Submission to the Joint Select Committee on Recognition of Aboriginal and Torres Strait Islander Peoples, Inquiry into the *Aboriginal and Torres Strait Islander Peoples Recognition Bill* 2012

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Dear Committee Members,

I am pleased to take this opportunity to comment on the *Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012*. The Bill is a valuable initiative. It is also admirable in its simplicity and restraint. The high symbolic and historical significance of legislative ATSI recognition could easily have offered temptation to add elaborate sentiments and over-reaching goals. These, in my view, would be likely to reduce the prospects for wide consensus on the Bill's main purpose. The Bill's restraint is therefore particularly commendable.

My comments are organised under three headings: (i) Provisions of the Bill (ii) Legislative 'entrenchment' (iii) Proposed referendum.

Provisions of the Bill
The Bill is generally well-constructed. I have only a few comments:

- **Section 4** mandates a review (after one year of the proposed *Recognition Act's* operation) of levels of support, specially, for a referendum to amend the Constitution. This narrows the scope of the review unnecessarily. The review should also incorporate an assessment of public knowledge and appreciation of the Act itself. It is a mistake, in my view, to put all the 'recognition eggs' in the constitutional basket, in particular given the uncertainties surrounding constitutional change in Australia. It may well be that the Act proves more significant than is currently anticipated. Alternatively, if the Act is found to be unpopular or is little known, strategies for improving its standing will need to be considered.

- **Section 5** sets a 'sunset' period, after which the Act will expire. This, in my view, is unnecessary and should be reconsidered. A review of the Act's

effectiveness (as suggested) will be valuable, but a mandatory expiry date may, in reality, work against the Act's capacity effectively to 'pre-constitutionalise' ATSI recognition. That is to say, it may create a sense that the issue is temporary, or encourage a view that the Act lacks seriousness.

- The Bill lacks a statement of justiciability or non-justiciability. I assume that this omission is deliberate, as a way of navigating between the Scylla and Charybdis of encouraging litigation on the one hand and accusations of toothless symbolism on the other. The issue, however, is bound to arise, and should not be avoided.

Legislative 'entrenchment'.

The Bill expresses an intention not to serve as a substitute for constitutional recognition. The 'sunset' clause is accordingly included, and the Explanatory Memorandum explains that the provision is designed to ensure that 'legislative recognition does not become entrenched at the expense of continued progress towards constitutional change.'

It is unclear whether the problem is the likelihood that legislative 'entrenchment' will come to be regarded as adequate, depleting the will for constitutional change, or whether legislation is regarded as inferior, precisely because it does not achieve 'real' entrenchment and may be altered or repealed by the Parliament.

The first should not be assumed. It is, indeed, possible that legislative action will stimulate the desire for constitutional change. The second problem presupposes that the two forms of 'entrenchment' are mutually exclusive. This, too, should not be assumed. Many Australian Acts have quasi-constitutional status. They are not formally protected from ordinary parliamentary process (in the manner of the Constitution) but their repeal would be highly controversial; they could not be described as 'ordinary' Acts. The *Flags Act 1953* (Cth), for example, does not entrench the current Australian flag, but is effectively protected by its high symbolic status from substantive alteration without major national 'conversation' and approval.

Similarly, Australia's various human rights Acts, such as the *Racial Discrimination Act 1975* (Cth), could technically be repealed, but their repeal would be deeply controversial. It is highly unlikely, again, without major national 'conversation'. The

Racial Discrimination Act is, in fact, a 'superstatute'; that is to say, its provisions are paramount over contrary provisions in any other Commonwealth, State or Territory Act. This does not protect it from amendment or repeal in a technical sense, but adds to its 'quasi-constitutional' status. (It also is noteworthy, in this regard, that the Bill's Explanatory Memorandum identifies the *Racial Discrimination Act* as a satisfactory alternative to a constitutional prohibition of racial discrimination.)

Given the symbolic importance of the *Recognition Bill* and the weight it will carry when passed, it is unlikely that governments would wantonly amend or repeal its substantive provisions (as opposed to the procedural provisions regarding the review and referendum), unless public opinion were overwhelmingly in favour of doing so. Such legislative 'entrenchment', being much more easily achieved, may serve as an effective alternative to constitutional entrenchment.

Additionally, it should not be forgotten that amendment of the *Recognition Act* might come to be desired by the Aboriginal and Torres Strait Islander people themselves. New or evolving understandings or knowledge may give rise to new ways of expressing recognition under law, which may attract public approval. In such a case, the relative simplicity with which legislation may be amended will prove an advantage.

Proposed referendum

The Bill is described as a step towards constitutional amendment, via a referendum (as required by s 128 of the Constitution). The Bill's Explanatory Memorandum states that 'it is important for a referendum to be held at a time when it has the most chance of success.' This goes without saying. It is pointless to hold a referendum to 'test the water', or when any significant opposition is anticipated. It is a simple fact of Australian constitutional history that referendums will not succeed in the face of organised opposition.

The Preamble to the Bill states, among other things, that 'further engagement' with ATSI peoples and other Australians is required 'to refine proposals for a referendum and to build the support necessary for successful constitutional change.' It cannot be stated strongly enough that the task of refining referendum proposals and building support depends upon a thorough understanding of Australia's referendum record, followed by a realistic assessment of what this reveals about the chances of referendum success.

The Expert Panel did not, in my view, pay sufficient attention to Australia's referendum record. It too readily adopted a number of 'received' explanations for this record, most of which have not been subjected to empirical research. It assumed, in particular, that referendum success could be achieved following a campaign of greater education. This is questionable. The relationship between education levels and voting propensities in referendums is, in fact, poorly understood. Furthermore, we know relatively little about Australians' current levels of constitutional knowledge, and we know equally little about whether or how knowledge equates with opinion about proposals for change. Dedicated surveys have not been conducted for many years. Many conclusions about education levels, the value of education campaigns, and the relationship between knowledge and understanding, are based on out-of-date data and/or guesswork.

