



**Submission to the Joint Select Committee on
Constitutional Recognition of Aboriginal and
Torres Strait Islander Peoples.**

25 June 2014

1. Introduction

1. Oxfam welcomes the opportunity to make a submission to the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (the Committee) on steps that can be taken regarding a proposed referendum on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples.
2. Oxfam is a long-term supporter of constitutional recognition of Aboriginal and Torres Strait Islander Peoples, and has been engaged in recent moves towards a referendum as members of Reconciliation Australia's *Recognise Reference Committee* and the *NGO Steering Committee for Constitutional Recognition*.
3. Oxfam maintains its support for reform of Australia's Constitution to recognise Aboriginal and Torres Strait Islander Peoples as Australia's First Peoples, remove racially discriminatory provisions and protect future generations from discrimination on the basis of their race, colour or ethnicity. A detailed statement of our position can be found in Oxfam's submission to the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples.
4. The Australian Constitution, as our founding legal document as a nation, should recognise the distinct place of Aboriginal and Torres Strait Islander Peoples in our history and their unique and ongoing relationship to the lands and waters, their cultures, languages and heritage. The racist elements of the Constitution and the lack of recognition of the status and rights of the First Peoples in the Constitution and Australian polity has had negative consequences for Aboriginal and Torres Strait Islander Peoples and the honour and civil maturity of the nation. Non-indigenous people in Australia have also been diminished by the structural and cultural forms of racism and lack of recognition of the First Peoples as it has impacted on our relationships and sense of identity as Australians. We see constitutional change in these areas as an opportunity to put the nation on the right track.

2. Summary of Recommendations

Recommendation 1: Oxfam recommends that the Expert Panel report, and its suggested model for constitutional change, provide the foundation of any proposal.

In particular Oxfam strongly recommends

- *The inclusion of a statement of recognition of Aboriginal and Torres Strait Islander peoples as Australia's original peoples, including their ongoing relationship to the lands and waters and their continuing cultures, languages and heritage, in the body of the Constitution, as recommended by the Expert Panel.*
- *That sections 25 and 51 (26) of the Australian Constitution (the so-called race powers) be repealed as recommended by the Expert Panel.*
- *That the constitution is amended with the insertion of a clause prohibiting racial discrimination as recommended by the Expert Panel.*

Recommendation 2: Oxfam recommends that the Joint Select Committee ensures that in finalising a proposal which may vary from the model proposed by the Expert Panel, it engages positively and negotiates appropriately with Aboriginal and Torres Strait Islander Peoples peak organisations and communities.

Recommendation 3: Oxfam recommends that the Joint Select Committee gives consideration in its reports about process and protocols that seek to maintain multi-party support and positive political engagement.

Recommendation 4: Oxfam recommends that the Joint Select Committee proposes greater resourcing for the public awareness campaign.

Recommendation 5: Oxfam recommends that should the referendum not take place in 2015 that a target date must be set prior to the expiry of the Act of Recognition and not exceeding three years from the expiry of the Act of Recognition.

