



# Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples

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Progress report

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# **Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples**

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Mr Ken Wyatt AM MP	Western Australia, LP

## **Secretariat**

Mr Tim Bryant, Secretary  
Dr Sean Turner, Principal Research Officer  
Ms Morana Kavagic, Administrative Officer

PO Box 6100  
Parliament House  
Canberra ACT 2600  
Ph: 02 6277 3540  
Fax: 02 6277 5719  
E-mail: [jscatsi@aph.gov.au](mailto:jscatsi@aph.gov.au)  
Internet: [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Committees?url=jscatsi\\_ctte/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=jscatsi_ctte/index.htm)



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# Chapter 1

## Overview of recent developments

### Support for constitutional recognition

1.1 The Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012, which included a statement of recognition by the Parliament on behalf of the Australian people of Aboriginal and Torres Strait Islander peoples, passed with the unanimous support of both houses of parliament in February and March 2013, and received royal assent on 27 March 2013.

1.2 The introduction into Parliament and subsequent passage of the bill provided an occasion for leaders on all sides of politics to express their support for the objective of recognising Aboriginal and Torres Strait Islander peoples in the Constitution.

1.3 In her second reading speech, Prime Minister the Hon Julia Gillard MP linked the goal of constitutional recognition to the successful 1967 referendum:

In 1967, the people of Australia sought restitution and repair, but their work was incomplete. Today a new generation dreams of finishing the job with the same idealism and the same means—not through protests or lawsuits but by this parliament summoning every Australian elector to a referendum and there, in the sanctity of the polling booth, to inscribe their agreement to a successful constitutional amendment.

On that day, as the polls close and the ballots are counted, individual assent will merge into a collective 'yes'. In that way, we will forge an accord, bipartisan and unanimous, to right an old and grievous wrong—a step that will take us further on the path of reconciliation than we have ever ventured before.<sup>1</sup>

1.4 The Leader of the Opposition, the Hon Tony Abbott MP, linked constitutional recognition to another pivotal moment in the history of relations between Australia's Indigenous and non-Indigenous peoples, Prime Minister Paul Keating's 1991 speech in Redfern:

Australia is a blessed country. Our climate, our land, our people, our institutions rightly make us the envy of the earth, except for one thing—we have never fully made peace with the First Australians. This is the stain on our soul that Prime Minister Keating so movingly evoked at Redfern 21 years ago. We have to acknowledge that pre-1788 this land was as Aboriginal then as it is Australian now. Until we have acknowledged that we will be an incomplete nation and a torn people.<sup>2</sup>

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1 The Hon Julia Gillard MP, Prime Minister, *Hansard*, 13 February 2013, p. 1120.

2 The Hon Tony Abbott MP, Leader of the Opposition, *Hansard*, 13 February 2013, p. 1123.

1.5 In a subsequent address to the Sydney Institute on 15 March 2013, Mr Abbott also referred to the 1967 referendum and the National Apology in 2008, and suggested constitutional change could be a moment of similar or greater historical import:

Done well, such an amendment could be a unifying and liberating moment, even surpassing the 1967 change or the apology, so it's worth making the effort.<sup>3</sup>

1.6 The Leader of the Australian Greens, Senator Christine Milne, also spoke strongly in favour of the constitutional recognition of Aboriginal and Torres Strait Islander peoples in her second reading speech.<sup>4</sup>

### **Committee activity**

1.7 The Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples was appointed in November 2012 to inquire into and report on steps that can be taken to progress towards a successful referendum on constitutional recognition of Aboriginal and Torres Strait Islander peoples.<sup>5</sup>

1.8 As part of this work, the committee was required to inquire into the Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012. The committee tabled its report on the bill on 30 January 2013, with a recommendation that the bill be passed.<sup>6</sup>

1.9 Consistent with its terms of reference, subsequent to its consideration of the bill the committee has been undertaking work to build a 'strong multi-partisan Parliamentary consensus around the timing, specific content and wording of referendum proposals for Indigenous constitutional recognition.'<sup>7</sup>

1.10 In doing so, the committee has sought to build on the strong foundation provided by the work of the Expert Panel on Constitutional Recognition of Indigenous Australians (the Expert Panel).<sup>8</sup> Indeed, much of the committee's work has focused on consideration of the Expert Panel's recommendations, and the extent to which those

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3 The Hon Tony Abbott MP, Leader of the Opposition, address to the Sydney Institute, Sydney, 15 March 2013, <http://www.liberal.org.au/latest-news/2013/03/15/tony-abbott-address-sydney-institute-sydney>.

4 Senator Christine Milne, Leader of the Australian Greens, *Hansard*, 26 February 2013, pp. 882-884.

5 *Journals of the Senate*, 28 November 2012, pp. 3470-74.

6 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012*, January 2013, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=jscatsi\\_cte/completed\\_inquiries/2010-13/jscatsi/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=jscatsi_cte/completed_inquiries/2010-13/jscatsi/index.htm).

7 *Journals of the Senate*, 28 November 2012, p. 3471.

8 The Expert Panel provided its report, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, to the government on 16 January 2012.

recommendations should provide the content and wording of a proposal for constitutional change.

1.11 To this end, the committee has held regular meetings in sitting weeks and met with representatives of Reconciliation Australia and Recognise on several occasions. The committee also held a meeting on 5 February 2013 with the former co-Chairs of the Expert Panel, Mr Mark Leibler and Mr Patrick Dodson, to seek their views on how the committee might build on the work of the Expert Panel.

1.12 During this meeting, Mr Leibler and Mr Dodson referred to the depth and breadth of the Expert Panel's consultations, and told committee members that while the committee should certainly seek to engage broadly with the Australian community in its work, it should not seek to repeat the Expert Panel's work. At the same time, the co-Chairs indicated their view that any departures from the Expert Panel's recommendations would require the committee to consult further with Aboriginal and Torres Strait Islander peoples.

1.13 The co-Chairs emphasised the importance of the committee building a multi-party political consensus on constitutional recognition of Aboriginal and Torres Strait Islander peoples, both at the Commonwealth and state levels.

1.14 The co-Chairs also pointed to the importance of the committee and, ultimately, the parliament finalising a proposal for constitutional change, noting that it would be very difficult to build strong public support for the general idea of constitutional recognition, as opposed to a specific proposal for constitutional change.

1.15 In addition to the above consultations and a public hearing in Sydney on 22 January 2013 for its inquiry on the Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012, on Tuesday, 30 April 2013, the committee conducted a roundtable discussion with various organisations representing Aboriginal and Torres Strait Islander peoples at the National Centre for Indigenous Excellence (NCIE) in Redfern, New South Wales. Chapter two provides an overview of the roundtable discussion.

### **The Journey to Recognition**

1.16 In addition to the enactment of the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* and the committee's subsequent activities, in recent months there has been significant activity undertaken by Recognise to build momentum toward constitutional recognition.

1.17 Most notably, on Sunday, 26 May 2013, the Journey to Recognition began in Federation Square, Melbourne.

1.18 The Journey is described by Recognise as 'an epic relay across our country building momentum to recognise Aboriginal and Torres Strait Islander peoples in our

Constitution.<sup>9</sup> Between now and August participants in the Journey will walk, cycle and drive their way to Nhulunbuy in the Northern Territory, stopping in places such as Adelaide, Alice Springs and Katherine along the way.

1.19 Several committee members have participated in the Journey to Recognition, including attending the commencement of the Journey in Melbourne on 26 May 2013. More broadly, the committee has continued to engage with Recognise and support its campaign activities.

### **Report structure**

1.20 As noted above, the committee held a roundtable discussion on 30 April 2013 in Redfern. Chapter two of this report provides an overview of this discussion.

1.21 Chapter three identifies the next steps that need to be taken in the journey to constitutional recognition of Aboriginal and Torres Strait Islander peoples, with a focus on this committee's role in this historic task.

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9 Recognise, accessed 6 June 2013, <http://www.recognise.org.au/thejourney>.