If the *Recognition Act* is to serve its purpose, and to provide a stepping stone for a deeper understanding of and support for ATSI recognition, it will be essential for a new national survey to be conducted, to gauge Australians' knowledge in nuanced, multifaceted, and genuinely informative ways.

I attach a copy of my analysis of the Expert Panel's Report, written shortly after its release, in which I test the Panel's recommendations against the referendum record. My conclusion is that – regardless of what supporters might wish – the Panel's recommendations would be unlikely to succeed in a referendum. Realistically, for constitutional change to be achieved, a different set of proposals (ideally, a single proposal) would be needed. Any future referendum, following the *Recognition Act*, should take this record into account.

The Government should be prepared to detach its proposed constitutional changes from those recommended by the Expert Panel. This should not be considered as a failure to respect or value the work of the Panel. Important constitutional changes have occurred in the past following extensive preparatory work which, itself, did not directly feature in the final form of the instrument. Australia's Constitution, indeed, was built upon much invaluable work which preceded it, but was not, itself, directly adopted in the Constitution's wording.

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ATTACHMENT

A Referendum on Indigenous Constitutional Recognition – What are the Chances?

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Introduction

The Report of the Expert Panel on Constitutional Recognition of Indigenous Australians was presented to the Prime Minister on 19 January 2012. It includes five recommendations for constitutional change,[1] and a further eight recommendations regarding the referendum process. The Report is now open for public consideration and debate. The government has already indicated its intention to put a Constitution Alteration Bill on the matter before parliament, and the Opposition its willingness, at least in principle, to support it. A referendum, on or before the 2013 Federal election, seems probable, even 'certain to proceed.'[2] But will it pass?

The Report is emphatic about the need for referendum success, and the profound and damaging consequences of failure. Many submissions to the Panel and many

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[1] **1.** Repeal section 25 and section 51(xxvi) of the Constitution;

2. Insert **Section 51A Recognition of Aboriginal and Torres Strait Islander peoples: Recognising** that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples; **Acknowledging** the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters; **Respecting** the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples; **Acknowledging** the need to secure the advancement of Aboriginal and Torres Strait Islander Peoples; the Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples;

3. Insert after section 116: **Section 116A Prohibition of racial discrimination** (1) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin. (2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group;

4. Insert **Section 127A Recognition of languages** (1) The national language of the Commonwealth of Australia is English. (2) The Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage.

[2] Dan Harrison, 'Push to erase racist laws,' *Sydney Morning Herald*, 20.1.12

comments on the Report concur. It is fair to say that it is a widely-held view. The Report concludes, accordingly, that 'achieving a successful referendum outcome should be the primary consideration of the Government and Parliament.'[3]

Referendums, it is well known, have had a low record of success in Australia. Only 8 out of 44 questions (put in 19 separate referendums) have been approved by a double majority of Australians nationally and a majority of voters in a majority of States, as required by section 128 of the Constitution. The Report reflects deep concern about this history. Chapter 10, 'Approaches to the Referendum', is devoted specifically to the challenge it presents, and is focused on ways of improving the chances. 'Five pillars' for success, borrowed from the submission by Professor George Williams, are set out:

- Bipartisanship
- Popular ownership
- Popular education
- A sound and sensible proposal
- A modern referendum process

As the Report notes, many submissions and consultations reflected similar conclusions: the issues most frequently raised were 'the need for simplicity of proposals for recognition, the timing of the referendum and the general lack of public knowledge about the Constitution.'[4]

The conclusion to Chapter 10 of the Report contains eight consequential recommendations about process. Several of these, uncontroversially, advocate consultation with the Opposition, other political parties, Members of Parliament, State governments, and Aboriginal and Torres Strait Islander peoples.

Among the others, the most significant with respect to the referendum record are, in summary:

- A 'single referendum question on the package of proposals' set out in the Report's draft Constitution Alteration Bill.

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3 'Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution', Report of the Expert Panel, Commonwealth of Australia, 2012 ('Report'), p. 226.

4 Report, p. 226.

- A 'properly resourced public education and awareness program,' as well as steps 'to educate Australians about the Constitution and the importance of constitutional recognition of Aboriginal and Torres Strait Islander peoples.'

Encouraged by the results of opinion polls, as well as the overwhelmingly positive character of submissions,[5] the Report concludes that its proposals, if accompanied by the processes it recommends, 'are capable of succeeding at referendum.'[6]

However, despite the critical importance of success, the Report devotes comparatively (and surprisingly) modest attention to the referendum record and its relevance for the Report's recommendations.

The Panel, it is clear, has relied substantially on George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia*.[7] This, unquestionably, is an authoritative source, and is by far the most thoroughly-researched in the large body of literature on Australia's referendum record. But it is also a work of advocacy and serves the dual purposes of detailing the history of referendums and promoting a higher 'Yes' rate in the future. Its core premise, shared by almost all other referendum analyses,[8] is that failures are aberrant.

This is not the only perspective available. It could alternatively be argued that section 128 serves as a type of 'plebiscite' with legal consequences. It invites Australian voters to say whether or not they agree with a particular proposal for constitutional change. The people are asked: the people respond. If a referendum fails, this reflects the people's opinion. Seen in this light, the failure of a referendum on indigenous recognition, as the Panel recognised, would be doubly distressing.

A dispassionate examination of the chances of success is therefore essential. 'Talking-up' the referendum may be a legitimate strategy in promoting a 'Yes' vote, but it must be grounded in reality. Fatalism is equally unscientific. The statistical

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5 Results of Newspoll surveys and research conducted in 2011 are found on pp. 70-71 of the Report. A commissioned analysis of the 3,464 public submissions, conducted by Urbis, is found in Appendix D of the Report, p 264 ff.

6 Report, p. 226.

7 George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia*, UNSW Press, 2010.

8 A notable exception is Brian Galligan, *A Federal Republic: Australia's Constitutional System of Government* (Cambridge University Press, 1995).

record tells us nothing, in itself, about the chances in an individual case. Failure is not the default. It is the decision of the voters, on each occasion.

