



# Final Report of the Referendum Council

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30 June 2017

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ISBN 978-1-925362-56-5 (print)

ISBN 978-1-925362-57-2 (PDF)

ISBN 978-1-925362-58-9 (HTML)

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Cover: photo James Widders-Hunt, design by Kylie Smith  
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Publishing consultant: Wilton Hanford Hanover

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### **Sources of quotations in the Uluru Statement from the Heart (facing page):**

... *a spiritual notion ... of sovereignty*: International Court of Justice in its Advisory Opinion on Western Sahara (62) (1975) ICJ Rep, [85]-[86], quoted in *Mabo v Queensland* [No 2] (1992) 175 CLR 1 [40].

... *the torment of our powerlessness*: WEH Stanner, *Durmugam: A Nangiomeri* (1959).

... *a rightful place*: Gough Whitlam, 'It's Time' (speech delivered at the Blacktown Civic Centre, 13 November 1972).

... *the coming together after a struggle*: Galarrwuy Yunupingu, '*Rom Watangu*', *The Monthly* (July 2016), 18.

## ULURU STATEMENT FROM THE HEART

We, gathered at the 2017 National Constitutional Convention, coming from all points of the southern sky, make this statement from the heart:

Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under our own laws and customs. This our ancestors did, according to the reckoning of our culture, from the Creation, according to the common law from 'time immemorial', and according to science more than 60,000 years ago.

This sovereignty is *a spiritual notion: the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty.* It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.

How could it be otherwise? That peoples possessed a land for sixty millennia and this sacred link disappears from world history in merely the last two hundred years?

With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia's nationhood.

Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are alienated from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.

These dimensions of our crisis tell plainly the structural nature of our problem. This is *the torment of our powerlessness.*

We seek constitutional reforms to empower our people and take *a rightful place* in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.

We call for the establishment of a First Nations Voice enshrined in the Constitution.

Makarrata is the culmination of our agenda: *the coming together after a struggle.* It captures our aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination.

We seek a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history.

In 1967 we were counted, in 2017 we seek to be heard. We leave base camp and start our trek across this vast country. We invite you to walk with us in a movement of the Australian people for a better future.

## LETTER OF TRANSMITTAL



Referendum Council

The Hon Malcolm Turnbull MP  
Prime Minister  
Parliament House  
CANBERRA ACT 2600

The Hon Bill Shorten MP  
Leader of the Opposition  
Parliament House  
CANBERRA ACT 2600

30 June 2017

Dear Prime Minister and Leader of the Opposition

We are proud to present you with the Final Report of the Referendum Council. This report has been prepared in accordance with the Referendum Council's Terms of Reference.

Yours sincerely

A handwritten signature in black ink that reads "Pat Anderson".

Pat Anderson AO  
Co-Chair, Referendum Council

A handwritten signature in black ink that reads "Mark Leibler".

Mark Leibler AC  
Co-Chair, Referendum Council

## FOREWORD FROM THE CO-CHAIRS

Aboriginal and Torres Strait Islander peoples have long struggled for constitutional recognition. As far back as Yorta Yorta elder William Cooper's letter to King George VI (1937), the Yirrkala Bark Petitions (1963), the Larrakia Petition (1972) and the Barunga Statement (1988), First Peoples have sought a fair place in our country.

All Prime Ministers of the modern era were conscious of the original omission of First Peoples from our constitutional arrangements. Prime Minister the Hon Gough Whitlam spoke of the need for Aboriginal and Torres Strait Islander peoples to take "their rightful place in this nation". Prime Minister the Rt Hon Malcolm Fraser established a Senate inquiry whose report, *200 Years Later: Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Feasibility of a Compact or 'Makarrata' between the Commonwealth and Aboriginal People*, was delivered after the 1983 election. Prime Minister the Hon Bob Hawke sought to respond to the Barunga Statement with his commitment for a treaty or compact at the bicentenary of 1988. In his Redfern Speech in 1991, Prime Minister the Hon Paul Keating said,

*How well we recognise the fact that, complex as our contemporary identity is, it cannot be separated from Aboriginal Australia.*

Prime Minister the Hon John Howard committed to a referendum on the eve of the 2007 federal election, saying:

*I believe we must find room in our national life to formally recognise the special status of Aboriginal and Torres Strait Islanders as the first peoples of our nation.*

These promising intentions never came to pass. They nevertheless confirm constitutional recognition is longstanding and unfinished business for the nation.

This history, from an Aboriginal perspective, is eloquently captured by Referendum Council member Galarrwuy Yunupingu in his essay 'Rom Watangu' at **Appendix D**.

*What Aboriginal people ask is that the modern world now makes the sacrifices necessary to give us a real future. To relax its grip on us. To let us breathe, to let us be free of the determined control exerted on us to make us like you. And you should take that a step further and recognise us for who we are, and not who you want us to be. Let us be who we are – Aboriginal people in a modern world – and be proud of us. Acknowledge that we have survived the worst that the past had thrown at us, and we are here with our songs, our ceremonies, our land, our language and our people – our full identity. What a gift this is that we can give you, if you choose to accept us in a meaningful way.*

In 2010 Prime Minister the Hon Julia Gillard established the Expert Panel on the Recognition of Aboriginal and Torres Strait Islander Peoples in the Constitution, co-chaired by Patrick Dodson and Mark Leibler, which reported in 2012. Prime Minister the Hon Tony Abbott established a Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, co-chaired by Senator Ken Wyatt and Senator Nova Peris, which reported in June 2015. Prime Minister the Hon Malcolm Turnbull and Opposition Leader the Hon Bill Shorten then established this Referendum Council in December 2015.



This report builds on the work of the Expert Panel and the Joint Select Committee. It takes into account the political and legal responses to the earlier reports, as well as the views of Aboriginal and Torres Strait Islander peoples and the general public.

We were required to consult specifically with Aboriginal and Torres Strait Islander peoples on their views of meaningful recognition. The 12 First Nations Regional Dialogues, which culminated in the National Constitutional Convention at Uluru in May 2017, empowered First Peoples from across the country to form a consensus position on the form constitutional recognition should take.

This is the first time in Australia's history that such a process has been undertaken. It is a significant response to the historical exclusion of First Peoples from the original process that led to the adoption of the Australian Constitution. The outcomes of the First Nations Regional Dialogues and the National Constitutional Convention are articulated in the Uluru Statement from the Heart.

The findings of our broader community consultation supported the findings of the First Nations Regional Dialogues. This strengthens our conviction that the Voice to the Parliament proposal and an extra-constitutional Declaration of Recognition will be acceptable to Aboriginal and Torres Strait Islander peoples and to the broader Australian community. We propose these reforms because they conform to the weight of views of First Peoples expressed in the First Nations Regional Dialogues as well as those of the wider community. With focussed political leadership and continued multiparty support for meaningful recognition, the Voice to the Parliament proposal can succeed at a referendum.

The consensus view of the Referendum Council is that these recommendations for constitutional and extra-constitutional recognition are modest, reasonable, unifying and capable of attracting the necessary support of the Australian people. A statement by Amanda Vanstone is at **Appendix E**.



Pat Anderson – Referendum Council Co-Chair



Mark Leibler – Referendum Council Co-Chair

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## INTRODUCTION

The Australian story began long before the arrival of the First Fleet on 26 January 1788. We Australians all know this. We have always known this.

As the Uluru Statement from the Heart puts it: the *'Aboriginal and Torres Strait Islander tribes that were the first sovereign Nations of the Australian continent and its adjacent islands, possessed it under our own laws and customs'* and *'[t]his our ancestors did, according to the reckoning of our culture, from the Creation, according to the common law from "time immemorial", and according to science more than 60,000 years ago.'*

This is the first part of the story of Australia, which tells of the epic discovery of our country by our most ancient tribes who crossed the northern land bridge from Papua New Guinea and southeast Asia, establishing in this country one of the planet's earliest civilisations. It is the longest continuous surviving civilisation.

With every advance of science our understanding increases, but the shadow of this ancient past – and its enduring presence – has never disappeared from our consciousness. Though the *Great Australian Silence* about this history persisted for much of the first 150 years of British colonisation, we have always known the truth.

We have known this but we did not acknowledge it and make it part of our Australian story.

The second part of the Australian story is recognised by 26 January: the arrival of the First Fleet and the establishment of the first colony in New South Wales. From the perspective of those who laid claim to the eastern seaboard of Australia under the sovereignty of the British Crown, this was a settlement. From the perspective of the First Nations this was an invasion. Their land and sovereignty was annexed without consent and without treating with the country's rightful owners.

The words 'settlement' and 'invasion' are highly charged for both sides of this historic encounter, but there is no use denying these two perspectives. It is understandable why some Australians speak of settlement, and why some speak of invasion. The maturation of Australia will be marked by our ability to understand both perspectives.

There is no doubt the second story of Australia is replete with triumph and failure, pride and regret, celebration and sorrow, greatness and shame. Like human history the world over. There is no doubt our constitutional system, our system of government, the rule of law, and our public institutions inherited from Britain are the heritage of the Australian people and enure for the benefit of all of us, including the First Peoples.

The third part of our Australian story is written by generations of migrants from Europe, Asia, the Middle East, the Pacific and the world over, who have come to make their home in this continent. They have made Australia a multicultural triumph of diversity in unity.

We now have the opportunity to bring together these three parts of the story of Australia through two measures, one involving constitutional amendment and the other involving an extra-constitutional symbolic statement.



## Recommendations

The Council recommends:

- 1. That a referendum be held to provide in the Australian Constitution for a representative body that gives Aboriginal and Torres Strait Islander First Nations a Voice to the Commonwealth Parliament. One of the specific functions of such a body, to be set out in legislation outside the Constitution, should include the function of monitoring the use of the heads of power in section 51 (xxvi) and section 122. The body will recognise the status of Aboriginal and Torres Strait Islander peoples as the first peoples of Australia.**

It will be for the Parliament to consider what further definition is required before the proposal is in a form appropriate to be put to a referendum. In that respect, the Council draws attention to the Guiding Principles that emerged from the National Constitutional Convention at Uluru on 23–26 May 2017 and advises that the support of Aboriginal and Torres Strait Islander peoples, in terms of both process and outcome, will be necessary for the success of a referendum.

In consequence of the First Nations Regional Dialogues, the Council is of the view that the only option for a referendum proposal that accords with the wishes of Aboriginal and Torres Strait Islander peoples is that which has been described as providing, in the Constitution, for a Voice to Parliament.

In principle, the establishment by the Constitution of a body to be a Voice for First Peoples, with the structure and functions of the body to be defined by Parliament, may be seen as an appropriate form of recognition, of both substantive and symbolic value, of the unique place of Aboriginal and Torres Strait Islander peoples in Australian history and in contemporary Australian society.

The Council recommends this option, understanding that finalising a proposal will involve further consultation, including steps of the kind envisaged in the Guiding Principles adopted at the Uluru Convention.

The Council further recommends:

- 2. That an extra-constitutional Declaration of Recognition be enacted by legislation passed by all Australian Parliaments, ideally on the same day, to articulate a symbolic statement of recognition to unify Australians.**

A Declaration of Recognition should be developed, containing inspiring and unifying words articulating Australia's shared history, heritage and aspirations. The Declaration should bring together the three parts of our Australian story: our ancient First Peoples' heritage and culture, our British institutions, and our multicultural unity. It should be legislated by all Australian Parliaments, on the same day, either in the lead up to or on the same day as the referendum establishing the First Peoples' Voice to Parliament, as an expression of national unity and reconciliation.

In addition, the Council reports that there are two matters of great importance to Aboriginal and Torres Strait Islander peoples, as articulated in the Uluru Statement from the Heart, that can be addressed outside the Constitution. The Uluru Statement called for the establishment of a Makarrata Commission with the function of supervising agreement-making and facilitating a process of local and regional truth telling. The Council recognises that this is a legislative initiative for Aboriginal and Torres Strait Islander peoples to pursue with government. The Council is not in a position to make a specific recommendation on this because it does not fall within our terms of reference. However, we draw attention to this proposal and note that various state governments are engaged in agreement-making.



# 1. THE WORK OF THE REFERENDUM COUNCIL

## 1.1 The Referendum Council

The Referendum Council was appointed by the Prime Minister, the Hon Malcolm Turnbull MP, and the Leader of the Opposition, the Hon Bill Shorten MP, on 7 December 2015. It comprises Aboriginal and Torres Strait Islander members and non-Indigenous members from a range of expert fields and backgrounds. At the time of drafting this report, Council Co-Chairs Pat Anderson AO and Mark Leibler AC are joined by Professor Megan Davis, Andrew Demetriou, Murray Gleeson AC, Tanya Hosch, Kristina Keneally, Jane McAloon, Noel Pearson, Michael Rose AM, Natasha Stott Despoja AM, Amanda Vanstone, Dalassa Yorkston and Galarrwuy Yunupingu AM (represented by Denise Bowden). Details of current and past members are at **Appendix A**.

The Council's terms of reference are at **Appendix B**. They require us to:

1. Lead the process for national consultations and community engagement about constitutional recognition, including a concurrent series of Indigenous designed and led consultations.
2. Be informed by the Parliamentary Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples chaired by Mr Ken Wyatt AM MP, with Deputy Chair, Senator Nova Peris OAM. The Committee will have input into the discussion paper on various issues regarding constitutional change to help facilitate an informed community discussion.
3. Consider the recommendations of the 2012 Expert Panel on Constitutional Recognition of Indigenous Australians.
4. Report to the Prime Minister and the Leader of the Opposition on:
  - outcomes of national consultations and community engagement about constitutional recognition, including Indigenous designed and led consultations;
  - options for a referendum proposal, steps for finalising a proposal, and possible timing for a referendum; and
  - constitutional issues.

The Council first met on 14 December 2015 with the Prime Minister and the Leader of the Opposition in attendance. The Council met on 11 subsequent occasions.

Meeting	Date	Location
1	14 December 2015	Sydney
2	28 January 2016	Melbourne
3	21 and 22 March 2016	Melbourne
4	10 May 2016	Melbourne
5	9 August 2016	Melbourne
6	20 October 2016	Melbourne
7	25 November 2016	Canberra
8	6 December 2016	Videoconference
9	20 March 2017	Melbourne
10	17 May 2017	Videoconference
11	6 June 2017	Melbourne
12	27 June 2017	Melbourne

The Council released a communiqué following some of the meetings. These communiqués are at **Appendix D**.

## 1.2 Building on past processes

Consistent with points 2 and 3 of our terms of reference, the Council was mindful of the need to pay close regard to the work completed through previous processes and this largely accounted for the structure of our Discussion Paper in **Appendix H**. These processes include: the Parliamentary Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples 2015 ('the Joint Select Committee'), the Aboriginal and Torres Strait Islander Peoples Act of Recognition Review Panel 2014 ('the Act of Recognition Review Panel') and the Expert Panel on Constitutional Recognition of Indigenous Australians 2012 ('the Expert Panel'). The options proposed by the Expert Panel and the Joint Select Committee were the basis of the Council's work and the subject of the First Nations Regional Dialogues. The executive summaries and recommendations from these three reports are at **Appendix F**.

The Council's establishment followed a meeting between the former Prime Minister, the Hon Tony Abbott MP, the Leader of the Opposition, the Hon Bill Shorten MP, and 40 Aboriginal and Torres Strait Islander leaders from around the country on 6 July 2015 at Kirribilli.

The Kirribilli meeting agreed on a number of outcomes. These included an agreement to hold a series of community conferences across the country to provide an opportunity for everyone to have a say and for all significant points of view to be considered. It was also agreed that a Referendum Council would be established to progress a range of issues around constitutional change and inform the further steps to be taken.

The Aboriginal and Torres Strait Islander leaders present at that meeting were united in their view that any constitutional change must be substantive. The leaders stated the following:

*[A]ny reform must involve substantive changes to the Australian Constitution. It must lay the foundation for the fair treatment of Aboriginal and Torres Strait Islander peoples into the future.*

*A minimalist approach, that provides preambular recognition, removes section 25 and moderates the race power [section 51(xxvi)], does not go far enough and would not be acceptable to Aboriginal and Torres Strait Islander peoples.*

The Kirribilli leaders recommended that there be an ongoing dialogue between Aboriginal and Torres Strait Islander peoples and the Government to negotiate the proposal to be put to referendum, as well as engagement about the acceptability of the proposed question. These recommendations were a key motivation for the creation of this Council. The Kirribilli Statement is at **Appendix G**.

### 1.3 National consultation and community engagement process

Point 1 of the Council's terms of reference emphasises the importance of an Aboriginal and Torres Strait Islander designed and led consultation process. The Council agreed early on in its work that this process must not be a 'tick a box' exercise but a true dialogue between Aboriginal and Torres Strait Islander peoples. It is the Council's view that there is no practical purpose to suggesting changes to the Constitution unless they are what Aboriginal and Torres Strait Islander peoples want.

The First Nations Regional Dialogues were therefore at the heart of the Referendum Council's work. The methodology and outcomes of this process are detailed in **Chapter 2**.

The Council's terms of reference also required it to engage with the broader community and encourage understanding of the need for constitutional reform. We understood this as necessary not only for a successful referendum, but for a productive consultation process. The broader community, including Aboriginal and Torres Strait Islander peoples who did not attend the regional dialogues, were encouraged to share their views through our digital platform, written submissions process and targeted stakeholder engagement.

Further detail on these processes, and their outcomes, is in **Chapter 3**.

### 1.4 Selecting the options to consider

The Council adopted the Expert Panel's four principles to guide its assessment of proposals for constitutional reform, meaning that each proposal must:

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

Five proposals for reform formed the basis of the Council's work. Four of these proposals are based on the substantial overlap between the Expert Panel's recommended model, and the Joint Select Committee:

- a statement acknowledging Aboriginal and Torres Strait Islander peoples as the First Australians (which could be placed in the Constitution or outside it);
- amending the existing 'race power', section 51(xxvi) of the Constitution, or deleting it and inserting a new power for the Commonwealth to make laws for Aboriginal and Torres Strait Islander peoples;
- inserting a guarantee against racial discrimination, Section 116A, into the Constitution; and
- deleting section 25, which contemplates the possibility of a state government excluding some Australians from voting on the basis of their race.

The Council also included a fifth option, providing for a First Peoples' Voice to be heard by Parliament, and the right to be consulted on legislation and policies that relate to Aboriginal and Torres Strait Islander peoples. This proposal emerged after the Expert Panel's work had concluded, as a response to the political blockages for the Expert Panel's proposed section 116A, a constitutional non-discrimination clause. Submissions supporting a proposal for the Voice were provided to the Joint Select Committee.<sup>1</sup> As a result, the Committee noted that the proposal 'would benefit from wider community and debate' and suggested:

*community consultation, particularly with Aboriginal and Torres Strait Islander peoples ... in order to gauge community views on the establishment of such a body, and [so] that Aboriginal and Torres Strait Islander peoples may consider [if] it has merit and [if they] may wish to pursue it in the future.<sup>2</sup>*

The Council wrote to the Prime Minister and the Leader of the Opposition on 22 March 2016 proposing these five options as the basis of our consultations. On 7 April 2016, the Council received their approval to proceed in this regard.

The Council was also conscious of concrete actions toward negotiating treaties commencing in Victoria and in South Australia during the its tenure, and the Northern Territory Government has also committed to commence discussions during this time. These treaty negotiations have had a significant impact on our engagement process.

The Council adopted the view that, although the five proposed options formed an important and useful focus for discussion, people should also be permitted to propose new options or to put forward their views in any way that suited them. Given the significant interest in agreement-making from Aboriginal and Torres Strait Islander peoples, it was included as a substantive reform option at the First Nations Regional Dialogues and was also touched on in the broader community consultations.

Although agreement-making and these other matters do not form part of our formal terms of reference, it is our view that they are inextricably linked to the issue of constitutional reform. Further detail on the outcomes of the consultations with regard to these issues is in **Chapter 2**, below.

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1 *Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples: Final Report*, June 2015, Submission 38, Supplementary submission 2, Submission 81 and Submission 112.

2 *Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples: Final Report*, June 2015, p. 38 (with further analysis on pp 33–38).

## 1.5 Discussion Paper

The Council developed a Discussion Paper to inform the public. The paper included detail on each of the five proposed options outlined above, and posed a number of questions to gauge the public response. It was published in October 2016 on the Council's website. It was promoted on social media and through the Regional Dialogues and targeted stakeholder engagement.

A plain English Introduction to the Issues Paper was also published on the Council's website to supplement the Discussion Paper. This paper was interpreted into 12 major First Nations languages as part of the Council's effort towards engaging with all Aboriginal and Torres Strait Islander peoples in a meaningful way, with audio of these interpretations available on the Council's website. This was the first time that information about options for constitutional reform had been made available in a concerted way in First Nations languages.

Languages for interpretation were carefully selected in consultation with expert linguists, with a focus on the regions to be covered throughout the consultations and the number of language speakers. The languages into which the Discussion Paper was interpreted were Warlpiri, Pintupi-Luritja, Eastern Central Arrernte, Pitjantjatjara, Katherine Kriol, Murrinh-patha, Anindilyakwa, Burrara, Yolngu Matha, Fitzroy Valley Kriol, Wik Mungkan and Yumpla Tok.

The Discussion Paper is at **Appendix H**.

## 1.6 Other matters

Although we were originally required to report by 30 June 2016, the Council soon became conscious of the need for a comprehensive dialogue with Aboriginal and Torres Strait Islander peoples, and that this would take more than the six months originally allocated to our work. We sought, and received, an extension of our tenure to 30 June 2017 to allow time for this engagement to take place. In view of the extended timeline, we submitted an Interim Report to the Prime Minister and Leader of the Opposition on 8 September 2016.

The terms of reference also required us to engage with members of the former Parliamentary Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, to seek their views on the draft Discussion Paper. As the Committee had since disbanded, and some of its members were no longer in the current Parliament, the Council sought advice from the Prime Minister and Leader of the Opposition on how to fulfil this requirement.

We were advised that an Informal Parliamentary Group had been established to provide advice on the Discussion Paper, as well as to provide ongoing liaison between the Council and the Parliament. The Informal Parliamentary Group comprised:

- the Minister for Indigenous Affairs, Senator the Hon Nigel Scullion;
- the Minister for Aged Care and Indigenous Health, the Hon Ken Wyatt AM MP;
- the Shadow Assistant Minister for Indigenous Affairs and Aboriginal and Torres Strait Islanders, Senator Patrick Dodson;
- the Shadow Minister for Human Services, the Hon Linda Burney MP; and
- Malarndirri McCarthy, Senator for the Northern Territory.

The Referendum Council met with the Prime Minister, the Leader of the Opposition and the Informal Parliamentary Group on 25 November 2016 to discuss the work the Council had undertaken to date and provide an update on the Council's future plans. The Council also wrote to the Informal Parliamentary Group on the following occasions:

- 2 February 2017 – invitation to attend the First Nations Regional Dialogues;
- 26 April 2017 – invitation to attend the National Constitutional Convention; and
- 1 May 2017 – to seek a meeting in Canberra with the Indigenous Steering Committee on 12 May 2017 (to provide a briefing prior to the Uluru Convention).

## 2. FIRST NATIONS REGIONAL DIALOGUES AND NATIONAL CONSTITUTIONAL CONVENTION

The Prime Minister and the Leader of the Opposition endorsed a plan put forward by the Referendum Council for the conduct of a series of First Nations Regional Dialogues culminating in a national constitutional convention at Uluru. The Referendum Council gave final approval to the framework for the regional dialogues on 20 October 2016.

The Australian Institute of Aboriginal and Torres Strait Islander Studies was engaged to provide assistance in delivering logistics and supporting delegates to attend.

The First Nations Regional Dialogues were convened in the following locations:

- Hobart, hosted by Tasmanian Aboriginal Corporation (9–11 December 2016)
- Broome, hosted by the Kimberley Land Council (10–12 February 2017)
- Dubbo, hosted by the New South Wales Aboriginal Land Council (17–19 February 2017)
- Darwin, hosted by the Northern Land Council (22–24 February 2017)
- Perth, hosted by the South West Aboriginal Land and Sea Council (3–5 March 2017)
- Sydney, hosted by the New South Wales Aboriginal Land Council (10–12 March 2017)
- Melbourne, hosted by the Federation of Victorian Traditional Owners Corporation (17–19 March 2017)
- Cairns, hosted by the North Queensland Land Council (24–27 March 2017)
- Ross River, hosted by the Central Land Council (31 March – 2 April 2017)
- Adelaide, hosted by the Aboriginal Legal Rights Movement Inc (7–9 April 2017)
- Brisbane, (21–23 April 2017)
- Thursday Island, hosted by Torres Shire Council and a number of Torres Strait regional organisations (5–7 May 2017).

An information session hosted by the United Ngunnawal Elders Council was held in Canberra on 10 May 2017.

The National Constitutional Convention was then held at Uluru (23–26 May 2017).

## 2.1 First Nations Regional Dialogues

### 2.1.1 Process

A full account of the process undertaken in relation to the First Nations Regional Dialogues and the convening of the National Constitutional Convention is set out in **Appendix I**. The following features of the process need to be emphasised:

#### The Dialogue process was unprecedented

This process is unprecedented in our nation's history and is the first time a constitutional convention has been convened with and for First Peoples. It is a significant response to the historical exclusion of Aboriginal and Torres Strait Islander peoples from the original processes which led to the drafting of Australia's Constitution.

The Dialogues engaged 1200 Aboriginal and Torres Strait Islander delegates – an average of 100 delegates from each Dialogue – out of a population of approximately 600,000 people nationally. This is the most proportionately significant consultation process that has ever been undertaken with First Peoples. Indeed, it engaged a greater proportion of the relevant population than the constitutional convention debates of the 1800s, from which First Peoples were excluded.

#### The process was structured and principled

The process was structured and principled, modelled partly on the Constitutional Centenary Foundation framework utilised through the 1990s to encourage debate on constitutional issues in local communities and schools. It was adapted to suit the needs of the First Nations Regional Dialogues but the characteristics remained the same: impartiality; accessibility of relevant information; open and constructive dialogue; and mutually agreed and owned outcomes. The dialogues were a deliberative decision-making process that followed an identical structured agenda across all the regions.

#### The process engaged leading Aboriginal and Torres Strait Islander organisations and individuals

Delegates to each Regional Dialogue were selected according to the following criteria: 60% from First Nations/traditional owner groups, 20% from community organisations and 20% involving key individuals. The Australian Institute of Aboriginal and Torres Strait Islander Studies and the host organisation engaged closely with relevant organisations in each region to meet the criteria on participation. A core principle was to ensure that the First Nations formed the core representation to these Dialogues.

The following leading organisations were engaged in the process:

- Aboriginal Legal Rights Movement Inc
- Central Land Council
- Federation of Victorian Traditional Owners Corporation
- Kimberley Land Council

- New South Wales Aboriginal Land Council
- North Queensland Land Council
- Northern Land Council
- South West Aboriginal Land and Sea Council
- Tasmanian Aboriginal Corporation
- Torres Shire Council
- Torres Strait Regional Authority
- United Ngunnawal Elders Council.

### **The Dialogues canvassed legal and policy issues and political viability**

The structured nature of the Dialogues provided for a comprehensive legal explanation of each of the proposals set out in the Referendum Council’s Discussion Paper. Delegates then engaged in break out groups that focussed on each of the proposals in turn. Relevant legal and policy issues were canvassed during these sessions and reported back to the plenary session. The level of engagement and intensity of the evaluation of proposals was very high. Furthermore, delegates grappled with questions of political viability and were prepared to assess and prioritise options for reform.

### **The process led to consensus at Uluru**

The integrity of the process is evidenced in the fact that the exhaustive deliberations and informed participation of participants in the First Nations Regional Dialogues led to consensus at Uluru. The outcome captured in the Uluru Statement from the Heart was a testament to the efficacy of the structured process, which allowed the wisdom and intent of the representatives of the First Nations Regional Dialogues to coalesce in a common position.

## **2.1.2 Assessment of reform proposals**

Every First Nations Regional Dialogue had the opportunity to learn about each of the reform proposals set out in the Referendum Council’s Discussion Paper. The process enabled the delegates to assess the proposals and then prioritise each option according to the views of their region.

The following is a summary of the assessment of the reform options that emerged from the dialogues and the reasoning put forward by delegates.

### **A statement of recognition**

A statement of recognition or acknowledgement in the Constitution was rejected by the Dialogues. There were concerns raised about the question of sovereignty. During the Expert Panel’s consultations in 2011, Aboriginal and Torres Strait Islander peoples also raised serious concerns about ‘recognition’ in the Constitution and sovereignty.<sup>3</sup> As a consequence, the Expert Panel sought legal advice about the status of sovereignty, as follows:

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<sup>3</sup> Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, pp. 205–212.

*Phillip's instructions assumed that Australia was terra nullius, or belonged to no-one. The subsequent occupation of the country and land law in the new colony proceeded on the fiction of terra nullius. It follows that ultimately the basis of settlement in Australia is and always has been the exertion of force by and on behalf of the British Crown. No-one asked permission to settle. No-one consented, no-one ceded. Sovereignty was not passed from the Aboriginal peoples by any actions of legal significance voluntarily taken by or on behalf of them.*<sup>4</sup>

The final report of the Joint Select Parliamentary Committee found that

*... at almost every consultation, Aboriginal and Torres Strait Islander participants raised issues of sovereignty, contending that sovereignty was never ceded, relinquished or validly extinguished. Participants at some consultations were concerned that recognition would have implications for sovereignty.*<sup>5</sup>

All Dialogues asserted the fact that Aboriginal peoples and Torres Strait Islander peoples never ceded their sovereignty. For this reason, delegates were not persuaded of the benefit of acknowledgement inside the Constitution.

Another concern raised was the content of any statement of acknowledgement. Dialogues spoke about the likelihood of government lawyers whittling down an acknowledgement into a bland statement incompatible with truth telling. For this reason, a Declaration outside the Constitution was endorsed by most Dialogues because it was considered that such a Declaration could be a more fulsome account of Aboriginal and Torres Strait Islander culture and history in Australia.

### Removal of section 25

Section 25 did not feature because it is a dead letter addressed to past historical circumstances that are unlikely to be replicated in the future. Its original intent was not directed at Aboriginal and Torres Strait Islander peoples. It was modelled upon the United States 14th Amendment, which sought to disincentivise states from denying the vote to certain races. In any case, any attempt on the part of a state or territory to deny the vote to certain races today would fall foul of the *Racial Discrimination Act 1975*. Delegates to the Dialogues therefore understood that the removal of section 25 would confer no substantive benefit on Aboriginal and Torres Strait Islander peoples.