## Chapter 2

### Roundtable discussion

2.1 As noted in the previous chapter, the committee held a roundtable discussion at the National Centre for Indigenous Excellence (NCIE) in Redfern, New South Wales on 30 April 2013.

2.2 Roundtable participants included the Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr Mick Gooda, and representatives of Reconciliation Australia, Recognise (the constitutional recognition campaign arm of Reconciliation Australia), the National Congress of Australia's First Peoples (Congress), ANTaR, NCIE's Indigenous Youth Engagement Council (IYEC) and the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS). Participants in the roundtable are listed at Appendix 1.

2.3 The committee invited roundtable participants to provide their views on:

- the Expert Panel's recommendations and the extent to which they should form the basis for any constitutional amendment; and
- the terms of a constitutional amendment that is most likely to be successful at a future referendum.

2.4 To help facilitate discussion, the committee invited participants to provide a brief written submission prior to the roundtable outlining their views, or the views of the organisation they represented, on these matters. The committee received submissions from AIATSIS, Recognise and Reconciliation Australia (in a joint submission) and ANTaR, which are available on the committee's website. The committee also received a supplementary submission following the roundtable discussion from IYEC.

2.5 All submissions received are available on the committee's website.

#### **Expert Panel's recommendations: the 'first word, not the last word'**

2.6 As noted above, one purpose of the roundtable was to seek the participants' views on the Expert Panel's recommendations (reproduced at Appendix 2) and the extent to which they should form the basis for any constitutional amendment. There was broad agreement from roundtable participants that the Expert Panel's work should serve as the foundation for the committee's consideration of a proposal to put to the Australian people in a referendum, but that its recommendations should not necessarily be seen as 'set in stone.' At the same time, roundtable participants argued that the committee should not seek to re-do the Expert Panel's work, and to the extent that any proposal it recommends departs from the Expert Panel's recommendations, the committee should consult further with Aboriginal and Torres Strait Islander peoples.

2.7 For instance, in its submission, Recognise argued that the committee should not 'reinvent the process undertaken by the Expert Panel but should use the Expert Panel report and process as a starting point'.<sup>1</sup>

2.8 ANTaR commended the recommendations of the Expert Panel, but noted that public criticism of some aspects of the Expert Panel's recommendations from some supporters of constitutional recognition indicated that 'more discussion will need to take place before a proposed Constitutional amendment is put to the people at a referendum'.<sup>2</sup>

2.9 ANTaR urged that the committee engage with these individuals and others who have been critical of aspects of the Expert Panel's recommendations, 'in order to further refine the proposed Constitutional amendment that will be put to the Australian people'.<sup>3</sup>

2.10 Mr Gary Highland, National Director of ANTaR, reiterated this point during the roundtable discussion, while emphasising that he did not believe there should be major change from the Expert Panel's recommendations. He further suggested that while the Expert Panel's recommendations might be refined through further dialogue, ANTaR 'strongly supports the expert panel's recommendations as the starting point for this dialogue'.<sup>4</sup>

2.11 ANTaR also noted that members of the Expert Panel had themselves indicated that the Panel's recommendations should be taken as a starting point, rather than an end point, for further discussion. In this connection, ANTaR quoted Expert Panel member Professor Megan Davis, who stated that the Expert Panel's recommendations should be 'the first word, not the last word, in what should be put to the Australian people'.<sup>5</sup>

2.12 AIATSIS made the point in its submission that the Expert Panel's recommendations, rather than representing an ideal 'wishlist' from which compromises downward should be made, were in fact the result of a compromise that had already made allowances for the need to gain broad public support.<sup>6</sup>

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1 Recognise/Reconciliation Australia, *submission 2*, p. 1.

2 ANTaR, *submission 3*, pp. 3-4.

3 ANTaR, *submission 3*, p. 4.

4 *Proof Committee Hansard*, Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, 30 April 2013, p. 9.

5 ANTaR, *submission 3*, p. 4. Quote is from Megan Davis, 'Where to next for Indigenous constitutional recognition?' Constitution Day: Have Your Say Forum, National Archives of Australia:

6 AIATSIS, *submission 1*, p. 1.

2.13 For its part, Congress firmly endorsed the Expert Panel's process and report, and argued that its recommendations should provide the framework for constitutional recognition of Aboriginal and Torres Strait Islander peoples:

The expert panel's recommendations were the result of an enormous amount of time, resources and engagement. The expert panel ensured that Aboriginal and Torres Strait Islander communities were consulted so that the recommendations reflected a balance of views of the first peoples of Australia. The recommendations were carefully researched to ensure legal clarity and were widely supported during the consultations and focus-group meetings undertaken by panel members. The expert panel's recommendations were designed to make simple but substantive improvements to the Constitution and at the same time have the potential to receive popular support in a referendum. Through surveying our own congress members we know the recommendations are widely supported on our membership. Congress continues to support the expert panel report and its recommendations. We reiterate that the recommendations must be accepted and endorsed as a framework for constitutional reform.<sup>7</sup>

2.14 Congress concluded that to the extent any changes were made to this framework or to the Expert Panel's recommendations, this would 'require a negotiation with Aboriginal and Torres Strait Islander peoples.'<sup>8</sup>

#### *Committee view*

2.15 As indicated in its report on the Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012, the committee remains very much of the view that the work of the Expert Panel provides a solid foundation for the process of constitutional reform.

2.16 At the same time, the committee believes that some of the Expert Panel's recommendations require further consideration, and as a result of this may need to be refined.

2.17 Consistent with the procedural recommendation made by the Expert Panel (recommendation (g)), to the extent that the committee makes any recommendations on a proposal for constitutional change that departs in form or substance from the recommendations made by the Expert Panel, it will 'consult further with Aboriginal and Torres Strait Islander peoples and their representative organisations to ascertain their views in relation to any such alternative proposal.'<sup>9</sup>

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7 Mr Lindon Coombes, Chief Executive Officer, National Congress of Australia's First Peoples, *Proof Committee Hansard*, 30 April 2013, p. 3.

8 Mr Lindon Coombes, Chief Executive Officer, National Congress of Australia's First Peoples, *Proof Committee Hansard*, 30 April 2013, p. 3.

9 Report of the Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, January 2012, p. xix.

## Guiding principles for a constitutional amendment

2.18 One of the broad themes raised during the roundtable was the principles that should guide the development of a proposal for constitutional change, including the committee's role in that work.

2.19 As committee members were reminded by some roundtable participants, the Expert Panel adopted four principles to guide its assessment of proposals for constitutional recognition, namely that a proposal should:

- 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.<sup>10</sup>

2.20 In its submission, ANTaR urged the committee to adopt the same four principles.<sup>11</sup>

2.21 Addressing the idea that the committee should be guided in part by the need to develop a proposal capable of securing overwhelming support from Australian voters, AIATSIS argued that rather than merely attempting to identify a proposal that is 'most likely to succeed at a future referendum,' it was important to identify the best proposal that is capable of gaining sufficient popular support to satisfy the requirements for constitutional amendment:

Constitutional recognition of Aboriginal and Torres Strait Islander peoples has specific objectives: it is intended to address unfinished business left over from Australia's history of colonisation and dispossession; it aims [to] establish a definition of Australian nationhood that is substantively inclusive; it seeks to acknowledge the prior and continuing existence of Indigenous political and legal entities in this country. Some proposals are better suited to achieving these objectives than others. AIATSIS would recommend that the Joint Select Committee should aim to identify the best proposal that can succeed, rather than merely the most popular.<sup>12</sup>

2.22 Congress, meanwhile, reiterated the fundamental importance of the participation of Aboriginal and Torres Strait Islander peoples in the ongoing development of a proposal for constitutional change:

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

11 ANTaR, *submission 3*, pp. 4-5.

12 AIATSIS, *submission 1*, pp. 1-2.

[C]onsistent with the UN Declaration on the Rights of Indigenous Peoples, Aboriginal and Torres Strait Islander people should provide their free, prior and informed consent to legislation for their benefit. The full participation of Australia's first peoples in every stage of the process of developing a model for consideration by all Australians is an essential principle. This approach ensures that Aboriginal and Torres Strait Islander people's views are never far from the process and offers a model of genuine partnership and reconciliation.<sup>13</sup>

2.23 The committee also heard from IYEC that constitutional recognition should be pursued within a broader long-term plan of legal and policy reform to implement the UN Declaration on the Rights of Indigenous People:

Finally, and this is a bit broader than just changing the Constitution, the participants [of the IYEC Indigenous youth forum on constitutional recognition] are of the view that constitutional recognition should be accompanied by a genuine review of current legislation policy for consistency with the very principles that we are proposing to recognise. So, if the nation's supreme legal document is to formally recognise Indigenous Australians as the first Australians, with unique cultures and heritages and relationships to lands and waters, the rest of the political and legal systems should follow suite, particularly when we look at a number of existing policies and laws that could arguably be damaging the culture, language and heritage of Indigenous peoples. Rather than taking an ad hoc approach to reviewing legislation and policies, we have recommended that the government work with Indigenous peoples to develop a long-term plan to implement the declaration on the rights of Indigenous peoples as part of the broader package of constitutional reform.<sup>14</sup>

#### *Committee view*

2.24 The committee believes the aforementioned four principles that guided the work of the Expert Panel remain appropriate in guiding its own work in helping develop a final proposal to put to the Australian people at a referendum.

### **Continued engagement with Aboriginal and Torres Strait Islander people**

2.25 Another theme of the roundtable discussion, and indeed of all other exchanges the committee has had with interested representative bodies and stakeholder groups, has been the importance of the committee engaging with Aboriginal and Torres Strait Islander peoples in undertaking its work.

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13 Mr Lindon Coombes, Chief Executive Officer, National Congress of Australia's First Peoples, *Proof Committee Hansard*, 30 April 2013, p. 4.

14 Mr Peter Dawson, Co-Chair, Indigenous Youth Engagement Council, National Centre for Indigenous Excellence, *Proof Committee Hansard*, 30 April 2013, p. 7.

2.26 Recognise told the committee that it was important that it engage openly and transparently with leadership organisations and Aboriginal and Torres Strait Islander people generally:

Obviously there needs to be as much broad engagement with the depth and diversity of Aboriginal and Torres Strait Islander leadership as possible because it is very diverse. The work in engaging with those groups is going to need to be ongoing and there needs to be open dialogue. We think that a group even like this as a starting point is a good representation to get that ball rolling. We also know from our engagement with Aboriginal and Torres Strait Islander people that there is an expectation that the engagement between the committee and the processes is frank and open, particularly around the way that the model is designed. There is definitely a great deal of interest from Aboriginal and Torres Strait Islander people to be involved in the development of the process as broadly as possible, not just through a few leadership organisations. Obviously, it is important to use the assets that we do have available. Organisations such as the National Congress of Australia's First Peoples and other Indigenous organisations to help facilitate a lot of that engagement.<sup>15</sup>

2.27 As noted above, Congress also underlined the fundamental importance the 'full participation' of Aboriginal and Torres Strait Islander people in the process of developing a model of constitutional change for consideration by Australian voters.<sup>16</sup>

2.28 Several participants in the roundtable also highlighted the need for the committee to engage with Indigenous youth. As Mr Peter Dawson, co-Chair of IYEC, explained:

In terms of the Indigenous youth perspectives on changes to the Constitution, our council is of the view that they are incredibly important in informing the proposed changes. This is for a few reasons. First, over half of the Indigenous Australian population is under the age of 25, so for that statistical reason alone it is essential that our views and aspirations form the basis of the proposed changes to the Constitution. But the moral imperatives for our involvement are much deeper than that. We are the generation who will inherit these changes and we are most affected by them, so in that sense we are the best in shaping future relationships between Indigenous and non-Indigenous Australians.<sup>17</sup>

2.29 In its supplementary submission to the committee, IYEC reiterated:

...the importance of full and effective participation of young Indigenous people in all future decision making processes regarding constitutional

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15 Ms Tanya Hosch, Deputy Campaign Director, Recognise, *Proof Committee Hansard*, 30 April 2013, p. 2.

16 Mr Lindon Coombes, Chief Executive Officer, National Congress of Australia's First Peoples, *Proof Committee Hansard*, 30 April 2013, p. 4.

17 Mr Peter Dawson, Co-Chair, Indigenous Youth Engagement Council, National Centre for Indigenous Excellence, *Proof Committee Hansard*, 30 April 2013, p. 6.

recognition. We encourage the Committee to continue and expand their engagement with Indigenous youth, particularly when formulating a model of constitutional recognition.<sup>18</sup>

2.30 IYEC also indicated in its supplementary submission that it intended to provide the committee with a copy of its Indigenous Youth Report on Constitutional Recognition when it is released in August 2013. This report, according to IYEC, will 'include Indigenous youth perspectives on the Expert Panel's proposed changes to the Constitution and will be a basis for future dialogue between the Committee and Indigenous youth.'<sup>19</sup>

2.31 Recognise also pointed to the importance of the committee engaging with Indigenous youth, with Ms Tanya Hosch, the Deputy Campaign Director of Recognise, telling the committee:

...because of our demographics and because of the active nature of younger Aboriginal and Torres Strait Islander people on this issue, it is really important to engage with those groups around the country. That is really important and we are very happy to help the committee to try to facilitate that engagement with some of those youth committees around the country.<sup>20</sup>

#### *Committee view*

2.32 As indicated in the committee's report on the Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012, the committee recognises the need for ongoing engagement with and support from Aboriginal and Torres Strait Islander peoples in undertaking its work.<sup>21</sup>

2.33 Moreover, the committee very much welcomes the enthusiasm and activism of younger Aboriginal and Torres Strait Islander people on the issue of constitutional recognition, and will work to ensure the voices of these young people are heard in the process of developing a proposal for constitutional change.

### **Roundtable discussion on specific Expert Panel recommendations**

2.34 Both in written submissions provided in advance of the roundtable, and during the roundtable discussion itself, participants provided the committee with feedback on each of the Expert Panel's specific recommendations.

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18 Indigenous Youth Engagement Council, *supplementary submission*, p. 1.

19 Indigenous Youth Engagement Council, *supplementary submission*, p. 1.

20 Ms Tanya Hosch, Deputy Campaign Director, Recognise, *Proof Committee Hansard*, 30 April 2013, p. 2.

21 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012*, January 2013, p. 21.

***Recommendation 1: That section 25 be repealed***

2.35 Recommendation 1 is that section 25 be repealed. Section 25 contemplates the possibility of State laws disqualifying people from voting at State elections on the basis of their race.

2.36 Recommendation 1 was uncontroversial and broadly supported by roundtable participants. As AIATSIS put it in their submission, section 25:

...contemplates, and accommodates, racism within the federal structure. Even though the section acts as disincentive to discriminatory exclusion from voting, it nevertheless has no place within the Constitution of a nation which holds equality as a core value.<sup>22</sup>

2.37 While there was broad agreement that section 25 should be removed, Congress noted that in practice section 25 no longer had any application, and therefore suggested that if a referendum was held on removing section 25 alone (although no-one was suggesting this) it would be largely indifferent to the outcome. Nonetheless, participants agreed that the repeal of section 25 should be a part of any broader proposal for constitutional recognition of Aboriginal and Torres Strait Islander peoples.<sup>23</sup>

*Committee view*

2.38 The committee agrees that the repeal of section 25 should form part of any proposal on constitutional recognition that is put to the Australian people at a referendum.