This paper considers the chances of success for the Report's recommendations, taking into account the referendum record and explanations offered by the literature. It does not address the legal questions arising from the proposed constitutional alterations.[9] It takes no position on the desirability of a referendum, or on the choice between a 'Yes' and 'No' vote.

The paper begins with an overview of the referendum record, with some general inferences relevant to the proposed indigenous recognition referendum. It then discusses the Report's recommendations under three headings. These aggregate the Report's conclusions about reasons for referendum failure and its strategies for success:

1. Support for the question.
2. Form of the question.
3. Knowledge about the question.

A number of common themes in the referendum literature are not discussed here, since these are not relevant to the Report's recommendations. For example, it is routinely claimed that Australians will not support proposals that would confer greater power on the Commonwealth. The record of defeats tends to support this claim, although there are at least two (arguably more) exceptions: 1946 and 1967. The Panel's recommendations, however, do not aim to enlarge the Commonwealth's powers.

It is also commonly claimed that poorly conducted campaigns, lacklustre support from the government, and short-term opportunism on the part of political opponents, have encouraged the 'No' case, and contributed to – even explained – many failures. This may well be true, although the explanation tends to assume that the proposals were inherently worthy, and the voters susceptible to deception. It is also, to some extent, a non-falsifiable claim (successes mean that campaigns were well-conducted; failures mean they were not). However, although the Report contains many ideas for mounting a multi-layered and positive 'Yes' campaign to

[9] These are discussed by Anne Twomey, 'Indigenous Constitutional Recognition Explained – The Issues, Risks and Options', on the Constitutional Reform Unit website, http://sydney.edu.au/law/cru/publications.shtml

support its recommendations, an assessment of the 'campaign explanation' can only occur after the event.

What does the record tell us?

Nineteen referendums took place between 1906 and 1999; there was at least one in each decade, with the exception of the first decade of the 21st century. A total of 44 questions were asked, of which eight, in six referendums, were successful.

There are many ways to slice up this record. The following are relevant to an analysis of the Report.

- The largest number of questions asked at any single referendum is six, in 1913 (all were defeated). The next largest is four. Four questions were asked in 1974 (all were defeated); four in 1977 (one was defeated), and four again in 1988 (all were defeated). Three questions were asked in 1946 (two were defeated). Two were asked in 1910, in 1919, 1926, 1937, 1967, 1973, 1984, and 1999 (both were defeated in all, except 1910, and 1967, with one success in each). The remaining five (1906, 1928, 1944, 1948, 1951) had a single question each.
- Of the eight successes, two (1906 and 1928) were single-question referendums. The six other successes included more than one question. In 1910, two questions were asked; one succeeded. In 1946, three questions were asked; one succeeded. In 1967, two questions were asked; one succeeded. In 1977, four questions were asked; three succeeded.
- The number of questions asked of the voter may not reflect the number of proposed constitutional alterations included in a single question. Several referendum questions have incorporated more than one alteration. Some of these alterations, however, while referring to different provisions in the Constitution, were interdependent or consequential upon each other; they were not separable or 'severable' (that is, the proposed alterations could not have been offered as separate questions[10]). Others could have been distinguished from each other and severed (offered as separate questions). The successes in 1910, 1946, and 1967 can be counted among the latter. For the five other successes, only one alteration was proposed in each relevant question.

[10] The interdependence of proposed alterations is not always easy to assess, and there can be some dispute over which questions had this character. This is unlikely, however, to affect the analysis offered here.

- The 1946 referendum is the only successful referendum in which multiple (more than two) severable alterations were incorporated into one question.[11]
- The 'Fourteen Points' referendum in 1944[12], the 'Rights and Freedoms' referendum in 1988[13], and (arguably) the Republic referendum in 1999, are notable examples of failures in which a single question incorporated multiple, but severable, proposals.
- Of the successes, the national percentage in favour ranged between 54.39% (1946) and 90.77% (1967).[14] However, only two successful referendums (1910 and 1946) attracted less than 70% support. Six attracted more than 70% and three of these more than 80%. In other words, six out of eight successes attracted a very high level of support.
- All the successes, with the exception of 1910 (with five States' support), obtained a majority in all States in addition to the national majority.
- In five defeats the question was carried nationally, but not in a majority of States: (1937 (aviation powers); 1946 (two questions: powers over marketing of primary products and industrial employment); 1977 (simultaneous elections); 1988 (fixed parliamentary terms).
- The 'Yes' vote cast in the failed referendums ranged between 30.79% (1988 – rights and freedoms) and 49.78% (1913 – Commonwealth power over trusts). Sixteen failed questions attracted more than 45% (but less than 50%) national 'Yes' votes. Of these, eleven attracted between 48% and 49.78%.

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11 The question put to voters was: 'Do you approve of the proposed law for the alteration of the Constitution entitled "Constitution Alteration (Social Services) 1946"?' The proposed new provision (section 51 (xxiii)A) gave the Commonwealth legislative powers over 'maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances.'

12 The question was: 'Do you approve of the proposed law for the alteration of the Constitution entitled "Constitution Alteration (Post-War Reconstruction and Democratic Rights) 1944"?' The proposal was for a new constitutional provision, extending Commonwealth legislative powers over: rehabilitation of ex-servicemen, national health, family allowances, 'the people of Aboriginal race', and corporations, trusts, combines, and monopolies, as well as guaranteeing freedom of speech and religion and a protection against the abuse of delegated legislative power. The provision included a sunset clause of five years.

13 The question was: 'A Proposed Law: to alter the Constitution to extend the right to trial by jury, to extend freedom of religion, and to ensure fair terms for persons whose property is acquired by any government. Do you approve of this proposed alteration?'

14 Some variations in the statistical data can be found in different sources. This paper has relied on the House of Representatives Standing Committee on Legal and Constitutional Affairs, Inquiry into the Machinery of Referendums, *A Time for Change: Yes/No?*, Canberra, December, 2009, Appendix E: Table of Australian Referendum Results.

