180.

This situation contravenes fundamental principles of non-discrimination, and runs contrary to the spirit of a host of international human rights instruments to which Australia has committed.[9] The issue is that the Constitution does not simply fail to protect individuals from racially discriminatory laws; it positively and specifically empowers the Commonwealth to make such laws.

That issue can be remedied in one of three ways:

(a) removing from s 51 any power which refers to 'race' generally or Aboriginal and Torres Strait Islander peoples in particular;

(b) inserting a clause specifying that the power in s 51(xxvi) may only be used for beneficial purposes; or

(c) leaving s 51(xxvi) as it is, or restricting its application to Aboriginal and Torres Strait Islander people only, and inserting an additional section prohibiting racial discrimination in Commonwealth law-making and executive action.

→ Option (a), which involves removing the 'race power' without replacing it with anything else, is subject to the risk that Commonwealth legislative power to make laws for the benefit of Aboriginal and Torres Strait Islander peoples would be put in doubt. Legislation such as the *Native Title Act* 1993 (Cth), or other future Commonwealth legislation, may be left without sufficient basis in the other powers of s 51. There are arguably other heads of power on which the Commonwealth could rely, such as s 51(xxix), but there is a risk that the scope and flexibility of the Commonwealth to legislate in this area would be limited in a way which would be to the detriment of Aboriginal and Torres Strait Islander peoples.

→ Option (b), which involves replacing s 51(xxvi) with a specifically beneficial power, may introduce a range of legal complexities.

- The broad range of interpretations available for the term 'beneficial' (or similar terms) would present a two-fold difficulty:
    - Courts may refuse to disallow discriminatory legislation on the grounds that it demonstrates, in the court's view, sufficient beneficial intent or effect; and
    - Courts may disallow legislation which many Aboriginal or Torres Strait Islander people may regard as in their interests, on the basis of an overly-protective interpretation of the term 'beneficial'.
- Parliament could be precluded from amending legislation to remove certain benefits, even if replacing them with others. Or there may be problems in passing laws to remove special measures once they are no

[9] See eg *International Convention on the Elimination of All Forms of Racial Discrimination* (1965), *International Covenant on Civil and Political Rights* (1966), *United Nations Declarations on the Rights of Indigenous Peoples* (2007).

longer necessary.[10] This 'ratchet' effect may dissuade Parliament from using the power in the first place.

- There may also be complications where a law does not benefit all Aboriginal and Torres Strait Islander peoples equally.

It may be that solutions to these difficulties may be found through careful drafting. If so, AIATSIS considers Option (b) to be a workable response to the currently unacceptable situation in which the Constitution expressly provides for the making of potentially adverse laws on the grounds of race.

Option (b) is also subject to the risk that voters would react negatively to a provision that empowered beneficial laws for Aboriginal and Torres Strait Islander people but for no other group. Although such a view is certainly problematic, it might nevertheless be sufficiently widespread that it ought to be taken into account by the Panel. On the other hand, the option should not be dismissed without a careful gauging of the likelihood of such a clause succeeding at referendum.

→ Option (c) is considered in the next section.

D. Equality and non-discrimination

Recommendation 4: **AIATSIS recommends that the Panel propose a new section prohibiting racial discrimination in the exercise of the legislative, executive or judicial powers of the Commonwealth. That recommendation is independent of the recommendation made above in Section C; a non-discrimination provision could be additional or alternative to the proposal discussed in Section C.**

If the existing s 51(xxvi) is left in its current state, then its potentially discriminatory application could be curtailed by a new non-discrimination clause. Such a clause could provide that the grants of legislative, executive and legislative power in ss 51, 52, 61 and 71 are subject to a limitation along the lines of s 9(1) of the *Racial Discrimination Act* 1975 (Cth).