2.39 As noted in its report on the Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012, the committee believes that the issue of racial discrimination goes to the heart of the broader question of constitutional recognition of Aboriginal and Torres Strait Islander peoples. Therefore, it is entirely appropriate and necessary that the removal of references to 'race' in the Constitution form part of a broader proposal for constitutional recognition of Aboriginal and Torres Strait Islander peoples.<sup>24</sup>

***Recommendation 2: That section 51(xxvi) be repealed***

2.40 Recommendation 2 is that section 51(xxvi) be repealed. Section 51(xxvi) can be used by the Commonwealth to enact legislation to discriminate for or against people on the basis of their race.

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22 AIATSIS, *submission 1*, p. 2.

23 Mr Robert Leslie Malezer, Co-Chair, National Congress of Australia's First Peoples, *Proof Committee Hansard*, 30 April 2013, pp. 9-10.

24 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012*, January 2013, p. 9.

2.41 In the course of discussing the Expert Panel's recommendations that sections 25 and 51(xxvi) be removed, Mr Gooda explained to the committee why the Expert Panel regarded the removal of references to race in the Constitution as so important:

There was a long discussion about the word 'race' in our Constitution. We could not find another constitution in the world that mentions race. We are a liberal democracy in the 21st century, why should we, even if it is obsolete, have powers in the Constitution that anticipate laws made on the basis of race. Talk about obsolete things; race is now almost obsolete as a concept anyway. I think there was an overwhelming thing, besides the impact of section 25 and 51(xxvi) that the mere fact of the word 'race' in our Constitution is something we should generally remove.<sup>25</sup>

2.42 In its submission, AIATSIS suggested there were two primary considerations with regard to the repeal of section 51(xxvi): first, the need to remove the Commonwealth's power to make laws against the interests of a particular 'racial' group; and second, the need to retain a constitutional head of power to support legislation that benefits Aboriginal and Torres Strait Islander peoples. AIATSIS indicated that it supported the repeal of section 51(xxvi), provided a replacement head of power was inserted. AIATSIS indicated that it supported a replacement head of power constrained by a non-discrimination clause, as proposed by the Expert Panel (at recommendation 3).<sup>26</sup>

2.43 While the removal of the references to 'race' from the Constitution, including in section 51(xxvi), was supported by all roundtable participants, in the course of discussion it was suggested that, given the need to maintain a head of power to ensure laws beneficial to Aboriginal and Torres Strait Islander peoples remained valid, section 51(xxvi) might be amended to remove the reference to race, rather than removed in its entirety. In response to this suggestion, Mr Gooda noted that if the word 'race' was removed, section 51(xxvi) might instead refer to the Commonwealth's capacity to 'make laws for groups for whom special laws are necessary', or words to that effect.<sup>27</sup>

2.44 Despite this suggestion, discussion during the roundtable centred on how to take forward the Expert Panel's recommendation that section 51(xxvi) be removed in its entirety, and a new head of power inserted as part of a new section 51A (as discussed below).

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25 Mr Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Proof Committee Hansard*, 30 April 2013, p. 10.

26 AIATSIS, *submission 1*, p. 2.

27 Mr Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Proof Committee Hansard*, 30 April 2013, p. 11.

*Committee view*

2.45 As noted in relation to recommendation 1, the committee holds that the removal of references to 'race' in the Constitution is an important component of constitutional recognition of Aboriginal and Torres Strait Islander peoples. As such, the committee agrees with the Expert Panel that section 51(xxvi) should be repealed.

2.46 However, the committee also recognises that the repeal of section 51(xxvi) will necessitate the insertion of a new head of power (as discussed below), and the form and content of this head of power will require further consideration by this committee in the next parliament.

***Recommendation 3: Insertion of a new section 51A***

2.47 The Expert Panel recommended the insertion of a new section 51A, which would recognise Aboriginal and Torres Strait Islander peoples as the first occupants of Australia, and provide the Commonwealth with the power to make laws for the benefit of Aboriginal and Torres Strait Islander peoples.

2.48 The statement of recognition in proposed section 51A takes the form of a preamble to the head of power. As was discussed at the roundtable, the fourth part of that preamble – acknowledging the 'need to secure the advancement of Aboriginal and Torres Strait Islander peoples' – is intended guard against the risk that this head of power might be used to make laws to the detriment of Aboriginal and Torres Strait Islander peoples.

2.49 Explaining the rationale for including in the proposed section 51A both a head of power and a statement of recognition as a preamble to that head of power, Congress told the committee that this represented:

...[a] convenient marriage of having preamble text that recognised Aboriginal and Torres Strait Islander people who were here first et cetera with the purposes of a head of power. That was what was most important—that is, to say, 'Yes, there can be a head of power to make a law, but the intent of the head of power also needs to be clear.'<sup>28</sup>

2.50 Put another way, as Congress continued, the reason why the preamble had been combined with the head of power was to 'make it clear that we want [the head of power] to serve a positive purpose.'<sup>29</sup>

2.51 While recognising the intent of the fourth part of the preamble in relation to the head of power, some roundtable participants questioned the use of the word 'advancement'. For example, Mr Dawson told the committee that the word

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28 Mr Robert Leslie Malezer, Co-Chair, National Congress of Australia's First Peoples, *Proof Committee Hansard*, 30 April 2013, p. 17.

29 Mr Robert Leslie Malezer, Co-Chair, National Congress of Australia's First Peoples, *Proof Committee Hansard*, 30 April 2013, p. 17.

'advancement' had been the subject of some discussion at a youth forum held by IYEC:

Some participants raised an issue with the word 'advancement' and questioned what 'advancement' means, who determines what advances Aboriginal and Torres Strait Islander people and whether that is consistent with the principles we are recognising in the preamble to proposed section 51A.

Some of the stuff that came up regarding advancement was that it could be seen to freeze our socioeconomic position in time. Are Indigenous Australians always in need of advancement, if advancement refers to alleviating disadvantage? Do we want to define Indigenous peoples in relation to disadvantage? That was one of the things raised by participants—especially in the National Centre of Indigenous Excellence, which looks at positive strengths based language and at the excellence, resilience and innovation of Indigenous peoples in changing the deficit language of disadvantage. If advancement refers to alleviating disadvantage, is it necessary to have that in there? Does it fit with recognising the unique status of Indigenous Australians as first peoples by defining us in relation to disadvantage? That was one point. The other key one is the subjective nature of the term—so governments can always argue that their policy is for the advancement of Indigenous peoples. There is a possibility there that they could do that independently of the wishes of Aboriginal and Torres Strait Islander people.<sup>30</sup>

2.52 Mr Dawson further suggested that, instead of the word 'advancement', his preference would be to include positive, enabling language in the preamble:

I prefer a more positive direction to the parliament about their role in making laws and policies about Aboriginal and Torres Strait Islander people and I think something that fits perfectly with the opening recitals to the head of power is an enabling role—create the conditions enabling Aboriginal and Torres Strait Islander people to protect, maintain and develop, something like that, and then all the things you just recognised—their culture, their language, their heritage, relationship with lands and waters.<sup>31</sup>

2.53 On a similar point, ANTaR noted in its submission that, despite being supportive of constitutional recognition, Professors George Williams, Anne Twomey and Frank Brennan, and then Generation One CEO, Mr Warren Mundine, had been critical of the Expert Panel's use of the word 'advancement' in its preamble to the proposed section 51A (an issue discussed further below in relation to recommendation 3 of the Expert Panel). As noted earlier in this chapter, ANTaR argued that the committee should seek to engage with those supporters of constitutional recognition

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30 Mr Peter Dawson, Co-Chair, Indigenous Youth Engagement Council, National Centre for Indigenous Excellence, *Proof Committee Hansard*, 30 April 2013, p. 15.