- The only successful referendum with an official 'No' case[15] was the 1946 social services referendum. No official arguments – for or against - were prepared, in 1906, 1910 or 1928.[16] There was no 'No' case for the success in 1967, or any of the three successes in 1977.
- No referendum has failed where there has only been a 'Yes' case.

It is striking that six of the successful referendums (including the four most recent) attracted very strong national support, much more than was needed for success. The data lends support to the simple intuition: proposals to alter the Constitution that inspire and mobilise a high level of support attract a high 'Yes' vote. This seems obvious, but it is more than a statistical tautology. Proposed alterations that conform to a strong normative consensus do well. This observation is underpinned by the apparent correspondence between success and the absence of official opposition, as well as the uniform support of all States in virtually all successful referendums.

In the past, it was occasionally suggested that section 128 of the Constitution was designed to produce defeats. The 'double majority' - a majority required in both the national vote and in the vote in a majority of states - was seen as an almost unsurmountable barrier. Few people make that claim these days. It is recognised that relatively few defeats can be explained by the 'machinery' hurdle. Only five further referendum questions would have passed if a favourable national majority alone counted.

Notwithstanding this history of rare successes, many defeats were reasonably close; eleven may be considered 'near misses'. Opposition to change has not always been as overwhelming as the record of defeats might suggest. But the flip-side is that even substantial levels of support do not necessarily translate into success.

Support for the question

One of the most common assertions about referendums is that success requires bipartisan support. Bipartisanship, however, is clearly not enough. It may be necessary, but it has not been sufficient in the past: several proposals were defeated,

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15 The official 'Yes' and 'No' cases, published in a pamphlet distributed to each Australian voter prior to a referendum (as required previously by the Referendum (Constitution Alteration) Act 1906 (amended in 1912); now by the Referendum (Machinery Provisions Act) 1984) are written by the Members of Parliament who voted, respectively, for or against the Constitution Alteration Bill. If the Parliament is unanimous in supporting a proposed alteration, there is no official 'No' case.

16 The Referendum (Constitution Alteration) Act 1906 did not require an official 'case'; it was amended in 1912, to include this, but also amended specifically in 1919, 1926, and 1928, exempting the referendums of these years from the application of the relevant provision.

despite the combined support of government and opposition. These were in 1919 (both questions), 1926 (both questions), 1937 (the aviation power question), 1967 (the 'nexus' question). No official arguments were prepared for the first two, but in 1937 and 1967, a 'No' case was prepared by the MPs from the minority parties who had voted against the relevant Constitution Alteration Bill.

The apparent correspondence between success and the absence of an official 'No' case is revealing, as is the fact that in seven out of the eight successes a majority in all six States was recorded, and in the eighth, only one State was opposed. There is an obvious inference: a proposal that attracts no opposition has a greater chance of success than one that does. Intuitively, the chance of success declines inversely to the level of opposition.

We do not know yet whether some in the parliament will vote against the proposed Constitution Alteration Bill on indigenous recognition, or whether, in the event that they do, they will prepare a 'No' case (this is not required by the Referendum Act). At present, no party (or parliamentary Independent) has announced its formal opposition to any of the individual alterations proposed in the Report, or to the 'package' of proposals, in which all the alterations are included as one question. This can only be a good sign for the Panel.

We do know, however, that the Report has had a mixed public reception, and certain 'reservations' have been expressed by leading politicians.[17] Some of the proposed alterations attracted immediate criticism,[18] and concerns have also been raised about uncertainties in the proposals' details.[19] These early responses may or may not persist; they may or may not multiply. If they do, however, the 'no opposition' imperative will be of significant concern to proponents.

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17 Patricia Karvelas, 'Historic Constitution vote over indigenous recognition facing hurdles', *The Australian*, 20 January, 2012 http://www.theaustralian.com.au/national-affairs/indigenous/historic-constitution-vote- (accessed 5.2.12)

18 For example, Professor Greg Craven, on the proposed provision to ban racial discrimination: Dan Harrison , 'Wording a Gift to the No Campaign', *Sydney Morning Herald*, 21.1.12: http://www.smh.com.au/national/wording-a-gift-to-the-no-campaign-20120120-1qa7p.html (accessed 5.2.12). The criticism, including in 'signals' from the Opposition, is discussed by George Williams, 'Only political negligence can kill off this historic referendum', *Sydney Morning Herald*, 31.1.12 http://www.smh.com.au/opinion/politics/only-political-negligence-can-kill-off-this-historic-referendum-20120130-1qpln.html (accessed 5.2.12).

19 See CRU paper, by Anne Twomey, fn 9 above.

The 1967 referendum

The Report singles out the 1967 referendum as a demonstration that Australians are willing to support indigenous people when issues of constitutional status are at stake. That referendum is unquestionably the high water mark in the history of Australian referendums, with 90.77 % (or 90.8 %[20]) of the national vote saying 'Yes' to the question:

> Do you approve the proposed law for the alteration of the Constitution entitled: 'An Act to alter the Constitution so as to omit certain words relating to the people of the Aboriginal race in any state and so that Aboriginals are to be counted in reckoning the population?'[21]

The referendum aimed to remove the words 'other than the aboriginal race in any State' from section 51 (xxvi) of the Constitution which empowers the Commonwealth to pass 'special laws' for 'the people of any race'[22] and, secondly, to remove the whole of section 127, which excluded the Aboriginal people in 'reckoning the numbers of the people of the Commonwealth, or of a State...'

To what extent can 1967 guide the proposed referendum on indigenous recognition? The example is certainly an inspiration, and there are a good number of similarities: the subject of constitutional change is sufficiently similar, as are many of the relevant sentiments and normative commitments. But there are differences. First, the current proposal involves a much larger number of alterations than in 1967, and these are much more varied. There are insertions as well as deletions. The insertions include both a conferral of power and limitations on the exercise of power, including an anti-discrimination clause going beyond the subject of the Aboriginal and Torres Strait

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[20] See fn 14, above. 90.8% is the figure given in the Report.