### Section 51A

Section 51A as proposed by the Expert Panel was precluded because of the rejection by the First Nations Regional Dialogues of the statement of recognition or acknowledgement in the Constitution.

### Section 51 (xxvi)

Section 51 (xxvi) is the essential achievement of the 1967 referendum. Delegates to the First Nations Regional Dialogues were conscious of this. Many expressed the view that, as archaic as the term 'race' might be according to contemporary standards, the triumph of 1967 and the mostly beneficial legislation that has flowed from it, argues against the deletion of this historically important provision.

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4 Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, p. 22.

5 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Final Report*, 25 June 2015, p. 69.

Delegates placed focused attention on the discriminatory potential of section 51(xxvi). The three most frequently cited examples used in the dialogues were the amendments to the *Native Title Act*, the Hindmarsh Island Bridge amendments and the Northern Territory Emergency Response, the latter enacted under the Territories power.

However proposed solutions aimed at removing or ameliorating this discriminatory potential were assessed as equivalent to maintaining the head of power in its current form.

Amending or deleting the race power was ranked low in many Dialogues and rejected in other Dialogues. Delegates understood there was no iron clad guarantee that Parliament could be prevented from passing discriminatory laws that single out Aboriginal and Torres Strait Islander peoples for adverse treatment.

Many participants at the dialogues felt it was too risky to amend section 51 (xxvi) because it could not be assured that the judicial interpretation of words such as 'benefit' or 'advancement' would accord with the desires and aspirations of the affected peoples.

Delegates were concerned that section 51 (xxvi) had empowered significant legislation in cultural heritage protection, land rights and native title that may be placed at risk. Similar concerns were raised by the Joint Select Committee in relation to the implications of altering or deleting section 51 (xxvi) upon the *Native Title Act*.<sup>6</sup>

There was no significant appetite for removing the word 'race'. Dialogues understood that although the concept of 'race' was a social construction, removing the word 'race' and inserting 'Aboriginal and Torres Strait Islander Peoples' does not alter the adverse discriminatory potential of the race power. Therefore, removing the word 'race' was not regarded as an improvement on the status quo of the people affected.

### Section 116A

Section 116A as proposed by the Expert Panel was one of two substantive proposals. The other substantive proposal was the Voice to the Parliament.

Delegates to the First Nations Regional Dialogues were conscious that these two substantive proposals were options, each being an alternative to the other. The protection against adverse discrimination provided by section 116A was viewed as a shield dependent upon interpretation by the High Court of Australia, whereas a Voice to the Parliament was viewed as a sword, enabling First Peoples to advocate directly to the Parliament.

The 116A proposal was explicitly supported in seven of the First Nations Regional Dialogues whereas the Voice to Parliament was supported in all of them.

Delegates were well aware, following considerable discussion at the Dialogues, that section 116A was subject to interpretation by the High Court and prohibitive in relation to costs of litigation both in terms of finance and time.

On the issue of political viability, the dialogues discussed media reports of section 116A being a 'one clause bill of rights' and not being politically feasible.

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<sup>6</sup> Opinion on recommendations made by the Expert Panel on the Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Mr Neil Young QC, 11 June 2014.

Dialogues in the Northern Territory (Darwin and Ross River) and the information session at the Australian Capital Territory were focused on section 122, the plenary power for the Commonwealth to make laws for the territories unconstrained by the Racial Discrimination Act.

The Dialogues discussed that there was no certainty that section 116A would apply to the Commonwealth power to make laws for the Territories in a way that absolutely prevented discriminatory legislation.

### **A Voice to the Parliament**

The proposal for the enhanced participation of Aboriginal and Torres Strait Islander peoples in the democratic life of the Australian state, especially the federal Parliament, is not a new one. It is as equally prominent in Aboriginal political advocacy as a racial non-discrimination clause. The Voice was the most endorsed singular option for constitutional alteration. A constitutionally entrenched Voice appealed to Aboriginal and Torres Strait Islander communities because of the history of poor or non-existent consultation with communities by the Commonwealth. Consultation is either very superficial or it is more meaningful, but then wholly ignored.

For Dialogue participants, the logic of a constitutionally enshrined Voice – rather than a legislative body alone – is that it provides reassurance and recognition that this new norm of participation and consultation would be different to the practices of the past.

The Dialogues recommended that one of the functions of the Voice would be ‘monitoring’ the Commonwealth’s use of the race power (section 51 (xxvi)) and Territories power (section 122). This means that discriminatory legislation like the Northern Territory Emergency Response would be contested before it originates.

Even though the Voice was not a foolproof way to prevent the Parliament passing discriminatory laws because of parliamentary sovereignty, the potential for the Voice to have additional functions that provided Aboriginal and Torres Strait Islander people with an active and participatory role in the democratic life of the state was viewed as more empowering than a non-discrimination clause (section 116A) or a qualified head of power.

### **Agreement-making**

Agreement-making was the next most endorsed reform. It was viewed as an option that could empower communities to take control of their lives. It does not require constitutional alteration.

The state-based treaty processes in Victoria and South Australia had provided some nuance to the discussion about the complexity of processes for negotiating agreements and the need for communities to be provided with resources. Also there is much agreement-making across the country under the native title statutory framework.

### 2.1.3 Outcomes

The reforms that emerged from the Dialogues with the highest level of support across the country were the Voice to Parliament, Agreement-making through Treaty and Truth-telling.

The Dialogues’ responses to the reform proposals, as recorded in the Records of Meeting, are evidenced in the table below. Truth telling is not an option in the table as it was not in the Referendum Council’s Discussion Paper. However it was unanimous at every Dialogue.

	Statement of Acknowledgement	Head of Power	Prohibition on Racial Discrimination	A Voice to Parliament	Agreement-Making
Hobart	Not endorsed	Endorsed	Endorsed	Endorsed	Endorsed
Broome	Inconclusive	Endorsed	Not recorded	Endorsed	Not recorded
Dubbo	Not endorsed	Inconclusive	Not recorded	Endorsed	Endorsed
Darwin	Not endorsed	Inconclusive	Endorsed	Endorsed	Endorsed
Perth	Not endorsed	Endorsed	Endorsed	Endorsed	Endorsed
Sydney	Inconclusive	Inconclusive	Endorsed	Endorsed	Endorsed
Melbourne	Not endorsed	Not recorded	Not recorded	Endorsed	Endorsed
Cairns	Inconclusive	Inconclusive	Not recorded	Endorsed	Endorsed
Ross River	Endorsed	Inconclusive	Endorsed	Endorsed	Endorsed
Adelaide	Inconclusive	Inconclusive	Not recorded	Endorsed	Endorsed
Brisbane	Inconclusive	Not endorsed	Endorsed	Endorsed	Endorsed
Thursday Island	Not endorsed	Inconclusive	Endorsed	Endorsed	Endorsed
Canberra	Not endorsed	Not recorded	Not recorded	Not recorded	Not recorded

- Endorsed
- Not endorsed
- Inconclusive
- Not recorded

## 2.2 National Constitutional Convention

The National Constitutional Convention was held at Uluru between 23 and 26 May 2017.

### 2.2.1 Process

A synthesis of the Records of Meetings of the First Nations Regional Dialogues was produced by the Referendum Council. This synthesis, entitled 'Our Story', recounted the themes that emerged in the Dialogues and is reproduced below.

**Note:** The shaded sections of text in the following pages are extracts from the Uluru Statement from the Heart.

#### OUR STORY

Our First Nations are extraordinarily diverse cultures, living in an astounding array of environments, multi-lingual across many hundreds of languages and dialects. The continent was occupied by our people and the footprints of our ancestors traversed the entire landscape. Our songlines covered vast distances, uniting peoples in shared stories and religion. The entire land and seascape is named, and the cultural memory of our old people is written there.

This rich diversity of our origins was eventually ruptured by colonisation. Violent dispossession and the struggle to survive a relentless inhumanity has marked our common history. The First Nations Regional Dialogues on constitutional reform bore witness to our shared stories.

All stories start with our Law.

#### The Law

We have coexisted as First Nations on this land for at least 60,000 years. Our sovereignty pre-existed the Australian state and has survived it.<sup>7</sup>

*'We have never, ever ceded our sovereignty.'* (Sydney)<sup>8</sup>

The unfinished business of Australia's nationhood includes recognising the ancient jurisdictions of First Nations law.<sup>9</sup>

*'The connection between language, the culture, the land and the enduring nature of Aboriginal law is fundamental to any consideration of constitutional recognition.'* (Ross River)<sup>10</sup>

7 Hobart Record of Meeting (ROM), p2; Broome ROM, p2; Dubbo ROM, p3; Perth ROM, p4; Canberra ROM, p2; Darwin ROM, p1; Melbourne ROM, p3, p6; Ross River ROM, p5; Cairns ROM, p2.

8 Sydney ROM, p1.

9 Brisbane ROM, p6: 'Belonging to country and spirituality are central to Aboriginal and Torres Strait Islander identity, and these need to be the basis for far-reaching structural change.'  
Torres Strait ROM, p2: 'Communities here should be in control of their own affairs. This is not a new concept. People in the Torres Strait did so for thousands of years prior to invasion.'

10 Ross River ROM, p1.

Every First Nation has its own word for The Law. Tjukurrpa is the Anangu word for The Law. The Meriam people of Mer refer to Malo's Law.<sup>11</sup> With substantive constitutional change and structural reform, we believe this surviving and underlying First Nation sovereignty can more effectively and powerfully shine through as a fuller expression of Australia's nationhood.<sup>12</sup>

The Law was violated by the coming of the British to Australia. This truth needs to be told.

## Invasion

Australia was not a settlement and it was not a discovery. It was an invasion.<sup>13</sup>

*'Cook did not discover us, because we saw him. We were telling each other with smoke, yet in his diary, he said "discovered".'* (Torres Strait)<sup>14</sup>

*'Australia must acknowledge its history, its true history. Not Captain Cook. What happened all across Australia: the massacres and the wars. If that were taught in schools, we might have one nation, where we are all together.'* (Darwin)<sup>15</sup>

The invasion that started at Botany Bay is the origin of the fundamental grievance between the old and new Australians: that Australia was colonised without the consent of its rightful owners.<sup>16</sup> Now is an opportunity for the First Nations to tell the truth about history in our own voices and from our own point of view.<sup>17</sup> And for mainstream Australians to hear those voices and to reconsider what they know and understand about their nation's history. This will be challenging, but the truth about invasion needs to be told.

*'In order for meaningful change to happen, Australian society generally needs to "work on itself" and to know the truth of its own history.'* (Brisbane)<sup>18</sup>

*'People repeatedly emphasised the need for truth and justice, and for non-Aboriginal Australians to take responsibility for that history and this legacy it has created: "Government needs to be told the truth of how people got to there. They need to admit to that and sort it out."'* (Melbourne)<sup>19</sup>

Invasion was met with resistance.

11 Perth ROM, p2: *'We've got to continue the fight for the unwritten constitutions. We know there were 260 language groups, and in each language group there were unwritten constitutions. ... Prior to white man coming, there were 260 unwritten constitutions, rules, policies, procedures governing Aboriginal People and their lands.'*

12 Cairns ROM, p2: *'No one gives you sovereignty, you go out there and practice it and go out there and enforce it. But we are in a position that there are certain laws that mean we can't go out and practise our sovereignty.'*

13 Dubbo ROM, p4: *'Delegates spoke of the need to acknowledge the illegality of everything done since colonization, the first act aggression on first contact, the extreme cruelty and violence of the government, and the impact of the forced removals.'*

14 Torres Strait ROM, p2.

15 Darwin ROM, p2.

16 Sydney ROM, p3: *'Some spoke about the possibility of having a "La Perouse" statement, that reflected the impact of colonisation on that community. "Dispossession started there."'*

17 Cairns ROM, p3: *'The names of our people. We've got nothing that bears the names of our ancestors.'*

18 Brisbane ROM, pp6-7.

19 Melbourne ROM, p2.

## Resistance

This is the time of the Frontier Wars, when massacres, disease and poison decimated First Nations, even as they fought a guerrilla war of resistance.<sup>20</sup> The Tasmanian Genocide and the Black War waged by the colonists reveals the truth about this evil time. We acknowledge the resistance of the remaining First Nations people in Tasmania who survived the onslaught.

*'A statement should recognise "the fights of our old people".'* (Hobart)<sup>21</sup>

Everywhere across Australia, great warriors like Pemulwuy and Jandamarra led resistance against the British. First Nations refused to acquiesce to dispossession and fought for their sovereign rights and their land.

*'The people who worked as stockmen for no pay, who have survived a history full of massacres and pain. We deserve respect.'* (Broome)<sup>22</sup>

The Crown had made promises when it colonised Australia. In 1768, Captain Cook was instructed to take possession 'with the consent of the natives'. In 1787, Governor Phillip was instructed to treat the First Nations with 'amity and kindness'. But there was a lack of good faith. The frontier continued to move outwards and the promises were broken in the refusal to negotiate and the violence of colonisation.

*'We were already recognised through the Letters Patent and the Imperial statutes that should be adhered to under their law. Because it's their law.'* (Adelaide)<sup>23</sup>

'Participants expressed disgust about a statue of John McDouall Stuart being erected in Alice Springs following the 150th anniversary of his successful attempt to reach the top end. This expedition led to the opening up of the "South Australian frontier" which led to massacres as the telegraph line was established and white settlers moved into the region. People feel sad whenever they see the statue; its presence and the fact that Stuart is holding a gun is disrespectful to the Aboriginal community who are descendants of the families slaughtered during the massacres throughout central Australia.' (Ross River)<sup>24</sup>

## Mourning

Eventually the Frontier Wars came to an end. As the violence subsided, governments employed new policies of control and discrimination.<sup>25</sup> We were herded to missions and reserves on the

20 Perth ROM, p4: 'A number of delegates expressed the importance of remembering and honouring First Nations people who had fought in wars, including frontier wars, but had not been recognised.'  
Ross River ROM, p1: *'[We] recall the Coniston massacre, and the many other massacres throughout the region. [We] remember the Aboriginal people involved in fighting in the frontier wars...If the government wants to speak about 'recognition' they need to recognise the true history, recognise the frontier wars.'*

Melbourne ROM, p1: 'People spoke of the mass slaughter of Aboriginal people during colonisation and how genocide had been committed on over 180 clans in Victoria.'

Torres Strait ROM, p1: The meeting 'remembered the massacres of the Kaurareg nation, and that the hurt and pain this had continued to this day, unresolved.'

21 Hobart ROM, p2.

22 Broome ROM, p7.

23 Adelaide ROM, p3.

24 Ross River ROM, p3.

25 Sydney ROM, p2: 'under non-Aboriginal law there have been killings, massacres, genocide, the stealing of land, the introduction of disease, and the taking of children.'

fringes of white society.<sup>26</sup> Our Stolen Generations were taken from their families.<sup>27</sup>

‘The Stolen Generations represented an example of the many and continued attempts to assimilate people and breed Aboriginality out of people, after the era of frontier killing was over.’ (Melbourne)<sup>28</sup>

But First Nations also re-gathered themselves. We remember the early heroes of our movement such as William Cooper, Fred Maynard, Margaret Tucker, Pearl Gibbs, Jack Patten and Doug Nicholls, who organised to deal with new realities. The Annual Day of Mourning was declared on 26 January 1938. It reflected on the pain and injustice of colonisation, and the necessity of continued resistance in defence of First Nations. There is much to mourn: the loss of land, the loss of culture and language, the loss of leaders who led our struggle in generations past.

‘Delegates spoke of the spiritual and cultural things that have been stolen. Delegates spoke of the destruction of boundaries because of the forced movement of people, the loss of First Peoples and Sovereign First Nations spirituality, and the destruction of language.’ (Dubbo)<sup>29</sup>

‘The burning of Mapoon in 1963 was remembered: *“Mapoon people have remained strong, we are still living at Mapoon. Mapoon still exists in western Cape York but a lot of our grandfathers have died at New Mapoon. That isn’t where their spirits need to be.”*’ (Cairns)<sup>30</sup>

But as we mourn, we can also celebrate those who have gone before us.<sup>31</sup> In a hostile Australia, with discrimination and persecution, out of their mourning they started a movement – the modern movement for rights, equality and self-determination.

*‘We have learnt through the leaders of the Pilbara Strike, we have learnt from the stories of our big sisters, our mothers, how to be proud of who we are.’* (Perth)<sup>32</sup>

*‘The old men and women were carrying fire. ... Let’s get that fire up and running again.’* (Darwin)<sup>33</sup>

## Activism

The movement for political change continued to grow through the 20<sup>th</sup> Century. Confronted by discrimination and the oppressive actions of government, First Nations showed tenacity, courage and perseverance.<sup>34</sup>

26 Ross River ROM, p1: ‘Some of us can’t speak our language. Some of us went to school and it was bashed out of us. There are psychological reasons why we can’t speak our language.’

27 Perth ROM, p1: ‘There’s a lot of sad stories from the Stolen Generations: genocide, abuse. And none of the people will be brought before the justice system for the abuse of those children.’

28 Melbourne ROM, p1.

29 Dubbo ROM, p2.

30 Cairns ROM, p1.

31 Adelaide ROM, p2: ‘[We] want the history of Aboriginal people taught in schools, including the truth about murders and the theft of land, Maralinga, and the Stolen Generations, as well the the story of all the Aboriginal fighters for reform. Healing can only begin when this true history is taught.’

32 Perth ROM, p1.

33 Darwin ROM, p2.

34 Darwin ROM, p2: ‘The government will always try to find a way to break you or beat you down. That doesn’t mean that we’re any weaker as Indigenous people because we lost. We’ve only lost in their eyes, they don’t know what we have underneath.’

*'Those who came before us marched and died for us and now it's time to achieve what we've been fighting for since invasion: self-determination.'* (Adelaide)<sup>35</sup>

*'Torres Strait Islanders have a long history of self-government. The civic local government was established in the late 1800s, and in the 1930s after the maritime strikes, local councils were created, and in the 1990s, the TSRA. The Torres Strait Islander peoples also have rights under the Torres Strait Treaty.'* (Torres Strait)<sup>36</sup>

Our leaders knew that empowerment and positive change would only come from activism.<sup>37</sup> Right across Australia, First Nations took their fight to the government, the people and the international community. From Yorta Yorta country, Yirrkala and many other places, people sent petitions urging the King, the Prime Minister and the Australian Parliament to heed their calls for justice. There were strikes for autonomy, equality and land in the Torres Strait, the Pilbara and Palm Island.

*'The history of petitions reminded people about the nationally significant Palm Island Strike. So many people from this region had been removed from Country to the "penal settlement" of Palm Island since its establishment in 1916. The Strike was also sparked by a petition, this time from seven Aboriginal men demanding improved wages, health, housing and working conditions, being ignored by the superintendent. We commemorate 60 years of the Strike in June 2017.'* (Cairns)<sup>38</sup>

Our people fought for and won the 1967 Referendum, the most successful Yes vote in Australian history. In front of the world, we set up an embassy on the lawns of Parliament House and we marched in the streets of Brisbane during the Commonwealth Games.<sup>39</sup> In the west, grassroots leaders like the late Rob Riley took the fight on sacred sites, deaths in custody and justice for the Stolen Generations to the highest levels of government.

## Land Rights

At the heart of our activism has been the long struggle for land rights and recognition of native title. This struggle goes back to the beginning. The taking of our land without consent represents our fundamental grievance against the British Crown.<sup>40</sup>

The struggle for land rights has united First Nations across the country, for example Tent Embassy activists down south supported Traditional Owners in the Territory, who fought for decades to retain control over their country. The Yolngu people's fight against mining leases at Yirrkala and the

35 Adelaide ROM, p1.

36 Torres Strait ROM, p1.

37 Sydney ROM, p2: 'Several delegates said that it was important to learn from the work of those who have gone before, for example from the demands that were contained in the three Yolngu petitions, including the Barunga statement, the Makaratta, Coe vs the Commonwealth, the Mabo decision, the 1938 10-point plan, as well as the Rights, Recognition and Reform Report compiled by ATSIIC as a social justice package.'

38 Cairns ROM, p1.

39 Canberra ROM, p1: '*[We] remember marching in the past despite knowing that we'd be met with police brutality and unwarranted arrests.'*

Brisbane ROM, p1: 'The dialogue emphasised the unique political activism in Queensland, in particular the South East region. This history reflects the indelible relationship between Aboriginal and Torres Strait Islander Peoples in the struggle, with and for each other. It is important that this special relationship, based on our old people's leadership, is recognized and continued.'

40 Perth ROM, p3: '*We don't have access to our own land ... We can't access special places for women's and men's business. Without our spirituality and identity we are nothing ... There needs to be a mechanism to allow these things to take place. ... We don't have access to our own sea as well.'*

Gurindji walk-off from Wave Hill station were at the centre of that battle. Their activism led to the Commonwealth legislating for land rights in the Northern Territory.

The epic struggle of Eddie Mabo and the Meriam people resulted in an historic victory in 1992, when the High Court finally rejected the legal fallacy of terra nullius and recognised that the land rights of First Nations peoples survived the arrival of the British.<sup>41</sup>

## Makarrata

The invasion of our land was met by resistance. But colonisation and dispossession cut deeply into our societies, and we have mourned the ancestors who died in the resistance, and the loss of land, language and culture. Through the activism of our leaders we have achieved some hard-won gains and recovered control over some of our lands. After the *Mabo* case, the Australian legal system can no longer hide behind the legal fiction of terra nullius. But there is Unfinished Business to resolve. And the way to address these differences is through agreement-making.<sup>42</sup>

*'Treaty was seen as the best form of establishing an honest relationship with government.'*  
(Dubbo)<sup>43</sup>

Makarrata is another word for Treaty or agreement-making. It is the culmination of our agenda. It captures our aspirations for a fair and honest relationship with government and a better future for our children based on justice and self-determination.<sup>44</sup>

*'If the community can't self-determine and make decisions for our own community regarding economic and social development, then we can't be confident about the future for our children.'* (Wreck Bay)<sup>45</sup>

Through negotiated settlement, First Nations can build their cultural strength, reclaim control and make practical changes over the things that matter in their daily life.<sup>46</sup> By making agreements at the highest level, the negotiation process with the Australian government allows First Nations to express our sovereignty – the sovereignty that we know comes from The Law.

*'The group felt strongly that the Constitution needed to recognise the traditional way of life for Aboriginal people. ... It would have to acknowledge the "Tjukurrpa" – "our own Constitution", which is what connects Aboriginal people to their creation and gives them authority.'*  
(Ross River)<sup>47</sup>

*'There is a potential for two sovereignties to co-exist in which both western and Indigenous values and identities are protected and given voice in policies and laws.'* (Broome)<sup>48</sup>

41 Darwin ROM, p2: *'We have to fight for black and white. Mabo said to his son – let's fight for black and white. His son asked, but why are we fighting for whitefellas? And Mabo said, because they are blindfolded, we need to open their eyes and let them recognise that we were in this country before them.'*

42 Broome ROM, p2: *'There is a potential for two sovereignties to co-exist in which both western and Indigenous values and identities are protected and given voice in policies and laws.'*

43 Dubbo ROM, p4.

44 Adelaide ROM, p4: *'We want Australia to take a giant leap in humanity. This is about truth-telling. Whether it is constitutional change or Treaty. It is not about colour. It is about truth-telling and justice.'*

45 Canberra ROM, p3.

46 Brisbane ROM, p8: *'[A] treaty process will only be worth the effort if its effects and benefits can filter down to the grassroots and make a difference to people in their daily lives.'*

47 Ross River ROM, p5.

48 Broome ROM, p2.

## 2.2.2 Assessment

Prior to the National Constitutional Convention, a set of Guiding Principles were distilled from the First Nations Regional Dialogues, which provided a framework for the assessment and deliberation on reform proposals. The National Convention did not reopen the work that had been done in the Dialogues. Rather, the task of the National Convention was to bring together the outcomes from the Dialogues in order to arrive at a consensus.

The Guiding Principles adopted at Uluru are reproduced below:

### GUIDING PRINCIPLES

The following guiding principles have been distilled from the Dialogues. These principles have historically underpinned declarations and calls for reform by First Nations. They are reflected, for example, in the Bark Petitions of 1963, the Barunga Statement of 1988, the Eva Valley Statement of 1993, the Kalkaringi Statement of 1998, the report on the Social Justice Package by ATSIC in 1995 and the Kirribilli Statement of 2015. They are supported by international standards pertaining to Indigenous peoples' rights and international human rights law.

The principles governing the assessment by the Convention of reform proposals were that an option should only proceed if it:

1. Does not diminish Aboriginal sovereignty and Torres Strait Islander sovereignty.
2. Involves substantive, structural reform.
3. Advances self-determination and the standards established under the *United Nations Declaration on the Rights of Indigenous Peoples*.
4. Recognises the status and rights of First Nations.
5. Tells the truth of history.
6. Does not foreclose on future advancement.
7. Does not waste the opportunity of reform.
8. Provides a mechanism for First Nations agreement-making.
9. Has the support of First Nations.
10. Does not interfere with positive legal arrangements.

#### **1. Does not diminish Aboriginal sovereignty and Torres Strait Islander sovereignty**

Delegates at the First Nations Regional Dialogues stated that they did not want constitutional recognition or constitutional reform to derogate from Aboriginal sovereignty and Torres Strait Islander sovereignty. All of the Dialogues agreed that they did not want any reform to have consequences for Aboriginal sovereignty; they did not want to cede sovereignty: Melbourne,<sup>49</sup>

<sup>49</sup> Melbourne ROM, 17-19 March 2017, pp3,5-6.

Hobart,<sup>50</sup> Broome,<sup>51</sup> Dubbo,<sup>52</sup> Darwin,<sup>53</sup> Perth,<sup>54</sup> Sydney,<sup>55</sup> Cairns,<sup>56</sup> Ross River,<sup>57</sup> Brisbane,<sup>58</sup> Torres Strait<sup>59</sup> and Canberra.<sup>60</sup>

The Barunga Statement called ‘on the Commonwealth Parliament to negotiate with us a Treaty or Compact recognising our prior ownership, continued occupation and sovereignty and affirming our human rights and freedoms.’

The Expert Panel’s report in 2012 stated that the legal status of sovereignty is as follows:

*‘Phillip’s instructions assumed that Australia was terra nullius, or belonged to no-one. The subsequent occupation of the country and land law in the new colony proceeded on the fiction of terra nullius. It follows that ultimately the basis of settlement in Australia is and always has been the exertion of force by and on behalf of the British Crown. No-one asked permission to settle. No-one consented, no-one ceded. Sovereignty was not passed from the Aboriginal peoples by any actions of legal significance voluntarily taken by or on behalf of them.’<sup>61</sup>*

And the final report of the Joint Select Parliamentary Committee found that ‘at almost every consultation, Aboriginal and Torres Strait Islander participants raised issues of sovereignty, contending that sovereignty was never ceded, relinquished or validly extinguished. Participants at some consultations were concerned that recognition would have implications for sovereignty’.<sup>62</sup>

## 2. Involves substantive, structural reform

Delegates at the First Nations Regional Dialogues stated that the reform must be substantive, meaning that minimal reform or symbolic reform is not enough. Dialogues emphasising that reform needed to be substantive and structural include: Hobart,<sup>63</sup> Broome,<sup>64</sup> Darwin,<sup>65</sup> Perth,<sup>66</sup> Sydney,<sup>67</sup> Ross River,<sup>68</sup> Adelaide,<sup>69</sup> Brisbane,<sup>70</sup> Torres Strait<sup>71</sup> and Canberra.<sup>72</sup>

50 Hobart ROM, 9-11 December 2016, pp2-6.

51 Broome ROM, 10-12 February 2017, pp2,3,6-7.

52 Dubbo ROM, 17-19 February 2017, pp1-5.

53 Darwin ROM, 22-24 February 2017, pp1,3.

54 Perth ROM, 3-5 March 2017, p4.

55 Sydney ROM, 10-12 March 2017, pp1,4.

56 Cairns ROM, 24-26 March 2017, pp2,3.

57 Ross River ROM, 31 March-2April 2017, p5.

58 Brisbane ROM, 21-23 April 2017, pp1,8.

59 Torres Strait ROM, 5-7 May 2017, pp2,6-7.

60 Canberra ROM, 10 May 2017, pp1-2.

61 The Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012, p22.

62 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Final Report*, 25 June 2015, p69.

63 Hobart ROM, 9-11 December 2016, p6.

64 Broome ROM, 10-12 February 2017, p6.

65 Darwin ROM, 22-24 February 2017, pp5-6.

66 Perth ROM, 3-5 March 2017, pp2,5.

67 Sydney ROM, 10-12 March 2017, p5.

68 Ross River ROM, 31 March-2April 2017, p4.

69 Adelaide ROM, 7-9 April 2017, pp5-6.

70 Brisbane ROM, 21-23 April 2017, pp6-7,10.

71 Torres Strait ROM, 5-7 May 2017, p7.

72 Canberra ROM, 10 May 2017, p2.

This is consistent with the Kirribilli Statement that ‘any reform must involve substantive changes to the Australian Constitution. A minimalist approach, that provides preambular recognition, removes section 25 and moderates the races power [section 51(xxvi)], does not go far enough and would not be acceptable to Aboriginal and Torres Strait Islander peoples’.<sup>73</sup>

This is consistent with Article 3 of the *United Nations Declaration on the Rights of Indigenous Peoples*: ‘Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development’.<sup>74</sup> In addition, the *United Nations Declaration on the Rights of Indigenous Peoples* provides that ‘Indigenous peoples have the right to the recognition, observance and enforcement of Treaties, Agreements and Other Constructive Arrangements concluded with States or their successors and to have States honour and respect such Treaties, Agreements and other Constructive Arrangements’.<sup>75</sup>

### **3. Advances self-determination and the standards established under the *United Nations Declaration on the Rights of Indigenous Peoples***

Many delegates at the First Nations Regional Dialogues referred to the importance of the right to self-determination as enshrined in Article 3 of the *United Nations Declaration on the Rights of Indigenous Peoples*.<sup>76</sup> In 1988, the Barunga Statement called for the recognition of our rights ‘to self-determination and self-management, including the freedom to pursue our own economic, social, religious and cultural development.’ One of the fundamental principles underpinning ATSIC’s report on the Social Justice Package was ‘self-determination to decide within the broad context of Australian society the priorities and the directions of their own lives, and to freely determine their own affairs.’<sup>77</sup>

Dialogues that referred to self-determination and the *United Nations Declaration on the Rights of Indigenous Peoples* include: Hobart,<sup>78</sup> Broome,<sup>79</sup> Darwin,<sup>80</sup> Perth,<sup>81</sup> Sydney,<sup>82</sup> Cairns,<sup>83</sup> Ross River,<sup>84</sup> Adelaide,<sup>85</sup> Brisbane,<sup>86</sup> Torres Strait<sup>87</sup> and Canberra.<sup>88</sup>

73 Statement presented by Aboriginal and Torres Strait Islander attendees at a meeting held with the Prime Minister and Opposition Leader on Constitutional Recognition, HC Coombs Centre, Kirribilli, Sydney, 6 July 2015.