31 Mr Peter Dawson, Co-Chair, Indigenous Youth Engagement Council, National Centre for Indigenous Excellence, *Proof Committee Hansard*, 30 April 2013, p. 19.

who remained critical of aspects of the Expert Panel's recommendations, including those who had questioned the use of the word 'advancement'.<sup>32</sup>

2.54 At the same time, Mr Dawson also questioned whether a preamble would actually be effective in informing judicial interpretations of a head of power. This was particularly the case because, as Mr Dawson pointed out, no other head of power in the Constitution had a preamble section, so a question mark remained as to what effect the preamble would actually have on the head of power.<sup>33</sup>

2.55 Addressing the issue of whether the fourth part of the statement of recognition in section 51A – that is, the part containing the word 'advancement' – could simply be removed from the proposed text, Mr Malezer responded:

I had not considered it before, but it could very well be possible for that to not be there and look at the three [remaining statements in the statement of recognition]. I would have to examine that more closely but that could be possible, because, at the end of the day, even after deliberately looking at that word and trying to deal with it, I think we accepted the advice to us that, at the end of the day, the court will do an interpretation of whatever word you put in there, and you cannot be certain of what that interpretation will be.<sup>34</sup>

2.56 Mr Highland, the National Director of ANTaR, explained to the committee that while the Expert Panel (for which he had worked as the executive officer) had received legal advice that the word 'advancement' was appropriate, subsequent debate suggested that a better word might instead be used. He emphasised that during the Expert Panel's processes Aboriginal and Torres Strait Islander peoples had made it clear that they:

...did not want to be worse off as a result of [constitutional change]. They were mindful of the fact that, should there be no qualifier [to the new head of power] and this change should go through, Aboriginal people might be the only group of people in society for whom you could make detrimental laws. So it was thought that there needed to be a qualifier on that and the legal advice was—it is in the report—that the term 'advancement' would be appropriate because it is used in other Australian acts ... So that was what the decision was.

Subsequent to that clearly 'advancement' is a contested term. There are a number of commentators who have said that they do not think that is an appropriate term. It is a contested term not just legally but also politically and historically. As Leslie [Mr Malezer] has pointed out, 'advancement' is a very different word to a Queensland Aboriginal person from a Victorian

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32 ANTaR, *submission 3*, p. 4.

33 Mr Peter Dawson, Co-Chair, Indigenous Youth Engagement Council, National Centre for Indigenous Excellence, *Proof Committee Hansard*, 30 April 2013, p. 17.

34 Mr Robert Leslie Malezer, Co-Chair, National Congress of Australia's First Peoples, *Proof Committee Hansard*, 30 April 2013, pp. 17-18.

Aboriginal person. For someone brought up in Queensland [it] is all about a government department that oppressed them. If you are in Victoria, it is about Aboriginal aspirations for their rights and the formation of the Victorian Aborigines Advancement League. It is a contested term around the country. From talking to different Aboriginal people, there is not an agreement as to what that term means. It is important to remember it is not even part of the substantive power but it has a potential to divert the debate to a whole range of issues, like the discussion we are having now. Personally, I think people should take into consideration the comments that some commentators have made that there might be a better word to use than 'advancement'.<sup>35</sup>

2.57 Roundtable participants also discussed whether it would, in fact, be necessary to insert a new head of power along the lines in the proposed section 51A. It was generally agreed that the removal of section 51(xxvi) made the inclusion of a new head of power necessary, in order to ensure that laws made for the benefit of Aboriginal and Torres Strait Islander peoples (such as native title and heritage protection legislation) remained valid.

2.58 For example, Mr Gooda explained that his thinking in terms of including a head of power in section 51A was that it was almost a technical matter – that is, if section 51(xxvi) is removed, then there is a need for a new head of power to validate the legislation that is of benefit to Aboriginal and Torres Strait Islander peoples, such as the *Native Title Act 1993*.

2.59 At the same time, Mr Gooda told the committee that while it was necessary to address the risk that removing the head of power at section 51(xxvi) would invalidate existing legislation, as a member of the Expert Panel he had always been concerned that:

...we were moving race [out of the Constitution] and we were putting race back in for one particular group. This is what worries me. The research tells us that, if one group is seen to benefit more than anyone else in Australia, we will lose the referendum. For me, that would be the easiest thing to run a no case against—the whole lot—because we are recommending that it goes in the package.<sup>36</sup>

2.60 It might be noted in this connection that in its report the Expert Panel stated that its polling and research had suggested that the singling out of one group of Australians in the Constitution could be a 'stumbling block' to constitutional change.

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35 Mr Gary Highland, National Director, ANTaR, *Proof Committee Hansard*, 30 April 2013, p. 18.

36 Mr Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Proof Committee Hansard*, 30 April 2013, pp. 12-13.

The report therefore pointed to the importance of a 'properly resourced public education and awareness campaign in the lead-up to the referendum'.<sup>37</sup>

2.61 AIATSIS, meanwhile, rejected the suggestion that there was a contradiction between removing references to 'race' from the Constitution and at the same time adding provision in the Constitution for laws to be made for the benefit of Aboriginal and Torres Strait Islander peoples. Here, AIATSIS drew a distinction between recognition of the unique history and place of Indigenous people as being political history, rather than racial history:

So the political history gives warrant for why we look at things like land rights, why we look at political institutions and why we look at the preservation of language and culture. Those languages and cultures are not being protected anywhere else in the world. The unique place of Indigenous peoples in this country is the reason for having a head of power in relation to Aboriginal and Torres Strait Islander peoples, and race is really a justification for distinction which colonisation relied on for centuries. The idea that Indigenous people had a unique place in the Constitution is separate from the concept of race, if we take a more modern and more appropriate race-blind approach to our political history and our legal history.<sup>38</sup>

2.62 In its written submission, AIATSIS also indicated that it supported the insertion of a new head of power in section 51A, provided that it was coupled with a prohibition on racial discrimination (as proposed for inclusion in a new section 116A).<sup>39</sup>

2.63 Mr Dawson, meanwhile, told the committee that the new head of power was not only about validating existing laws, but also providing:

...a new legal and moral framework within which Indigenous policy and laws can be made. So as well as validating existing laws it is about what we want laws in the future regarding Aboriginal and Torres Strait Islander people to be about, and I think the value in linking a head of power to the principles that we are recognising with regard to Aboriginal and Torres Strait Islander people is directing what they should be about. They should be about our status as first peoples, our distinct cultures and heritage, and our relationship to land and waters. There is a risk in talking just about validating existing laws. You need to be future looking as well about what

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37 Report of the Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, January 2012, p. 146.

38 Dr Lisa Strelein, Director, Corporate Strategy, Australian Institute of Aboriginal and Torres Strait Islander Studies, *Proof Committee Hansard*, 30 April 2013, p. 11.

39 AIATSIS, *submission 1*, p. 2.

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the future of Indigenous policy and laws regarding Aboriginal and Torres Strait Islander people is going to be like.<sup>40</sup>

*Committee view*

2.64 The committee is broadly supportive of the wording and the content of the statement of recognition contained in the preamble to the head of power in the proposed section 51A.

2.65 However, the committee believes that the wording of the fourth part of the preamble, and in particular the use of the word 'advancement' in that part, will require further consideration by this committee and the parliament following the 2013 Federal Election.

2.66 While the committee recognises that the repeal of section 51(xxvi) necessitates the inclusion in the Constitution of a new head of power, it also believes there is a need for this committee to further consider how this head of power should be framed, and what relationship if any it should have to the statement of recognition.

***Recommendation 4: Insertion of a new section 116A***

2.67 Recommendation 4 proposes the insertion of a new section 116A prohibiting racial discrimination by the Commonwealth, States or Territories. Section 116A(2) states that this prohibition on discrimination 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.'

2.68 Dr Strelein explained that the inclusion of the words 'ameliorating the effects of past discrimination' would allow for the possibility of laws that provide compensation for past discrimination, and not just laws that address current disadvantage:

By introducing a non-discrimination clause into the constitution, you also provide a mechanism for non-Indigenous people to make an argument that laws that may provide compensation for past dispossession, for example, are based on race and therefore discriminate against non-Indigenous people. So the idea behind special measures provisions, generally, is to make it clear that you can do something for the benefit that may be discriminatory in the sense that it is for Indigenous people only, but because it is beneficial it is not prohibited. So this makes it clear that it is not just for current disadvantage but to provide a mechanism for compensation for past injustices.<sup>41</sup>

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40 Mr Peter Dawson, Co-Chair, Indigenous Youth Engagement Council, National Centre for Indigenous Excellence, *Proof Committee Hansard*, 30 April 2013, p. 13.