[21] Running the two proposals together, conjoined with 'and so that', may have created the impression that the proposal referred only to the deletion of section 127. Some sources, moreover, incorrectly give the wording as: 'An Act to alter the Constitution so as to omit certain words relating to the people of the Aboriginal race in any state so that Aboriginals are to be counted in reckoning the population.' (Inaccurate sources include a Report, 'History of Australian Referendums Part 2', on the Australian Parliament House/Parliamentary Library website: (http_wopared.aph.gov.au_house_committee_laca_constitutionalchange_part2.pdf).

[22] The Commonwealth retained its powers under section 122 of the Constitution to make laws for the Aboriginal people in any Territory.

Islander peoples. Additionally, some provisions include normative or aspirational language; these depart from the functional 'tone' of the rest of the Constitution.[23]

Many myths surround 1967. Many otherwise-accurate publications have claimed that the referendum gave Aborigines the vote, or gave them 'citizenship' or 'equal rights', or allowed them to be counted in the census. All are inaccurate. The inaccuracy is not surprising. These are simple, concrete propositions, easily understood, and easily confused with the truth. The reality – the deletion of several words from section 51 (xxvi) and the whole of section 127 – was harder to explain, and the impact was less certain. The question asked of the voters did not enlighten. It bore only a roundabout resemblance to the actual alterations to be made to the Constitution.

The very fact of misunderstanding, however, seems to have assisted the 'Yes' campaign.[24] People, it seems, thought they were voting for something clear and tangible, both legally and normatively significant. They had a straightforward narrative about what they were doing. This helped generate an unprecedented level of consensus.[25] A similar narrative may perhaps be possible for the current proposal, although its achievement is likely to be more difficult than in 1967.[26]

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[23] Arguably, with the exception of section 92, which mandates *absolutely free* trade, commerce, and intercourse among the States. This comparator does not provide comfort to those who support abstract or normative/aspirational constitutional language: for the better part of eight decades the words 'absolutely free' proved enigmatic. They were the source of deep disagreement, both on the High Court and among commentators, and their interpretation went through several different phases. In 1988, in *Cole v Whitfield* (1988) 165 CLR 360, the High Court finally ruled that the words had a precise and more-or-less technical meaning: they prohibited nothing more than the imposition of discriminatory burdens of a protectionist kind in the trade and commerce laws of one State (or the Commonwealth) against others. Section 100 refers to the 'reasonable use' of water; again, the meaning is far from clear.

[24] See Bain Attwood and Andrew Markus, '(The) 1967 (Referendum) and All That: Narrative and Myth, Aborigines and Australia' (1998) 29 *Australian Historical Studies* 267.

[25] The consensus should not be exaggerated, however. Analysts of the referendum have pointed out that there was a 'strong inverse relationship between the percentage of electors agreeing with the proposals and ratio of Aboriginal to European population'. Dr John Gardiner-Garden, 'The 1967 Referendum – History and Myths', Parliament of Australia, Parliamentary Library, Research Brief no. 11, 2007.

[26] A simple narrative may be available, but it may not 'stick'. This happened in 1951, when the proponents of the referendum to ban the Communist Party of Australia represented the case in simple and rallying terms; as the details of the Alteration Bill were subjected to close scrutiny, a simple 'take-away' 'Yes' message became elusive (but a simple narrative of opposition became more available).

Electronic campaigning

In assessing the prospects for an opposition-free referendum, one critical variable has never been 'trialled' before. This is the internet and other forms of electronic communication. Although the 1999 Republic referendum took place in the internet era, it pre-dated social networking, mass emailing, blogging, tweeting, and texting. These new media, as the Report notes, create huge opportunities for educating and harnessing support, and are of particular significance to young voters. But there is another side to the picture. They also offer formidable avenues for opposition. Campaigns, furthermore, can be anonymous, and allow criticism that would be unacceptable if openly expressed.

Multipartisanship and wide public support are goals, not processes. They can only be secured by proposals that attract no, or very little, opposition. The nature of the proposals, and the form in which the question is put, must be the point of departure.

Form of the Question

The Report recommends that all the proposed constitutional alterations should be put in a single question. It advances two reasons. The first is simplicity. The second - considered by the Panel to be 'more fundamental' – is the interconnected nature of the package of proposals for constitutional recognition.

The constitutional interconnectedness of the proposals is not the subject of this paper. However, it is worth noting that, applying the 'test' of interconnectedness above – namely, asking whether the proposals could be severed and put as separate questions – the claim of legal interconnectedness is questionable. Certainly some of the proposals (the deletion of section 25; the insertion of section 116A; the statement of official language in section 127A; the statement of recognition at the top of section 51A) could stand or fall on their own at a referendum. Assuming that the deletion of section 51 (xxvi) and the insertion of the proposed section 51A are interdependent, a section 51 A 'package' could still stand alone, put as a single question.

Although three of the eight successes have been for questions which incorporated more than one severable alteration, it is at least received wisdom that complicated proposals discourage a 'Yes' vote.[27] The 1944 'Fourteen Points' referendum in particular is thought to have suffered significantly from being over-inclusive. In the words of Scott Bennett and Sean Brennan, the decision to include all proposed

[27] Williams and Hume point out that 'questions containing multiple ideas aggregate opposition.' fn 7 above, p. 212

alterations in a single question was 'an extraordinary error of judgment' on the part of the government.[28] The 'rights and freedoms' question in 1988 may have been similarly misjudged. It is also inferentially noteworthy that the successful referendum which attracted the lowest 'Yes' votes, in 1946, included multiple alterations. Voters, it can be conjectured, are put off by package deals.

Assuming this is correct, there are at least two likely reasons: voter confusion, and a greater disinclination to vote 'Yes' for the alterations one opposes than 'No' for the alterations one favours. This second explanation should be a matter of particular concern for the Panel. The public reception of the Report, so far, suggests that, while some proposed alterations (the deletion of section 25, in particular) are uncontroversial, others are not. A voter confronted with a single question, and invited to make an 'all or nothing' choice about a package of proposals will be justified in voting 'No'.