The effect of such a limitation would be to stipulate that the Constitution does not empower the Parliament, the executive or the Courts to make any distinction, exclusion, restriction or preference based on race, colour, descent, ethnic or national origin which has the purpose or effect of nullifying or

[10] Law Council of Australia 2011, *Constitutional Change: Recognition or Substantive Rights?*, Transcript of proceedings, at p.23. Available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=DFC9E8FF-EB34-AB69-8659-BAC87B391D40&siteName=lca.

impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.[11]

Thus, even if s 51(xxvi), on its prevailing construction, were capable of empowering laws which were adverse to the rights and interests of Aboriginal or Torres Strait Islander peoples, the new non-discrimination provision would limit the scope of that head of power. Laws supported by s 51(xxvi) would not necessarily need to be 'beneficial', but they would need to comply with principles of non-discrimination (see below, 'Special measures').

Should s 51(xxvi) be replaced by a specifically beneficial grant of power, the proposed non-discrimination provision would not be superfluous. It would ensure that other heads of power could not be used to make laws which discriminated against Aboriginal or Torres Strait Islander people.

Special measures

A non-discrimination provision should be drafted to ensure that it does not prohibit positive measures designed to assist or protect the interests of disadvantaged groups. There is already a well-developed body of Australian, overseas, and international law on the issue of 'special measures', and this jurisprudence can be incorporated into the interpretation of a non-discrimination provision. The extent of this available jurisprudence may mean that, compared to option (b) described above (the 'beneficial-only' clause), a non-discrimination provision would present a lesser risk of Courts overturning legislation that Aboriginal or Torres Strait Islander peoples consider would benefit them.

Other forms of discrimination

It might be thought that a focus on racial discrimination alone, rather than including gender (including pregnancy and marital status), religion, age, disability and sexual orientation, may be an unjustifiably narrow proposal for reform. The importance of guarding against these other forms of discrimination, however, should not be taken as a reason not to implement protection against racial discrimination if the opportunity arises. Further, as mentioned, the Constitution specifically empowers the Parliament to pass racially discriminatory laws. That situation must not be allowed to persist and requires rectification.

Taken as part of an 'Indigenous recognition' reform package, the prohibition of racial discrimination may be considered to be a first step towards a more comprehensive set of protections against discrimination. It should not be

[11] Note that this provision need not contain any equivalent to other aspects of the *Racial Discrimination Act* 1975, such as prohibitions on racial vilification or offensive behaviour.

interpreted as implying that those other forms of discrimination are somehow less important.

It should be noted that the *Racial Discrimination Act* 1975 (Cth) was passed well ahead of the *Sex Discrimination Act* 1984 (Cth), the *Disability Discrimination Act* 1992 (Cth), and the *Age Discrimination Act* 2004 (Cth). Each area of discrimination is important, but they need not be dealt with simultaneously.

The option of including broader provision for non-discrimination is considered below, in Section F, 'Other options'.

E. Agreement-making power, constitutional protection of Indigenous and treaty rights

Recommendation 5: **AIATSIS supports a proposed reform that would create a constitutional framework for the making, and incorporation into binding law, of agreements between the Commonwealth and Aboriginal and Torres Strait Islander peoples.**

Australia is unique in the colonies of the British Empire by its lack of any formal processes of treaty-making with Indigenous peoples.[12] As mentioned above, the dominant official discourse at the time of colonisation and subsequently was that it was not legally, practically or morally necessary to negotiate terms of coexistence between colonial authorities and Indigenous peoples. Now, however, and particularly subsequent to the judgment in *Mabo (No 2)*, there is a widespread rejection in Australian society of this previous position, tainted as it was by flawed and racist assumptions about the value of non-European cultures. For many Aboriginal and Torres Strait Islander peoples, though, the continuing absence of any formal agreements is experienced as an ongoing endorsement of the colonial-era position. Not only is this hurtful and likely to produce the kinds of harms highlighted earlier (Section A, 'Statement of recognition, statement of values'), but it also inhibits the creation of effective structures of governance and accountability.

There are various models for the constitutional incorporation or protection of agreements between governments and Indigenous peoples.

→ One such model is the provision in Canada's 1982 Constitution which 'recognized and affirmed' the 'aboriginal and treaty rights of the aboriginal

[12] The Batman-Kulin Treaty of 1835 would have been the only example, but the colonial authorities refused to recognise its validity, both because the non-Indigenous signatories were not representatives of the Crown, and because it would subvert the foundation of all colonists' property in Australia: Macintyre, S 1999, *A Concise History of Australia,* Cambridge University Press, Cambridge, at p.68.

peoples of Canada'.[13] That recognition and affirmation extends to rights secured under treaties signed in the future, as well as past treaties.