41 Dr Lisa Strelein, Director, Corporate Strategy, Australian Institute of Aboriginal and Torres Strait Islander Studies, *Proof Committee Hansard*, 30 April 2013, p. 22.

2.69 Asked if section 116A was needed at all, Mr Malezer responded that it was, and reminded the committee that the Racial Discrimination Act had been overridden by the Commonwealth on several occasions, and that once this had happened there was no constitutional protection against racial discrimination.<sup>42</sup>

2.70 While there was some discussion as to whether the inclusion of section 116A would foster opposition on the basis that it was perceived, however incorrectly, to provide for the 'special treatment' of Aboriginal and Torres Strait Islander peoples, several participants in the roundtable stressed that section 116A would be a general prohibition on racial discrimination that applies to all Australians. As Mr Dawson argued, the inclusion of the anti-discrimination clause could therefore help secure public support for constitutional change:

That is actually a good message, I think, to Australians at a referendum that everyone should be treated equally under the Constitution. ... I think it is actually a good thing to have in there in terms of public support because it applies to all Australians. There are no special rights in there.<sup>43</sup>

2.71 One possibility raised during the roundtable was that proposed sections 51A and 116A might be modified so that the application of section 116A was subject to the head of power in section 51A. In this scenario, section 51A would be modified so that the head of power expressed the intent that it be used only for positive purposes – through the inclusion of the 'advancement' wording or words to similar effect in the head of power itself, rather than in the preamble to the head of power – and section 116A(1) would be rewritten to indicate it was subject to the section 51A. Section 116A(2) would, in this scenario, be removed, as its purpose would be served by the reference in the section 116A to the head of power in section 51A.<sup>44</sup>

#### *Committee view*

2.72 The committee believes that a prohibition against racial discrimination will likely be an important component of the proposal for constitutional change that Australians are asked to vote on.

2.73 At the same time, the committee believes there is room for it to further consider how the qualifying provision (or 'carve out', as some have put it) proposed for section 116A(2) is framed and worded. In particular, the committee believes that further consideration should be given to whether section 116(2) is the best mechanism to qualify the anti-discrimination provision, or whether this might be better achieved by including in section 116A a reference to it being subject to a revised head of power in section 51A which expressly indicates that it should only be applied for the

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42 Mr Robert Leslie Malezer, Co-Chair, National Congress of Australia's First Peoples, *Proof Committee Hansard*, 30 April 2013, p. 23.

43 Mr Peter Dawson, Co-Chair, Indigenous Youth Engagement Council, National Centre for Indigenous Excellence, *Proof Committee Hansard*, 30 April 2013, p. 23.

44 Senator Brandis, *Proof Committee Hansard*, 30 April 2013, p. 23.

'advancement' or 'benefit' (or some other word to this effect) of Aboriginal and Torres Strait Islander peoples.

***Recommendation 5: Insertion of a new section 127A***

2.74 Recommendation 5 proposes the insertion of a new section 127A recognising Aboriginal and Torres Strait Islander languages as the original Australian languages, while stating that the national language is English.

2.75 While a number of roundtable participants voiced their support for the inclusion of section 127A in a referendum proposal, the discussion also revealed concerns that the inclusion of this section could prove divisive or distract from the central issue of constitutional recognition of Aboriginal and Torres Strait Islander peoples.

2.76 ANTaR told the committee that it supported the proposed section 127A because, during the Expert Panel process:

...many Aboriginal people spoke in very moving terms—and I am sure the panel members who participated in the consultations would attest to this—about the threat that they felt to their language and their languages and the fact that they really identify that with their very sense of existence. One of the panel members, Noel Pearson, has both spoken and written very movingly about his language and his fears that that is under threat and his desire for there to be some affirmation at the highest level of the nation that as a nation we want to nurture and protect those languages, particularly since so many of these languages are no longer with us.<sup>45</sup>

2.77 In its submission, AIATSIS stated that it regarded section 127A as 'appropriate, important, and capable of mustering sufficient public support.'<sup>46</sup>

2.78 Congress also indicated that it was supportive of section 127A, while noting that some of its members felt uncomfortable with the statement affirming English as Australia's national language. Mr Malezer told the committee he was strongly supportive of section 127A, on the basis that it was more likely to provide protection of Aboriginal and Torres Strait Islander languages than section 51A (which also refers to the languages of Aboriginal and Torres Strait Islander peoples). Mr Malezer also noted that some of his Congress colleagues were opposed to section 127A(1) – which affirms that the English is the national language of Australia – but he recognised that its inclusion was politically necessary to balance the recognition of Aboriginal and Torres Strait Islander languages at section 127A(2):

The idea of having recognition of language as part of the national heritage is a question of saleability. It is something that would be able to be

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45 Mr Gary Highland, National Director, ANTaR, *Proof Committee Hansard*, 30 April 2013, pp. 27-28.

46 AIATSIS, *submission 1*, p. 3.

supported by conservatives and radicals alike in Australia on the basis, on one side of this, of acknowledging that English is the national language and, on the other part, of recognising that Aboriginal languages are part of the national heritage. If that is the trade-off, I can see the advantage in that and I can see the value of having that come up in the referendum.<sup>47</sup>

2.79 During the roundtable, participants discussed whether it was appropriate to refer to Aboriginal and Torres Strait Islander languages as 'part of our national heritage' (as the proposed section 127A does) given this would seem to exclude non-Aboriginal languages from being considered part of our heritage. Addressing this issue, Dr Strelein told the committee:

In terms of what is national heritage, I think there is also an important connection to be made, when you are talking about languages, with what languages talk about. Aboriginal languages are unique in the world. They are something that we have an obligation to preserve for the world in terms of linguistic diversity. But also those languages contain ways of talking about our land, about knowledge systems and about the history of the land. So all of those concepts that are contained in language are certainly part of our collective national heritage as well.<sup>48</sup>

2.80 Roundtable participants also discussed whether proposed section 127A distracted from the primary task of recognising Aboriginal and Torres Strait Islander peoples in the Constitution, particularly given that the statement of recognition proposed for the section 51A includes a statement of respect for the continuing languages of Aboriginal and Torres Strait Islander peoples. Mr Dawson suggested that, while he supported the inclusion of section 127A, at a constitutional forum held by IYEC, young Indigenous participants had struggled to understand why section 127A had been included:

We had technical, legal workshops with law professors and members of the expert panel, and most people struggled to explain to us and the other participants why it was in there. Everyone agreed on the unique importance of Indigenous languages, and I would say that it is clear that they are part of the national heritage. I have heard people give welcomes to country before, where they have spoken about the fact that this land recognises that language; it has been spoken on this piece of land for thousands of years and it resonates with this country. It is part of our holistic definition of who we are and our relationship to country. I would also point out that many Australian towns and cities have Aboriginal names, so I think it is firmly part of our national heritage.

So I am not against it being in there. I think there would have to be a really clear message about why it was being separately recognised, for it to make

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47 Mr Robert Leslie Malezer, Co-Chair, National Congress of Australia's First Peoples, *Proof Committee Hansard*, 30 April 2013, p. 28.

48 Dr Lisa Strelein, Director, Corporate Strategy, Australian Institute of Aboriginal and Torres Strait Islander Studies, *Proof Committee Hansard*, 30 April 2013, p. 29.

sense, because it is already mentioned in the preamble to the head of power. Because of that, it automatically, straightaway, raised questions from the young people we were talking to. And that is probably a good litmus test for people in Australia who do not necessarily have any understanding of constitutional recognition so far; they look at that and they go, 'Why is it mentioned twice?' If there is a clear explanation of that, it might make more sense. Or is it possible to edit the preamble's mention of languages to reflect the national heritage component? I do not know. Does it have to be separate?<sup>49</sup>

2.81 Representatives of Recognise told the committee that in its work building support for constitutional recognition, many supporters had questioned how important it was to include section 127A in a proposal for constitutional change. Ms Hosch suggested that if section 127A were included in the package put to the Australian people, 'this will probably end up requiring quite a lot of community education work.'<sup>50</sup>

#### *Committee view*

2.82 The committee believes that it will need to further consider arguments for and against including section 127A, as currently worded, in the proposal for constitutional change.