74 See also Article 38: ‘States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including measures to achieve the ends of this Declaration’; and Article 37: ‘1. Indigenous peoples have the right to the recognition, observance and enforcement of Treaties, Agreements and Other Constructive Arrangements concluded with States or their successors and to have States honour and respect such Treaties, Agreements and other Constructive Arrangements. 2. Nothing in this Declaration may be interpreted as to diminish or eliminate the rights of Indigenous Peoples contained in Treaties, Agreements and Constructive Arrangements.’

75 Art 37, UNDRIP.

76 Art 3, UNDRIP.

77 ATSIC, *Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures* (1995), 10.

78 Hobart ROM, 9-11 December 2016, pp2,10.

79 Broome ROM, 10-12 February 2017, p2.

80 Darwin ROM, 22-24 February 2017, p3.

81 Perth ROM, 3-5 March 2017, pp1,3,5.

82 Sydney ROM, 10-12 March 2017, pp2-3.

83 Cairns ROM, 24-26 March 2017, pp2,3,5.

84 Ross River ROM, 31 March-2April 2017, pp2,4-5.

85 Adelaide ROM, 7-9 April 2017, pp1-3,5-6.

86 Brisbane ROM, 21-23 April 2017, pp2,9.

87 Torres Strait ROM, 5-7 May 2017, pp2-3,5,7-8.

88 Canberra ROM, 10 May 2017, pp2-3.

#### 4. Recognises the status and rights of First Nations

Many delegates at the First Nations Regional Dialogues wanted the status and rights of First Nations recognised. Dialogues that referenced status and rights of First Nations include: Melbourne,<sup>89</sup> Hobart,<sup>90</sup> Broome,<sup>91</sup> Dubbo,<sup>92</sup> Darwin,<sup>93</sup> Perth,<sup>94</sup> Sydney,<sup>95</sup> Cairns,<sup>96</sup> Ross River,<sup>97</sup> Adelaide,<sup>98</sup> Brisbane,<sup>99</sup> Torres Strait<sup>100</sup> and Canberra.<sup>101</sup>

The Barunga Statement called for the government to recognise our rights ‘to respect for, and promotion of our Aboriginal identity, including the cultural, linguistic, religious and historical aspects, and including the right to be educated in our own languages and in our own culture and history.’ One of the fundamental principles underpinning ATSIC’s report on the Social Justice Package was ‘recognition of Indigenous peoples as the original owners of this land, and of the particular rights that are associated with that status.’<sup>102</sup>

Consistent with Article 3 on the right of self-determination, the preamble of the *United Nations Declaration on the Rights of Indigenous Peoples* recognises ‘the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources’.

#### 5. Tells the truth of history

The Dialogues raised truth-telling as important for the relationship between First Nations and the country. Many delegates at the First Nations Regional Dialogues recalled significant historical moments including the history of the Frontier Wars and massacres. Dialogues that stressed the importance of truth-telling include: Melbourne<sup>103</sup>, Broome<sup>104</sup>, Darwin<sup>105</sup>, Perth<sup>106</sup>, Sydney<sup>107</sup>, Cairns<sup>108</sup>, Ross River<sup>109</sup>, Adelaide<sup>110</sup>, Brisbane<sup>111</sup>, Torres Strait.<sup>112</sup>

89 Melbourne ROM, 17-19 March, p5.

90 Hobart ROM, 9-11 December 2016, pp6-7.

91 Broome ROM, 10-12 February 2017, pp1,2,4,5.

92 Dubbo ROM, 17-19 February 2017, pp1-5.

93 Darwin ROM, 22-24 February 2017, pp1,4,7.

94 Perth ROM, 3-5 March 2017, pp1,3,5.

95 Sydney ROM, 10-12 March 2017, pp3-4.

96 Cairns ROM, 24-26 March 2017, pp3-5.

97 Ross River ROM, 31 March-2April 2017, pp2-3, 5.

98 Adelaide ROM, 7-9 April 2017, p5.

99 Brisbane ROM, 21-23 April 2017, pp1-3,11.

100 Torres Strait ROM, 5-7 May 2017, pp3-4, 6.

101 Canberra ROM, 10 May 2017, p2.

102 ATSIC, *Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures* (1995).

103 Melbourne ROM, 17-19 March, pp2, 5.

104 Broome ROM, 10-12 February 2017, pp1,7.

105 Darwin ROM, 22-24 February 2017, pp2,6.

106 Perth ROM, 3-5 March 2017, pp1,4.

107 Sydney ROM, 10-12 March 2017, p5.

108 Cairns ROM, 24-26 March 2017, p1.

109 Ross River ROM, 31 March-2April 2017, pp1,5.

110 Adelaide ROM, 7-9 April 2017, pp2,4,6.

111 Brisbane ROM, 21-23 April 2017, pp1-2,6-7.

112 Torres Strait ROM, 5-7 May 2017, pp2,5.

The importance of truth-telling as a guiding principle draws on previous statements such as the ATSIIC report for the Social Justice Package.<sup>113</sup> The Eva Valley Statement said that a lasting settlement process must recognise and address historical truths.

The *United Nations Declaration on the Rights of Indigenous Peoples* enshrines the importance of truth-telling,<sup>114</sup> as does the United Nations General Assembly resolution on the basic principles on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law.<sup>115</sup>

In its Resolution on the Right to the Truth in 2009, the Human Rights Council stressed that the victims of gross violations of human rights should know the truth about those violations to the greatest extent practicable, in particular the identity of the perpetrators, the causes and facts of such violations, and the circumstances under which they occurred. And that States should provide effective mechanisms to make that truth known, for society as a whole and in particular for relatives of the victims.<sup>116</sup> In 2010, the UN General Assembly proclaimed the International Day for the Right to the Truth Concerning Gross Human Rights Violations and for the Dignity of Victims.<sup>117</sup> In 2012, the Human Rights Council appointed a Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence.<sup>118</sup> In 2013, the UN General Assembly passed the Resolution on the right to the truth.<sup>119</sup>

## 6. Does not foreclose on future advancement

Many delegates at the First Nations Regional Dialogues stated that they did not want constitutional reform to foreclose on future advancement. Constitutional reform must not prevent the pursuit of other beneficial reforms in the future, whether this be through beneficial changes to legislation, policy, or moving towards statehood (in the Northern Territory) or towards Territory status (in the Torres Strait). Dialogues that referenced this include: Hobart,<sup>120</sup> Sydney,<sup>121</sup> Darwin,<sup>122</sup> Torres Strait<sup>123</sup> and Canberra.<sup>124</sup>

## 7. Does not waste the opportunity of reform

Many delegates at the First Nations Regional Dialogues stated that constitutional reform was an opportunity and therefore should not be wasted on minimalist reform: a minimalist approach, that provides preambular recognition, removes section 25 and moderates the races power (section 51(xxvi)), does not go far enough and would not be acceptable to Aboriginal and Torres Strait

113 ATSIIC, *Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures* (1995) Recommendations 53-55.

114 Preambular paragraphs 3, 4, 8, 15 and 21; Articles 5, 15, 37 and 40.

115 A/RES/60/147.

116 A/HRC/RES/9/11; A/HRC/RES/12/12.

117 General Assembly resolution 65/196 of 21 December 2010.

118 A/HRC/RES/18/7.

119 A/RES/68/165.

120 Hobart ROM, 9-11 December 2016, p 8.

121 Sydney ROM, 10-12 March 2017, p 4.

122 Darwin ROM, 22-24 February 2017, p 7.

123 Torres Strait ROM, 5-7 May 2017, p 6.

124 Canberra ROM 10 May 2017, p 2.

Islander peoples. Dialogues emphasising that reform needed to be more than a minimalist position include: Melbourne,<sup>125</sup> Hobart,<sup>126</sup> Broome,<sup>127</sup> Dubbo,<sup>128</sup> Darwin,<sup>129</sup> Perth,<sup>130</sup> Sydney,<sup>131</sup> Cairns,<sup>132</sup> Adelaide,<sup>133</sup> Torres Strait<sup>134</sup> and Canberra.<sup>135</sup>

### 8. Provides a mechanism for First Nations agreement-making

Many delegates at the First Nations Regional Dialogues stated that reform must provide a mechanism for First Nations agreement-making. Dialogues that referenced a mechanism for agreement-making include: Melbourne,<sup>136</sup> Broome,<sup>137</sup> Perth,<sup>138</sup> Cairns,<sup>139</sup> Ross River,<sup>140</sup> Adelaide,<sup>141</sup> Brisbane<sup>142</sup> and Torres Strait.<sup>143</sup>

The obligation of the state to provide agreement-making mechanisms is reflected in the *United Nations Declaration on the Rights of Indigenous Peoples*. Article 37 proclaims, 'Indigenous peoples have the right to the recognition, observance and enforcement of Treaties, Agreements and Other Constructive Arrangements concluded with States or their successors and to have States honour and respect such Treaties, Agreements and other Constructive Arrangements'.

### 9. Has the support of First Nations

A message from across the First Nations Regional Dialogues was that any constitutional reform must have the support of the First Nations right around the country. The Dialogues emphasised that constitutional reform is only legitimate if First Nations are involved in each step of the negotiations, including after the Uluru Convention. Dialogues emphasising that reform needed the support of First Nations include: Hobart,<sup>144</sup> Broome,<sup>145</sup> Dubbo,<sup>146</sup> Darwin,<sup>147</sup> Perth,<sup>148</sup> Sydney,<sup>149</sup>

125 Melbourne ROM, 17-19 March, p4.

126 Hobart ROM, 9-11 December 2016, p6.

127 Broome ROM, 10-12 February 2017, p3.

128 Dubbo ROM, 17-19 February 2017, p1.

129 Darwin ROM, 22-24 February 2017, p6.

130 Perth ROM, 3-5 March 2017, pp4,5.

131 Sydney ROM, 10-12 March 2017, p5.

132 Cairns ROM, 24-26 March 2017, p5.

133 Adelaide ROM, 7-9 April 2017, pp5-6.

134 Torres Strait ROM, 5-7 May 2017, pp5-6.

135 Canberra ROM, 10 May 2017, p2.

136 Melbourne ROM, 17-19 March, pp2-7.

137 Broome ROM, 10-12 February 2017, p5.

138 Perth ROM, 3-5 March 2017, p5.

139 Cairns ROM, 24-26 March 2017, p5.

140 Ross River ROM, 31 March-2 April 2017, pp5-6.

141 Adelaide ROM, 7-9 April 2017, p4.

142 Brisbane ROM, 21-23 April 2017, pp3,8-10.

143 Torres Strait ROM, 5-7 May 2017, pp7-8.

144 Hobart ROM, 9-11 December 2016, p9.

145 Broome ROM, 10-12 February 2017, pp2, 6.

146 Dubbo ROM, 17-19 February 2017, pp1, 2, 3.

147 Darwin ROM, 22-24 February 2017, pp2, 5, 7.

148 Perth ROM, 3-5 March 2017, pp1, 3.

149 Sydney ROM, 10-12 March 2017, pp2, 4, 5.

Melbourne,<sup>150</sup> Canberra,<sup>151</sup> Brisbane,<sup>152</sup> Torres Strait,<sup>153</sup> Adelaide,<sup>154</sup> Ross River<sup>155</sup> and Cairns.<sup>156</sup>

The failure to consult with First Nations has been a persistent cause of earlier activism. For example, the 1963 Yirrkala Bark Petition was launched by the Yolngu people after the Federal Government excised their land without undertaking consultation or seeking Yolngu consent. They complained that ‘when Welfare Officers and Government officials came to inform them of decisions taken without them and against them, they did not undertake to convey to the Government in Canberra the views and feelings of the Yirrkala aboriginal people.’ The Eva Valley Statement of 1993 demanded that the development of legislation in response to the *Mabo* decision have ‘the full and free participation and consent of those Peoples concerned.’

The importance of First Nations’ support is recognised by the *United Declaration on the Rights of Indigenous Peoples*, which states in Article 3, that through the right of self-determination, Indigenous peoples must be able to ‘freely determine their political status and freely pursue their economic, social and cultural development’. The *Declaration* also recognises in Article 19 that, before any new laws or policies affecting Indigenous peoples are adopted, ‘States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent’.

## 10. Does not interfere with positive legal arrangements

Many delegates at the First Nations Regional Dialogues expressed their concerns that any constitutional reform must not have the unintended consequence of interfering with beneficial current arrangements that are already in place in some areas, or with future positive arrangements that may be negotiated. Dialogues that supported this principle were: Cairns,<sup>157</sup> Torres Strait<sup>158</sup> and Canberra (Wreck Bay).<sup>159</sup>

150 Melbourne ROM, 17-19 March 2017, p5.

151 Canberra ROM, 10 May 2017, pp2-3.

152 Brisbane ROM, 21-23 April 2017, pp2, 4.

153 Torres Strait ROM, 5-7 May 2017, pp2, 6.

154 Adelaide ROM, 7-9 April 2017, pp2-3, 6.

155 Ross River ROM, 31 March-2 April 2017, pp2-3, 6.

156 Cairns ROM, 24-26 March 2017, p6.

157 Cairns ROM, 24-26 March 2017, p5.

158 Torres Strait, 5-7 May 2017, ROM, pp2-3.

159 Canberra ROM 10 May 2017, p3.

Below is an assessment of the reform proposals against the Guiding Principles. The priority of the Voice to the Parliament and Agreement-making is clear from the assessment.

	Statement of Acknowledgement	Head of Power	Prohibition on Racial Discrimination	A Voice to Parliament	Agreement-Making
Does not diminish Aboriginal sovereignty and Torres Strait Islander sovereignty	Yellow	Green	Green	Green	Green
Involves substantive, structural reform	Red	Red	Green	Green	Green
Advances self-determination and the standards established under the <i>United Nations Declaration on the Rights of Indigenous Peoples</i>	Red	Red	Yellow	Green	Green
Recognises the status and rights of First Nations	Yellow	Yellow	Yellow	Green	Green
Tells the truth of history	Yellow	Red	Red	Green	Green
Does not foreclose on future advancement	Yellow	Green	Yellow	Green	Green
Does not waste the opportunity of reform	Red	Red	Green	Green	Green
Provides a mechanism for First Nations agreement-making	Red	Yellow	Red	Green	Green
Has the support of First Nations	Red	Red	Yellow	Green	Green
Does not interfere with positive legal arrangements	Yellow	Yellow	Yellow	Green	Green

- Meets principle
- Does not meet principle
- Inconclusive

### 2.2.3 Outcomes

The following analysis of the three propositions that subsequently emerged in the Uluru Statement of the Heart was presented to the National Constitutional Convention and approved.

## Voice to Parliament

A constitutionally entrenched Voice to Parliament was a strongly supported option across the Dialogues.<sup>160</sup> It was considered as a way by which the right to self-determination could be achieved.<sup>161</sup> Aboriginal and Torres Strait Islander peoples need to be involved in the design of any model for the Voice.<sup>162</sup>

There was a concern that the proposed body would have insufficient power if its constitutional function was ‘advisory’ only, and there was support in many Dialogues for it to be given stronger powers so that it could be a mechanism for providing ‘free, prior and informed consent’.<sup>163</sup> Any Voice to Parliament should be designed so that it could support and promote a treaty-making process.<sup>164</sup> Any body must have authority from, be representative of, and have legitimacy in Aboriginal and Torres Strait Islander communities across Australia. It must represent communities in remote, rural and urban areas, and not be comprised of handpicked leaders.<sup>165</sup> The body must be structured in a way that respects culture.<sup>166</sup> Any body must also be supported by a sufficient

<sup>160</sup> **Hobart:** Supported a powerful representative body.

**Broome:** Four out of five groups ranked the Indigenous voice as number one, either on its own or in combination with other options.

**Dubbo:** All groups supported the voice to parliament, with two groups prioritising this option.

**Darwin:** Considered important by all groups and was ranked as a priority in any reform package.

**Perth:** First preference for a voice for the First Nations people of Australia to Parliament and agreement making.

**Sydney:** Constitutionally guaranteed a First Nations Voice to Parliament was priorities by several groups and was considered as crucial.

**Melbourne:** The most supported package alongside agreement making. The Voice to Parliament was important to increase political power and authority and needs to be enshrined into the Constitution.

**Cairns:** Strong agreement across the groups for a Voice to Parliament as an important priority.

**Ross River:** Some people suggested embedding a representative body for Aboriginal people in the Constitution as a good option.

**Brisbane:** Well supported option.

**Torres Strait:** A Voice to Parliament was seen as an ‘engine room’ for change and a way of realising the right to self-determination.

<sup>161</sup> **Torres Strait:** A Voice to Parliament was seen as an ‘engine room’ for change and a way of realising the right to self-determination.

<sup>162</sup> **Brisbane:** The Aboriginal and Torres Strait Islander People need to be consulted on the model.

<sup>163</sup> **Hobart:** Supported a powerful representative body with the consensus that a body must be stronger than just an advisory body to Parliament.

**Broome:** Someone suggested that the Parliament would need to be compelled to respond to the advice of the Body, and there was discussion of giving the body the right to address the Parliament.

**Dubbo:** There was a strong view that the Indigenous body must have real power: a power of veto and the power to make a difference.

**Melbourne:** There was a concern that the body could become a tokenistic process. Hence, it must be more than advisory and consultative. It needs powers of compliance and to be able to hold Parliament on account against the standards of the UNDRIP.

**Brisbane:** The body needs to be more than just advisory. It needs to be able to provide free, prior and informed consent that is binding on government.

<sup>164</sup> **Melbourne:** Support was also given for the statement that would underpin and strengthen a Voice to Parliament to enable it to progress and protect a treaty process. This should be a statement of ‘intent’ and a statement of the ‘inherent rights of the First Peoples’. The statement could refer to Australia’s international obligation (e.g. UNDRIP) and acknowledge the sovereign position of Australia’s First Peoples and the crimes committed against the humanity.

**Cairns:** It could be used to pursue economic developments and to pursue negotiations of treaties with government.

**Torres Strait:** It could support and promote a treaty-making process.

<sup>165</sup> **Hobart:** A selection process should be put in place to ensure that the body is representative of Aboriginal and Torres Strait Islander Peoples.

**Darwin:** The body would need to be elected and connected to the community.

**Perth:** Very strong support for a Voice to Parliament that would represent all lands and waters across Australia.

**Ross River:** The body must represent communities across Australia and have legitimacy in remote, rural and urban areas. It was also suggested that it should include representatives across generations.

**Brisbane:** The body needs to be representative of grassroots. Not a handpicked organisation like the Indigenous Advisory Council. It needs to be elected by grassroots and consult back with the community.

**Adelaide:** The Aboriginal Voice could be drawn from the First Nations and reflect the song lines of the country.

<sup>166</sup> **Brisbane:** The structure of the body needs to respect Aboriginal cultural heritage – ‘the oldest governance structure on the planet’.

and guaranteed budget, with access to its own independent secretariat, experts and lawyers.<sup>167</sup> It was also suggested that the body could represent Aboriginal and Torres Strait Islander Peoples internationally.<sup>168</sup> A number of Dialogues said the body's representation could be drawn from an Assembly of First Nations, which could be established through a series of treaties among nations.<sup>169</sup>

## Treaty

The pursuit of Treaty and treaties was strongly supported across the Dialogues.<sup>170</sup> Treaty was seen as a pathway to recognition of sovereignty and for achieving future meaningful reform for Aboriginal and Torres Strait Islander Peoples. Treaty would be the vehicle to achieve self-determination, autonomy and self-government.<sup>171</sup>

The Dialogues discussed who would be the parties to Treaty, as well as the process, content and enforcement questions that pursuing Treaty raises. In relation to process, these questions included whether a Treaty should be negotiated first as a national framework agreement under which regional and local treaties are made. In relation to content, the Dialogues discussed that a Treaty could include a proper say in decision-making, the establishment of a truth commission, reparations, a settlement, the resolution of land, water and resources issues, recognition of authority and customary law, and guarantees of respect for the rights of Aboriginal and Torres Strait Islander peoples.<sup>172</sup> In relation to enforcement, the issues raised were about the legal force the Treaty should have, and particularly whether it should be backed by legislation or given constitutional force.

167 **Broome:** The body must be supported – with a budget, with experts (eg, through a supporting secretariat) and with lawyers.  
**Darwin:** The body would need to be properly resourced.

**Brisbane:** The body needs to have guaranteed funding. One way of guaranteeing funding that was discussed was through a percentage of taxes (land taxes, water taxes) or linked to representatives.

168 **Thursday Island:** The body could be a way of achieving representation internationally (at the UN) and also connecting with other First Nations people internationally.

169 **Cairns:** A number of groups suggested the body could be drawn from an Assembly of First Nations which could be established through a series of treaties among nations.

**Brisbane:** Other ways of achieving political representation were discussed, including designated seats, or the creation of 'our own Parliament'.

170 **Hobart:** Supported and firmly committed to pursuing Treaty.

**Dubbo:** Strong consensus across all groups for a treaty as a form of establishing an honest relationship with government and perhaps achieving other options.

**Darwin:** As an overarching aspiration, Treaty was regarded as important.

**Perth:** Agreement making and Treaty was a high priority for a number of groups.

**Sydney:** While there was strong support in many of the groups for pursuing Treaty negotiations, there was no overall consensus as to how this could be achieved.

**Melbourne:** The most supported package alongside the Voice.

**Cairns:** Strong support for treaty, but not a clear consensus when a treaty should be pursued.

**Torres Strait:** A strong support for the pursuit of treaty that would give Torres Strait Islander Peoples self-determination, autonomy and self-government.

**Sydney:** Strong support to pursue Treaty negotiations but no overall consensus on how to do that.

171 **Torres Strait:** A strong support for the pursuit of treaty that would give Torres Strait Islander Peoples self-determination, autonomy and self-government.

172 **Hobart:** Treaty needs to recognise sovereignty, a land and a financial settlement, and recognition of rights.

**Broome:** People looked to agreement-making for a proper say in decision-making, recognition of authority and customary law, guaranteed or quarantined funding so people can plan for the long term, addressing issues that fall outside the scope of native title agreements, a better form of legal enforcement and better legal protection of rights.

**Dubbo:** Strong consensus across all groups for a treaty as a form of establishing an honest relationship with government and perhaps achieving other options.

**Adelaide:** Strong support for Agreement Making as a vehicle for implementing policies such as a truth and reconciliation commission, designated seats in Parliament, self-determination policies, and economic measures.

There were different views about the priority as between Treaty and constitutional reform.<sup>173</sup> For some, Treaty should be pursued alongside, but separate from, constitutional reform.<sup>174</sup> For others, constitutional reform that gives Aboriginal and Torres Strait Islander peoples a voice in the political process will be a way to achieve Treaty.<sup>175</sup> For others, specific constitutional amendment could set out a negotiating framework, and give constitutional status to any concluded treaty.<sup>176</sup>

### Truth-telling

The need for the truth to be told as part of the process of reform emerged from many of the Dialogues.<sup>177</sup> The Dialogues emphasised that the true history of colonisation must be told: the genocides, the massacres, the wars and the ongoing injustices and discrimination.<sup>178</sup> This truth also needed to include the stories of how First Nations Peoples have contributed to protecting and building this country.<sup>179</sup> A truth commission could be established as part of any reform, for example, prior to a constitutional reform or as part of a Treaty negotiation.<sup>180</sup>

173 **Dubbo:** Treaty could be pursued outside the constitutional reform process, or it could be pursued together with constitutional recognition through a voice to Parliament and a racial non-discrimination clause.

**Darwin:** This could be achieved inside or outside the Constitution.

**Perth:** For a number of groups, agreement making and Treaty was a high priority, but that in terms of timing it could follow constitutional reform.

**Cairns:** Strong support for treaty, but not a clear consensus when a treaty should be pursued.

**Brisbane:** This was a primary aspiration for the region but not ranked as a major priority for the reform.

174 **Hobart:** Treaty needed to be included in the final report from the Referendum Council and put into legislation, but not included in a referendum proposal.

175 **Sydney:** Some suggested that this could be done simultaneously while pursuing constitutional reform or achieved and strengthened through constitutional change such as through the inclusion of a Voice in Parliament.

**Broome:** The general sense was that agreement-making should be in the Constitution, because it is proper recognition of people, sovereignty and the importance of local culture, values and customary law.

**Perth:** Should be timed to follow constitutional reform.

**Adelaide:** Some chose to package the Voice with Agreement Making because they felt the agreement making process would be enhanced by the involvement of the Aboriginal Voice.

176 **Darwin:** Negotiating framework for the treaty needs to be enshrined in the Constitution.

177 **Sydney:** One group also suggested that dealing with question of 'truth and justice' had to be part of the process of constitutional reform.

**Melbourne:** People repeatedly emphasised the need for truth and justice, and for non-Aboriginal Australians to take responsibility for that history and this legacy it has created. The group believed that there needed to be a truth and reconciliation process as part of the larger process.

**Cairns:** This history and the suffering needed to be acknowledged before progress could be made with constitutional reform.

**Ross River:** The meeting recalled the Coniston massacre, and the many other massacres throughout the region. The meeting remembered the Aboriginal people who had been involved in fighting in the frontier wars. They also spoke of the Aboriginal people who fought in the wars, such as in the Vietnam war, but have not been recognised. If the government want to speak about 'recognition' they need to recognise the true history, recognise the frontier wars. They need to recognise the atrocity of Maralinga.

178 **Broome:** The need to generate greater understanding of our people and our history across Australia. The massacres were referred to many times across the Dialogue.

**Dubbo:** One group stated that it was important to correct the record. Delegates spoke of the need to acknowledge the illegality of everything done since colonization, the first act of aggression of first contact, the extreme cruelty and violence of the government, and the impact of the forced removals.

179 **Darwin:** There was a very strong feeling that the true history of Australia, the massacres and frontier killings, the stolen generations and other stories of how First Nations peoples have contributed to protecting and building this country are not taught in Australian education institutions.

180 **Melbourne:** One suggestion was to achieve change by 2020, with a truth and reconciliation commission to occur during that time, and a checkpoint in 2018.

**Adelaide:** Strong support for Agreement Making as a vehicle for implementing policies such as a truth and reconciliation commission, designated seats in Parliament, self-determination policies, and economic measures.

## 3. BROADER COMMUNITY CONSULTATION PROCESS

### 3.1 Digital platform

The Council was conscious that any future referendum would be the first in the age of social media.<sup>181</sup> Recent international experience demonstrates that social media can be a powerful determinant of public sentiment in referendums, and one that brings with it a complex set of challenges and opportunities. The Council engaged Cox Inall Ridgeway and BWM Dentsu to develop a digital platform comprising an interactive website and social media channels.

This online presence was established in the following stages:

Date	Event
26 October 2016	Phase 1 Council website goes live
6 December 2016	Council's Twitter channel goes live
9 December 2016	Online submission process opens
3 February 2017	Council's Facebook channel goes live
28 February 2017	Phase 2 Council website, including digital consultations, goes live
15 March 2017	Online submissions process and digital consultations close

The online consultation period was divided into five 'key topics', each showcasing one of the five key options in the Discussion Paper. A brief animated video was developed explaining the key features, rationale and potential limitations of the proposal. This content was then supplemented with infographics, social media posts and short textual descriptions on the website.

Content development was guided by the following goals:

- To provide an official voice for the Council to engage in existing online conversations about constitutional recognition, including correcting misinformation.
- To broadcast information quickly and effectively about the Council to a network of interested stakeholders, including alerting stakeholders to new information on the digital platform and encouraging discussion.

Australians were able to engage with this content by leaving a comment, by posting on social media, by completing a submission, or by emailing the Council directly.

The Council went to some effort to develop content that was informative and factual, and to promote this online discussion as broadly as possible. A modest sum of money was allocated to paid promotion on social media, and four Electronic Direct Mails were distributed between March and May 2017 to drive traffic to the online discussions. As a result, the Council and the options were talked about 2,824,702 times, and 195,831 people actively engaged in the discussion. Sentiment was measured

<sup>181</sup> *Final Report of the Act of Recognition Review Panel*, September 2014, p. 17.

and reviewed through machine filtering and analysis by research experts to assess support for the five reform options.

A total of 5,300 people also participated in online and telephone surveys over a six-month period between November 2016 and May 2017. This included two samples of 2,500 Australians representative of Australia's diverse geography and demography, as well as 100 Australians identifying as Aboriginal and/or Torres Strait Islander. The aim of the surveys was to benchmark and determine levels of awareness and attitudes toward constitutional reform across a range of demographics, within both Aboriginal and Torres Strait Islander communities and the wider community. Importantly, the surveys were also used to determine any changes in awareness or attitudes across the consultation period.

Cox Inall Ridgeway found that the social and digital consultations and online and telephone surveys delivered starkly different results. The majority of those who participated in the online and telephone surveys were in favour of constitutional reform, while the social media sentiment was overwhelmingly neutral or negative. A wide range of views were expressed on social media, and the process revealed the challenges inherent in engaging and informing Australians about such complex issues. Some who commented worried that the proposed reforms appeared to give 'special treatment' to a single group, while others were concerned about the erosion of existing rights, particularly sovereignty.

A report on the outcomes of the digital consultations is at **Appendix J**.

### 3.2 Submissions

The Council called for public submissions, based on its Discussion Paper, between December 2016 and May 2017. An online form was developed to facilitate this process, together with the facility for free-form submissions from key stakeholder organisations. The online form incorporated all 20 questions posed in the Discussion Paper, based on the five reform proposals.

The Council conducted a large, targeted stakeholder engagement campaign. This included requesting that stakeholders reach out to their networks to promote discussion on constitutional recognition. The Council produced a Community Discussion Kit to aid these conversations and provide a means of reporting the feedback to the Council.

A total of 1,111 submissions were received, including 1,057 submissions via the online form (structured submissions) and 54 submissions taking the form of an email, letter or other document (free form submissions).