3. About Oxfam Australia

- 4.1 Oxfam Australia is an independent, not-for-profit, secular, international development agency. We are a member of Oxfam International, a global confederation of 15 Oxfam affiliates that work together to fight poverty and injustice in almost 100 countries around the world.
- 4.2 Oxfam Australia has worked with local communities around the world to combat poverty and injustice for over 50 years. Our organisation undertakes long-term development projects, provides emergency response during disaster and conflict, and conducts campaigning and advocacy for policy and practice changes which promote human rights and justice. We support over 400 long-term development projects in 30 countries across Africa, Asia, the Pacific and Indigenous Australia.
- 4.3 Oxfam adopts a rights-based approach to community development. This approach focuses on the full achievement of the rights of human beings and looks at the drivers of inequality, poverty and conflict, rather than focusing on an immediate needs analysis alone. Oxfam's experience is that a rights-based approach has the potential to have a far greater impact within various levels of society because it uncovers and proposes solutions to multi-levelled barriers. Significantly, rights-based approaches are no less 'practical' than other approaches as they look holistically at both rights and responsibilities.
- 4.4 Oxfam Australia recognises that since colonisation, successive government policies have systematically disadvantaged and marginalised Aboriginal and Torres Strait Islander peoples. Aboriginal and Torres Strait Islander Peoples remain the most significantly disadvantaged group in Australia, disproportionately affected by poverty, unemployment, chronic illness, disability, lower life expectancy and high levels of incarceration. We acknowledge our responsibilities to Aboriginal and Torres Strait Islander peoples. We are committed to working with Aboriginal and Torres Strait Islander peoples to play a strategic role in supporting the realisation of self-determination and other human rights including those set out in the UN Declaration on the Rights of Indigenous Peoples. This commitment has involved working in partnerships with Aboriginal and Torres Strait Islander individuals and communities across the country for over 30 years.
- 4.5 Oxfam Australia has supported opportunities for Aboriginal and Torres Strait Islander Peoples to exercise their rights to basic social services, sustainable livelihoods, a strong voice and cultural diversity, for more than 30 years. We are a strong supporter of the United Nations Declaration of the Rights of Indigenous Peoples (UN DRIP) and believe that the UN DRIP should guide all government policies concerning, and engagement with, Aboriginal and Torres Strait Islander Peoples.

4. The Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples.

- 4.1 The nation's founding document and pre-eminent source of law should recognise Aboriginal and Torres Strait Islander peoples as the First Peoples of these lands and waters, now known as Australia. Oxfam has for many years called for constitutional change to recognise the unique status of Aboriginal and Torres Strait Islander Peoples as Australia's First Peoples and to address the discriminatory provisions, and lack of protection from discrimination, in the Constitution. All of these proposed amendments to the constitution were recommended by the Council for Aboriginal Reconciliation in 2000 in its final report.
- 4.2 As well as removal of the 'race powers', the inclusion of the proposed 116A Prohibition of Racial Discrimination is an essential element of constitutional reform. For example, when the National Congress of Australia's First Peoples consulted its organisational and individual members the feedback "confirmed that protection from racial discrimination provided tangible and worthy change to the Constitution."¹ Such amendments would ensure consistency as recognition without such measures concerning racial discrimination is generally recognised to be hollow. Aboriginal and Torres Strait Islander Peoples have been calling for meaningful and substantive reform to the constitution for many years.
- 4.3 We believe that the reform proposals advanced by the Expert Panel, while in many respects is a minimalist position, offers the best platform to progress discussions concerning constitutional recognition.
- 4.4 Given the Expert Panel's extensive consultation and submission process and the detailed and considered Report it provided to the then government in 2012, representing the consensus of its diverse Indigenous and non-Indigenous members, its suggested model for reform must provide the foundation for any proposal going before the people of Australia.

Recommendation 1: Oxfam recommends that the Expert Panel report and its suggested model for constitutional change provide the foundation of any proposal.

In particular Oxfam strongly recommends

- *The inclusion of a statement of recognition of Aboriginal and Torres Strait Islander peoples as Australia's original peoples, including their ongoing relationship to the lands and waters and their continuing cultures, languages*

¹ <http://nationalcongress.com.au/wp-content/uploads/2014/02/140221CongressStatement-JSC-Briefing.pdf>

and heritage, in the body of the Constitution, as recommended by the Expert Panel.

- *That sections 25 and 51 (26) of the Australian Constitution (the so-called race powers) be repealed as recommended by the Expert Panel.*
- *That the constitution is amended with the insertion of a clause prohibiting racial discrimination as recommended by the Expert Panel.*

5. Possible changes to the model proposed by the Expert Panel

5.1 Oxfam supports the principles of the Expert Panel concerning constitutional amendments that is, that in order to succeed at referendum, any constitutional amendment must:

- contribute to a more unified and reconciled nation;
- be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples;
- be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums; and
- be technically and legally sound.²

5.2 Oxfam is aware that one of the areas of consideration by the committee is balancing removal of the 'race powers' with the need for the Commonwealth to make laws that specifically concern Aboriginal and Torres Strait Islander Peoples in order to

- maintain and consolidate their rights concerning connection to land and waters,
- maintain and consolidate their rights concerning the protection of their culture and heritage and
- address historic discrimination and dispossession.