This model could be applied in the Australian context, with three important functions:

- Giving recognition to the special historical and political status of Aboriginal and Torres Strait Islander polities, and acknowledging the unacceptability of the previously held view that Indigenous societies did not warrant the making of treaties;
- Providing a framework whereby future agreements would have legal effect rather than being merely 'political' documents; and
- Protecting rights which are currently recognised by the common law or legislation, but which are vulnerable to abrogation.

If there were concern about the potential breadth of the term 'aboriginal ... rights', these could be enumerated more specifically, either within the text of the section, or by incorporation of instruments to be negotiated later in time.

→ Another option is to model a new section on the existing s 105A of the Commonwealth Constitution, which provides that the Commonwealth 'may make agreements with the States with respect to the public debts of the States' and that such agreements are binding on the Commonwealth and the States party to them.

Applied to the Indigenous context, a new section on these lines would be a simple and effective way of providing recognition to Indigenous peoples and creating a framework for ongoing improvements in their relationships with government.

A s 105A-style section would have the advantage of leaving the specific relationship between government and particular Indigenous peoples a matter of negotiation (and re-negotiation) without the need for a constitutional referendum each time. There would be no problem of unpredictable or unforeseen consequences, since the parties would be free to make whatever qualifications or specifications they saw fit.

It should be noted that a special agreement-making provision is not strictly necessary to enable the Commonwealth to enter into agreements with Aboriginal or Torres Strait Islander peoples. There is sufficient constitutional support for agreement-making under the existing Constitution (in particular in ss 51(xxvi),(xxix), and 61), so if no new special provision is inserted, this should not be taken as a reason not to engage in agreement-making. The benefit of a new provision would be to provide a clear framework and impetus for the negotiation of agreements.

[13] Section 35 *Constitution Act* 1982 (Can).

→ Finally, a constitutional amendment may provide a mandatory procedural framework for the holding of one or more constitutional conferences, including a timeline, agenda items and required attendees. For example, the Canadian constitution has, more than once, been amended to include such provisions. The now-repealed s 37.1 of Canada's 1982 Constitution provided:

> *(1) In addition to the conference convened in March 1983, at least two constitutional conferences composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada, the first within three years after April 17, 1982 and the second within five years after that date.*
>
> *(2) Each conference convened under subsection (1) shall have included in its agenda constitutional matters that directly affect the aboriginal peoples of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on those matters.*

This may be seen as an alternative to immediate, substantive change, but which nonetheless sets out clear expectations for the process to be followed. It should be kept in mind as an option should the other models be considered to be too unlikely to generate sufficient electoral support.

F. Other options

In considering the merits of proposals for reform, in light of the need to ensure that proposals accord with the wishes of Aboriginal and Torres Strait Islander peoples and are capable of securing sufficient public support, the Panel should be aware that the proposals outlined in the Discussion Paper do not represent the full range of aspirations for reform held by Aboriginal and Torres Strait Islander peoples.

The following are some other options for reform, which may involve constitutional reform, that have been suggested or considered by Aboriginal or Torres Strait Islander peoples:

- Specifying in the Constitution certain rights of Aboriginal and Torres Strait Islander people, whether as individuals or as groups.
- Altering the basis of representation in the House of Representatives, for example through the creation multi-member districts, to better reflect the diverse makeup of communities.
- Establishing or recognising Indigenous parliaments through which Aboriginal and Torres Strait Islander peoples can decide matters, govern areas or advise the Commonwealth government.
- Creating reserved seats in Parliament for Aboriginal and Torres Strait Islander people, linked to an Indigenous electoral roll.

- The wider establishment of customary law courts and dispute resolution institutions.
- Recognising indigenous government in specific areas or for certain subject matters.
- Different levels of government, including indigenous government, for different subject matters.