2.83 The committee acknowledges the importance that many Aboriginal and Torres Strait Islander people place on constitutional recognition of Australia's original languages. At the same time, committee members believe that the questions of whether a standalone languages provision is necessary in addition to the reference to languages in section 51A, and whether it is capable of achieving public support, remain unresolved. Moreover, the committee believes that if it is in fact desirable to include a standalone languages provision, there remains a need for further consideration of the exact structure and wording of that provision.

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49 Mr Peter Dawson, Co-Chair, Indigenous Youth Engagement Council, National Centre for Indigenous Excellence, *Proof Committee Hansard*, 30 April 2013, p. 30.

50 Ms Tanya Hosch, Deputy Campaign Director, Recognise, *Proof Committee Hansard*, 30 April 2013, p. 31.



# Chapter 3

## Next steps toward constitutional recognition

### Bipartisan support for action in the 44<sup>th</sup> Parliament

3.1 Both the Prime Minister and the Leader of the Opposition indicated that they expect that a referendum bill will be introduced and passed in the next (the 44<sup>th</sup>) parliament.

3.2 In her second reading speech on the Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012, the Prime Minister stated that the work of the Committee would 'prepare the way for the parliament, most likely in the course of 2014, to debate and pass the referendum bill.'<sup>1</sup>

3.3 Both the Prime Minister and the Minister for Families, Community Services and Indigenous Affairs, the Hon Jenny Macklin MP, pointed out in their respective second reading speeches that the sunset provision and review clauses in the bill were intended to help maintain momentum toward constitutional change. As the Prime Minister put it, this would help ensure that 'the 44<sup>th</sup> Parliament can achieve what the 42<sup>nd</sup> and 43<sup>rd</sup> have been unable to do.'<sup>2</sup>

3.4 Meanwhile, the Leader of the Opposition, the Hon Tony Abbott MP, stated in his second reading speech that the 'next parliament will, I trust, finish the work that this one has begun.'<sup>3</sup>

3.5 In his address to the Sydney Institute, Mr Abbott also committed a future Coalition government to action on constitutional recognition:

Within 12 months of taking office, an incoming Coalition government would put forward a draft amendment and establish a bipartisan process to assess its chances of success.<sup>4</sup>

### The committee's role

3.6 The expectation of committee members is that the committee will be reconstituted in the next parliament (which is necessary, given this is a select committee).

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1 The Hon Julia Gillard MP, Prime Minister, *Hansard*, 13 February 2013, p. 1121.

2 The Hon Julia Gillard MP, Prime Minister, *Hansard*, 13 February 2013, p. 1120; and The Hon Jenny Macklin MP, *Hansard*, 13 February 2013, p. 1124.

3 The Hon Tony Abbott MP, Leader of the Opposition, *Hansard*, 13 February 2013, p. 1123.

4 The Hon Tony Abbott MP, Leader of the Opposition, address to the Sydney Institute, Sydney, 15 March 2013, <http://www.liberal.org.au/latest-news/2013/03/15/tony-abbott-address-sydney-institute-sydney>.

3.7 There was broad agreement from participants in the roundtable discussion on 30 April 2013 that the committee would have significant work to undertake in guiding and, where appropriate, driving progress toward constitutional change. Roundtable participants also offered their thoughts to committee members on how the committee might focus its efforts.

3.8 For instance, in its submission, Recognise and Reconciliation Australia suggested that the committee should:

...break its tasks into defined sections of work and develop a timetable so that post-election a reconstituted committee doesn't have to start over again and can take up where this committee left off.<sup>5</sup>

3.9 Recognise and Reconciliation Australia also emphasised the importance of the committee being accessible and transparent to Indigenous people, and noted that 'there is an active group of young Indigenous people who should be incorporated into [the committee's] processes.'<sup>6</sup>

3.10 Congress told the Committee that, given the inclusion of a sunset clause in the Aboriginal and Torres Strait Islander Peoples Recognition Act, there was a need for a clear:

...two-year plan that genuinely engages the community broadly and also the Aboriginal and Torres Strait Islander communities specifically. We suggest that there are a range of processes that might be used during this period such as a constitutional convention or summit to generate awareness and community support to ensure a successful referendum in the next term of government. Congress welcomes further discussions regarding these proposals. Congress encourages the committee to ensure a timetable is outlined prior to the September election to ensure that continuity and momentum remain with the reconstituted committee post-election.<sup>7</sup>

3.11 Congress further told the committee that while it was necessary for the committee to build support for constitutional recognition, there was a risk that continual re-examination of the Expert Panel's recommendations would be counterproductive:

I would be a bit concerned if the process involving this committee is to go around and keep on re-examining the recommendations made by the panel because if there is enough picking it will all come undone. That is the issue. Also, as I understand it, the official line is that the process has not proceeded because there is not enough awareness out there in the community about what is going on. I would think that the committee itself needs to have some positive purpose as to what it is going to do. ...

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5 Recognise/Reconciliation Australia, *submission 2*, p. 1.

6 Recognise/Reconciliation Australia, *submission 2*, p. 1.

7 Mr Lindon Coombes, Chief Executive Officer, National Congress of Australia's First Peoples, *Proof Committee Hansard*, 30 April 2013, p. 4.

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There is a major responsibility from this point on to sell this, because if it keeps on going out there it will get picked apart, there will be a thousand different things brought up and it will not help build up this unity of support we are trying to achieve.<sup>8</sup>

3.12 Recognise also stressed that the process going forward would be more targeted than the process undertaken by the Expert Panel:

[The current process] is a very different phase to [the Expert Panel process]. It is not that broad brush try to get everybody type of thing; this is about trying to engage people who are going to be critical voices and stakeholders when the model development progresses. If they are getting information about process and progress late then a lot of this work is going to have to be revisited. It is about engaging very targeted people, knowing full well that they are going to be very vocal when the time comes.<sup>9</sup>

#### *Committee view*

3.13 The committee agrees with roundtable participants who suggested that the committee should not seek to re-do the Expert Panel's work.

3.14 At the same time, as indicated in the previous chapter the committee believes that the following aspects of the Expert Panel's recommendations will require further consideration and, where appropriate, refinement before a final referendum proposal is put to the parliament:

- (a) The placement and wording of the new head of power contemplated in the proposed section 51A, and how the statement of recognition that constitutes the preamble to proposed section 51A informs that head of power.
- (b) The extent to which it is necessary to use the statement of recognition to ensure the positive purpose of the head of power at proposed section 51A, whether the fourth part of the proposed preamble to section 51A is appropriately worded, and in particular whether the word 'advancement' is appropriate.
- (c) The placement and wording of the anti-discrimination clause proposed for a section 116A, and in particular the qualifying clause to the anti-discrimination provisions at section 116A(2).
- (d) Whether a standalone languages provision, as recommended by the Expert Panel for section 127A, is necessary and capable of securing public support, and if so, what the exact structure and wording of that provision should be.

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8 Mr Robert Leslie Malezer, Co-Chair, National Congress of Australia's First Peoples, *Proof Committee Hansard*, 30 April 2013, p. 34.

9 Ms Tanya Hosch, Deputy Campaign Director, Recognise, *Proof Committee Hansard*, 30 April 2013, p. 35.

3.15 As noted in the previous chapter, the committee recognises that, to the extent any recommendations it ultimately makes depart from the Expert Panel's recommendations, it will need to consult further with Aboriginal and Torres Strait Islander peoples and their representative organisations to ascertain their views on these departures.