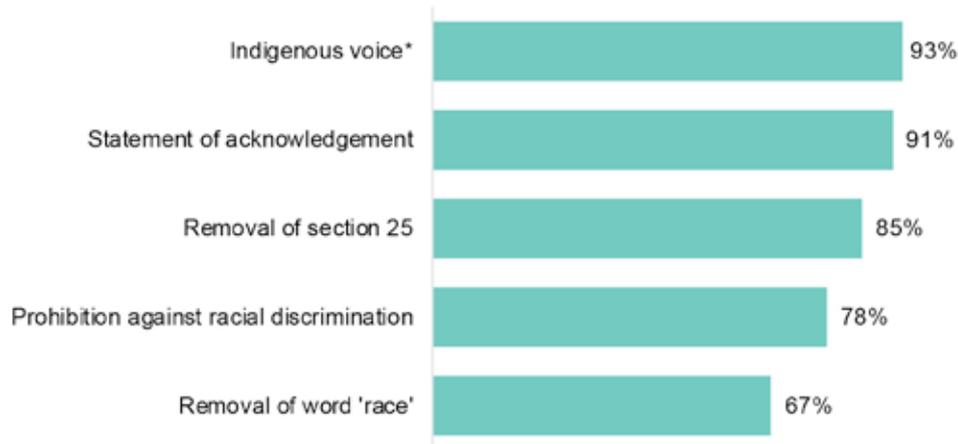
Urbis was engaged to analyse the submissions received; its report is at **Appendix K**. It found strong support for recognition, based on a desire to see Aboriginal and Torres Strait Islander peoples acknowledged as Australia's First Peoples, and enshrinement of an ongoing set of rights based on that legacy.

A large majority of submissions supported all five of the key proposals (see Figure 1). With strongest support, more than nine in ten (93%) backed the inclusion of an Indigenous voice when Parliament and government make laws and policies about Indigenous affairs. A total of 77% supported the creation of a group providing this voice under the Constitution.

A statement of acknowledgement of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia also received significant backing, with 91% supporting this measure – 86% in favour of a statement within the Constitution and 5% in favour of a statement in normal Australian law.

Changes to the 'race' provisions, section 25 and section 51 (xxvi), also received strong support with 85% of submissions supporting the removal of section 25 and more than two in three (67%) supporting removal of the word 'race' from the Constitution. A further 78% supported the insertion of a constitutional prohibition against racial discrimination.

**Figure 1: Preferred proposals for recognition**



\*Indicative of support for an Indigenous voice in general, rather than creation of a group under the Constitution.

Source: Urbis, Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples: Analysis of public submissions, unpublished report, 13 June 2017, p. ii.

Each submission provided to the Council (where the author consented to publication) can be found on our [website](#).

### 3.3 Outcomes

Both the digital consultations and the public submissions process found the following:

- A majority of participants supported all five reform options.
- No public submission expressed support for a statement of acknowledgement in isolation from other reform options – rather, a package of reforms was favoured.
- There was strong support for the Voice to Parliament option and, in particular, emphatic agreement in the public submissions that Aboriginal and Torres Strait Islander people should have a say when Parliament makes laws and policies relating to Indigenous affairs.

It is also important to note that both the public submissions process and research relating to the digital platform highlighted strong interest among the general population in knowing that the proposed reforms are supported by Aboriginal and Torres Strait Islander peoples, before choosing whether or not to support them. In other words, only a referendum proposal backed by Aboriginal and Torres Strait Islander peoples is likely to succeed.

## 4. FINDINGS

The Council refers to the summary of the outcomes at Uluru (see 2.2.3). The Council bears in mind, in particular, one of the four Guiding Principles adopted by the Council, namely, that the Council's recommendations must 'be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples'. Of the proposals referred to in the Discussion Paper, the only one to emerge as in accordance with the wishes of the Aboriginal and Torres Strait Islander peoples is the Voice to Parliament. The reasoning underlying this is set out earlier in this report and is regarded by the Council as deserving respect.

The Council emphasises the uniqueness of the First Nations Regional Dialogue process – designed by, owned by, and adopted by the Indigenous Steering Committee after extensive consultations with Aboriginal and Torres Strait Islander traditional owners, leaders, elders and organisations.

The First Nations Regional Dialogues process must be contrasted with the consultations conducted by the Expert Panel. The Expert Panel conducted 'a broad national consultation program' and held more than 250 consultations with more than 4,600 attendees. The Expert Panel process involved Australia-wide consultations but was not designed with a view to securing a representative view from Aboriginal and Torres Strait Islander peoples.

### Constitutional issues

**Although the proposals in relation to a Voice to the Parliament have not all been identical in form or substance, they have certain features in common:**

- The proposed body should take its structure from legislation enacted by the Parliament of the Commonwealth. No one has suggested there be an attempt to enshrine in the Constitution provisions of the kind more appropriately left to Parliament. Legislation of the Parliament would deal with how the body is to be given an appropriately representative character and how it can properly and most usefully discharge its advisory functions.
- It is not suggested that the body should have any kind of veto power.
- The constitutional description of the function of the body and its relationship to the parliamentary process is obviously of central importance. The concept of providing advice on certain matters requires definition of the relevant matters. For example, it would not be realistic to provide advice on all matters 'affecting' Aboriginal and Torres Strait Islander peoples because most laws of general application affect such peoples. On the other hand, it may be too narrow to limit the subject matters to laws with respect to Aboriginal and Torres Strait Islander peoples because some laws of general application have particular impact on or significance to such peoples.
- It would be for the legislation establishing such a body to deal with its constitution and procedures. It is not the intention of the proposal to limit the legislative power of the Commonwealth Parliament but, rather, to provide where such power is exercised in relation to Aboriginal and Torres Strait Islander peoples, they have appropriate input by way of advice and consultation.
- The Council notes the submission of the Law Council of Australia paragraphs [43], [44] and [45]. In particular, paragraph 43 states,

*Exercising the right to self-determination can encompass a range of different actions. In the Law Council's view, one aspect is the capacity for Aboriginal and Torres Strait Islander peoples to determine their own political future. Being provided with a role when Parliament and government make laws and policies about Indigenous affairs is integrally linked to freely pursuing their political status and freely pursuing their economic, social and cultural development as outlined in Article 1 of ICESCR [the International Covenant on Economic, Social and Cultural Rights] and Article 1 of ICCPR [the International Covenant on Civil and Political Rights].*

### **Extra-constitutional proposals**

The Council recommends, not by way of proposed alteration to the Constitution, but as guidance for associated legislation, that one of the specific functions of the body be to monitor the head of power section 51(xxvi) and section 122.

In addition, the Council reports that there are matters of great importance to Australia's Indigenous peoples that can be addressed more appropriately outside the Constitution. They are:

1. An extra-constitutional statement of recognition
2. The establishment of a Makarrata Commission
3. A process to facilitate Truth Telling.

The Council recommends an extra-constitutional statement of recognition.

Support for dealing with matters outside the Constitution was partly attributable to an understanding of the difficulties associated with amending the Constitution and recognition of the importance of the principle of parliamentary supremacy.

## CONCLUSION

The window of constitutional opportunity is limited for well-known reasons. The political and electoral challenges facing the promulgation and passage of a Bill of the Commonwealth Parliament to initiate a referendum are considerable. The political and electoral challenges facing the conduct of a referendum are also considerable. Bipartisanship, indeed multi-partisanship, amongst political parties within the parliament and constituencies in the wider community, is necessary but not always sufficient for success.

### Modest and substantive

We put forward a single recommendation for constitutional amendment – *that a referendum be held to provide in the Australian Constitution for a body that gives Aboriginal and Torres Strait Islander peoples a Voice to the Commonwealth Parliament* – in order to fit into this window of constitutional opportunity. Our recommended option for constitutional amendment is both modest and substantive.

The proposed Voice would not interfere with parliamentary supremacy, it would not be justiciable, and the details of its structure and functions would be established by Parliament through legislation that could be altered by Parliament. This is modest. It would place into the supreme law of our Commonwealth, a Voice that will enable the First Peoples of Australia to speak to the Parliament and to the nation about the laws and policies that concern them. This is substantive.

### Reasonable

The proposed Voice which we recommend is also reasonable. It was the first preference of Aboriginal and Torres Strait Islander delegates to the First Nations Regional Dialogues, and the consensus proposal coming out of the National Constitutional Convention at Uluru.

This preference took account of the objections raised against the alternative substantive constitutional amendment option: the insertion of some form of non-discrimination protection into the Constitution. The objections to a non-discrimination provision which would render parliamentary legislation justiciable under the jurisdiction of the High Court, may be appropriate or inappropriate – but that is not the point. The point is that such a non-discrimination provision has strong objections and objectors, which the Council believes will see it fail at a referendum.

The choice of an institutional alternative – a Voice to the Parliament – is therefore a highly reasonable proposal, put forward at Uluru and supported by our Council.

### Unifying

We believe that the recommendation we have made for enshrining a First People's Voice in the Constitution will be unifying for the nation, because constitutional inclusion is fundamental to a reconciled future. The symbolic and practical effects of the Voice will enable good measures to flow from future legislation, institutions, agreements and policies.

Our recommendation of an extra-constitutional Declaration will also be unifying. This will give our nation the opportunity to bring together the story of Australia and afford mutual recognition of the three parts of our shared heritage: the First Peoples, the British and the Migrant. It is not possible to recognise First Peoples within the Australian Commonwealth without recognising the whole. That whole includes two other parts, which the proposed Declaration would also encompass.

### **Capable of attracting the necessary support**

Finally, this single, modest and substantive constitutional amendment combined with a unifying extra-constitutional Declaration is capable of attracting the necessary support of the Australian people. Much work and goodwill will need to flow for their achievement, but these reforms are foundational to a better future. It is our Council's fervent belief that we have before us the best opportunity we are likely to ever have, to achieve something profound for our children's future, that they may live in a reconciled future and be proud of their identity as Australians and feel the gift of all its parts.



# Appendices



## APPENDIX A: REFERENDUM COUNCIL MEMBERSHIP

### **Pat Anderson AO, Co-Chair**

Pat Anderson is an Alywarre woman and the Chairperson of the Lowitja Institute. Previously, Ms Anderson was Chief Executive Officer of Danila Dilba Health Service in Darwin, Chair of the National Aboriginal Community Controlled Health Organisation and Executive Officer of the Aboriginal Medical Services Alliance Northern Territory. Ms Anderson co-authored Little Children Are Sacred, a report on the abuse of Aboriginal children in the Northern Territory.

### **Mark Leibler AC, Co-Chair**

Mark Leibler is the senior partner at Arnold Bloch Leibler and head of the firm's taxation practice. Mr Leibler is the National Chairman of the Australia/Israel and Jewish Affairs Council and was Co-Chair of Reconciliation Australia. Mr Leibler served as a Co-Chair of the Expert Panel on Constitutional Recognition of Indigenous Australians.

### **Megan Davis**

Megan Davis is a Cobble Cobble Aboriginal woman from Queensland and a Professor of Law and Pro Vice Chancellor, UNSW, Sydney. Professor Davis is an Acting Commissioner of the NSW Land and Environment Court and a member of the NSW Sentencing Council. Professor Davis is an expert member of the UN Human Rights Council's Expert Mechanism on the Rights of Indigenous Peoples and served for six years as an expert and chair of the UN Permanent Forum on Indigenous Issues. Professor Davis is a constitutional lawyer and was a member of the Expert Panel on Constitutional Recognition of Indigenous Australians.

### **Andrew Demetriou**

Andrew Demetriou is the former Chief Executive Officer of the Australian Football League. Mr Demetriou previously held the positions of Managing Director of Ruthinium Group and Chief Executive Officer of the AFL Players Association. Mr Demetriou currently serves as Chairman of Capitol Health Ltd and is a Director-Sports Marketing at Bastion Group (Australia).

### **Natasha Stott Despoja AM**

Natasha Stott Despoja is the Australian Ambassador for Women and Girls. She is the founding Chair of Our Watch, a national organisation to prevent violence against women and their children. Ms Stott Despoja is an Honorary Visiting Research Fellow at the University of Adelaide. She is the former leader of the Australian Democrats and was a Senator for South Australia (1995–2008).

### **Murray Gleeson AC**

Murray Gleeson is a former Chief Justice of the High Court of Australia and was Chief Justice of the Supreme Court of New South Wales. Mr Gleeson was appointed Queen's Counsel in 1974. Mr Gleeson was previously Lieutenant Governor of New South Wales. Mr Gleeson currently serves as a nonpermanent Judge for the Court of Final Appeal (Hong Kong Special Administrative Region).

### **Tanya Hosch**

Tanya Hosch is a Torres Strait Islander woman, and was recently appointed as the first-ever General Manager, Inclusion and Social Policy, for the Australian Football League. Ms Hosch is also a Director of the Australian Indigenous Governance Institute and the Indigenous Land Council. She previously served as the Joint Campaign Director of Recognise, and worked on the design and establishment of the National Congress of Australia's First Peoples. Ms Hosch was also a member of the Act of Recognition Review Panel.

### **Kristina Keneally**

Kristina Keneally is a former Premier of New South Wales, and held a range of ministerial portfolios including Planning, Infrastructure, Disability Services, and Ageing. Professor Keneally currently serves as Director of Gender Inclusion and Adjunct Professor at the Macquarie Graduate School of Management. Professor Keneally cohosts 'To the Point'; is Patron of the Stillbirth Foundation Australia; and is an Ambassador for both Opportunity Australia International and the John Berne School.

### **Jane McAloon**

Jane McAloon is a strategic and corporate adviser. Previously, Ms McAloon was President of Governance and Group Company Secretary of BHP Billiton, and served as Director General of the New South Wales Ministry of Energy and Utilities. Ms McAloon is a non-Executive Director of Energy Australia, a Fellow of the Institute of Chartered Secretaries and a former Director of the Australian War Memorial.

### **Noel Pearson**

Noel Pearson comes from the Guugu Yimidhirr community of Hope Vale on south eastern Cape York Peninsula. Mr Pearson is a lawyer, and Founder and Director of Strategy of the Cape York Partnership. Mr Pearson also co-founded the Cape York Land Council, and helped to establish Apunipima Health Council, Balkanu Cape York Development Corporation and Indigenous Enterprise Partnerships. Mr Pearson served as a member of the Expert Panel on Constitutional Recognition of Indigenous Australians.

### **Michael Rose AM**

Michael is a lawyer and the former Chief Executive Partner of Allens. He is the Chairman of a number of government, arts and not-for-profit organisations including the Committee for Sydney, Sydney Living Museums and ChildFund Alliance, an international development NGO. Michael is Chairman of the Indigenous Engagement Task Force of the Business Council of Australia, and Deputy Chairman of the Aurora Education Foundation. He is an Ambassador for the Australian Indigenous Education Foundation and the Menzies School of Health Research. He is also a Fellow of the Australian Institute of Company Directors.

### **Amanda Vanstone**

Amanda Vanstone is a former Senator for South Australia, and held a number of ministerial portfolios in the Howard Government, including Minister for Immigration and Multicultural and Indigenous Affairs. Ms Vanstone is Australia's longest-serving female Cabinet Minister since Federation. Ms Vanstone also served as Australia's Ambassador to Italy and San Marino from 2007 to 2010. Ms Vanstone is currently Chair of Vision 2020 Australia and the Royal Flying Doctor Service.

### **Dalassa Yorkston**

Dalassa Yorkston is a Torres Strait Islander woman and Chief Executive Officer of the Torres Shire Council. She is the first Indigenous local woman to hold this position. Ms Yorkston has been a member of the Executive Management Team within Council since 2008, and has long experience working with local government.

### **Galarrwuy Yunupingu AM**

Galarrwuy Yunupingu is an Elder of the Gumatj clan of the Yolngu people and assisted in the drafting of the Bark Petition at Yirrkala. Dr Yunupingu was a member of the Yirrkala Town Council and is a former Chairman of the Northern Land Council. Dr Yunupingu was named Australian of the Year in 1978 for his negotiations on the Ranger uranium mine agreement. Dr Yunupingu was a member of the Council for Aboriginal Reconciliation.

### **Denise Bowden (proxy representative for Mr Yunupingu)**

An Indigenous woman from Katherine, Northern Territory, Denise Bowden is the Chief Executive Officer and Director of the Garma Festival at the Yothu Yindi Foundation Aboriginal Corporation. Through Aboriginal Hostels Limited Denise sits as a Board of Director. She is active in the north-east Arnhem land region, working on a number of education and governance policy projects. Denise holds many significant positions networked throughout the Northern Territory with regional and very remote Indigenous communities.

## **Past Council members**

### **Patrick Dodson**

Patrick Dodson is a Yawuru man from Broome, Western Australia. He was Co-Chair of the Expert Panel, and attended the summit meeting on 6 July 2015 in Kirribilli. He is Chair of the Yawuru Native Title Company "Nyamba Buru Yawuru Ltd", and a director on the Yawuru PBC. Mr Dodson was the founding Chairman of the Council for Aboriginal Reconciliation, a Royal Commissioner into Aboriginal Deaths in Custody, and is a former Director of the Central and Kimberley Land Councils. In 1975, he became Australia's first ordained Aboriginal Catholic priest (although he has since left the priesthood). Patrick has devoted his life to building bridges between Indigenous and non-Indigenous Australians.

Professor Patrick Dodson resigned as a member of the Council on 2 March 2016 .

### **Mick Gooda**

Mick Gooda is a descendant of the Gangulu people of central Queensland, is the Aboriginal and Torres Strait Islander Social Justice Commissioner, and a Royal Commissioner of the Royal Commission into the Child Protection and Youth Detention Systems of the Government of the Northern Territory. Mr Gooda was previously Chief Executive Officer of the Cooperative Research Centre for Aboriginal Health, and served as a member of the Expert Panel on Constitutional Recognition of Indigenous Australians.

Mick Gooda resigned as a member of the Council on 27 February 2017.

### **Stan Grant**

Stan Grant is a Wiradjuri man and a distinguished journalist. Mr Grant is the Indigenous Affairs Editor for Guardian Australia as well as the International Editor at Sky News. As the Managing Editor of NITV, he also hosts the network's nightly current affairs show, 'The Point'. His 30 year career as a political affairs correspondent, news anchor and international journalist has been recognised with a number of awards, including a Walkley Award in 2015.

Stan Grant resigned as a member of the Council on 4 March 2017.

## APPENDIX B: TERMS OF REFERENCE

### Purpose

The Referendum Council (the Council) will advise the Prime Minister and the Leader of the Opposition on progress and next steps towards a successful referendum to recognise Aboriginal and Torres Strait Islander peoples in the Constitution, as set out in these terms of reference.

The Council will build upon the extensive work of the Expert Panel on Constitutional Recognition of Indigenous Australians and the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples.

### Role

1. The Council will lead the process for national consultations and community engagement about constitutional recognition, including a concurrent series of Indigenous-designed and led consultations.
2. The Council will be informed by the Parliamentary Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples chaired by Mr Ken Wyatt AM MP with Deputy Chair, Senator Nova Peris OAM. The Committee will have input into the discussion paper on various issues regarding constitutional change to help facilitate an informed community discussion.
3. The Council and consultations it leads, will also consider the recommendations of the 2012 Expert Panel on Constitutional Recognition of Indigenous Australians.
4. The Council will report to the Prime Minister and the Leader of the Opposition by 30 June 2016 on:
  - a. outcomes of national consultations and community engagement about constitutional recognition, including indigenous-led consultations;
  - b. options for a referendum proposal, steps for finalising a proposal, and possible timing for a referendum; and
  - c. constitutional issues.

### Membership

1. The Council will have up to 16 members, including two Co-Chairs.
2. Membership will be for a term of one year.
3. The Prime Minister, after consultation with the Leader of the Opposition, will determine appointment of members and extensions of membership.

### Meetings and Working Methods

1. The Council will meet once every three months or as otherwise agreed.
2. The quorum for Council meetings will be ten members, including one Co-Chair.
3. The Council may convene working groups as necessary, to consider particular issues in depth and report back to the full Council.
4. Deliberations of the Council will be confidential.

### **Indigenous Reference Group**

1. The Government will appoint an Indigenous Reference Group of non-Council Members to advise the Referendum Council on the roll-out of the national consultation and community engagement process and provide a sounding board for views among Indigenous communities and groups on constitutional recognition.
2. The Indigenous Reference Group will include members of the Indigenous leaders meeting on 6 July 2015 and others.

### **Remuneration**

1. The Co-Chairs will be part-time paid positions.
2. Other Council members will be paid sitting fees and costs for in-person attendance at Council and Indigenous Reference Group meetings and for participation in community conferences provided that such participation is agreed in advance by the Council. Other Council members will not be paid sitting fees or costs for participation in working groups or any other activities related to the Referendum Council.
3. Indigenous Reference Group members will not receive sitting fees. Their reasonable costs of travel to participate in-person meetings will be paid.

### **Secretariat**

1. The Council will be supported by a Secretary and secretariat provided by the Department of the Prime Minister and Cabinet.
2. The Referendum Council and its activities will be properly supported by the Department of the Prime Minister and Cabinet.

## APPENDIX C: REFERENDUM COUNCIL COMMUNIQUES

### COMMUNIQUE, 14 December 2015

The Referendum Council, appointed by the Prime Minister, the Hon Malcom Turnbull MP, and the Leader of the Opposition, the Hon Bill Shorten MP, met in Sydney today, 14 December 2015, for its first meeting. The Council was announced on 7 December 2015.

The Council comprises sixteen Australians, and includes eight Aboriginal and Torres Strait Islander and eight non-Indigenous Members. Eight members are women; eight are men. Members have a range of backgrounds and bring different and important experiences and expertise to the table.

The Prime Minister and the Leader of the Opposition joined the Council at the start of its meeting. They discussed progress that has been made to date, the task before the Council, and the potential for constitutional recognition to make a significant contribution to Australia.

The Referendum Council Co-Chairs, Professor Patrick Dodson and Mr Mark Leibler AC, welcomed the shared, bipartisan commitment of the Prime Minister and the Leader of the Opposition to recognition. Their leadership and commitment will be critical on the path ahead.

The Co-Chairs also welcomed the shared commitment of all state and territory governments to recognition, which was reaffirmed by all Premiers and Chief Ministers at the Council of Australian Governments meeting on 11 December 2015.

The Referendum Council discussed the need for constitutional recognition to be progressed as part of a broader conversation that addresses concerns among Indigenous communities about Indigenous affairs and the settlement of 'unfinished business'.

The Referendum Council considers that consultation and community engagement is paramount. There have, to date, been two exhaustive processes with over 260 public meetings and over 3600 submissions.

There needs to be opportunities for all Australians to have their voices heard. This could commence with a digital platform, which will provide more information on options, and submissions and discussions will be encouraged.

As options are further distilled, community meetings or conferences could occur to get views on the proposition.

Given the importance of ensuring the proposition reflects the wishes of Indigenous Australians, a series of Indigenous-designed and led consultations will also occur.

The Referendum Council determined that an initial step will be the development of an information pack that will guide consultations and discussions. This information pack should provide a narrative about the contribution that recognition can make to Australia's national identity, and detail the various options for constitutional reform.

Further details will be announced in the near future.

## COMMUNIQUE, 10 May 2016

The Referendum Council, appointed by the Prime Minister, the Hon Malcolm Turnbull MP, and the Leader of the Opposition, the Hon Bill Shorten MP, held its fourth meeting in Melbourne today.

The Council has agreed to a thorough and inclusive process for consulting Australians, including Aboriginal and Torres Strait Islander peoples, about recognising Indigenous peoples in the Constitution.

### Indigenous leadership meetings

The Council will commence its consultation process with three significant meetings with Aboriginal and Torres Strait Islander leaders, including traditional owners and representatives of peak bodies.

At these Indigenous leadership meetings, participants will discuss constitutional recognition and the process of consulting Aboriginal and Torres Strait Islander peoples about options for recognition.

### Indigenous, community-wide and digital consultations

The Council will conduct a concurrent series of Indigenous consultations and community-wide consultations in the second half of 2016. The Council will also lead a national conversation on recognition through an innovative digital platform that gives all Australians the chance to have their say.

These consultations will include a series of regional dialogues for Aboriginal and Torres Strait Islander peoples to discuss options for a referendum proposal that could be supported by Indigenous peoples.

All Australians will have the opportunity to contribute to the national discussion. At the same time as the Indigenous meetings, the Council will provide opportunities for all Australians to have their say through a range of online discussions on constitutional recognition. The Council will also hold community consultations in each State and Territory across Australia.

### Consultation framework

The Council has also agreed on elements of potential referendum proposals that should form the basis of consultations:

- addressing the sections of the Constitution, including section 25 and section 51(xxvi), that are based on the outdated notion of 'race',
- ensuring continued capacity for the Commonwealth Government to make laws for Aboriginal and Torres Strait Islander peoples,
- formally acknowledging Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia,
- providing an Aboriginal and Torres Strait Islander body to advise Parliament about matters affecting Indigenous peoples, and
- providing a constitutional prohibition on racial discrimination.

## Timeframe

The Indigenous leadership meetings will begin in June. The regional dialogues, community-wide and digital consultations will take place in the second half of 2016.

The Council is confident that the decisions made today are an important step towards constitutional recognition.

The Co-Chairs will seek the approval of the Prime Minister and the Leader of the Opposition to continue the Council's work throughout the caretaker period.

The Council has set out a considered process for respectful and inclusive consultations and discussions with Aboriginal and Torres Strait Islander peoples and the wider Australian community about constitutional reform. This is an exciting opportunity for all Australians to have their say and create the foundations for a successful referendum.

The Council will step through this process carefully and deliver its final report to the Prime Minister and the Leader of the Opposition following the conclusion of the consultations.

## COMMUNIQUE, 9 August 2016

The Referendum Council met in Melbourne today to discuss the progress of its work and next steps. Co-Chair Mark Leibler and Pat Anderson reported to members that Prime Minister Malcolm Turnbull and Leader of the Opposition Bill Shorten had reaffirmed to them their joint and ongoing commitment towards a successful referendum to recognise Aboriginal and Torres Strait Islander peoples in the Constitution.

The Prime Minister and the Leader of the Opposition have requested the Council provide them with an interim report by 8 September 2016 to outline progress to date and the next phase of consultation. In a conversation with the Co-Chairs, Mr Turnbull reiterated the imperative that the Council's report reflect the outcome of comprehensive consultation with Indigenous people and that no proposal should proceed without the support of Indigenous people. He also emphasised the importance of the proposal being achievable and having near-universal support.

Council members discussed the outcome of the first phase of consultation which comprised three meetings involving Aboriginal and Torres Strait Islander leaders in Broome, Thursday Island and Melbourne. The meetings were a critical first step for the Council to seek guidance from leaders about the upcoming series of Indigenous-led dialogues to be held around the country. Members noted that about 150 participants had attended the meetings, including participants who took part in the 6 July 2015 Kirribilli meeting with former Prime Minister Tony Abbott and Mr Shorten.

Members acknowledged the broad-ranging views being raised at the meetings and noted this was to be expected given the complexity of the issue, the diversity of people being canvassed across the country and the reality that Indigenous peoples had not been given such an opportunity previously to express their hopes and concerns to the wider community.

Members also noted the strong message received from meeting participants that the consultation process should not be rushed by working to an artificial deadline.

In light of the feedback, the Council today agreed to a new timeframe for its work, which will now see consultations continuing into 2017 with a view to presenting a final report to the Prime Minister and Leader of the Opposition by mid-year.

The Council agreed to the framework for the upcoming series of regional dialogues, set to begin in the coming months. It was noted that a separate engagement process would be held to take the conversation to the broader Australian community.

Members also considered a public discussion paper, which sets out the options and issues for constitutional change to help guide community discussion. The paper will be translated into a number of Indigenous languages and will be published just prior to the next phase of consultation.

During the meeting, Council members reinforced their commitment to the process and the role they had been tasked with, as well as their desire to ensure the process was managed with respect and understanding.

The Referendum Council consists of 16 eminent Australians and was appointed by Prime Minister Malcolm Turnbull and Leader of the Opposition Bill Shorten in December 2015. Its role is to provide advice on constitutional change, including a proposal to create the foundations for a referendum.

### COMMUNIQUE, 20 October 2016

The Referendum Council has settled on timeframes and locations for its next phase of Indigenous consultation on constitutional recognition.

The council will hold 12 First Nations dialogues over November and December and into early 2017, and will culminate in a national convention of Indigenous leaders at Uluru.

The council's Indigenous steering committee members designed the series of Indigenous-led dialogues with Aboriginal and Torres Strait Islander leaders during the council's first phase of consultation earlier this year. Through the dialogues, the council will seek the views of Aboriginal and Torres Strait Islander representatives on options for a referendum proposal.

The council has agreed that between November and December 2016, locations for dialogues will include Adelaide, Hobart and Perth. Locations in 2017 will include Darwin, Broome, Dubbo, Brisbane, Torres Strait, Sydney, Melbourne, Cairns and Alice Springs.

The council will meet with Aboriginal and Torres Strait Islander representatives from across Australia, including representatives from First Nations and community organisations, as well as key individuals. The council's digital consultation process, which will complement the dialogues, is due to go live in November. The digital platform will provide information about constitutional recognition and an opportunity for people to put forward their views.

Given the complexity of the issue, council members emphasised the importance of helping people to better understand the options being explored for constitutional change so they are well placed to provide input when the council calls for formal submissions next year.

Members also discussed the latest iteration of the public discussion paper, which sets out the options and issues for constitutional change to help guide community discussion. The paper, which will also be available in a number of Indigenous languages, will be published next month.

The Referendum Council consists of 16 eminent Australians and was appointed by Prime Minister Malcolm Turnbull and Leader of the Opposition Bill Shorten in December 2015. Its role is to provide advice on constitutional change, including a proposal to create the foundations for a referendum.

### **COMMUNIQUE, 25 November 2016**

The Referendum Council met at Parliament House, Canberra, today to progress steps towards a national referendum on constitutional recognition.

The Prime Minister the Hon Malcolm Turnbull MP and the Leader of the Opposition, the Hon Bill Shorten MP, attended the meeting to discuss the work the council has undertaken to date, as well as to receive an update on the council's future plans.

The meeting was also attended by the Minister for Indigenous Affairs, Senator the Hon Nigel Scullion, Assistant Minister for Health and Aged Care, the Hon Ken Wyatt AM MP, Shadow Assistant Minister for Indigenous Affairs and Aboriginal and Torres Strait Islanders, Senator Patrick Dodson, Shadow Minister for Human Services, the Hon Linda Burney MP, and Senator Malarndirri McCarthy.