Confusion may also be a factor, but is a less likely explanation. Voters have shown themselves capable of distinguishing between different questions asked at the same time, on six of the eight successful occasions. Simplicity may be one of the 'iron laws'[29] of a successful referendum, but 'simplicity' does not merely lie in the question: it is also a reflection of the voters' recognition that the proposal makes sense. They understand it, because it corresponds to what they appreciate. The fact that a simple narrative may assist a referendum's success, as in 1967, reflects this. If an overarching narrative can be found for multiple alterations, this suggests that there is an appreciable coherence among them. To the extent that the 'confusion' explanation is also merged with the claim that lack of education or understanding correlate with a propensity to vote 'No', it is also open to doubt (this is discussed further, below).

Questions on the ballot paper

For similar reasons, it is debatable whether a single question, as such, achieves 'simplicity'. There is no data from previous referendums which reveal that simple questions do well and complex questions do not. In fact, the wording of the questions on the ballot paper has always been relatively simple. For the most part, it has consisted of a reference to the 'proposed law' and a query as to whether the voter approves. Since 1974, a subtle change in the form of the question has appeared

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[28] Scott Bennett and Sean Brennan, 'Constitutional Referenda in Australia', Parliament of Australia, Parliamentary Library, Research Paper 2, 1999.

[29] Greg Craven, fn 18 above.

on the ballot paper, incorporating a short 'summary' of the proposal, arguably making it simpler (although not necessarily more appealing: only three out of sixteen questions put between 1974 and 1999, have succeeded).

For example:

1906 (successful): 'Do you approve of the proposed law for the alteration of the Constitution entitled "Constitution Alteration (Senate Elections) 1906"?'

1951 (unsuccessful): 'Do you approve of the proposed law for the alteration of the Constitution entitled "Constitution Alteration (Powers to deal with Communists and Communism) 1951"?'

1977 (successful): 'It is proposed to alter the Constitution so as to allow electors in the territories, as well as electors in the states, to vote at referendums on proposed laws to alter the Constitution. Do you approve of the proposed law?'

1988 (unsuccessful): 'A Proposed Law: To alter the Constitution to provide for fair and democratic parliamentary elections throughout Australia. Do you approve of this proposed alteration?'

The question itself may be simple, but the proposed textual alteration(s) to the Constitution may be more complex. The reasons for making the alteration(s) may be more complex still, and the long-term impact may not be describable or gaugeable in any realistically simple way. This does not mean that constitutional alteration is impossibly complex, or that the questions put to the voters must necessarily be deceptively simple, but the question (in these multiple senses) should be capable of being understood by the voter. This is not an impossible goal, although the longer-term impact of change can never be entirely clear at the time.

However, as noted above, regarding the 1967 referendum on constitutional references to the Aboriginal people, voters (it seems) thought they understood the question, but subsequent commentaries on the referendum suggest that they did not. This, paradoxically, seems to have assisted the referendum.

Nevertheless, a reliance on simplicity is questionable. If the proposed alterations are, either singly or collectively, *not* simple, presenting them as if they were may be a 'gift' to the opposition (the 'No' campaign in the 1999 Republic referendum is an example).

Knowledge of the question

It is a common claim that ignorance and a propensity to vote 'No' go hand in hand. In the words of the Report, '[o]verall, the record shows that when electors do not understand or have no opinion on a proposal, they tend to vote "No".'[30] The Report, accordingly, directs much attention to programs of pre-referendum education. It is not clear, however, where this 'record' lies, or to what, exactly, it refers. The claim is not borne out by referendum history, at least if lack of education and ignorance about referendum proposals are conflated. The record is, in fact, mixed and unstable. To give a couple of examples, in the first three decades of the twentieth century, Western Australia, with a lower education rate than Victoria, voted 'Yes' more frequently (supporting eleven out of sixteen referendum questions, to Victoria's five). In 1999, however, the 'Yes' vote mostly followed educational levels (Western Australia, this time, voted 'No' and Victoria 'Yes') but the ACT, with by far the highest education rate in Australia ,[31] voted 'Yes' for the republic question, while rejecting the proposed new preamble for the Constitution. The results in the 1988 referendum are also said to challenge the ignorance (and apathy or 'mindlessness') hypothesis.[32]

The hypothesis that those who 'don't know' will 'vote no' does not make it clear whether the putative problem is lack of knowledge about the referendum proposal or lack of knowledge about the Constitution. Although the two may overlap, it is quite feasible for a voter to be knowledgeable about one, while ignorant about the other. To assume that understanding (whether of the Constitution or the referendum proposal) will assist the 'Yes' vote is, in any case, to confuse knowledge with opinion. Understanding the Constitution provides little guidance about whether or not an alteration is desirable. Constitutional lawyers and academics have never been unanimous on the merits of a referendum question. Similarly, constitutional knowledge does not, in itself, create certainty about the consequences of the proposed alteration. Again, even those with expert knowledge reach different conclusions. This divergence is already apparent in responses to the proposed indigenous recognition referendum.

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30 Submission to the Expert Panel on Indigenous Constitutional Recognition, Report, fn 3, p. 223. See also Williams and Hume, *People Power*, fn 7 above, p 229.

31 Persons with Post-School Qualifications: Percentage of total population aged 15 years and over, Australian Bureau of Statistics.

32 Campbell Sharman, 'The Referendum Results and their Context', in Brian Galligan and J.R. Nethercote (eds), *The Constitutional Commission and the 1988 Referendums*, Centre for Research on Federal Financial Relations/Royal Australian Institute of Public Administration, Canberra, 1989, p. 114.