In this context, the Expert Panel has suggested the term 'advancement' to cover these principles in the fourth recital of the preamble to its proposed Section 51A.

5.3 However Oxfam is concerned with the legal implications of the term particularly regard to who it is who determines 'advancement' and the potential for laws made under that power to further diminish the rights of Aboriginal and Torres Strait Islander Peoples. Our view is that the two principles of

- ensuring that laws cannot be made to the detriment of Aboriginal and Torres Strait Islander Peoples and
- that laws cannot be made for First Peoples without a process of ensuring consultation and consent

² Report of the Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, Commonwealth of Australia, January 2012, p.xi.

should be guides to the committee's deliberations concerning its recommendations for specific constitutional amendments to be put to the nation through a referendum.

- 5.4 As the Expert Panel Report suggests, Oxfam believes whatever change, if any, is suggested will need to be tested with Aboriginal and Torres Strait Islander Peoples before it is put before initially the parliament and then the people. Positive engagement and appropriate forms of engagement with Aboriginal and Torres Strait Islander Peoples will be necessary to maintain the ongoing legitimacy of the process and ensuring the appropriateness of any final model for reform. It is essential that the committee recommends that a consultative process with Aboriginal and Torres Strait Islander peoples and their representative organisations be put in place should the committee recommend or the government decide to put forward an option that differs from the Expert Panel.

Recommendation 2: Oxfam recommends that the Joint Select Committee ensure that in finalising a proposal which may vary from the model proposed by the Expert Panel, it engages positively and negotiates appropriately with Aboriginal and Torres Strait Islander Peoples peak organisations and recognised community leaders.

6. Towards a referendum

- 6.1 We are aware that any change to the constitution requires a referendum that receives support from a majority of both the population and of the states. It is our view that the current multi-party political support and growing public support for constitutional recognition offers an historic opportunity for the nation to take a further step in the on-going reconciliation process.
- 6.2 Successful referendums require strong multiparty support. Our hope is that political support is maintained through the leadership of the major parties in a co-ordinated and disciplined manner. Such fundamental change to our founding document requires constructive political engagement and not 'politics as usual'. However any consensus achieved must not be at the expense of the aspirations of Aboriginal and Torres Strait Islanders Peoples in regard to constitutional change. In terms of the specific work of the committee we would welcome comments and recommendations from the committee in its interim and final reports that promote considered discussion of the proposals and processes that encourage positive leadership from political leaders.

Recommendation 3: Oxfam recommends that the Joint Select Committee gives consideration in its reports about process and protocols that seek to maintain multi-party support and positive political engagement.

6.3 In its report, the Expert Panel recommended a properly resourced public education and awareness program. Oxfam commends the previous and current government for supporting the work of *Recognise* and its predecessor *YouMeUnity* in raising awareness and support from the Australian public for this change through its positive activities, such as the Journey for Recognition, and its community grants processes. However, as we move closer to a proposal to be put before the Australian public, Oxfam believes that greater resourcing of this campaign, particularly in terms of provision of community grants and funding for broad community education programs, is required so that the current momentum for change is not lost.

Recommendation 4: Oxfam recommends that the Joint Select Committee propose increased funding for the public awareness campaign.

6.4 Oxfam is hopeful that the referendum will be held in 2015 but the critical consideration regarding the timing of the referendum is that it should be held when it is most likely to succeed following genuine support from Aboriginal and Torres Strait Islander people, as well as the wider community. Given the possibility for momentum to be lost, it is essential that a target date is set prior to the expiry of the Act of Recognition in February 2015 and that it not exceed three years.

Recommendation 5: Oxfam recommends that should the referendum not take place in 2015 that a target date must be set prior to the expiry of the Act of Recognition and not exceed three years from the expiry of the Act of Recognition.