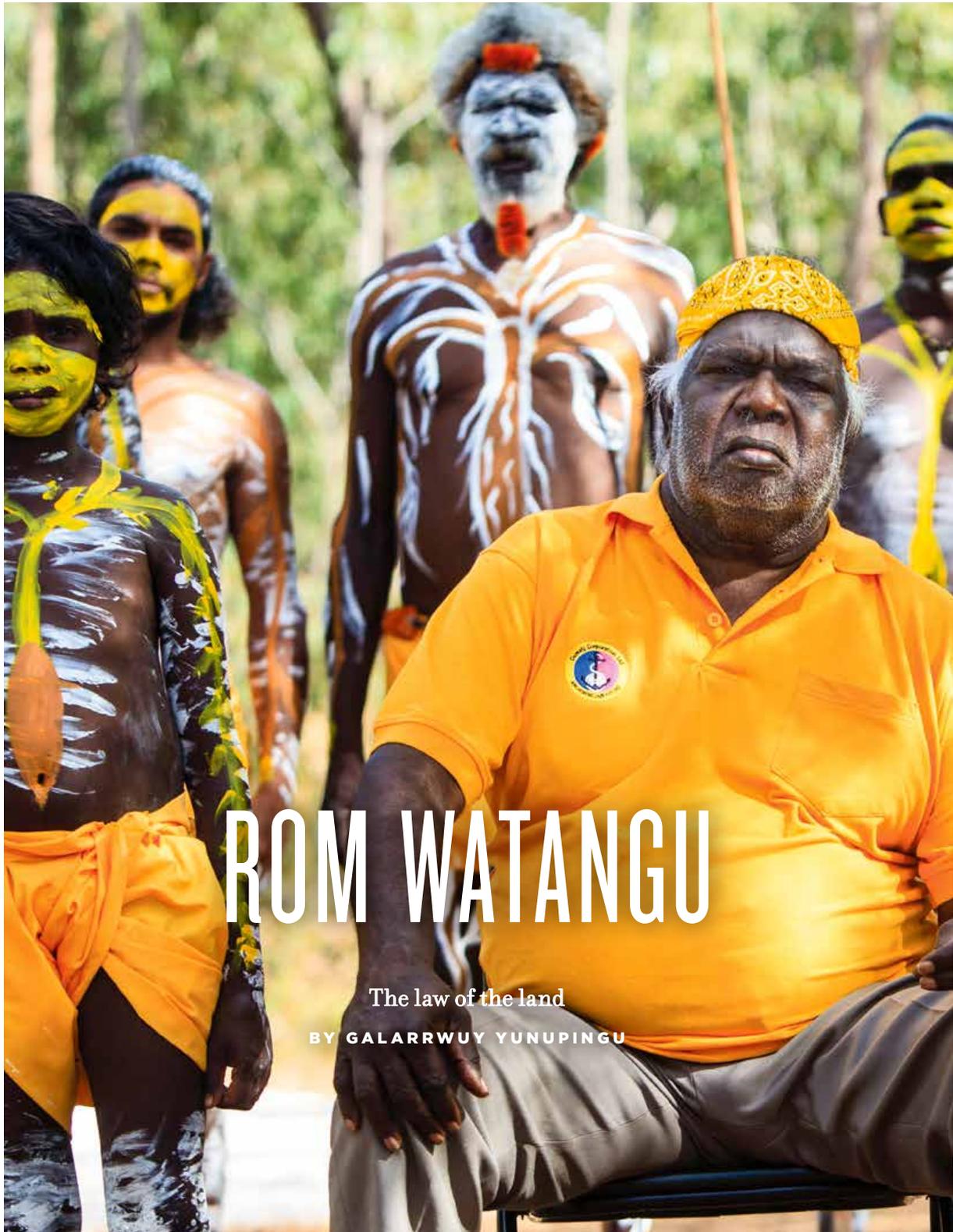
The Prime Minister and the Leader of the Opposition both reaffirmed their strong, bipartisan commitment to the Referendum Council's work.

The Referendum Council remains committed to maintaining momentum in its consultations and providing all Australians with the opportunity to consider all possible proposals for constitutional change.

The Prime Minister and the Leader of the Opposition asked the Council to progress its work without delay and to provide its report by 30 June 2017 to enable the Parliament to give due consideration to the issues.

The council has now published a discussion paper designed to support conversations with Australians about five key proposals, available on its website. The Prime Minister and the Leader of the Opposition had previously endorsed these proposals forming the basis of consultations.

**APPENDIX D: ROM WATANGU – THE LAW OF THE LAND**





Galarwiy Yunupingu at the Garma festival in East Arnhem Land, Northern Territory. © Amos Akman / Newpix

Our song cycles have the greatest importance in the lives of my people. They guide and inform our lives.

A song cycle tells a person's life: it relates to the past, to the present and to the future.

Yolngu balance our lives through the song cycles that are laid out on the ceremony grounds. These are the universities of our people, where we hone and perfect our knowledge.

It is through the song cycles that we acknowledge our allegiance to the land, to our laws, to our life, to our ancestors and to each other. We work from the new moon to the full moon - travelling these song cycles as a guide to life and the essence of our people: keeping it all in balance so that wealth and prosperity might flow. This is the cycle of events that is in us and gives us the energy for life, the full energy that we require. Without this, we are nobody and we can achieve nothing.

As a man reaches the final points in his journey it is then for others to do the singing. Others must take the lead, acknowledge him and guide him. If there is unfinished business it is no longer for that man to carry that business; others who have taken responsibility and who have taken leadership must then bear the burden of creation. The future is theirs, to be taken by them, crafted along the terms set by law as given to us by those that have come before. And failure will be theirs also, to own and bear witness to if they fail.

I have lived my song cycle and I have done what I can to translate the concepts of the Yolngu world into the reality of my life. I have endured much change and seen many different faces - I have watched both Aboriginal and non-Aboriginal leaders move in and out. And of course I have mixed feelings when I reflect on my life's work. I feel a deep sadness at times, yet I know that I have done much that is useful. I know that I have secured my family's birthright - we will not drift off with the tide; we will stand and endure, and our names will pass down through the decades and the centuries. Yunupingu means "the rock that stands against time", and so be it. But I think always of what has been lost around me against what endures. It is a form of torture for a Yolngu person to see the loss of our life: every word, every note, every slip in the song is pain; every patch of land taken; every time an outsider takes control from Yolngu; every time we compromise; and every time we lose something or someone. I tell my family to stand strong and endure, stay within the guidelines of our law, stay with the song cycles and be armed with this knowledge so as to secure for our people our lands, our way of life and our place in the world.

My father, Mungurrawuy, understood the difficulties and the complexities of white men, and the threats posed to his people's future by white society. As a young man he had been present when the massacres occurred in the 1920s and 1930s, and as a young man he was shot by a man licensed to do so. These were days not too dis-

One of the things that gave him the most recognition just before the missionaries arrived occurred when he joined Birrikitji and his younger brother Buwatjpuuy from the Dhalwangu clan in a dispute with the Djapu clan, the Madarrpa clan and other clan groups. This came in the middle of a terrible feud among the clans. Mungurrawuy

## How do we balance the wrongs that have been done with a need to work together in the future?

tant from today – days that every Yolngu person knows of, and remembers. The men who hunted my father were simply tasked to their job by their superiors, and they carried it out as well as they could.

At Gan Gan these men on horseback performed their duties and killed an entire clan group – men, women and children. They shot them out and killed them in any way they could so that they could take the land. These men on horseback then rode to Birany Birany and killed many of our Yarrwidi Gumatj, the saltwater people who cared for the great ceremonies at Birany Birany. There are few places in our lives as sacred as Gan Gan – from its fresh waters all things come – and Birany Birany.

When Europeans came to East Arnhem Land, this is how they introduced their world to the Yolngu. The old people carried the knowledge of these murders inside them, and when they spoke about it they were loud and clear and we all heard their words. It was a wave of history that broke over us, and that we had to contend with. We heard that my father and other senior men from all the clans unified against the cattle prospectors and land thieves, who hunted and killed Yolngu women and children.

These events and what lies behind them are burned into our minds. They are never forgotten. Such things are remembered. Like the scar that marked the exit of the bullet from my father's body.

Mungurrawuy stood out among the leaders of East Arnhem Land. He was strong. He could present himself. He could fight. He could lead his people and mediate between troublesome clans to make peace. By the time Mungurrawuy brought his families to Yirrkala on the Gove Peninsula, after the earlier days of terror, he was the most senior elder and land-owner, and he had the highest status in Yolngu law. He obtained this status by right – he was born to it by Yolngu law – but he earned it by performance and responsibility, and through his care for the families.

walked side by side with Birrikitji and his brother to a peacemaking event – a *makarrata* – that was held on the beach at Birany Birany.

The dispute was very deep and very serious, and in the event Mungurrawuy made the peace.

It was my father, perhaps for the last time before the missionaries arrived, who had the responsibility to make this happen in a proper way, in a proper Yolngu way – to bring about reconciliation.

After the *makarrata* my father was widely praised by the senior leadership throughout East Arnhem Land.

So the quest for “peace and harmony” in the world wasn't anything new to Yolngu when the missionaries came and spoke of such ideals. They were already our words and our way of life. We had seen it through the actions of my father, who performed these duties in his time.

And we still think in this way when we think about our future. How do we reconcile? What do we need to give, and what must be given to us for our loss, for our grievance? How do we balance the wrongs that have been done with a need to work together in the future?

Mungurrawuy was the pioneer who took the missionaries to the fresh water at Yirrkala and approved their presence there. I grew up with my family on the beach at Yirrkala. We lived in a series of humpies made out of bent iron and a mix of stringybark and paperbark – simple structures designed to keep the rain out. There were five or six different humpies in our camp, which was set up in a traditional way, with my father overseeing the lot.

We slept on sheets with blankets or sheets over us. No mattresses. We slept on the sand bars, close to the beach – a bit softer for us. I have no complaints, really. Looking back, I was safe and with my family.

The fires of the camp burned all night – our grandmothers would tend them, keeping them alive, which was a great gift they gave to the family. Eventually the missionaries

built a hut for my father, so he was the first to receive proper accommodation, if you could call it that.

While I was growing up at Yirrkala in the 1950s, my sisters were with me always, watching over me as I made my way to manhood. And my elder sisters, women of the highest degree, the most brilliant people, were married to men from the Djapu clan. These marriages brought the Gumatj and Djapu people closer together. And so it fell to my brother-in-law, a Djapu man, to supervise my initiation and purification. My brother-in-law was a son of the great Wonggu, who had also played a central role at the *makarrata* at Birany Birany.

Like Mungurrawuy with the Gumatj, Wonggu had led the Djapu through many dangers and had given them strength. He was a partner of my father's, and though each man would contest and challenge the other they did this always with the good of their people in mind – not with an eye on personal gain. They were a parliament unto themselves when it came to the affairs of Gumatj and Djapu, two great clans of East Arnhem Land, and the Yolngu people as a whole.

When I was initiated, Yirrkala was a very different world. It was the world of our fathers – men who were of their own time. These men held life and death in their hands: should your life be in their hands, you were safe and all your needs were met; should your death be in their minds, then your future was under grave threat.

My brother-in-law's name was Murtitjpu. He was the man who painted the sacred stories for Wonggu, and he did this in brilliant and distinctive ways. Murtitjpu was Wonggu's attendant and worked closely under his direction. So it was Murtitjpu who supervised the painting of the sacred designs on my body, and when I had been painted he took me to sit on the lap of my father-in-law, Wonggu. Just to be in Wonggu's presence was a great honour; to sit with him was a sign of respect from his people. It indicated his acceptance of me, even before I was initiated.

The great man spoke little. His words were power and he used them carefully. In those days he smoked a pipe made of corkwood. It was about a metre long and on it were the most beautiful carvings done by Murtitjpu. His cuts were very fine and detailed, carved as if part of a painting. The pipe was empowered with these magnificent designs – a sacred pipe of the Djapu people. Murtitjpu lit Wonggu's pipe. He drew breath and blew smoke over me, then passed me the pipe and directed me to softly draw, even though I could not smoke. The smoke passed over and around me as I sat with the old man. This recognised me and gave me the greatest honour, and I knew even then that this signalled that trust was to be ever-present between my brother-in-law and me. As I grew to be a man, Murtitjpu and his family would trust and not question me, allowing me into their world to ensure the safety and security of our laws and ceremonies. It was a special moment,

qualifying me for the future – and burdening me for the future.

I left the great man then and completed my initiation into manhood. I remember this like it was yesterday. It is clear in my mind.

It was during my schooling at Yirrkala when, one morning as I moved through the camp to visit my sister, I heard the news that Wonggu had passed away. I went to his camp, where my sister was, and there the body lay on a stretcher covered by a white sheet. Wonggu was peaceful but we were all in shock at the death of the great man. Preparations were made, and I watched quietly as the Djapu men sang to the spirit world. I sat motionless as my brother-in-law, with great love, removed the shirt from his father's body. Murtitjpu took his delicate human-hair brush and his ochres, and began to paint his father's body. I remember the painting as the most beautiful I have ever seen. Murtitjpu was so focused. He was in his own world, delicately working with the brush. He said no words to explain, but the painting spoke of power and authority. The work covered all of Wonggu's upper body including his face, which was most carefully done. His hair was decorated with white clay, and his authority and greatness were obvious for all to see.

Four Djapu men then came to the body. With great respect they rewrapped it, making a shroud, and placed it on a stretcher of stringybark. With sacred words they sang a special ceremony, a song cycle of the Djapu people, and raised the great man above their heads, carrying him to his final resting place. The men and women of the Yolngu world came and lined the beach, and Wonggu's sons carried him on high, in a procession of dignified authority. And then the tears broke: men and women, including my father, were crying and lamenting the passing, throwing themselves about and calling out in respect of this man. At the grave we were directed in the shark dance, the sacred totem of the Djapu.

Today when a man dies he is taken by the police or a coroner and he is made cold and sterile. Too often he dies violently or suddenly, surrounded by tokens of the Western world, not the Yolngu world. Tokens that have drawn him to his peril. The family loses the deceased and the deceased loses the family. He goes into a coffin, nailed in, screwed down, without love and without respect. Then he is returned in that way to the family for burial.

It is a different world today from what it was then. It will be a different world tomorrow from what it is today.

I did well at school and I enjoyed learning. There were Yolngu teachers in the classroom with us. They would write the numbers or words in the sand and we would write the numbers or words in the sand underneath. Then

they would push the sand over and we would do it again. Later we moved on to blackboards and pens and paper.

For a time my father was pressured to send me to Geelong Grammar. He decided I had not reached a point in my Yolngu learning that he could risk me to the outside world. He held me in Yirrkala, and my training continued under his supervision.

Like me, they seek a simple truth. Like me, they seek a simple recognition – the recognition of the truth of who we are.

In the 1970s the federal government gave the Northern Territory the power of self-government with the ability to pass its own legislation.

## The federal government knew this would happen – it was warned but did it anyway

The time came, though, when he decided that I must go and learn the ways of the outside world, and for this I travelled with cousins and brothers to a Methodist Bible college in Brisbane. I spent two and a half years there. With me was my cousin from the Dhalwangu clan, Mr Wunungmurra. He and I formed a partnership that ran for many, many years until his passing. As men we trusted each other and understood the hard road that Yolngu people must tread, and the discipline and determination that is required.

You see, Mr Wunungmurra and I were commissioned by both our fathers – Mangarri and Mungurrawuy – and other elders, and blessed by all of them. Mangarri and my father and other elders gave us and our other brothers and cousins our commission. And this commission was not just to be the interpreters of the future for Yolngu people but to be the future. We were sent to Brisbane for a purpose, and that purpose was to arm ourselves with knowledge and education for the future: not just for ourselves but also for our people. And that was a lifelong commission. Mr Wunungmurra lived it to the end and I will live it to the end also – there is no other way for men like us.

It was an honour to be commissioned by such men as our fathers, and it was important to my life, for when I came back to Yirrkala I was received into two kinds of ceremonies at the same time: the Dhalwangu ceremonies and the Gumatj ceremonies. And it was Mangarri himself who requested I go into the Dhalwangu world, to see that world and to respect that world. Dhalwangu men – Bukumarra, Yumutjin, Waaralka, to name a few – have sat closely with me ever since, mentoring and protecting me, and they have honoured me lately as my days get shorter. These are men who carry the same inheritance as I do, who have been on the same path as I have and who share the same world of ceremony as I do. These men have passed to their children, and to their children's children, the same stories that their fathers and grandfathers gave to them – the same belief system, the same laws and the same ways. Like me, like all Yolngu, they are proud and certain about who they are, and they will not change.

I thought at that time this decision had just come out of nowhere. It took the people of East Arnhem Land by surprise, as it was made without discussion. At this time in my life I had spent many years negotiating land rights for Aboriginal people with the Whitlam and Fraser governments, acting on my commission. And we had started the homeland movement. In 1974 Murtitjpu and I had established a homeland at Birany Birany with our families. Birany Birany troubled my father for it brought back old memories, but we made a home there and looked to the future where the younger ones would have what they needed, living and working on their own land, and where the older people were happy on their homelands and could end their days in dignity and comfort, and in the knowledge that their world was in order.

All over the place Yolngu were moving back to their homelands, and there was good support and recognition for this work. I know because I was there. The homeland movement was proving very effective at bringing hope to people on the ground. Homelands were being set up everywhere: the Dhalwangu clan took back Gan Gan for us, as well as the homeland of Gurrumurru further north. These are sacred places to us, and today our most senior people look after them. This task spread like wildfire, and more and more homelands were established. Work was carried out by land-owning groups who saw a way to return to themselves and to become whole again, by living on their country with their ancestors. Plans were drawn up for businesses and we set rules: “no work, no pay” was one of them. This was one time when Yolngu instinct and necessity met the government policy of the day. And it was in people's minds that the activities and involvement of government and others like the missionaries would simply be transferred from the central areas, like Yirrkala, to the homelands. This was seen as an arrangement to fulfil the needs of the people. Education, health and housing, sewerage and electricity – and economic activity of any kind the clan thought fit for the land – would come out to those homelands. Linked together, this would stand as an achievement of Yolngu land-owners doing their own thing.

Then two things came, halting both our progress and our initiative. The federal government started a process, which is still continuing to this day, of cutting its ties with, and its responsibility for, Yolngu people. It handed over our trust to a new Northern Territory government. And then it gave us a form of welfare, which killed off this whole idea of self-management. And the federal government knew this would happen – it was warned but did it anyway. The arrival of welfare demoralised the willingness of local people in every homeland to do things for themselves. This is because of the way that the government developed the program: you had to be on your homeland to receive the welfare payment but you did not have to work. There was no development agenda and there was no employment. Think about that – the only requirement to get money was that you were on the homeland on a given day. Whether working or not, you still got your payments of \$200 or \$300 each fortnight. So self-determination and self-management were out the window almost immediately, and later the Community Development and Employment Projects (CDEP) took control of Aboriginal people throughout the Territory – and badly so in East Arnhem Land, where I had a firsthand view of the destructive impact of this government program.

As it grew, the CDEP scheme did something else: it brought with it a new caste, or a new class, of managers. These were mostly people who were at the lowest level of the government public service, or had come for some reason of their own, either well intentioned or not. These people found that with the programs they ran they had power and influence beyond their previous experience. There were good people in the mix, but overall these people either made comfortable nests for themselves or they took what they could while they were there, financially or otherwise. Some simply stayed for a short time until they found another job and moved on, never accountable, never doing or achieving anything, and



leaving behind them confused people who wondered what this was all about. And, of course, people being as they are, Yolngu adapted to this system and started using these temporary workers as best they could, taking what they could from them and turning a blind eye to abuses by the *balanda* (white people) if it meant being able to get something on the day for themselves. And this became normal, for soon there were no other choices or outcomes – we were trapped in a welfare world with welfare thinking. This was the system as it was, and soon people came to know only that system. And government turned its head away, not interested anymore, not concerned about working with us to make these homelands functional.

It was during this period that my father, Mungurrawuy, became very ill, and he requested that I return from Darwin to be at his bedside and bear witness to his passing. I left Darwin, where I was now commissioned as chairman of the Northern Land Council, and came to him. I stayed close by, visiting Dad every day.

responsibility for the families. And with that gesture he ordered me to take charge of everything that he was able to do.

I could feel the silence of the crowd, filled with many great senior men of exceptional knowledge and learning, and all my sisters. Soon they started talking among them-

## I was trying to achieve then what I am trying to achieve now

Dad had aged greatly in the last few years of his life. The smoke from the Gove refinery had affected his eyes, as he lived close to the smokestacks at Galupa, on a small excision he had won from the government in his battles.

He was very old. He had 11 wives, many, many children, and many grandchildren and great-grandchildren.

I was with my brothers when an urgent message came that I had to be with my father. My brothers, nephews and many other relations and I headed back to Dad's house at Galupa, where all my sisters were gathered. All the families were there – everyone watching over him. All the men gathered in a group, as did the women, with my dying father watching over us all in the centre of our circle.

He was the most senior man in the community – in our world – such that his passing called many, many people of great seniority and experience to his side, to sit with the family while he died.

As we sang to his mind, to his head and to his ears, all the songs he loved and had taught us, we made the way and set up the direction for his spirit. Our song cycle, so important to our lives, is particularly important to individuals at the moment of their dying. It means a lot to their past, present and future. The future is already in the song cycle, and it takes senior ceremonial people, with great knowledge and love, to relate that to the dying person. Ordinary people cannot understand this or comprehend the critical importance of the event. Normally there is no hope in finding a place in the spirit home if there is no song. The songline sends you on a course so that your spirit arrives at its rightful destination.

I was the master of the ceremony that night, when Dad's time had come and he had to leave us.

I held clap sticks, but I noticed that night that he held clap sticks of his own, and as his time came and we sang for him, he still had strength to reach out, clenching his own clap sticks in his right hand. And he directed them to where I was sitting, singing for him.

"Take them," he said, and symbolically he passed to me all his power and authority over the ceremonies, his

responsibility for the families. And with that gesture he ordered me to take charge of everything that he was able to do.

I led the ceremony for him for six weeks. People and leaders and simple family members came from all over to farewell him. There were dignitaries from the Yolngu world and elders of the highest degree from every tribe. His burial day marked a special farewell to our leader: a man who had fought for and defended his land, bled for his land and his people, taken the missionaries to water, and mediated the relationship between the outside world and the Yolngu of the Gove Peninsula. A man who had sung into our ears as children since first we could hear. A man who believed in the future and our place in it.

Those of us who had known him missed him greatly because we were suddenly left without seniority and felt fragile and exposed.

Later we took his belongings and buried them at Galupa. A lease had been set aside for him there. It was called Kings Village.

The cleaning and purifying ceremony took place there at Galupa, looking out across to Melville Bay. The ceremony involved water and smoke. The last song I sang was 'Djapanana' (Sunset Dreaming), our final song cycle. I was seated as I sang this famous song cycle, but I felt as if I were standing, elevated. I sang it in a way that Dad would sing it, and I could hear my sisters crying as I brought back Dad's voice, his deepest spirit, in the singing. My sisters were wailing and crying, throwing themselves at the ground as I sang 'Djapanana'. I then actually stood and sang, in my thoughts saying my farewell, my final tribute to Dad's passing. I ceased singing and everyone was silent, wondering what was going to happen next. They were looking for a direction. I gave that direction. It was my first as leader of the clan. I simply said that I, my family, and my Gumatj brothers and sisters would come out of Yirrkala and start a new life and a new community, with a new direction, at Gunyangara, 30 kilometres from Yirrkala and

just to the west of Galupa. They were my words. I was trying to achieve then what I am trying to achieve now: a place where my family could live and prosper on their own country, within the modern world.

As time went on we realised that there was actually a Northern Territory government and that it was in power and that it had power over us. This was a new thing to us entirely. The party of power in the early '70s was the Country Liberal Party, which was started in Alice Springs by cattlemen and other newcomers to our lands. It was led for a time by a thin, tall bloke by the name of Dr Letts, who hung around the Batchelor community at that time. Located about 100 kilometres south of Darwin, Batchelor is an old mining town and the entry point to what is now Litchfield National Park. How he became the leader of the Northern Territory I really don't know. But soon enough I realised that things were not the same and that any balance we had achieved – first with the missionaries and then with the government in Canberra – was gone.

Consider the education of my people, a big part of my life's work. It was changed for the worse. With a stroke of a pen the government in Darwin simply closed up Dhupuma College, the hub of education for all of East Arnhem Land and beyond, a place where I worked mentoring young men and women as their sport and recreation officer. Dhupuma College had been opened by my father and Prime Minister William McMahon. It was a school that went to the secondary level, and one that was working. Dhupuma was not just a place but also an idea that inspired Yolngu people. A Yolngu word, *dhupuma* means “look up to the future”, reminding us of the leadership of our ancestor Ganbulapula. Students came from all over Arnhem Land to learn, supported by their parents, relatives and communities. It was devastating when the college was closed. It was said that the Northern Territory government could not carry this school anymore. There were only three of these schools in the Northern Territory

at the time: Kormilda College in Darwin, Yirara College in Alice Springs, and Dhupuma College that had been going for quite a while and whose graduates were our best and brightest. It was heartbreaking for the communities, the parents and most particularly the students, who were summarily told that they could no longer get their opportunity of an education.

I think that from then on a Mickey Mouse education has been given to Aboriginal communities, and a much higher standard to white communities in towns and cities. I think it bears out that this is the case.

For many years I have looked at the kids who went to Dhupuma College at one time or another, and I have followed their lives. They are involved in their communities: taking leadership, actively participating, delivering services. These individuals still stand out as people whose brains have been trained to take on roles of leadership and service. And I think straight away, when I run into these individuals or I think about them, that these are people who were given a chance of an education but in most cases had the opportunity to complete it taken away for no reason, with no explanation. I realise that these individuals have only what they received in their time at Dhupuma College, and it is with this that they serve their communities and their people. I wonder how high they could have flown if they had been allowed to train themselves to the full.

And then came the attacks on land rights. This is a disgraceful chapter in Australian history, which saw a group of people, made up of all sorts of itinerant workers who came from somewhere else, attack and attack and attack the land rights of people who had been there forever, and who had been given rightful ownership by the federal parliament. It was disgraceful and wrong, but attack us the Northern Territory government did. Year after year they ran legal cases against us, trying to stop the important work we were doing in the land councils. And when we defended ourselves, when we fought back, they punished us in different ways. There were reductions in services to our communities, the taking



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away or withholding of the services that had been entrusted by the Commonwealth – by the people of Australia – to the new Northern Territory government to rightly deliver to us.

And the Commonwealth parliament stood back and let it happen, occasionally joining in one way or another, but never again taking responsibility as it once had. They never forgot about the wealth of our land, and when the Commonwealth intervened it was to make a track for the mining companies, or the developers, or whoever wanted to use our land. They were very sure of this, and this thinking continues today.

A lot of the suffering we see in the remote places of the Northern Territory can be traced back to the total neglect of governance and responsibility by those charged with that duty. Instead of working with us and accepting us, governments fought us – from both sides of politics. Something gave them the idea that they didn't need to provide the same level of service to us as they did to other people in the Northern Territory. The fact that this behaviour continues in different ways is not lost on Aboriginal people in the Northern Territory. The impact upon us is the same, and that impact can be really bad.

**G**ulkula is a place chosen by our ancestors. It is a special place made for open discussion and debate, and for the contest of ideas. It is Gumatj land, owned

by Gumatj through the line of our ancestor, Ganbulapula. Many songlines run to Gulkula, and it is Ganbulapula who is the master of the ceremony. Gulkula is where the Garma festival is held each year.

It was Ganbulapula, our ancestor, who set our future. He was a hard man, to whom leadership was a challenge and a right. He spoke with a tongue of fire and had great strength for action. He knew the songlines. He was the singing man and the ceremonial manager.

Ganbulapula led a funeral ceremony and an initiation ceremony for the Matjurr people. The Damala people and the Matjurr people were the dancers. As a funeral, the ceremony was a grieving for the past. Decorated log coffins lay in the centre of the ceremony ground, waiting to receive the bodies of the dead that lay in a shelter of stringybark. This was also a ceremony looking to a new future. Young men were initiated into manhood, families were brought together, and there was a healing of the divisions of the past – an affirmation of a collective determination to go on together. There was an agreement to change, and to find peace through that change.

But others came forward and challenged the ceremony – insiders who thought they knew better. There was fighting and disagreement, confusion and conflict. The ceremony began to disintegrate into a hardening of past divisions,

disagreements and oppositions. Ganbulapula would not be denied, though, and he did something extraordinary. He picked up one of the painted log coffins waiting there to receive its body, a coffin saturated with cultural meaning, a living object of power. And he flung it eastwards, a little to the south from Gulkula. It landed in the sea at Djalambu. From Djalambu the hollow log was carried by the tides to other parts of East Arnhem Land. The hollow log became one means by which knowledge was sent out to other groups who were then linked through the sharing of this knowledge.

This action was both stunning and brilliant, and it lifted people's eyes from the mire of disorder, disagreement and bitter division. In that unprecedented throwing of the decorated log coffin, that unexpected shift into a new context, a new network of cultural meaning was created – a new future was believed in. The action generated the possibility of a future different from the past. Bitter division was healed by way of bold, confident leadership.

My father believed in this future. He chose to look up to the future as Ganbulapula had. At Gulkula he was the one who had named the school aimed at training our people for the future as Dhupuma, telling us to “look up to the future”. And then he took us to Dhanaya, to the place of our ancestors, and he told us to anchor ourselves to our land, to anchor our future.

Our people needed anchors when the mining came and set itself upon us with a full force. We fought the Gove bauxite mine and lost, and our elders were frightened and worried about what the future held for the young men and women of their clans. And rightfully so. The mining sent every leader on the Gove Peninsula to wonderment trying to think of the future and of the white men that would come and how they would bring with them their influences, good and bad. The bad influences were spoken of more than the good.

As I sit here nearly 50 years later, looking back, having settled with the mining company and now building a mine for my people and a mining training centre of our own, I still hear the words of those old men and women worrying about the future of the Gove Peninsula, and they were right – their concerns were right.

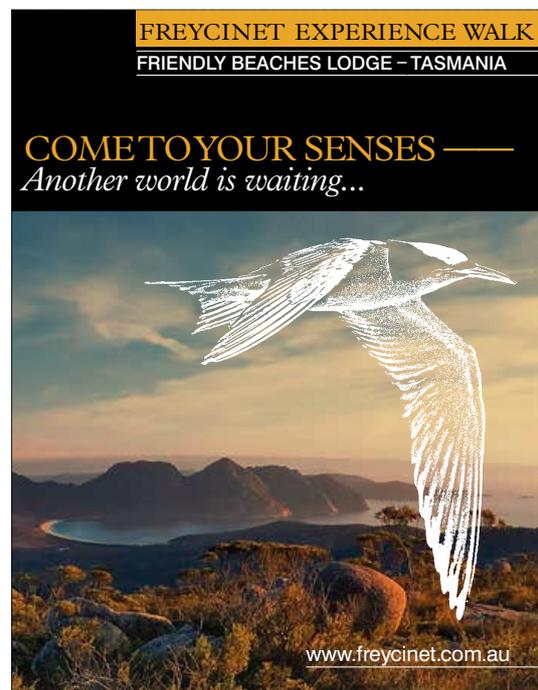
The mine came on us too fast. We were unprepared and people were not able to handle the change that it brought. I am sure many elders died from culture shock, and every man and woman of their age group died before their time – a straight culture shock. That's the truth of it.