In saying this, AIATSIS does not necessarily recommend any or all of these proposals should be put to referendum without reference to their capacity to sustain sufficient electoral support. Rather, the point is to contextualise those proposals which have received more thorough attention, by positioning them in relation to this broader range of reform options. Viewed in this light, it can be seen that the focus of the debate on the more modest proposals already represents a compromise.

One option for reform, which goes beyond the present focus on Aboriginal and Torres Strait Islander peoples, would be the inclusion of a new chapter in the Constitution relating to human rights and civil liberties. Currently, constitutionally protected rights or restrictions on Commonwealth power are few and weak (such as ss 7, 24, 51(xxxi), 80, 116). The strengthening of specific fundamental rights, in addition to the entrenchment of non-discrimination principles discussed above, would be welcome.

- While a longer and more comprehensive process of research and consultation may be required before a specific proposal for such a new chapter were developed, AIATSIS encourages the Panel to see their recommendations to the government in the broader context of other potential reforms to the constitution such as this.

Assessing different constitutional reform packages

This section makes three comments about the merit of particular combinations of proposed reforms.

- The inclusion of a strong statement of recognition, together with the removal of s 25 and the elimination of the ability for s 51(xxvi) to be used to discriminate against Aboriginal and Torres Strait Islander peoples, would constitute a modest and realistic starting point for constitutional reform. These elements provide a realistic basis for a 'minimum package'. However, many Aboriginal and Torres Strait Islander peoples would aspire to more extensive

reforms, and these should be considered relative to the Panel's assessment of the likelihood of such reforms gaining sufficient support. But.

Recommendation 6.1: **AIATSIS recommends that a package combining a statement of recognition, unaccompanied by any legal disclaimer, with other substantive changes to the body of the Constitution, could both meet some of the aspirations of Aboriginal and Torres Strait Islander peoples and secure sufficient support in the broader community.**

- A statement of recognition unaccompanied by any other substantive changes would be unlikely to meet the expectations or serve the rights and interests of Aboriginal and Torres Strait Islander peoples, particularly if the statement was accompanied by a legal disclaimer.

  There is the further risk that such a proposal would reinforce perceptions among some Aboriginal and Torres Strait Islander people that symbolic reforms are a cynical or easy way of avoiding more substantial change.

  While, as indicated, symbolic changes are substantively important, the symbolic impact of a preamble without any other amendments would be significantly diminished – and potentially negative.

  Recommendation 6.2: **AIATSIS recommends that, if nothing more than a statement of recognition were deemed capable of meeting the Panel's criteria, it would be preferable not to put any proposal to referendum. The expense and the potential damage to the longer-term project of securing more substantial recognition would justify postponing the matter altogether.**

- The repeal of s 25 along with the addition of a non-discrimination provision would go far in removing the racially discriminatory aspects of the constitution, but would not fulfil the strong aspiration of many Aboriginal and Torres Strait Islander peoples for recognition of their distinct cultural, historical, legal and political status within the Australian polity.

  Recommendation 6.3: **AIATSIS recommends that a reform package grounded solely on grounds of non-discrimination should be clearly distinguished from the question of the recognition of Aboriginal and Torres Strait Islander peoples. If this distinction is not clearly made, the non-discrimination-only proposal would risk setting back the broader goal of recognising the distinct cultural, historical, legal and political status of Aboriginal and Torres Strait Islander peoples.**

Process issues

Recommendation 7: **AIATSIS recommends that a referendum on the constitutional recognition of Aboriginal and Torres Strait Islander peoples should not be held in conjunction with a referendum question relating to the status of local governments, nor with a general election.**

Recommendation 8: **AIATSIS further recommends that a referendum should not be scheduled without allowing sufficient time for a sustained and widespread education program and advocacy campaign.**

This final section addresses a number of procedural issues relating to this consultation and to the ultimate question of a constitutional referendum.

Local government referendum

The Commonwealth government is currently committed to holding a referendum on the 'recognition of local government in the Constitution'.[14] AIATSIS acknowledges the importance of the examining the institutional status of local government within our democracy, but would recommend against holding a referendum on that issue at the same time as a referendum on the constitutional recognition of Aboriginal and Torres Strait Islander peoples.