3.16 The committee is firmly of the view that the next parliament should consider a bill for a referendum proposal on constitutional recognition of Aboriginal and Torres Strait Islander peoples, and that the committee's own work should be focused on finalising the specific content and wording of that referendum proposal.

3.17 To this end, current committee members believe that, after the committee is reconstituted following the 2013 Federal Election, it should endeavour to finalise a draft proposal for constitutional change by no later than the end of June 2014. This proposal should then be reported to the parliament for its consideration.

3.18 The committee is mindful that, in addition to its own work, the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* requires that:

- (a) the responsible Minister initiate a review within 12 months of the commencement of the Act (that is, by 27 March 2014) of support for a referendum to recognise Aboriginal and Torres Strait Islander peoples in the Constitution; and
- (b) the resulting report must be provided to the Minister at least six months prior to the expiration of the Act – as the Act expires on 27 March 2015, the review must therefore be provided to the Minister no later than 27 September 2014.

3.19 In addition to building a strong multi-partisan parliamentary consensus on the specific content, wording and timing of a referendum proposal, the committee also believes its work should aim to secure the support for that proposal from the state governments.

3.20 The committee also intends to continue its strong support for the campaign activities of Recognise to build public support for constitutional recognition of Aboriginal and Torres Strait Islander peoples.

3.21 The committee emphasises the strong bipartisan support that already exists and urges the next Chair of the committee to leverage this support to ensure a successful referendum takes place during the next parliament.

**Senator Trish Crossin**  
**Chair**

## **Additional Comments by Mr Robert Oakeshott MP**

1.1 I support Aboriginal and Torres Strait Islander recognition in our Australian Constitution. It is an important step to address the open wound in our legal and moral culture as a nation.

1.2 In 2010, I sought agreement from the commissioned Prime Minister that the 43rd Parliament would address this issue in detail, and progress to a referendum question at the ballot box in 2013.

1.3 An expert panel was established, that I had the honour to participate in, that consulted widely and put together a formal set of words and recommendations.

1.4 Following this, it became clear that there was concern about the loss of bipartisanship due to a political “rush” to deliver, and concern about unintended consequences of anything that may have looked like a one sentence “bill of rights” from the expert panel recommendations.

1.5 This was disappointing, as judgement calls were then made that the timeframe of a 2013 referendum could not be kept, whether for political or policy reasons. In the end, it didn't matter.

1.6 Following this, a cross-parliamentary committee was established to try and fine tune agreement on the set of words, with legislation passed with the support of both major parties that the matter would be dealt with within the next two years.

1.7 This committee continues to work, and has delivered its second report today.

1.8 As can be seen in the report, the intent behind recognition remains bi-partisan. This is good.

1.9 What is of concern, however, is the ongoing difficulty in getting both major parties to agree on a set of words that matter. In dispute seems to be critical wording – such as words at section 51A, and 116A as just two examples.

1.10 I can confirm all words were given a great deal of consideration by the Expert Panel in 2011, and that very wide consultation was and is being conducted, and any change to these words has the danger of sending the entire process back to the start. I worry this is the real political intent of some.

1.11 I therefore write these additional comments not to dissent from the findings of the report, but to express full confidence in the Expert Panel recommendations, and to express full confidence in the originally agreed timeframe of a bipartisan push for the ballot of 2013 (which of course I concede is not going to happen).

1.12 I do this to indicate great faith in the want for Australia to reconcile with our traditional custodians, and to celebrate over 60,000 years of continuous culture in our lead law document, rather than just “whitemans” history of the past 200 odd years.

1.13 And I do this to indicate little faith in the want for politicians to actually reach agreement any time soon, and that stalling for stalling sake’s is something we all need to indicate an intolerance of.

1.14 When a question is put, that makes common sense, providing reconciliation in law, justice and morality, Australia will quickly embrace it and is ready to support it. With true bi-partisanship around the urgency of this, it is my ongoing view this could have been achieved within the original timeframe set.

1.15 I believe it is important a value is placed on the good and detailed work done to produce the expert panel recommendations in 2011. If, after a federal election, these recommendations are twisted and turned into something they are not, this is where the unintended consequences truly lie.

1.16 And I also question this desire for time. Our original drafters of the Australian Constitution finalised the document on a boating trip on the Hawkesbury River, NSW, over several days. I may be wrong, and hope I am, but this convenient “buying of time” by political parties concerns me.

1.17 I invite the Australian community to treat this issue as the priority issue for Australia for the coming two years. It is our most important for our culture. Bipartisan agreement in legislation has been passed that it will be done in the next two years. And the foundation for the detailed question lies in the good work done, in a bipartisan and unanimously supported way, in the expert panel report of 2011. Please, Australia, stay true to this good done in preparation for this important work for our future nation.

**Mr Robert Oakeshott MP**

# **APPENDIX 1**

## **Roundtable Discussion and Participants**

**REDFERN, NEW SOUTH WALES, 30 APRIL 2013**

ARMSTRONG, Ms Leah, Chief Executive Officer, Reconciliation Australia

COOMBES, Mr Lindon, Chief Executive Officer  
National Congress of Australia's First Peoples

DAWSON, Mr Peter, Co-Chair, Indigenous Youth Engagement Council,  
National Centre for Indigenous Excellence

GARTRELL, Mr Tim, Campaign Director, Recognise

GOODA, Mr Mick, Aboriginal and Torres Strait Islander Social Justice  
Commissioner

HIGHLAND, Mr Gary, National Director, ANTaR

HOSCH, Ms Tanya, Deputy Campaign Director, Recognise

MALEZER, Mr Robert Leslie, Co-Chair,  
National Congress of Australia's First Peoples

STRELEIN, Dr Lisa, Director, Corporate Strategy,  
Australian Institute of Aboriginal and Torres Strait Islander Studies



# APPENDIX 2

## Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution

Report of the Expert Panel

January 2012

## Recommendations

### Recommendations for changes to the Constitution

The Panel recommends:

- 1 That section 25 be repealed.
- 2 That section 51(xxvi) be repealed.
- 3 That a new 'section 51A' be inserted, along the following lines:

#### **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.

The Panel further recommends that the repeal of section 51(xxvi) and the insertion of the new 'section 51A' be proposed together.

- 4 That a new 'section 116A' be inserted, along the following lines:

#### **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.

- 5 That a new 'section 127A' be inserted, along the following lines:

#### **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.

## **Recommendations on the process for the referendum**

- a. In the interests of simplicity, there should be a single referendum question in relation to the package of proposals on constitutional recognition of Aboriginal and Torres Strait Islander peoples set out in the draft Bill (Chapter 11).
- b. Before making a decision to proceed to a referendum, the Government should consult with the Opposition, the Greens and the independent members of Parliament, and with State and Territory governments and oppositions, in relation to the timing of the referendum and the content of the proposals.
- c. The referendum should only proceed when it is likely to be supported by all major political parties, and a majority of State governments.
- d. The referendum should not be held at the same time as a referendum on constitutional recognition of local government.
- e. Before the referendum is held, there should be a properly resourced public education and awareness program. If necessary, legislative change should occur to allow adequate funding of such a program.
- f. The Government should take steps, including through commitment of adequate financial resources, to maintain the momentum for recognition, including the widespread public support established through the *YouMeUnity* website, and to educate Australians about the Constitution and the importance of constitutional recognition of Aboriginal and Torres Strait Islander peoples. Reconciliation Australia could be involved in this process.
- g. If the Government decides to put to referendum a proposal for constitutional recognition of Aboriginal and Torres Strait Islander peoples other than the proposals recommended by the Panel, it should consult further with Aboriginal and Torres Strait Islander peoples and their representative organisations to ascertain their views in relation to any such alternative proposal.
- h. Immediately after the Panel's report is presented to the Prime Minister, copies should be made available to the leader of the Opposition, the leader of the Greens, and the independent members of Parliament. The report should be released publicly as soon as practicable after it is presented to the Prime Minister.