I have spent all of those 50 years trying to reconcile my people, and my life, to the world that the mining company ushered in – a world that threatened everything for us.

My answer as it came was given to me by our songlines, and I led my family as we set about connecting and securing our songlines so as to ensure our life. First we built Birany Birany, and then we made Gonyangara our base. We then went to Dhanaya and reasserted ourselves near the waters of the stingray, where the anchor from the deep past lies in the rock, remembered by all for its meaning. We connected the sacred string of our songlines: from Birany Birany, to Dhanaya, to Garrathiya, to Gulkula, through Bay Bay Mi and then to our northern bases at Galupa and Gonyangara. We reclaim and hold these places as capitals of our lands and places for our future. Gonyangara is our base and the centre of our administration. At Gulkula we run the Garma festival and have placed the Garma Knowledge Centre. Close by is our training centre. At Garrathiya we have a cattle station and abattoir, and at Dhanaya we have secured a place of rest and ceremony, and a base for our workers – it's our favourite place. Further south, at Birany Birany, we hold close a place of beauty and memory, the site of the last *makarrata*.

Each place is special, with its own patterns, sacred words, song cycles and meaning. Each place is connected and part of a whole. No one must threaten or terrorise these places again.

Galarway Yunupingu (centre) with Dhalwangu clan leaders David Wunungmurra and Bukumarra Wunungmurra, near Gonyangara in East Arnhem Land, Northern Territory © Anos Akman / Newspix



There is always something wanted by someone who knows nothing of our land or its people. There is always someone who wants us to be like them, to give up our knowledge and our laws, or our land. There is always someone who wants to take something from us. I disapprove of that person, whoever he or she is. There is no other way for us. Our laws tell us how to live and lead in the proper way. Others will always seek to interrupt my thinking, but I will tell the difference between their ways and my laws, which are the only ones to live by. I am mindful of the continuing attempts to change all that is in us, and I know that it is not workable at all. It cannot work. We are covered by a law of another kind and that law is lasting and alive, the law of the land, *rom watangu* – my backbone.

Remember that there was a time when I believed that a government and its departments were there to meet the needs, to understand the needs, and to act on the needs of the people for whom they have taken responsibility. It took me some time to question why it was in relation to my people that they did not meet the needs, or take the steps, that responsible government demands. Why do they not provide the simple basics in the ways that work for us? Why not? There has never been an honest answer to this.

I still sit here and wait for the day when someone will stand up and say, “Hey, I’m responsible and I will do what is required of my leadership. I am the provider of housing, education, health, law, order and good government, and I will provide as is rightly required and in accordance with people’s needs. I will adjust and act in the way you seek – not as I seek – and I will give up something from my side. And I will make decisions that will not be popular at times with my people, but I will do this so that we may have what we both require.”

I live in the total knowledge that politics is a business that runs hot and cold every time a new office holder comes to Canberra (and Darwin), and they have to find some answers to what they can do in their time. Three years is such a short time, and politicians are under pressure to do something instead of biting their fingernails and having no solutions.

Aboriginal people need to understand that the government of the day will always seek to justify itself, protect itself and get its reputation straight. Its members will worry about their jobs and about saying things that will keep them in the good books with their electors, who are mainly white people. And those people will often have little good to say about Aboriginal people; when the voters do talk to their politicians they may want something from us or have some problem with us, because we are not like them. And this adds to

the worry of politicians who are most of all concerned about whether they will be re-elected. That’s their first commitment. That’s the real situation. So the only way through it is for a politician to risk prestige with the voters to make the achievement, and to believe that an outcome can be good for all concerned.

This type of sacrifice from strength is the key to leadership. My father had to sacrifice much, too much, to reconcile his life with the ways of the modern world. But he did so. What Aboriginal people ask is that the modern world now makes the sacrifices necessary to give us a real future. To relax its grip on us. To let us breathe, to let us be free of the determined control exerted on us to make us like you. And you should take that a step further and recognise us for who we are, and not who you want us to be. Let us be who we are – Aboriginal people in a modern world – and be proud of us. Acknowledge that we have survived the worst that the past had thrown at us, and we are here with our songs, our ceremonies, our land, our language and our people – our full identity. What a gift this is that we can give you, if you choose to accept us in a meaningful way.

With my family I have built Gunyangara into a place that we hoped all Yolngu places might be, back when hope powered the homeland movement. Men and women go to work and sweat for their wages, children go to school, old people are safer and happier, and we are making our way. Let me tell you this: Murtitjpu’s granddaughter Djurrathi runs the Gunyangara coffee shop, and should I drop in of a morning she will make me coffee, at our own coffee shop. Djurrathi’s mother, Yananymul, is Murtitjpu’s daughter, and she is often there now, at our coffee shop, learning from her daughter these new skills. Yananymul’s husband is Yalpi, who oversees Birany Birany. And Murtitjpu is buried at Birany Birany with his wife, my elder sister Lamangirra, in the land of our fathers, with our ancestors. Djurrathi’s daughter, Gali Gali, who is Murtitjpu and my great-granddaughter, is across the road from the coffee shop each morning at our preschool.

And it was Yananymul and Djurrathi and their sisters who, under my instructions, led the painting of the designs for the petition that I gave to Kevin Rudd, as Her Majesty’s representative, as the elected leader of Australians, in 2008. It is their precise and beautiful lines that mark out the designs on that petition – diamonds and fire and the fire-carrier, *djirrikitj* (the quail). Little Gali Gali is learning these song cycles as her mother learned them, who knows them as well as her mother does, who knows them as Murtitjpu knew them, and as his father and my father knew them. These song cycles are inscribed on that petition and they are as important as the words. Your children and grandchildren

will read the words on the petition but they will be ignorant about the designs and the patterns. Gali Gali will read both and understand everything.

In this story is a key to any Yolngu person's future. To find a part to play, to be dedicated to that work, to feed a child's brain with knowledge, to arm that child with the tools for life, to make a home, to feed your family. To live on our land, to be guided by our ceremonies and to be lifted up by the song cycles of our life. To believe totally in our way of life as the anchor, and to be confident enough to match our ways with the way of the world as it is today. Never let an outsider determine your life for you. Never forget who you are and where you come from. Never forget what is rightfully yours.

**K**evin Rudd, like prime ministers before and after him, acknowledged my leadership and made promises to my people. Tony Abbott made the same promises and came and lived on my land at Gulkula, and from there he ran the government for five or six days. Both were decent and respectful men. All the prime ministers I have known have been friendly to me, but I mark them all hard. None of them has done what I asked, or delivered what they promised. I asked each one to be truthful and to honestly recognise the truth of history, and to reconcile that truth in a way that finds unity in the future. But they are who they are and they were not able or not permitted to complete their task. For a prime minister is beholden to his party and to the parliament, which in turn is held by the Australian people. And the Australian people seem to disapprove of my simple truths, or the idea of proper reconciliation. The Australian people do not wish to recognise me for who I am – with all that this brings – and it is the Australian people whom the politicians fear. The Australian people know that their success is built on the taking of the land, in making the country their own, which they did at the expense of so many languages and ceremonies and songlines – and people – now destroyed. They worry about what has been done for them and on their behalf, and they know that reconciliation requires much more than just words.

So the task remains: to reconcile with the truth, to find the unity and achieve the settlement. A prime minister must lead it and complete it. The leader of the nation should accept his or her commission and simply say what he or she thinks is right, and put that forward for the nation to correct, or to accept, or to reject. Let us have an honest answer from the Australian people to an honest question.

**M**y father, Mungurrawuy, walked side by side with clan leaders Birrikitji and Buwatjpu to a field of settlement. These men walked to an outcome that was uncertain. Behind them lay wrongfulness and death.

Ahead, waiting for them, were Wonggu and his sons and clansmen, aggrieved and angry. On the sand at Birany Birany the peace was made, grievances were settled and a better future was created.

Like they did that day, I must dream of a future that is different from the past. A future that has in it everything my people need.

My ancestors and my fathers have dreamed of this future, and I have tried in my life, in my times, to bring it to reality. But I will not see it all, and I will not see the reality, only the dream.

Now when I am at Dhanaya, my most special place, I see the future running above the water, down the blue skyline and through the horizon, as if it were on a projector screen revealing to me a portrait of the future.

At other times I see a beautiful painting, created by the hands of masters, now broken into a thousand pieces. Those pieces are split up and thrown about, and I am seeking always to put them back together, to refit the pieces, to re-create the picture as it should be and then to hang it again on the wall – a beautiful picture for all to see.

In these moments I tune myself up so high that sometimes I can't even hear myself think. I wonder, then, who understands me, who could understand? **M**

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## APPENDIX E: QUALIFYING STATEMENT FROM AMANDA VANSTONE

### Qualifying Statement

The proposal to hold a referendum to insert into the constitution a requirement for an indigenous voice to Parliament is not one I can recommend to the Prime Minister and Leader of the Opposition at this point without this clarifying qualification. I hope we can get to the point where such a referendum is successfully put.

### A New Journey

The Referendum Council undertook, through the Indigenous sub committee , a very significant consultative process to ascertain what form of recognition Indigenous Australians want. It is clear that the single constitutional change wanted expressed through those consultations is a voice to Parliament enshrined in the constitution. If Parliament and the Australian people want to progress with constitutional recognition of first Australians the consultations have made clear that a voice to Parliament is not so much the best shot at it but that it is the only shot in the locker.

This is a relatively new development. If that were not the case indigenous leaders speaking on behalf of indigenous Australians would have said so some time ago. That means despite all the effort, contributions and time expended over a number of years we now find ourselves at a new starting point. Exhausting as that may seem to some that's where we are.

Polling, to the extent that we can rely on it in these days, indicates there is significant support for recognition of indigenous Australians in our constitution.

My own experience leads me to conclude that Australians think it only fair and just to do so. That they were thinking of symbolic recognition in the constitution is an indicator, in my view, that Australians inherently understand the importance of the constitution and regard recognition in that as important. I believe that is because they expect that, over time, symbolic constitutional change can and does both reflect and bring about better understanding and positive change .

We now understand through the Indigenous consultations that Indigenous Australians do not attach the same importance to that type of recognition and in fact reject it. The outcome of the consultations has thus taken us to new territory. In one sense we are all at the start of a new journey.

### Broad Australian Community Support

It would be a folly to take the support previously expressed by Australians for Constitutional Recognition in the Constitution to be unconditional. Whilst one would expect that Australians would not support something which Indigenous Australia did not endorse it is not clear that they would automatically endorse whatever indigenous Australia prefers. The substantive change contemplated is quite different from what had been contemplated by everyone and everyone will have to refresh their thinking.

I listened carefully to the Indigenous members from both sides of politics and both Houses of Parliament. They clearly expressed a view that in pursuing change a softly softly approach was required and that a radical proposal for change would not succeed. They were offering helpful insight. Whether they still hold that view I do not know. However that others do I am certain.

## Parliamentary Control

The report highlights that the details of the nature and scope of an indigenous voice to Parliament would be the province of Parliament. That would mean that once there was a constitutional requirement for such a body it would be established through an Act of Parliament and could be changed over time by subsequent Acts of Parliament.

We need not be concerned here with what future Parliaments may choose to do. They would have the authority of being elected by us. We do however need to be concerned with what would be initially put forward to Parliament as the first such body. Australians need to see a reasonable, relatively non-contentious and largely agreed plan as to what they would be voting for in the first instance.

## The Difficulty of This New Journey

Members of the Council, other than myself, believe that in saying that the details are within the province of Parliament one is acknowledging just how much additional work needs to be done. I do not agree. Those words merely point out in the most general terms possible that there is more to be done and that it is up to the parliament. In one sense that is true as it would be for any referendum proposal.

However those words do not make clear some factors I think it important to spell out. A much wiser person than myself might ask the question as to whether this fruit ( the proposal) is ripe. The newness of the idea in broad public debate means there is a tremendous amount of work to be done before Parliament and the broader community will consider this proposal's time has come.

For example , there is no point in pretending that there are not expectations as to the nature and scope of such a voice. Those expectations may well not accord with what either the Parliament or the Australian people see as appropriate.

What I can envisage as such a voice, that I imagine a majority of Australians would be prepared to endorse, might be considered unacceptable to indigenous Australians. On the other hand a model, which has been discussed, is not one I believe would be acceptable to the majority of Australians.

Not every detail of a proposed voice would need to be settled but the major structural ones would. The report acknowledges some of these difficulties.

What is called for is a representative voice. To some that means elected, to others appointed but in both cases by indigenous Australians. Some would envisage it may include indigenous Australians appointed by either Parliament or the government. It could mean a combination of all of the above. Questions as to voting eligibility would need to be resolved.

One of the reasons for seeking a body enshrined in the constitution is so that it cannot be removed, as ATSIC was, without being replaced by another body. It is important to reflect on the fact that in terms of electing representatives to an indigenous body Indigenous Australians have not in the past shown great enthusiasm. An incredibly low proportion of indigenous Australians voted in ATSIC elections. If voting were compulsory it would raise the question of whether there should be elections simultaneous with Federal elections and if so terms of office.

Australians would, in my view, need to be assured that any such body, whilst intended to be a step towards coming together would not in fact be an inbuilt dissonance within our system. The advice to parliament would be public and thus any disagreement would feed into the public debate. Advice opposing a proposal before parliament would in effect be perilously close to a veto. It would be important that such a body did not become another combatant in a frankly all too combative political arena.

## The Task Ahead

The task therefore is to find a version of an indigenous voice to parliament that will be acceptable to indigenous Australians and the parliament of the day. That debate, the one that gets to the basics of what would be acceptable to both indigenous Australia and the Parliament should be had before a referendum is contemplated.

Without finding that common ground before a referendum Parliament may find itself with significant Indigenous voices dissatisfied with what is subsequently proposed and yet be in a position that the constitution requires a body to be set up. What was intended to be a unifying and progressive move forward could turn into a lightning rod for discontent. That would be a terrible outcome for everyone.

## What is the Difference?

The Council members clearly do understand that an enormous amount of work would need to be done before a referendum could proceed. The report from the consultations also acknowledges in the proposed roadmap how much work needs to be done. The Indigenous members in particular through the consultations understand how hard it can be to bring together diverse views. The consultations have shown everyone how engaging substantively can produce unexpected results.

The broader community consultations and the call for submissions cannot be said to have captured the imagination of the broad Australian community. The electorate is not all fired up, let alone set alight with enthusiasm at this point. For a referendum to pass we will need to get close to that point.

To recommend to proceed to a referendum whilst acknowledging that the shape et cetera is within the province of parliament seems to me to assume that we are close to that point and that agreement between the Parliament and indigenous Australians can be found. Bearing in mind we are on a new journey that assumption cannot be made. To use a much overused idiom, it is putting the cart before the horse. A voice in the constitution is the only option we now have. Recommending a referendum is the last step. The first is finding the common ground.

I recognise that some will say my remarks are just another example of non indigenous Australians responding to a positive policy for Indigenous Australians by “kicking the can down the road”. To pick up on the kicking aspect of that metaphor let me say it was the indigenous consultations that put a relatively new “can” on the field. That “can” will not get through the goal posts unless we all work together as a team and get the right game plan.

A recent discussion in the Council highlighted for me the need to spell out these concerns. The reality of Australian politics is an unknown world to some people. A suggestion that we could, with political will, move to a referendum in January 2018 is testament to that. The roadmap in the Uluru statement, whilst recognising that much needs to be done only serves to highlight the gap between how people think the parliamentary process could work and the day to day reality of its operation.

Calls for courage and leadership are easy to make. Substantive change however is not easy to achieve. It is hard and frustrating work. Poetry and polemics will not overcome the necessary practicalities. They must be dealt with first. Unless that happens a referendum would be lost.

A loss would set back by a decade, probably more, the opportunity to move forward together as a nation in both coming to terms with our past and building a better future. It would do a great disservice to indigenous Australians.

## APPENDIX F: EXECUTIVE SUMMARIES FROM PREVIOUS REPORTS

### F.1 *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel (2012)*

#### Executive summary

Current multiparty support has created a historic opportunity to recognise Aboriginal and Torres Strait Islander peoples as the first peoples of Australia, to affirm their full and equal citizenship, and to remove the last vestiges of racial discrimination from the Constitution.

The Expert Panel was tasked to report to the Government on possible options for constitutional change to give effect to indigenous constitutional recognition, including advice as to the level of support from indigenous people and the broader community for these options. This executive summary sets out the Panel's conclusions and recommendations.

#### Methodology

The **introduction** sets out the background to the Panel's work and its methodology.

In formulating its recommendations, the Panel adopted four principles to guide its assessment of proposals for constitutional recognition of Aboriginal and Torres Strait Islander peoples, namely that each proposal must:

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

Between May and October 2011, the Panel conducted a broad national consultation and community engagement program to raise awareness about the question of constitutional recognition of Aboriginal and Torres Strait Islander peoples. The program included public consultation meetings, individual discussions with high-level stakeholders, presentations at festivals and other events, a website, and a formal public submissions process. To ascertain the views of a wider spectrum of the community, and to help build an understanding of the likely levels of support within the community for different options for constitutional recognition, the Panel commissioned Newspoll to undertake quantitative and qualitative research between February and November 2011.

The Panel placed a strong emphasis upon ensuring that its consultation program enabled it to capture the views of as many Aboriginal and Torres Strait Islander people and communities as possible within the available timeframes. It also sought legal advice from leading practitioners of constitutional law on options for, and issues arising in relation to, constitutional recognition to ensure that its proposals were technically and legally sound.

#### Historical background

The Panel examined the history of the Australian Constitution and law and policy relating to Aboriginal and Torres Strait Islander peoples since Federation in order to fully address its terms of reference. **Chapter 1** details the most relevant aspects of that history, which have

informed the Panel's consideration of the substantive matters in this report. This chapter chronicles the history of racial discrimination and non-recognition of Aboriginal and Torres Strait Islander peoples within the Constitution, and the use of the fiction of *terra nullius* to justify the taking and occupation of their lands.

The Panel's consultations revealed limited understanding among Australians generally of our constitutional history, especially in relation to the exclusion of Aboriginal and Torres Strait Islander people from full citizenship. During the consultation process, many people were surprised or embarrassed to learn that the Constitution still provides a head of power that permits the Commonwealth Parliament to make laws that discriminate on the basis of 'race'. While Australians are justifiably proud of the modern nation whose foundation is the Constitution, they are increasingly aware of the blemish on our nationhood caused by two of its sections, section 25 and the 'race power' in section 51(xxvi).

## Comparative and international recognition

**Chapter 2** surveys comparative and international experience with recognition of indigenous peoples. The countries considered include the settler states Canada, the United States and Aotearoa/New Zealand, which have similar constitutional and common law traditions to those of Australia. Also considered are Finland, Norway, Sweden, Denmark, the Russian Federation, Bolivia, Brazil, Colombia, Ecuador, Mexico, the Philippines and South Africa, all of which have pursued constitutional reform in recent decades to provide recognition of indigenous peoples. The example of comparative jurisdictions provides encouragement that such recognition can be successfully achieved with the support of a majority of the population.

## The national conversation: Themes from the consultation program

**Chapter 3** outlines the key themes that emerged from consultations, submissions and research, other ideas for change provided during consultations and in submissions, and the views of some who were not supportive of the ideas in the Panel's discussion paper of May 2011. In the discussion paper, the Panel set out seven ideas for constitutional recognition of Aboriginal and Torres Strait Islander peoples and invited the views of the community on these ideas. The ideas for change were as follows:

### Statements of recognition/values

- Idea 1. Statement of recognition in a preamble
- Idea 2. Statement of recognition in the body of the Constitution
- Idea 3. Statement of recognition and statement of values in a preamble
- Idea 4. Statement of recognition and statement of values in the body of the Constitution

### Equality and non-discrimination

- Idea 5. Repeal or amend the 'race power'
- Idea 6. Repeal section 25

### Constitutional agreements

- Idea 7. Agreement-making power.

## Forms of recognition

**Chapter 4** addresses the following issues, which emerged at consultations and in submissions in relation to statements of recognition or values:

- recognition in the preamble to the Imperial Act (4.1);
- recognition in a new preamble or in a new section of the Constitution (4.2);
- placing a statement of recognition, together with a new head of power (4.3);
- recognition in a new preamble, accompanied by a statement of values (4.4);
- the content of a statement of recognition (4.5); and
- recognition of Aboriginal and Torres Strait Islander cultures, languages and heritage in the Constitution (4.6).

Among the Panel's principles for assessing proposals for constitutional recognition were that they must 'contribute to a more unified and reconciled nation' and 'be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums'. During consultations with the community and in submissions, a number of questions were raised with respect to recognising Aboriginal and Torres Strait Islander peoples in a preamble at the beginning of the Constitution. The Panel concluded that there is too much uncertainty in having two preambles—the preamble to the Imperial Commonwealth of Australia Constitution Act 1900, by which the Parliament at Westminster enacted the Constitution in 1900, and a new preamble. The Panel found there are too many unintended consequences from the potential use of a new preamble in interpreting other provisions of the Constitution and there was next to no community support for a 'no legal effect' clause to accompany a preamble. The Panel has concluded, however, that a statement of recognition of Aboriginal and Torres Strait Islander peoples in the body of the Constitution would be consistent with both principles.

Another principle was that a proposal must 'be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples'. The Panel has concluded that a majority of Aboriginal and Torres Strait Islander people would support a proposal for constitutional recognition. Such support, however, would depend upon the form of recognition and whether such recognition was also accompanied by a change to the body of the Constitution. The Panel has concluded that the option which would best conform with the principle of being 'technically and legally sound' would be a new grant of legislative power with its own introductory and explanatory preamble to replace section 51 (xxvi).

The Panel has further concluded that a declaratory languages provision affirming that English is the national language of the Commonwealth of Australia, and declaring that Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage, would be consistent with each of its four principles.

## The ‘race’ provisions

In **Chapter 5** the so-called ‘race’ provisions of the Constitution are addressed. At its early meetings, the Panel came to the view that, in order to recognise Aboriginal and Torres Strait Islander peoples in the Constitution, there was a case for removing the two provisions that contemplate discrimination against them (as well as against people of any so-called ‘race’). The Panel’s discussion paper therefore raised a number of ideas for change in relation to the two so-called ‘race’ provisions: section 25 and the race power in section 51(xxvi).

In relation to section 25, which contemplates the possibility of State laws disqualifying people of a particular race from voting at State elections, the discussion paper identified the option of repeal.

In relation to section 51(xxvi), the discussion paper identified a number of options, including:

- repealing the provision altogether;
- amending it so that it can only be used to make laws for the benefit of Aboriginal and Torres Strait Islander peoples or other racial groups;
- creating a new head of power to make laws with respect to Aboriginal and Torres Strait Islander peoples; and
- inserting a new guarantee of racial non-discrimination and equality for all Australians in the Constitution.

The Panel’s consultations and submissions to the Panel overwhelmingly supported the repeal of section 25 and, in relation to section 51(xxvi), a large majority supported change.

## Racial non-discrimination

The Panel came to the view that there is a case for moving on from the history of constitutional non-recognition of Aboriginal and Torres Strait Islander peoples and racial discrimination and for affirming that racially discriminatory laws and executive action have no place in contemporary Australia. **Chapter 6** addresses the possibility of a new racial non-discrimination provision in the Constitution to strengthen protection against discrimination for Australians of all ethnic backgrounds. The Panel was, however, clear from the outset that any discussion of a bill or statement of rights was well outside its remit.

The submissions to the Panel overwhelmingly supported a racial non-discrimination provision and argued in favour of the principle of racial equality.

The Panel concluded that a constitutional prohibition of racially discriminatory laws and executive action would be consistent with each of the four principles identified in its discussion paper to guide assessment of proposals for recognition.

The Panel carefully considered the relationship between a racial non-discrimination provision, the race power in section 51(xxvi), and the proposed replacement power, ‘section 51A’. The Panel is conscious that there would be less need to qualify the preamble to the proposed replacement power in ‘section 51A’ with a word like ‘advancement’ if a racial non-discrimination provision with a special measures exception were to be included as part

of the constitutional amendments. In order to minimise the risk of invalidating current and future Commonwealth laws with respect to Aboriginal and Torres Strait Islander peoples, the proposed racial non-discrimination provision needs to be qualified so that the following laws and actions are secure:

- laws and measures adopted to overcome disadvantage and ameliorate the effects of past discrimination; and
- laws and measures adopted to protect the cultures, languages or heritage of any group.

## Governance and political participation

**Chapter 7** discusses the historical exclusion of Aboriginal and Torres Strait Islander peoples from participation in the processes of government in Australia—nationally, in the States and Territories, and in local government—and the perceived lack of accountability of the institutions of government to Aboriginal and Torres Strait Islander people, who constitute 2.5 per cent of the population.

Specifically, this chapter addresses:

- participation and representation of Aboriginal and Torres Strait Islander people in Australian parliaments and public life;
- autonomous Aboriginal and Torres Strait Islander representative institutions; and
- how governments interact with Aboriginal and Torres Strait Islander communities.

The Panel welcomes the increasing participation of Aboriginal and Torres Strait Islander people in Australian parliaments and public life, as well as moves to autonomous Aboriginal and Torres Strait Islander representative structures and institutions. At this time, however, the Panel does not recommend further consideration of dedicated or reserved seats in federal Parliament for Aboriginal and Torres Strait Islander peoples.

In relation to the way governments deal with Aboriginal and Torres Strait Islander communities and the economic and social disempowerment of many of these communities, raised so frequently and with such anguish, hurt and anger at consultations, the Panel recognises that these matters require attention beyond amendment of the Constitution. The Panel has concluded, however, that it would be remiss not to comment on the often cited failures of Australian governments at all levels to deliver better outcomes for Aboriginal and Torres Strait Islander peoples. While it is clear that constitutional recognition would not directly address many of the issues that are of concern to communities and governments, many of those consulted by the Panel supported the idea that constitutional recognition could provide a more positive framework within which the issues collected under the heading ‘closing the gap’ could be addressed more successfully.

## Agreement-making

**Chapter 8** addresses another of the key themes to emerge at consultations and in submissions to the Panel: the aspirations of many Aboriginal and Torres Strait Islander peoples in relation to agreement-making. It was apparent that there is also strong support among the non-indigenous community for forms of binding agreements between Aboriginal and Torres Strait Islander communities and governmental and non-governmental parties.

Those who referred to agreement-making identified a number of different forms that agreements with indigenous peoples can take:

- treaties entered into on a sovereign-to-sovereign basis;
- agreements with constitutional backing;
- agreements that are enforceable as contracts; and
- agreements with statutory backing.

While calls for an amendment to confer constitutional backing to such agreements are likely to continue, the Panel does not consider that these questions can be resolved or advanced at this time by inclusion in a constitutional referendum proposal. However, the Panel was interested in a mechanism for conferring constitutional backing to an agreement or agreements with Aboriginal and Torres Strait Islander peoples that might be negotiated with them in the future.

Like the Constitutional Commission in 1988, the Panel was not persuaded that any alteration to the Constitution should be attempted until such agreement or agreements had been negotiated in a process involving Aboriginal and Torres Strait Islander peoples, the Commonwealth and the States and Territories. The Panel considered that no proposal for an agreement should be taken to the Australian people at referendum until they were in a position to know what they were being asked to approve. This is a challenge for the future.

## The question of sovereignty

At consultations and in submissions to the Panel, there were numerous calls for a reappraisal of currently accepted perceptions of the historical relationship between indigenous and non-indigenous Australians from the time of European settlement. **Chapter 9** discusses one of the significant issues to have emerged during the consultation process: the aspiration of some Aboriginal and Torres Strait Islander peoples for recognition of their sovereign status.

The Panel has concluded that any proposal relating to constitutional recognition of the sovereign status of Aboriginal and Torres Strait Islander peoples would be highly contested by many Australians, and likely to jeopardise broad public support for the Panel's recommendations. Such a proposal would not therefore satisfy at least two of the Panel's principles for assessment of proposals, namely 'contribute to a more unified and reconciled nation', and 'be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums'. While questions relating to sovereignty are likely to continue to be the subject of debate in the community, including among Aboriginal and Torres Strait Islander people, the Panel does not consider that these questions can be resolved or advanced at this time by inclusion in a constitutional referendum proposal.

## Approaches to the referendum

The Panel has concluded that the options for constitutional recognition of Aboriginal and Torres Strait Islander peoples recommended in chapters 4, 5 and 6 are capable of succeeding at a referendum. The success of the 1967 referendum, at which a record high of 90 per cent support was secured, is a reminder that constitutional change in relation to Aboriginal and Torres Strait Islander peoples can gain the support of a significant majority of Australians. At the same time, the Panel is conscious of the record of unsuccessful referendum proposals in Australia. **Chapter 10** addresses the three issues most frequently raised with the Panel in relation to the referendum: the need for simplicity of proposals for recognition, the timing of the referendum and the general lack of public knowledge about the Constitution.

The Panel has further concluded that the Government and the Parliament should carefully consider whether the circumstances in which any referendum will be held are conducive to its success. Factors that should be taken into consideration include:

- whether there is strong support for the proposals to be put at referendum across the political spectrum;
- whether the referendum proposals are likely to be vigorously opposed by significant and influential groups;
- the likelihood of opposition to the referendum proposals from one or more State governments;
- whether the Government has done all it can to lay the groundwork for public support for the referendum proposals;
- whether there would be sufficient time to build public awareness and support for the referendum proposals;
- whether the referendum would be conducted in a political environment conducive to sympathetic consideration by the electorate of the referendum proposals; and
- whether the referendum proposals would be seen by electors as genuine and meaningful so as to avoid the risk of rejection on the basis that they represent an inadequate or ‘tokenistic’ response to the profound questions raised by constitutional recognition of Aboriginal and Torres Strait Islander peoples.

For many Australians, the failure of a referendum on recognition of Aboriginal and Torres Strait Islander peoples would result in confusion about the nation’s values, commitment to racial non-discrimination, and sense of national identity. The negative impact on Aboriginal and Torres Strait Islander peoples would be profound.

In the Panel’s view, achieving a successful referendum outcome should be the primary consideration of the Government and Parliament. It has therefore proposed a number of recommendations in relation to the process for the referendum.

**Chapter 11** puts forward a draft Bill for an Act to alter the Constitution to recognise Aboriginal and Torres Strait Islander peoples and to replace current racially discriminatory provisions with a racial non-discrimination provision.