There is little comprehensive recent data on Australians' knowledge of the Constitution. Opinion polls conducted in 1987 and 1994[33] revealed a very low level of information about the Constitution (although, it should be borne in mind that information does not necessarily equate with 'understanding'). They are frequently cited in relevant literature, including in the Report.[34] They are, however, now seriously out-of-date: the Republic Referendum, the Centenary of Federation, and the introduction of 'civics education' in schools have all occurred since the last poll in 1994. Their impact on levels of knowledge remains to be tested.

This is not to suggest that Australians' have become deeply knowledgeable. A 2006 Amnesty International survey regarding rights protection in Australia is reported to have found that 61% of Australians believed Australia had a national Bill of Rights.[35] (It is just possible, however, that the 2009 National Human Rights Consultation has, to some extent at least, corrected this misapprehension.) The Report also records that Newspoll research in 2011, and that a study by Reconciliation Australia, 'found there is little knowledge among Australian voters of the Constitution's role and importance, or about the processes involved in moving towards and achieving success at a referendum.'[36] However, such findings - at least as captured in the Report - are only extrapolations from questions not directly concerning knowledge, and are not comprehensive.

The Report recommends, among other things, that the government should devote funds to a large-scale education and public awareness program prior to the referendum. This will not necessarily be helpful. In 1999, $16,858 million were spent on the preparation and distribution of the official referendum pamphlets; additional funds of $4.5 million were also allocated for public information about the referendum, and a further $15 million was granted to the 'Yes' and 'No' committees for national campaign advertising.[37] It is possible that voters went to the ballot box better informed about the proposal than in any previous referendum. Despite this,

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33 Constitutional Commission Bulletin, No 5, September 1987; Civic Experts Group, *Whereas the People: Civics and Citizenship Education,* Canberra, 1994.

34 Report, p. 222.

35 Williams and Hume, fin 7 above, p. 205.

36 Report, p. 222.

37 *A Time for Change: Yes/No?* fn 14, above, pp. 20-21.

their answer was resoundingly negative. Knowledge, it has been noted, may also lead individual voters to reject proposals.[38]

It is also frequently claimed that success is more likely to emerge after long and considered discussion and consultation about the proposed alteration(s). For example, all of the 1977 proposals had been the subject of 'extensive debate' at the 1976 session of the Constitutional Convention.[39] Many years of careful inquiry and public preparation preceded the 1967 'Aborigines' referendum. However, the many years' work of the Constitutional Commission, established in 1985, and the Constitutional Centenary Foundation, established in 1991 – both of which conducted extensive public consultation and had popular as well as 'expert' membership - seem to have done little, if anything, to improve the respective chances of the 1988 and 1999 referendums. Supporters of the present proposal cannot rely on the proposition that discussion and consultation will underpin success.

Analysis

What, then, does the record tell us about the likely chances that the Report's proposals will succeed?

In summary, if the question conforms exactly to the Report's recommendation, the chance of success is doubtful. The immediate public response to the Report suggests there is a reasonable likelihood of significant opposition to several of the proposed alterations. It should be remembered that all but one of the successful referendums in the past attracted virtually no opposition.

In particular, the recommendation that all proposed alterations should be put as a single question should be reconsidered. The claim that this will create simplicity is unlikely to succeed, and – given that some of the proposed alterations are actually complex - it may appear as an attempt (even a deliberately misleading one) to create an illusion of simplicity.

If the recommended alterations are put as separate questions, the prospects are likely to vary.

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[38] Scott Bennett, *The Politics of Constitutional Amendment* (Parliamentary Research Service, Commonwealth Parliament, Research Paper No 11, 2002-03). http://www.aph.gov.au/library/pubs/rp/2002-03/03rp11.htm (accessed 5.2. 12).

[39] Williams and Hume, fn 7 above, p. 233.

Deletion of section 25. (The provision states the consequences of a State's disqualifying persons of any race from voting). This comes closest to the 'ideal' captured (or mythologised) in the 1967 success. The section appears offensive to modern values; there appears to be a wide consensus among indigenous and non-indigenous people that the concept of 'race' is outmoded and should not be perpetuated; the deletion is likely to appeal to a strong normative consensus. The proposal can be explained in non-technical terms. No negative or unforeseen consequences are likely to be identified; indeed, it may have no practical consequences at all. It is a 'good news' question, and it is difficult to imagine a rational, or defensible, campaign against it.[40]

Deletion of section 51 (xxvi). (The provision gives the Commonwealth power to make special laws with respect to the people of any race.) The case for removal could be couched in similar terms to the case for removing section 25. Again, the 1967 example has some 'precedential' application. However, the matter is more complex than for section 25, and it may be difficult to explain the proposal in non-technical terms. Simple deletion of this section will raise questions about the Commonwealth parliament's capacity to pass special laws for the Aboriginal people. While there may be other constitutional heads of power to hand (the external affairs power, section 51 (xxix), for example), there are doubts whether these will fully compensate in key legislative areas, such as native title.[41] This complexity appears to be the reason for the Report's recommendation of a further section, section 51A.

Insertion of section 51A. This is a complex proposal. It includes a historical statement: recognition of the Aboriginal and Torres Strait Islander peoples as having *first occupied* Australia; two normative statements: that the Aboriginal and Torres Strait Islander people's culture, language and heritage is *respected* and that the *need to secure the advancement* of Aboriginal and Torres Strait Islander peoples is *acknowledged*; and a 'machinery' statement: giving the Parliament a revised head of

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[40] The deletion of section 25 has, in fact, been included, among other proposed alterations in the relevant Constitution Alteration Bill for more than one unsuccessful referendum, including the parliamentary 'nexus' referendum in 1967. It is unlikely, however, that defeat represent any considered assessment of the proposed deletion of section 25: there was no reference to the section in the question on the ballot paper in 1967, nor was it discussed in the Yes and No cases prepared for the referendum. It seems to have been uncontroversial.