The primary reason for this is the capacity for the local government referendum to confuse the articulation and understanding of issues in relation to the Indigenous recognition referendum. Both referenda would be employing the terminology of 'recognition', and given the difficulties already faced in clearly explaining what 'recognition' may mean in the Indigenous context, it is likely that this task would be made considerably more difficult if the recognition of local government were at the forefront of the agenda at the same time.

AIATSIS acknowledges the time-intensive and costly nature of constitutional referenda, but would recommend that the two issues are so important that they ought to be considered by the electorate on separate occasions.

[14] Spooner, D 2011, *Budget Review 2011-12*, Research Paper No. 13, 2010-11, Parliamentary Library, at pp.86-87. Available at http://www.aph.gov.au/library/pubs/RP/BudgetReview2011-12/LocalGov.htm .

General election

For similar reasons, AIATSIS recommends that the referendum on Indigenous recognition not be held in conjunction with a Commonwealth general election.

As the Discussion Paper makes clear, it is in practical terms essential to the success of a constitutional amendment for a proposed amendment to have the support of the main political parties. There is at present in-principal support for constitutional recognition across the Australian Labor Party, Liberal Party of Australia, National Party of Australia, Australian Greens, and independent Members of Parliament. Nevertheless, during election campaigns the polarising of political positions between political parties is likely to escalate. Multi-party support for particular reform proposals will almost certainly be more difficult in the lead-up to an election, and this is likely to damage the prospects of a referendum succeeding.

Again, AIATSIS recognises that referenda are expensive processes which are more efficiently run in conjunction with other electoral processes. Even so, AIATSIS recommends that the fundamental nature of this particular issue warrants a separate referendum date. The proposals under consideration do not simply alter the distribution of legislative power between different levels of the federation (which was the main change achieved in the 1967 referendum); rather, the current proposals would contribute to the fundamental realignment of the relationship between the Commonwealth and the country's first peoples, the Aboriginal and Torres Strait Islander peoples.

Further, this referendum constitutes an opportunity to begin the promotion of a climate of regular constitutional examination and change. In order to remain relevant and authoritative, the Constitution needs to be a living document. That requires an ongoing willingness to examine whether the structures, assumptions and objectives of the Constitution remain in line with contemporary realities. This process of constitutional examination may require more frequent referenda, which ought not be held in conjunction with general elections.

Overwhelming majority

The criteria set down by the Panel for their assessment of reform proposals, at p16 of the Discussion Paper, include the requirement that a proposal be capable of being supported by an 'overwhelming majority' of Australians.

This requirement goes beyond the already-strict requirements set out in s 128 of the Constitution, which require only a bare majority overall plus a majority in a majority of States. AIATSIS would caution the Panel against substituting this for a higher threshold, and would instead recommend that the Panel make as

accurate a judgment as possible as to whether a particular proposal is likely to gain sufficient support to satisfy s 128.

Timeframe

Finally, AIATSIS recommends that the Panel's report to the government should emphasise the need for an adequate timeline leading up to a referendum.

Due to the complex and contested nature of the issues involved, it is imperative that sufficient time is allowed for a comprehensive education program. Advocacy campaigns, too, will require a substantial period to formulate and articulate their messages with respect to particular proposals, and to allow the issues to be fully debated. Considering that a decade-long campaign preceded the 1967 referendum, it is unlikely that adequate preparations for a referendum on the current proposals could be completed before the time due for the next Commonwealth general elections in 2013. And if an election were to be held before that time, it would be an even less favourable point at which to hold the referendum.

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 timeline is put in place.

Further Reading

Dodson, M 2003, 'Unfinished Business: A Shadow Across Our Relationships', in *Treaty: let's get it right!*, Aboriginal Studies Press for the Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

Dodson, M and Strelein, L 2001, 'Australia's Nation-Building: Renegotiating the Relationship Between Indigenous Peoples and the State', *University of New South Wales Law Journal* vol. 24, no. 3, p. 826.

Strelein, L, Dodson, M and Weir, J 2001, 'Understanding non-discrimination: Native title law and policy in a human rights context', *Balayi: Culture, Law and Colonialism* vol. 3, pp. 113-148.