## 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.

## **F.2 Final Report of the Aboriginal and Torres Strait Islander Act of Recognition Review Panel (2014)**

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### **Executive Summary**

*“I suppose to some extent I see this as nation building. We have now matured as a nation and our Constitution needs to recognise that.”<sup>1</sup>*

The recognition of Aboriginal and Torres Strait Islander peoples in our country’s founding document is a matter of profound importance. We cannot afford to get it wrong. Since 1967, when over 90% of Australians supported the inclusion of Indigenous Australians in the national census and a new Commonwealth responsibility for Indigenous policy matters, no other referendum has come close in its significance or impact on Australia’s national psyche.

Constitutional recognition embodies the strong spirit of reconciliation across Australia, signalling the next important step in our maturity as a nation. Non-Indigenous Australians who have not been subject to racism need to understand the debilitating effect it has on those who regularly experience it.

Most Australians know of the existence of the Constitution in broad terms and see it as the rulebook that ensures ‘fair play’ for all. Against that backdrop it is only logical that many Indigenous Australians feel that the Constitution not only fails to acknowledge their unique place in the country’s history, but also, that it has let them down. In fact, it is more often the case that when discrimination happens it is because we have failed to uphold the intent and inherent values of the Constitution.

It is readily apparent from the research that most Australians want to ensure that the Constitution reflects what it means to be Australian in the 21<sup>st</sup> century. We have a landmark opportunity to recognise our first peoples and ensure the Constitution never again allows for the omissions and inequalities that have happened in the past. It would allow us to protect what is uniquely Australian and acknowledge over 40,000 years of history. It ensures our Constitution reflects our values and recognises the equal worth and dignity of each citizen.

As a principle, there is broad support for the recognition and acknowledgement of our nation’s first peoples in the Constitution. Indeed, in the current climate, few issues have such a solid base of public support. However, it is also clear that levels of awareness and understanding of why change is needed, and what it would mean, are still low.

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<sup>1</sup> Evidence to Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Senate, Halls Creek, 22 July 2014, p. 16. (Mr Ian Trust, Chairman and Executive Director, Wunan Foundation).

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Despite the issue of constitutional recognition being on the national agenda since 2006, there is evidence that we are losing momentum and awareness is drifting. Over the past year public awareness levels on the referendum have dropped to less than 40% across the country. Encouragingly, support remains steady across both Indigenous and non-Indigenous people but this is at risk of declining if there isn't a clear path to a referendum.

We have not yet reached a point where we can proceed immediately to a referendum on the issue. To give the greatest chance of success, a number of pre-conditions need to be met. Fundamentally, this rests on a number of interdependent elements: agreeing a final proposal that can win the support of Indigenous Australians, parliaments and the people; setting a clear timeframe to show renewed commitment and urgency; and significantly raising the profile and understanding of constitutional recognition across the population. Our report reflects on each of these matters.

We are ready to take the next step on the path to a referendum. A 'circuit-breaker' is needed to move the debate forward. The time for clarity of intention and action is now.

First and foremost, the Panel has found that there is an **immediate imperative to remove any sense of ambiguity** around the intention to proceed to a referendum. The process to date has been challenging, with many moving parts, unclear timelines and a lack of certainty about next steps. This has led to unrealistic expectations on several fronts, leading to ambiguity and a sense of frustration among key groups. In our consultations we consistently heard the need for a clear public re-commitment to constitutional recognition. Indeed, there is a need for strong public commitment from all sides of politics, from state and territory governments, and from a wide range of Aboriginal and Torres Strait Islander people. This must be accompanied by a clear pathway forward, articulating the steps to get the country to a point of readiness and delivery of a referendum.

As noted above, awareness levels are flagging. **Raising awareness of why** we should pursue a referendum is a relatively straightforward matter, but efforts to promote this understanding need to be ramped up in the near future as investment in a wide-scale national campaign has been limited. The campaign will require new investment and a focus on the place our first Australians held in this nation before European settlement together with the valuable ongoing contribution of Aboriginal and Torres Strait Islander peoples and cultures to modern Australia. There is also a very real need for strong political leadership in explaining the place and role of our Constitution.

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**Crystallising the question to be put to the Australian voters** lies at the heart of the referendum. Indeed, shaping a final proposition is by far the most complex matter on the path to a referendum. Definitively assessing the country's readiness for a referendum is difficult in the absence of the final proposal to be put to a vote.

It is clear that there is a thirst for change that is both symbolic and substantial. History confirms that to vote 'yes', Australians must be convinced that the proposed change to the Constitution is worth the investment. Consultations and research show that the change must be more than symbolic to win both Indigenous support and that of the wider public. The broader population also want to know that the final proposal is one that is wanted by the majority of Aboriginal and Torres Strait Islander Australians before they will support it. There are a range of diverse views on wording of the final proposition. Finding the 'sweet spot' that meets the test of meaningful change without significantly increasing the risk of uncertainty and judicial activism is challenging but possible.

Our report provides some observations around the issues that will need to be confronted when settling on a final model. Research shows that there is strong support for changes that recognise the place and history of Indigenous Australians and the removal of references to race. Australians want to address inequality in our Constitution but are wary of 'special treatment' for one group of people on the basis of race. The scope of the final proposition is narrowing and centres on:

- the placement of a statement of recognition;
- removal of section 25, which currently envisages the ability of state governments to disqualify a group of people from voting based on race; and
- re-formulation of the race power (section 51(xxvi)) to avoid the potential for perverse outcomes while retaining the Commonwealth's responsibility for Indigenous affairs.

It is worth noting that the 1967 referendum changes were arguably not as substantial as the modern public narrative indicates – yet the moral force of the changes have been tremendous. While not of itself sufficient, the importance of symbolic change through a statement of recognition should not be understated, and the strength of unity and goodwill accompanying such changes will be a landmark moment in our nation.

The current debate lends itself to more substantial changes – changes which will amend the Constitution so that it reflects our values. Section 25 of the Constitution is out-dated and indeed reflective of a time long past – where our leaders could restrict, on the basis of race, access to the most fundamental democratic right, the right to vote. The Panel considers that the Australian people are ready for this change.

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Changes beyond these have become the real focus of the debate. This centres on the way in which the Commonwealth can exercise its powers under the Constitution and discharge its responsibilities in Indigenous affairs without the risk of perverse outcomes. These changes elicit the most polarised opinions.

As noted above, the Panel found a significant divergence of perspectives on what the final proposition should look like, and what the rightful role of the Constitution is in recognising Indigenous Australians. Importantly the Panel is optimistic that a strong proposition can be agreed – one which balances symbolism, while also ensuring there is substance to the change.

The work of the Expert Panel on the Constitutional Recognition of Indigenous Australians and more recently the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples has been invaluable in exploring the options and building multi-party support. Ultimately, however, the referendum rests on finalising a set of words that can be widely supported by Aboriginal and Torres Strait Islander people and the wider public. Political leadership is needed to break through the ongoing cycle of deliberations. There are a number of ways to achieve this, but any mechanism must have legitimacy, trust across the political spectrum, the direct involvement of Indigenous people and be above the challenges of day to day politics. It requires dedicated commitment, leadership and focus to bring about a truly multi-partisan approach – one where Indigenous Australians are full and respected partners in the change.

The **timing of a referendum** also needs to be settled quickly to give renewed certainty that we are progressing to a vote and to build momentum. The complex and hard work of finalising a model does not get any easier with delays or deferral. There are mixed views on when to hold a referendum and whether to hold it with an election or as a standalone vote. Holding a referendum within this term of government is ambitious but possible if all the pre-conditions are met. This hinges on gaining agreement to a final set of words and building sufficient understanding and support for the change. All efforts must be highly synchronised and coordinated.

The Panel heard views that holding a referendum at the time of the next election is possible, and in some cases desirable, principally to reduce cost. This needs to be balanced with the risks associated with holding a referendum that is designed to unite the nation, and which needs unwavering multi-partisan support, at a time of inevitable political tension. Others were of the strong view that the imperative to ‘get it right’ justifies holding a referendum after the next election. The Panel also heard that many

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Aboriginal and Torres Strait Islander people were increasingly concerned about the ability to deliver constitutional change if the timeframe lingers.

However, almost all of the people we spoke to made it clear that reaching agreement on a final proposition to put to a referendum will ultimately determine the timeframe.

The Panel is of the view that an end-date must be identified – to remove ambiguity and achieve a sense of focus. The Panel suggests that a referendum should be held no later than the first half of 2017, within a fifty year window of the 1967 referendum. If the pre-conditions outlined in this report can be met earlier, including widespread support for an agreed proposition, then there remains a case for an earlier referendum. However, above all else, the Panel recognises that such a referendum is a most fundamental step for our nation. Getting it right and achieving success must be the overriding imperative.

### Recommendations:

On the basis of the evidence before it, the Panel recommends:

1. A ‘circuit breaker’ needs to be rapidly identified to settle the final form of words and draw debate on the model to a conclusion. This will build a sense of national urgency and provide renewed certainty that the country will proceed to a referendum. Delivering on the commitment to form a special committee to guide the referendum, a Referendum Council of trusted national figures is recommended.

The Referendum Council would:

- a. Have legitimacy in the eyes of the nation, be seen as apolitical and include both Indigenous and non-Indigenous members.
  - b. Advise on the final proposition and gain agreement to it from Indigenous peoples, constitutional experts, parliaments and the wider public.
  - c. Draw on the work of this report and the Joint Select Committee.
  - d. Ensure that the final proposition is legally sound, clear, easily understood and does not significantly increase constitutional uncertainty.
2. The Parliament, state and territory governments and Aboriginal and Torres Strait Islander peoples publicly re-declare their commitment to constitutional recognition and working in collaboration towards a referendum.
  3. Timing parameters for a referendum should be settled as soon as possible to provide certainty and focus. A referendum should be held no later than the first

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half of 2017. If the pre-conditions outlined in this report can be met earlier, including widespread support for an agreed proposition, then there remains a case for an earlier referendum.

4. The Government should continue to support and resource Recognise, and its partner organisations, to finalise an increased public awareness strategy that builds a better understanding of why recognition is important in the wider community. This strategy should:
  - a. include a focus on the enduring contributions of Aboriginal and Torres Strait Islander peoples and cultures on the life of the nation;
  - b. focus on real Australians telling real stories;
  - c. draw on social research and historical facts;
  - d. target a wide audience, but with a focus on those groups that have the lowest levels of awareness;
  - e. ensure Aboriginal and Torres Strait Islander peoples are engaged in community education activities as broadly as possible; and
  - f. be educational in nature and include raising awareness of the role of the Constitution.
  
5. The Parliament should amend the *Aboriginal and Torres Strait Islander Recognition Act 2013* to demonstrate continuing commitment and ensure the Act does not sunset in March 2015. The Act should be extended for no more than three years, to align with the timing of the referendum (as per Recommendation 3 above).<sup>2</sup>

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<sup>2</sup> Note: in this report the term 'Indigenous people/s' refers to both the Aboriginal and Torres Strait Islander peoples of Australia.

### **F.3 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples: Final Report (2015)**

## **Executive summary**

The committee recommends that a referendum be held on the matter of recognising Aboriginal and Torres Strait Islander peoples in the Australian Constitution, and that it be held at a time when it has the highest chance of success.

**The committee recommends that a referendum be held on the matter of recognising Aboriginal and Torres Strait Islander peoples in the Australian Constitution** (paragraph 9.32).

**The committee recommends that the referendum on constitutional recognition be held when it has the highest chance of success** (paragraph 2.40).

The committee has considered mechanisms for engagement on the topic of constitutional recognition, and recommends that conventions consisting of Aboriginal and Torres Strait Islander delegates as well as delegates from the broader Australian community be held to build support for a referendum and to engage a wide cross-section of the community (paragraphs 8.49-8.50).

The committee puts forward three options which it considers would meet the dual objectives of achieving constitutional recognition and protecting Aboriginal and Torres Strait Islander peoples from racial discrimination (paragraphs 4.88-4.94).

The committee recommends that section 25 of the Constitution be repealed, and that section 51 (xxvi) be replaced, with the retention of a persons power so that the Commonwealth government may legislate for Aboriginal and Torres Strait Islander peoples as per the 1967 referendum result (paragraphs 3.19-3.20).

During the inquiry, the committee formed the view that amending the *Human Rights (Parliamentary Scrutiny) Act 2011* to include scrutiny of the United Nations Declaration on the Rights of Indigenous Peoples would act as an enhancement to the existing parliamentary scrutiny framework (paragraph 6.18).

The committee has achieved its objective of building a secure strong multi-partisan parliamentary consensus around the timing, specific content and wording of referendum proposals for Indigenous constitutional recognition.

The committee recommends that each House of Parliament set aside a full day of sitting to debate concurrently the recommendations of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, with a view to achieving near-unanimous support for and build momentum towards a referendum to recognise Aboriginal and Torres Strait Islander peoples (paragraph 2.32).

As a mechanism to focus engagement on this important debate, the committee recommends that a parliamentary process be established to oversight progress towards a successful referendum (paragraph 9.33).

## Recommendations

### Recommendation 1

2.32 The committee recommends that each House of Parliament set aside a full day of sitting to debate concurrently the recommendations of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, with a view to achieving near-unanimous support for and build momentum towards a referendum to recognise Aboriginal and Torres Strait Islander peoples.

### Recommendation 2

2.40 The committee recommends that the referendum on constitutional recognition be held when it has the highest chance of success.

### Recommendation 3

3.19 The committee recommends that section 25 of the Constitution be repealed.

### Recommendation 4

3.20 The committee recommends the repeal of section 51(xxvi) and the retention of a persons power so that the Commonwealth government may legislate for Aboriginal and Torres Strait Islander peoples as per the 1967 referendum result.

### Recommendation 5

4.88 The committee recommends that the three options, which would retain the persons power, set out as proposed new sections 60A, 80A and 51A & 116A, be considered for referendum.

4.89 The first option the committee recommends for consideration is its amended proposed new section 51A, and proposed new section 116A, reported as option 1 in the committee's Progress Report:

#### **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;



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.

#### **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;

4.90 The committee considers that this proposal:

- is legally and technically sound;
- retains a persons power as per the 1967 referendum result;
- contains a special measures provision;
- limits the constitutional capacity of the Commonwealth, states and territories to discriminate;
- offers a protection for all Australians;
- is a broad option;
- had the overwhelming support of Aboriginal and Torres Strait Islander peoples and non-Aboriginal and Torres Strait Islander peoples during the inquiry; and
- accords with the recommendation of the Expert Panel.

4.91 The second option was proposed by Mr Henry Burmester AO QC, Professor Megan Davis and Mr Glenn Ferguson after their consultation process:

### **CHAPTER IIIA**

#### **Aboriginal and Torres Strait Islander Peoples**

##### **Section 80A**

(1) **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 and heritage of Aboriginal and Torres Strait Islander peoples;

**Acknowledging** that Aboriginal and Torres Strait Islander languages are the original Australian languages and a part of our national heritage;

the Parliament shall, subject to this Constitution, have power to make laws with respect to Aboriginal and Torres Strait Islander peoples, but so as not to discriminate against them.

(2) This section provides the sole power for the Commonwealth to make special laws for Aboriginal and Torres Strait Islander peoples.

4.92 The committee considers that this proposal:

- is legally and technically sound;
- retains a persons power as per the 1967 referendum result;
- is clear in meaning;
- limits the capacity of the Commonwealth only with regard to discrimination, so states and territories are not affected by constitutional change;
- is a narrow option; and
- offers constitutional protection from racial discrimination for Aboriginal and Torres Strait Islander peoples.

4.93 The third option which would retain the persons power is the proposal from the Public Law and Policy Research Unit at the University of Adelaide:

#### **60A 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 and heritage of Aboriginal and Torres Strait Islander peoples;

**Acknowledging** that Aboriginal and Torres Strait Islander languages are the original Australian languages and a part of our national heritage;

(1) 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.

(2) A law of the Commonwealth, a State or a Territory must not discriminate adversely against Aboriginal and Torres Strait Islander peoples.

4.94 The committee considers that this proposal:

- is legally and technically sound;
- retains a persons power as per the 1967 referendum result;
- is clear in meaning;
- is both a narrow and a broad option;
- limits the 'adverse discrimination' provision to Aboriginal and Torres Strait Islander peoples; and
- limits the capacity of the Commonwealth, states and territories constitutionally to discriminate.

**Recommendation 6**

6.18 The committee recommends that the *Human Rights (Parliamentary Scrutiny) Act 2011* be amended to include the United Nations Declaration on the Rights of Indigenous Peoples in the list of international instruments which comprise the definition of human rights under the Act.

**Recommendation 7**

8.49 The committee recommends that the government hold constitutional conventions as a mechanism for building support for a referendum and engaging a broad cross-section of the community while focussing the debate.

**Recommendation 8**

8.50 The committee further recommends that conventions made up of Aboriginal and Torres Strait Islander delegates be held, with a certain number of those delegates then selected to participate in national conventions.

**Recommendation 9**

9.32 The committee recommends that a referendum be held on the matter of recognising Aboriginal and Torres Strait Islander peoples in the Australian Constitution.

**Recommendation 10**

9.33 The committee recommends that a parliamentary process be established to oversight progress towards a successful referendum.

## APPENDIX G: KIRRIBILLI STATEMENT

**Monday, 6 July 2015**

**Statement presented by Aboriginal and Torres Strait Islander attendees  
at a meeting held today with the Prime Minister and Opposition Leader  
on Constitutional Recognition**

**HC Coombs Centre, Kirribilli, Sydney**

*We welcome* the willingness of the Prime Minister and Opposition Leader to meet with Aboriginal and Torres Strait Islander people to discuss next steps towards recognition of Aboriginal and Torres Strait Islander peoples in the Australian Constitution.

*We encourage* the Government and the Parliament to identify a strong, multi-partisan consensus on the timing, content and wording of a referendum proposal, and acknowledge the stated commitment of all parties to this end.

*We acknowledge* the work to date by the Expert Panel (2012), Joint Select Committees on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (2013-15) and, prior to these, the Council for Aboriginal Reconciliation (1991-2000) in identifying options for recognition.

*We note* the guiding principles laid out by the Expert Panel that constitutional recognition must:

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

*Further, we agree with* the Joint Select Committee (Interim Report, July 2014), that a successful referendum proposal must:

- Recognise Aboriginal and Torres Strait Islander peoples as the first peoples of Australia
- Preserve the Commonwealth's power to make laws with respect to Aboriginal and Torres Strait Islander peoples; and
- In making laws under such a power, prevent the Commonwealth from discriminating against Aboriginal and Torres Strait Islander peoples.

**On this basis, the meeting participants:**

*Emphasize* the importance of leadership from the Prime Minister and Opposition Leader to ensure that:

- Constitutional recognition is progressed in a non-partisan manner; and

APPENDIX G: KIRIBILLI STATEMENT

- that the debate shifts to discussion of concrete proposals for reform to avoid the process stalling.

**Request that the Government and the Opposition identify the parameters of what they will support in relation to constitutional recognition, based on the issues identified by the various review processes to date, as well as their willingness to consider further measures to address the specific circumstances faced by Aboriginal and Torres Strait Islander peoples.**

Process issues

Call for the following process moving forward:

- a) An ongoing dialogue between Aboriginal and Torres Strait Islander people (via a referendum council, steering committee or other mechanism) and the government and parliament, based on the significant work already completed, to negotiate on the content of the question to be put to referendum;
- b) Development of accessible and useful information for the Aboriginal and Torres Strait Islander community about the key issues to enable informed decision making;
- c) Engagement over the coming months with Aboriginal and Torres Strait Islander peoples about the acceptability of the proposed question for constitutional recognition; and
- d) Continuation of a parliamentary process to oversight the work towards a successful referendum.

*Note* the Joint Select Committee's final report recommendations on engagement processes moving forward, including the role of National Congress, the ongoing public awareness and education role of Recognise, and the need to reform the referendum process. There is a need for ongoing resources to be allocated for these processes.

Substantive issues

*Identify* that any reform must involve substantive changes to the Australian Constitution. It must lay the foundation for the fair treatment of Aboriginal and Torres Strait Islander peoples into the future.

A minimalist approach, that provides preambular recognition, removes section 25 and moderates the races power [section 51(xxvi)], does not go far enough and would not be acceptable to Aboriginal and Torres Strait Islander peoples.

The recommendations of the Joint Select Committee were endorsed, noting that further engagement with Aboriginal and Torres Strait Islander peoples is

APPENDIX G: KIRRIBILLI STATEMENT

required in relation to Recommendation 5 and in relation to a proposed Aboriginal and Torres Strait Islander advisory body and proposed Declaration.

To progress these matters, clarity from the Government and Opposition of their positions on two key issues is critical: prevention of racially discriminatory laws and the proposed advisory body.

There was significant concern expressed that the Constitution as it stands enables current and future parliaments to enact discriminatory measures against Aboriginal and Torres Strait Islander peoples. Any reform option must address this concern.

At this stage, there are several proposals on the table that are aimed at addressing this issue ranging from: a stand alone prohibition of racial discrimination (proposed new section 116A); a new, contained power to make laws for Aboriginal and Torres Strait Islander peoples that does not extend to making adverse discriminatory laws; and a role for a new advisory body established under the Constitution.

It is recognized that Constitutional Recognition is only part of the solution to ensuring that Aboriginal and Torres Strait Islander peoples are treated equally in Australia, and that it must be accompanied by other measures to address the historic and ongoing disadvantage that has resulted from our past mistreatment.

***Attachment A is a list of Aboriginal and Torres Strait Islander attendees at today's meeting with the Prime Minister and Opposition Leader.***

APPENDIX G: KIRIBILLI STATEMENT

**Attachment A:** List of Aboriginal and Torres Strait Islander attendees at meeting held today with the Prime Minister and Opposition Leader on constitutional recognition, Monday 6 July, 2015.

Djapirri Mununggirtj  
Sean Gordon  
Rachel Perkins  
Denise Bowden  
Selwyn Button  
Jason Mifsud  
Tanya Hosch  
Ngiare Brown  
Samuel Bush-Blanasi  
Noel Pearson  
Joe Morrison  
Kenny Bedford  
Megan Davis  
Bruce Martin  
Lester Irabinna Rigney  
Ken Wyatt MP  
David Ross  
Charlee-Sue Frail  
Richie Ah Mat  
Gail Mabo  
Djawa Yunupingu  
Pat Anderson AO  
Aden Ridgeway  
Shannan Dodson  
Shane Duffy  
Kirstie Parker  
Les Malezer  
Josephine Cashman  
Mick Gooda  
Tom Calma  
Geoff Scott  
Marcia Langton  
Jill Gallagher  
Patrick Dodson  
Nova Peris  
Warren Mundine  
Leah Armstrong  
Pat Turner  
Justin Mohamed

**APPENDIX H: DISCUSSION PAPER**

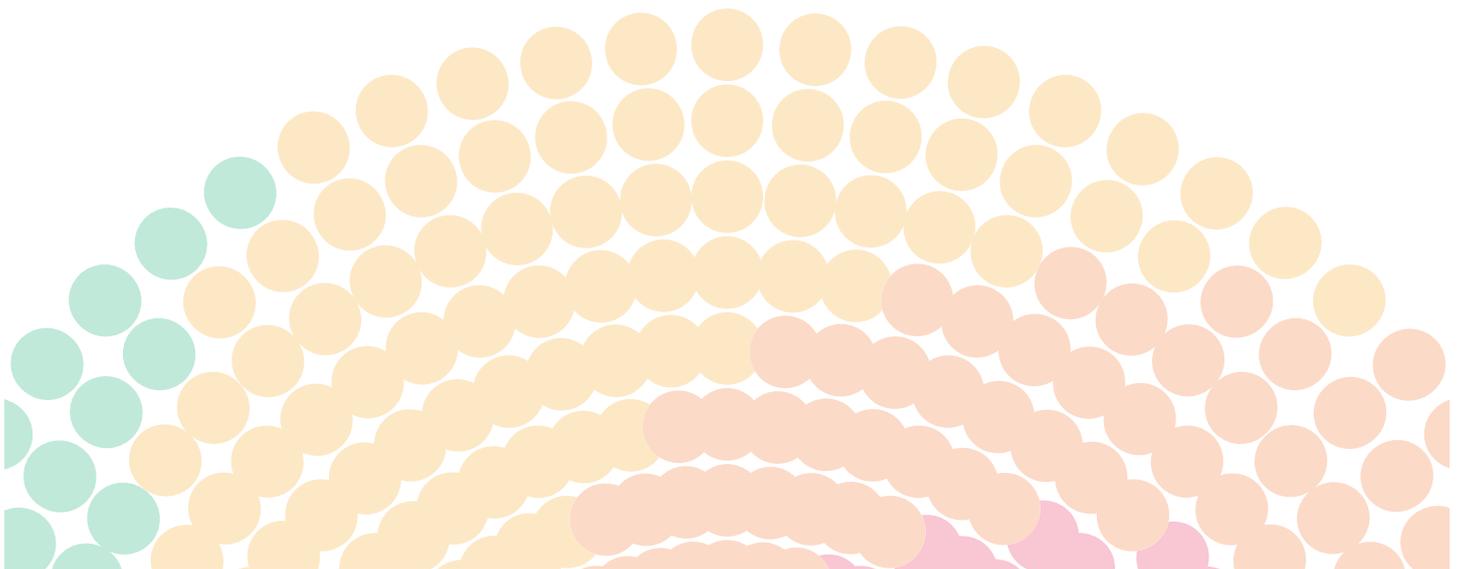


Referendum Council

# **Discussion Paper on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples**

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October 2016



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## Introduction

Aboriginal and Torres Strait Islander peoples have lived on the land and seas around the Australian continent for more than 60,000 years. They are the First Peoples.

The rich languages, cultures and traditions of Aboriginal and Torres Strait Islander peoples represent the world's oldest continuous cultural heritage. This unique legacy is recognised internationally and is one of the things that sets Australia apart from the rest of the world.

Those lands and waters were colonised by Europeans, who took them [without treaty or consent](#), and Australia's Constitution, our most important legal document, contains no acknowledgement of the First Peoples of Australia. Aboriginal and Torres Strait Islander people were not given a voice in the convention debates of the 1890s, which led to the drafting of the Constitution in 1901, and few were able to vote for it.

Many laws and policies enacted since 1901 have discriminated against Aboriginal and Torres Strait Islander peoples. Our Constitution could offer protections against unfair treatment. But at present it does not—nor does it recognise the special place of Aboriginal and Torres Strait Islander peoples within the life of the nation.

Australians now have an opportunity to change this situation.

Much work has already been done on what form constitutional change could take, most recently by the [Expert Panel](#) appointed by the Australian Government in 2011 and by a [Parliamentary Joint Select Committee](#) that completed its work in 2015.

In December 2015, the Australian Government and the Opposition came together to appoint a 16-member [Referendum Council](#) to consult widely throughout Australia and take the next steps towards achieving constitutional recognition of the First Australians.

The council wants to hear the views of all Australians on constitutional change regarding Aboriginal and Torres Strait Islander peoples. Through our consultations, we will ask you some fundamental questions, such as: *Do you support constitutional change? And, if you do, What form do you think change should take?* We will also ask what you think about some specific proposals for symbolic and practical reform and how they might ensure that the Constitution treats Aboriginal and Torres Strait Islander peoples more fairly.

Over the same period, the council will hold a series of Indigenous consultations to give Aboriginal and Torres Strait Islander people the chance to say what meaningful recognition is to them. Indigenous people will design and lead these consultations.

APPENDIX H: DISCUSSION PAPER

The council will report to the Government and the Opposition on what people say and on how the Constitution might best be changed.

This Discussion Paper sets out some of the different options for change and outlines some of the issues to be taken into account. We want to know what you think.



Pat Anderson – Referendum Council co-Chair



Mark Leibler – Referendum Council co-Chair

## What is the Constitution and how can it be changed?

The Constitution is the legal and political foundation document of Australia. It was drafted following a series of constitutional conventions held in the 1890s and was passed by the British Parliament in 1900. It took effect on 1 January 1901.

The Constitution is the Australian government's 'rulebook'. It establishes Australia as a federation and defines the national law-making powers of the Commonwealth or federal government. Every law passed by the federal Parliament must be empowered by the Australian Constitution—it must be based on what is called a *head of power* set down in the Constitution, which is divided into *sections*.

The Constitution distributes power between the Commonwealth and the States and Territories and sets out the roles of the federal Parliament and the executive (the government of the day). It empowers federal courts and establishes the High Court of Australia as the ultimate decision maker on questions about the meaning of the Constitution. It is essentially a structural plan for a federal system of government.

By allocating and also limiting government powers, the Constitution protects certain rights and freedoms, but it is not a charter of human rights.

The Australian Constitution, like all foundation documents, also says something about the values of our society.

The drafters of the Constitution wanted to make sure it could be amended over time, but only with the clear consent of the Australian people. This consent is given through a *referendum*, when all Australians registered on the electoral roll cast a vote. Under section 128, a majority of Australian voters and a majority of voters in a majority of States (that is, in at least four out of the six States) must approve any proposed amendment. This is known as a *double majority*. People cast their votes by writing either a 'yes' or 'no' in response to specific questions put to them.

## Indigenous Peoples and the Constitution

Aboriginal people lived on the land when the British arrived, but the British did not recognise their ownership and authority. A legal fiction applied that was later called *terra nullius*: the incorrect belief that the land was owned by nobody. The High Court says Australia was a ‘settled’ colony and that meant sovereignty passed to the British.

The Joint Select Committee cited legal advice obtained by the Expert Panel on the relationship between settlement and sovereignty:

Given the previous presence of all the different indigenous inhabitants and owners of all the different countries now comprising the territory of the nation Australia, contemporary legal doctrine implies acceptance that the basis of settlement of Australia is and always has been, ultimately, the exertion of force by and on behalf of the British arrivals. They did not ask permission to settle. No-one consented, no-one ceded. Sovereignty was not passed from the aboriginal peoples to the settlers by any actions of legal significance voluntarily taken by or on behalf of the former or any of them.<sup>1</sup>

Six Australian colonies were eventually established. The Constitution united these colonies in a federal system and was approved by popular vote in each colony. The position on settlement and sovereignty was taken for granted and did not arise. As Professor Patrick Dodson has observed, the Constitution of 1901 was drafted ‘in the spirit of *terra nullius*’.<sup>2</sup>

The process of writing the Constitution excluded Aboriginal and Torres Strait Islander peoples. The Constitution made no direct mention of them, except for two references designed to exclude them:

- section 51 (xxvi) gave the federal government the power to make national laws for ‘the people of any race for whom it is deemed necessary to make special laws’— the ‘race power’. But the wording excluded Aboriginal people from the power. That meant outside the Northern Territory, the States remained in control of Indigenous affairs
- section 127 said that when calculating the ‘people of the Commonwealth’ Aboriginal people were not to be counted.