[41] Professor Cheryl Saunders states that section 51 (xxvi) 'is probably the only source of power for legislation operating outside the territories dealing with, for example, native title, aboriginal heritage and indigenous organisations'. *The Conversation*, 8 February, 2012 at http://theconversation.edu.au/indigenous-recognition-we-cant-afford-to-water-down-constitutional-reform-4705 (accessed 8.2.12)

power to make laws with respect to Aboriginal and Torres Strait Islander peoples. The latter appears tied to the historical and normative provisions, which may be intended as guidelines, possibly to serve in constitutional interpretation of the new head of power. The complexity of the proposal is not necessarily fatal (the 1967 proposal, as noted, was more complex than it appeared at the time) but, if nothing else, it may open opportunities for criticism.

If the recognition statement were separated from the others, the likelihood of success may be greater.[42]

Insertion of section 116A. This new provision would prohibit discrimination on the grounds of race, colour or ethnic or national origin (unless ameliorative or protective in nature). There is no direct historical analogy, but to the extent that the 1988 'rights and freedoms' question is comparable, it offers a warning. Despite a belief that Australians 'would not reject the ideas contained in it',[43] the defeat was the worst in the history of referendums. One of the reasons, as suggested above, may have been its 'all-or-nothing' character, with multiple proposed alterations packaged in a single question. The 'No' case, revealingly, included the mixed message that the proposal threatened the rights and freedoms Australians already enjoyed, and that it was 'inadequate, unnecessary and legally flawed.'[44]

The proposed section 116A also goes well beyond indigenous recognition, and appears to re-insert a term – 'race' – that the deletions seek to remove. Also, what is not included – protection against discrimination on the grounds of gender, disability, age, and sexuality, for example – may well provide ammunition for opponents.

Insertion of section 127A. This proposed new provision would include a statement that English is Australia's national language, and that the Aboriginal languages are part of Australia's 'national heritage.' We do not have a useful analogy in the referendum record. The first statement is unlikely to be controversial, at least to the majority of Australians (this is guesswork, however). It has the virtues of simplicity

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42 The Newspoll telephone survey conducted for the Panel in February 2011 reported that 75% of respondents stated that they would vote in favour of a proposal to recognise Aboriginal and Torres Strait Islander people in the Constitution. The September survey found that 68% supported holding a referendum to recognise Aboriginal and Torres Strait Islander people in the Constitution. Report, p. 70.

43 Williams and Hume, fn 7 above, p. 216.

44 Commonwealth Parliament, 'History of Australian Referendums. Part 2.' www.aph.gov.au/house/committee/laca/.../part2.pdf (accessed 5.2.12)

and clarity, and to the extent that these assist a referendum, the chances are probably good. It also states what is already, *de facto*, the case, and at least three of the eight successes in the past can be described in this way.[45] However, if it remains attached to the second proposition, the chances are more difficult to calculate, although probably lower. To the extent that the 1999 preamble referendum, which included statements about Australia's indigenous heritage,[46] provides some guidance, it is not a promising analogy. The preamble question suffered a major defeat.[47]

Conclusion

The Report's recommendations reflect a tentative confidence. A reader, unfamiliar with the literature, might conclude that, while that the referendum hurdle is high, the reasons for failure are fairly well understood. This would be a mistake. It is true that a substantial amount of research has been done on the referendum record (although the Report does not capture this as well as it might have). We know a lot about the data, the nature of the campaigns, the media coverage, and so on. But it would be misleading to assert that we know an equal amount about the reasons people vote one way or another. There is no 'scientific' explanation of referendum success. There are a number of well-worn hypotheses, and a good deal of conjecture. This does not mean that the familiar explanations are necessarily wrong, simply that we do not know with any level of precision or certainty.

What we know is that referendums are defeated if there is an appreciable level of opposition to the proposal. The government would be ill-advised to proceed with a referendum in the absence of unanimity – at least *nem con* - in the parliament. It should be equally wary, if there is any indication of substantial public opposition. We know that education and information programs, no matter how well resourced or long-running, cannot be relied upon to turn around opposition. Indeed, a swing towards the 'No' vote in the course of a referendum campaign is much more likely.[48]

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45 Williams and Hume, fn 7 above, pp. 200-1.

46 Including the words: *honouring Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country.*

47 It was rejected in every State and Territory, and attracted only 38.96% of the national vote, making it the 7th least successful of all 36 defeats.

48 Murray Goot and Terence W. Beed, 'The Referenda: Pollsters and Predictions', *Politics* XII (2) 1977, 86-95 at p. 89. Also, Goot, 'Contingent Inevitability: Reflections on the Prognosis for Republicanism', in George Winterton (ed), *We, The People*, St Leonards, NSW: Allen & Unwin, 1994, p. 87

The hypothesis that those who 'don't know', will 'vote No' is appealingly simple (and provides referendum opponents with a handy slogan), but it is misleading. It assumes its own conclusion, namely that the proposed changes are inherently worthy, and that rejection reflects misunderstanding of their worth. As noted, this explanation does not fit easily with the data or the history of referendum campaigns.

We do have a few inferential guidelines, as well as recourse to sensible intuitions, but these can also lead us to conflicting conclusions. Australia's referendums have happened over a long span of time. On almost any measure - social, political, demographic, legal – immense changes have occurred, and the character, predisposition, and values of the people have changed. Even to compare 1967 with 2012 is 'unscientific.'

This is not to say that proposals for a new referendum cannot learn from the record. Some hypotheses are better than others, and these, it is hoped, will help guide a government's decision whether or not to go ahead in the first place. While George Williams's recommendation of a 'sound and sensible proposal' is tendentious (a flaky proposal, by definition, will not appeal to voters, assuming there can be agreement on its flakiness), it does put its finger on something upon which everyone can agree.

A majority of people will (probably) vote 'Yes' if the proposal reflects a combination of settled norms and comfortable aspirations. A tentative, but judicious, understanding of what the record reveals, combined with a 'gut' sense of what the Australian people are likely to support (assisted by well-designed opinion polls), is the best guide to the chances of success.

From this perspective, if the proposed alterations recommended by the Panel are separated, the chances will vary, depending on the question. The Panel, however, should be much less confident than its Report suggests about the likelihood of success if its proposals are put in the form of a single question.

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