In 1967, after a long period of advocacy and protest by both Indigenous people and non-Indigenous Australians, a [referendum](#) was held to determine whether these two references, which were seen to discriminate against Aboriginal people, should be deleted. More than 90% of Australians voted ‘yes’ to change the Constitution by:

- amending section 51 (xxvi) so that federal laws under the race power could apply to Aboriginal and Torres Strait Islander people
- deleting section 127 so that Aboriginal and Torres Strait Islander peoples could be counted in the national population.

1 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Final Report, June 2015, p. 72.

2 Patrick Dodson, ‘Welcoming Speech’, Position of Indigenous People in National Constitutions Conference, Canberra, 4 June 1993, quoted in Bain Attwood and Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (2nd edn, 2007), pp. 146-7. {‘edn’ (no full point) is correct according the *Style manual*—it’s a contraction.}

APPENDIX H: DISCUSSION PAPER

But the 1967 referendum also left unresolved issues. It did not implement any constitutional guarantee of fair treatment, nor any specific recognition for Indigenous people and their rights. It left section 25 in the Constitution, which contemplates that certain races could be banned from voting in State elections. As a result, Aboriginal and Torres Strait Islander advocacy for constitutional change continued.

## What does ‘recognition’ mean?

Much of the recent debate over constitutional change has used the word ‘recognition’, but that can mean different things to different people. Recognition might be as basic as acknowledging the existence of people, their history and their culture. Or it might mean confirming their legal rights and freedoms, or giving them a voice and political representation, or making a treaty or agreement with them—or all of these things. Recognition in one way or another is common around the world in countries with Indigenous populations. It can happen within a national constitution, or outside it.

Aboriginal and Torres Strait Islander advocacy for constitutional recognition has emphasised the importance of a constitutional guarantee of fairer treatment, because the Constitution is where binding and enduring guarantees can be made. Many Aboriginal and Torres Strait Islander leaders have sought constitutional recognition to ensure that Australian governments treat Aboriginal and Torres Strait Islander peoples more fairly. As Yolgnu leader Galarrwuy Yunupingu explained in 1998:

Our Yolgnu law is more like your Balanda Constitution than Balanda legislation or statutory law. It doesn’t change at the whim of short-term political expediency. It protects the principles which go to make up the very essence of who we are and how we should manage the most precious things about our culture and our society. Changing it is a very serious business ...

If our Indigenous rights were recognised in the Constitution, it would not be so easy for Governments to change the laws all the time, and wipe out our rights ...<sup>3</sup>

Professor Patrick Dodson has similarly noted:

It may be a harsh thing to say, but many actions of Australian Governments have given Aboriginal people little faith in the promises Governments make in relation to protecting and defending the rights of Indigenous Australians. That is why we need a formal Agreement that recognises and guarantees the rights of Indigenous Australians within the Australian Constitution.<sup>4</sup>

Noel Pearson has also called for a national ‘promise’, in the form of a constitutional guarantee that the discrimination of the past will not be repeated.<sup>5</sup>

Recognition can also happen outside the Constitution. In Australia, the [Mabo](#) decision was a form of recognition in common law, and the official [Apology](#) to Aboriginal and Torres Strait Islander peoples was a form of political recognition.

In the [Mabo](#) decision, the High Court ruled in 1992 that the lands of this continent were not *terra nullius* or ‘land belonging to no-one’ when European settlement occurred, and that the Meriam people, the traditional owners, were ‘entitled as against the whole world to possession, occupation, use and enjoyment of (most of) the lands of the Murray Islands’. This recognition was then incorporated into legislation in the *Native Title Act 1993* (Cth).

3 See Galarrwuy Yunupingu, Vincent Lingiari Memorial Lecture, Darwin, 20 August 1998. ‘Balanda’ means European/Western

4 Patrick Dodson, ‘Until the Chains are Broken’, Vincent Lingiari Memorial Lecture, Darwin, 8 September 1999.

5 Noel Pearson, ‘Next step for the nation is to leave race behind’, *The Australian*, 25 May 2013.

The formal Apology by then Prime Minister Kevin Rudd in 2008 recognised the damage that had been done to Indigenous peoples, and particularly members of the Stolen Generations, by past government policies of forced child removal and Indigenous assimilation.

In deciding what constitutes a fair form of recognition, Aboriginal and Torres Strait Islander views are important. There would be no point proceeding with a form of recognition that Aboriginal and Torres Strait Islander peoples do not support. This is why the Referendum Council is consulting Aboriginal and Torres Strait Islander peoples on what is meaningful recognition to them.

### Recent steps on the path to a referendum

Over the decades, there has been a lot of discussion and many proposals for recognition, from both Indigenous people and non-Indigenous Australians. Many of the earlier suggestions have themes that we see again in the options presented in this paper:

- giving Indigenous people a **voice in federal Parliament** and a **role in making decisions** about matters that affect them directly
- a guarantee against **discrimination** by the Parliament
- **acknowledgement** of status as First Peoples.

The most detailed recent discussion on constitutional recognition was by the Expert Panel, set up by former Prime Minister Julia Gillard. Its report, presented in January 2012, contained a [number of recommendations](#) that combined symbolic and practical change, including a racial non-discrimination clause.

There was no formal government response to the recommendations in the report, although the federal Parliament did pass an [Act](#) in 2013 that recognised the unique and special place of Aboriginal and Torres Strait Islander peoples in the nation. In 2014, a [review panel](#) convened under this Act recommended that the Government proceed towards a referendum, provided certain preconditions were met.

The Parliamentary Joint Select Committee set up in 2013 to consider options for reform also recommended that a referendum be held on constitutional recognition and set out a [range of options for change largely in line with the Expert Panel's recommendations](#).

Throughout the discussion Aboriginal and Torres Strait Islander communities have made it clear that they seek substantive and practical recognition. On 6 July 2015, then Prime Minister Tony Abbott and Opposition Leader Bill Shorten hosted a meeting in Sydney with 40 Indigenous leaders to discuss constitutional recognition.

After the meeting, the leaders submitted a statement to the Prime Minister and the Opposition Leader saying that a 'minimalist' approach—one that provided symbolic recognition in a constitutional preamble, removed section 25 and moderated the race power (section 51 (xxvi))—would not be acceptable to Aboriginal and Torres Strait Islander peoples. They sought substantive changes to the Constitution that would lay the foundation for fair treatment of Aboriginal and Torres Strait Islander peoples into the future.

It was later agreed that further meetings and consultations—designed and led by Indigenous leaders—would be held to settle on a proposal containing options for recognition that were meaningful to Indigenous people. The [Referendum Council](#) was set up to lead further national consultations and promote community engagement.

## Constitutional recognition and treaty issues

Many people ask where treaties and sovereignty fit in with the discussion of constitutional recognition. Talking about the Constitution draws our attention to basic questions about power in society. For many Aboriginal and Torres Strait Islander people, that brings up topics like treaty-making and sovereignty because it connects with the process of colonisation.

When people talk about a treaty, they generally mean an agreement between Indigenous people and government that has legal effect. The emphasis is on resolving difficult problems by negotiation rather than fighting things out in court or governments imposing top-down legislation. Treaties were common in the past in the United States. In New Zealand, the Treaty of Waitangi was signed long ago but still plays a central role in law and government administration today. In Canada, a modern treaty-making process is going on right now. In each of these countries, treaties form the basis for relationships between governments and First Peoples, even though each side might disagree over the definition of sovereignty. As long ago as 1983, an Australian Senate committee put forward a [proposal](#) for an agreement-making provision in the Australian Constitution.

Both the Expert Panel and the Parliamentary Joint Select Committee acknowledged strong community interest in a treaty or an agreement-making process with constitutional backing. But both bodies put it on a longer timeline, saying it needed more discussion.

In the meantime, Aboriginal and Torres Strait Islander groups are already making significant and legally binding agreements with governments and other parties. For example, native title legislation supports wide-ranging negotiations and hundreds of agreements have been registered. The historic Noongar Agreement in Western Australia has been described by many as being akin to a modern treaty. In Victoria, the State government has entered into treaty discussions with Aboriginal people and the new Northern Territory government plans to do so as well. The Expert Panel suggested that the Commonwealth could start negotiations for a treaty or similar agreement using its existing powers, and that a constitutional amendment down the track could help to give any agreement greater legal force.

All this suggests that constitutional recognition and treaty discussions are complementary processes and one is not a legal impediment to the other. Existing and enhanced agreement-making may be considered an important form of recognition.

## What are some key proposals for reform?

We are interested in what you think about proposals for constitutional reform in the near future. As well as delivering reports, both the Expert Panel and the Joint Select Committee conducted extensive public consultations, and debate has continued since. Here are some of the key proposals to emerge from that process:

- drafting a **statement** acknowledging Aboriginal and Torres Strait Islander peoples as the First Australians, and inserting it either in the Constitution or outside the Constitution, either as a preamble in a new head of power or in a statutory Declaration of Recognition
- **amending or deleting the ‘race power’, section 51 (xxvi)** and replacing it with a new head of power (which might contain a statement of acknowledgement as a preamble to that power) to enable the continuation of necessary laws with respect to Indigenous issues
- **inserting a constitutional prohibition against racial discrimination** into the Constitution
- providing for an **Indigenous voice** to be heard by Parliament, and the right to be consulted on legislation and policy that affect Aboriginal and Torres Strait Islander people
- **deleting section 25**, which contemplates the possibility of a State government excluding some Australians from voting in State elections on the basis of their race.

Let’s look more closely at each of these options, remembering that both the Expert Panel and the Joint Select Committee favoured a **package** of amendments rather than a single change to the Constitution.

### Statement of acknowledgement

A statement of acknowledgement is a statement of facts. It could acknowledge that the continent was occupied by Aboriginal and Torres Strait Islander peoples before the arrival of the British. It could acknowledge that there is a continuing relationship between Aboriginal and Torres Strait Islander peoples, their lands and waters, and their cultures, languages and heritage. Some suggest a broader statement that acknowledges Australia’s ancient Indigenous heritage, its British institutional inheritance, and its multicultural achievement.

The Expert Panel recommended a statement of acknowledgement as an introduction (preamble) to a proposed new law-making power along the following lines:

**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 ... [etc.]*

Another suggestion is that a statement of acknowledgement could be enshrined in a Declaration outside the Constitution, perhaps in legislation enacted by all parliaments—federal, State and Territory—at the same time to create a national defining moment of reconciliation. This would not require a referendum.

### Power to make laws for Aboriginal and Torres Strait Islander peoples

Section 51 is the part of the Constitution that contains the powers to make national laws on various matters, such as taxation, foreign affairs and social security. To pass a law on anything, the federal government needs to identify a head of power.

The head of power that allows the federal Parliament to make laws regarding Aboriginal and Torres Strait Islander peoples on issues such as native title and heritage protection, is known as the ‘race power’. Section 51 (xxvi) currently states:

*Section 51. 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:*

*... (xxvi) The people of any race for whom it is deemed necessary to make special laws*

One of the options for reform is to delete this head of power and insert a new head of power elsewhere in the Constitution that avoids the word ‘race’ and more accurately describe who the power is to be used for. It would be a power to make laws with respect to ‘Aboriginal and Torres Strait Islander peoples’. Locating the power outside section 51 would make it easier to insert a *preambular* statement of acknowledgement. If the power were simply deleted, with no replacement, then we would go back to the situation before the 1967 referendum. Outside the Northern Territory, the States would be left in charge of Aboriginal and Torres Strait Islander affairs and the Commonwealth would lack power to make national laws dealing with native title and so on.

Another approach, with a similar effect, would be to amend, rather than delete, the current power in section 51 (xxvi) so that it authorises laws with respect to ‘Aboriginal and Torres Strait Islander peoples’ and the concept of ‘race’ is removed.

‘Race’ is a concept that belongs to the 19th century rather than the 21st. But removing the word ‘race’ and replacing it with the words ‘Aboriginal and Torres Strait Islander peoples’ in a new or amended power does not solve the problem of Parliament having the power to pass racially discriminatory laws. This is why a guarantee against racial discrimination by the federal Parliament is another option (see next section).

A new or amended power could also list some of the things that communities would like to see created in the future, for example, an Indigenous voice in the Parliament (see below) or an agreement-making process.

## A constitutional prohibition against racial discrimination

The proposal to insert a guarantee in the Constitution to stop the federal Parliament from discriminating against a people of any race or cultural background has been made many times since 1901. A racial non-discrimination clause was discussed in the lead up to the 1967 referendum but the government did not include it in the proposal put to the vote. Advocacy for a prohibition against racial discrimination grew among Indigenous people following a High Court [decision](#) in 1998 that the race power can likely be used to support racially discriminatory laws that single them out for adverse treatment.

Australia's commitment to the principle of racial non-discrimination is accepted in legislation and policy in all the States and Territories. There has also been a national law since 1975, the Racial Discrimination Act. Only the federal Parliament is not bound. A constitutional guarantee against racial discrimination would change this: it would bind the federal Parliament.

A non-discrimination clause could be inserted as a new section of the Constitution. Or it could be included as a limit inside the wording of a new or amended Commonwealth power to make laws for Aboriginal and Torres Strait Islander peoples. Either way it would need to allow for laws that are specific to Aboriginal and Torres Strait Islander peoples but which don't discriminate against them.

## An Indigenous voice to Parliament

Aboriginal and Torres Strait Islander peoples are the First Peoples, but they are less than 3% of the Australian population. In Australia's representative democracy, which works by majority vote at the ballot box and in Parliament, it is difficult for their voice to be heard and for them to influence laws that are made about them. Indigenous people have long advocated for better political representation and fairer consultation.

Australia has acceded to the United Nations Declaration on the Rights of Indigenous Peoples, which emphasises the importance of genuine Indigenous participation and consultation in political decisions made about their rights—but no formal processes for this to occur have yet been implemented.

If section 51 (xxvi) were to be replaced or amended, Aboriginal people and Torres Strait Islanders would need some assurance that any new or amended power could only be used for their advancement or benefit. This is the reasoning behind the suggestion of providing for an Indigenous voice in Parliament.

It is critical that Aboriginal and Torres Strait Islander peoples are engaged in the development and implementation of laws, policies and programs that affect them and their rights. This is important in achieving better policies and outcomes for Indigenous peoples, and a fairer relationship with government. It may also help prevent discriminatory laws and policies being enacted.

The Constitution could be amended by establishing an Indigenous body—as many other countries have—to advise Parliament on laws and policies with respect to Indigenous affairs. Such an amendment could ensure that the views of First Peoples are heard by lawmakers and could help Parliament to enact better and more effective laws.

## Deleting section 25

Section 25 contemplates that the States might pass a law banning people from voting at a State election, on the basis of their race.

Under this section, if a racial group were denied the right to vote in State elections, the people of that race would not be counted in working out the number of seats which that State has in the Commonwealth House of Representatives. By reducing federal representation, in theory it acts as a penalty against race-based voting laws at the State level. But people and politicians on all sides have long said that section 25 should be deleted.

The problem is not State voting laws—the Racial Discrimination Act would take care of them. In that sense, section 25 is a dead letter. The problem is that, with section 25, our Constitution still contemplates that a government would ban an Australian from voting on the basis of their race.

## Now have your say

Australians now face a historic opportunity to engage in a national discussion about improving the relationship between Indigenous peoples and Australian governments. We have an opportunity to amend the Constitution to ensure Indigenous peoples are treated more fairly than in the past, and to recognise the important place of Aboriginal and Torres Strait Islander peoples within our national life.

This is our chance to make real the advocacy of so many Indigenous activists over the decades, and to come together as Australians to make our great country even greater.

Join in the conversation. Have your say. Let's all work together to come up with the right solutions and make recognition a reality.

Here are some questions to help you frame your response to this Discussion Paper.

### What do you think?

#### General

1. Do you support constitutional or other legal change to deal with the question of recognition?
2. If you do, what form do you think change should take?

### What about the specific proposals for reform?

#### Statement of acknowledgement

3. Should we have a statement of acknowledgement in Australian law?
4. To effect an inspiring statement of recognition, should it be within the Constitution or outside it?
5. If it is to be within the Constitution, is the statement best placed as an introduction to a *head of power* to make laws with respect to the people it acknowledges?
6. What should be included in a statement of acknowledgement?

### **A federal power to make laws for Aboriginal and Torres Strait Islander peoples**

7. Should references to 'race' be removed from the Constitution?
8. Should the federal Parliament retain a specific power to make laws with respect to Aboriginal and Torres Strait Islander peoples, to enable laws on issues like native title?
9. Do you have any suggestions about how it is worded or where it is located in the Constitution?

### **A constitutional prohibition against racial discrimination**

10. Do you think that a guarantee against racial discrimination should be inserted in the Constitution?
11. Do you have any suggestions about how it is worded or where it is located in the Constitution?
12. Should any racial non-discrimination clause protect all Australians, or Indigenous Australians only?
13. Are there other ways of preventing racial discrimination in Commonwealth laws and policies if such a clause does not win support?

### **An Indigenous voice**

14. Do you think Indigenous people should have a say when Parliament and government make laws and policies about Indigenous affairs?
15. Should Aboriginal and Torres Strait Islander peoples have an advisory role or body mandated in the Constitution, so they are guaranteed a voice in political decisions made about them?
16. Given that the proposal is for the body to offer non-binding advice, so it cannot veto legislation, would it still be worthwhile?
17. Do you have any ideas about the design of such a body?

**Deleting section 25**

18. What would be achieved by deleting section 25?
19. Is there any point in retaining it?

**In conclusion**

20. Do you have any other comments?



To make a submission, visit: [www.referendumcouncil.org.au](http://www.referendumcouncil.org.au).

## APPENDIX I: PROCESS FOR FIRST NATIONS REGIONAL DIALOGUES

### Process and significance

The bipartisan support of the Government and the Opposition for the Council to host a series of Aboriginal and Torres Strait Islander designed and led dialogues provided a historic opportunity to genuinely engage with First Peoples. For the first time, the voices of Aboriginal and Torres Strait Islander leaders and communities were placed at the centre of discussions. This was achieved through a series of leadership meetings followed by a trial dialogue convened in Melbourne to test the methodology. The First Nations Regional Dialogues commenced in December 2016 and culminated in a National Constitutional Convention at Uluru in May 2017.

The process developed for the First Nations Regional Dialogues was modelled partly on the one that was used by the Constitutional Centenary Foundation through the 1990s to encourage debate on constitutional issues in local communities and schools. It was adapted to suit the needs of this process but the characteristics remained the same: impartiality; accessibility of relevant information; open and constructive dialogue; and mutually agreed and owned outcomes.

The First Nations Regional Dialogues engaged 1,200 Aboriginal and Torres Strait Islander delegates, out of a population of approximately 600,000 Aboriginal and Torres Strait Islander peoples nationally. This is the most proportionately significant consultation process that has ever been undertaken with Aboriginal and Torres Strait Islander peoples – it engaged a greater proportion of the relevant population than the constitutional convention debates of the 1800s, from which Aboriginal and Torres Strait Islander peoples were excluded.

This is the first time in our nation's history that such a process has been undertaken, and the first time a constitutional convention has been held with and for Aboriginal and Torres Strait Islander peoples. It was significant, not only as a step toward recognising Aboriginal and Torres Strait Islander peoples in the Australian Constitution, but as a response to their historical exclusion from the original processes which led to the drafting, establishment and oversight of Australia's Constitution.

### Initial stages

The Council established an Indigenous Steering Committee from its Aboriginal and Torres Strait Islander membership to design and deliver the Dialogues. The Australian Institute of Aboriginal and Torres Strait Islander Studies was engaged to provide expert assistance in delivering logistics and supporting delegates to attend. The Steering Committee also engaged an Executive Officer, through the Australian Human Rights Commission, to support efficient decision making and communicate with key stakeholders.

The Council sought input to the design of the framework through a series of three Indigenous leadership meetings with around 150 Aboriginal and Torres Strait Islander traditional owners, peak body representatives and individuals. These meetings were held in Broome (28–29 June 2016), Thursday Island (12–13 July 2016) and Melbourne (18–19 July 2016), and involved consideration of the Council's proposed approach to its task, as well as an overview of the proposals and the Council's role.

Several key themes emerged from the Indigenous Leadership meetings:

- the Council's framework for the Dialogues was widely supported;
- the Dialogue process should not be rushed;
- constitutional reform must be meaningful and supported by Aboriginal and Torres Strait Islander peoples;
- there is growing interest in and support for the proposal for an Indigenous representative body or voice to the Parliament;
- a 'package' of reforms in Indigenous affairs to accompany constitutional reform is necessary, and constitutional recognition is in no way a solution by itself;
- treaty/treaties (or a framework for treaties) is the most meaningful form of 'recognition' and constitutional 'recognition' that undermines sovereignty was unacceptable; and
- the role of Recognise needed to be clearly delineated from the Referendum Council.

A 'trial' Regional Dialogue was held in Melbourne on 4–6 November 2016. The purpose of the trial was to test and, if necessary, adjust, the format proposed for the twelve First Nations Regional Dialogues that would follow. There were approximately 70 participants involved, including many who would go on to become the convenors and workshop leaders for the Dialogues in their region. This had the advantage of ensuring that a core group of participants in most of the Dialogues would be familiar with the agenda to be followed.

The trial Dialogue confirmed that the structure of the First Nations Regional Dialogues – namely, plenary sessions combined with structured working groups on each of the five principal constitutional reform options – was effective in achieving the aims of the Dialogue process. It also provided important learnings about the types of support required for convenors and working group leaders, the need to include discussion of sovereignty and agreement-making, and confirmation of the message of the Kirribilli Statement that, whatever recognition involved, it should make a substantive difference. A minimalist approach to reform, which provides preambular recognition, removes section 25 and moderates the race power, was viewed as unacceptable to Aboriginal and Torres Strait Islander peoples.

The Referendum Council gave final approval of the framework for the Dialogues on 20 October 2016. The approach continued to be refined throughout the delivery of the Dialogues.

## The First Nations Regional Dialogues

The aim of the First Nations Regional Dialogues was to enter into a dialogue with Aboriginal and Torres Strait Islander peoples about what constitutional recognition involves from their perspectives. The format was designed to give participants a chance to examine the main options for recognition that had been put forward, to understand them in detail, to discuss the pros and cons of each proposal and to explore their potential significance for the relationship between Aboriginal and Torres Strait Islander peoples and other Australians. Through this process, delegates were invited to identify an

## APPENDIX I: PROCESS FOR FIRST NATIONS REGIONAL DIALOGUES

approach to recognition that seemed most likely to be meaningful. The Dialogues involved a sample of Aboriginal and Torres Strait Islander peoples from a sample of regions in Australia. The deliberative decision-making nature of the Dialogues meant that the numbers had to be capped and the agenda structured.

The Dialogues were held between December 2016 and May 2017:

<b>Dates</b>	<b>Location</b>	<b>Host organisation</b>
9–11 December 2016	Hobart, Tasmania	Tasmanian Aboriginal Corporation
10–12 February 2017	Broome, Western Australia	Kimberley Land Council
17–19 February 2017	Dubbo, New South Wales	NSW Aboriginal Land Council
22–24 February 2017	Darwin, Northern Territory	Northern Land Council
3–5 March 2017	Perth, Western Australia	South West Aboriginal Land and Sea Council
10–12 March 2017	Sydney, New South Wales	NSW Aboriginal Land Council
17–19 March 2017	Melbourne, Victoria	Federation of Victorian Traditional Owners Corporation
24–26 March 2017	Cairns, Queensland	North Queensland Land Council
31 March – 2 April 2017	Ross River, Northern Territory	Central Land Council
7–9 April 2017	Adelaide, South Australia	Aboriginal Legal Rights Movement Inc
21–23 April 2017	Brisbane, Queensland	-
5–7 May 2017	Torres Strait, Queensland	Torres Strait Regional Authority in partnership with a number of Torres Strait Islander organisations
10 May 2017	Canberra, Australian Capital Territory	United Ngunnawal Elders Council (Information Day)

Each First Nations Regional Dialogue was delivered in partnership with a local host organisation with an understanding of the region. Two convenors were selected from the local region to facilitate discussions according to an agenda prepared by the Council's Indigenous Steering Committee. Five local working group leaders, supported by legal and technical advisors, facilitated the working group discussions at each Dialogue. The host organisations, together with co-convenors, and, in some cases, working group leaders, provided guidance on a range of issues including: invitees, venues, Welcome to Country, and community functions held on the first evening.

Up to 100 delegates were invited to each First Nations Regional Dialogue. Those attending from outside the regional centre were supported to travel and attend. Delegates were selected according to the following split: 60% of places for First Nations/traditional owner groups, 20% for community organisations and 20% for key individuals. The Council, together with the Australian Institute of Aboriginal and Torres Strait Islander Studies, worked with the host organisation at each location to

ensure the local community was appropriately represented, including a reasonable spread across age and gender demographics.

As relevant and appropriate, at each Dialogue, interpreting services were offered, in the local languages of the region.

Each Dialogue was held over two and a half days, beginning at 12.30pm on day 1 and ending with lunch on day 3. The agenda was a structured agenda. It involved intensive civics education on the Australian legal and political system and a history of Aboriginal and Torres Strait Islander advocacy for structural legal and political reform.

The first half-day was spent on introductions, an overview of the struggle of the First Nations Peoples for reform since the early 19th century, and a plenary discussion that was broad-ranging on constitutional reform and the aspirations of delegates for the future of their region.

The second morning commenced with a civics lecture that included the following information:

- *What is the Constitution?*
- *Why have constitutions?*
- *Who determines the interpretation of the Constitution?*
- *What is the difference between the Constitution and ordinary laws?*
- *Who makes ordinary laws?*
- *What is the Parliament?*
- *How is a bill generated and then is passed?*
- *What scrutiny is there of Australian government actions?*
- *What role for ordinary citizens?*
- *What role for Aboriginal and Torres Strait Islander peoples in that process?*

The remainder of the morning included a discussion of the word 'recognition, an overview of relevant constitutional and legal frameworks, and comparative international models. Six principal reform options were explained: a statement of acknowledgement, within or outside the Constitution; amendment or replacement of the 'race power'; repeal of section 25; constitutional prohibition of racial discrimination; agreement-making; and an Indigenous Voice to the Parliament, with a base in the Constitution. All of these, with the exception of the repeal of section 25, were allocated to a working group to examine in the next session.

The remainder of the day involved a dialogue in plenary and small group sessions. In working groups, delegates examined and reported back on the reform options, including possible benefits, any concerns and their preference for what should be taken forward. Each working group was led by a regional working group leader and guided by advice from a constitutional lawyer or technical advisor.

Delegates were advised that it was open to them to agree or disagree that constitutional reform was necessary or desirable, indicate what might be a priority and that they could propose additional options for reform beyond those presented in the Discussion Paper.

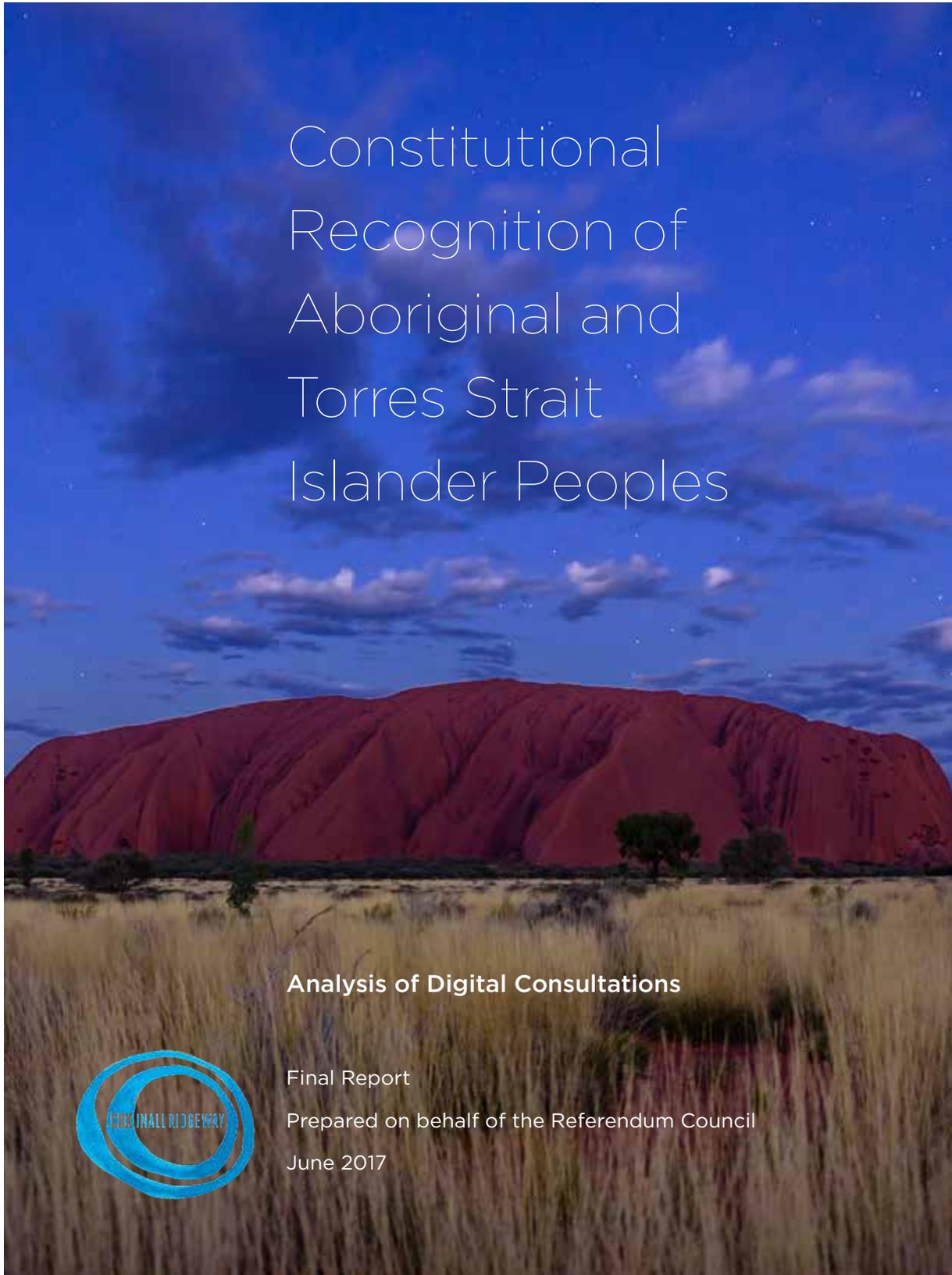
APPENDIX I: PROCESS FOR FIRST NATIONS REGIONAL DIALOGUES

The day ended with discussion of the process to select delegates for the National Constitutional Convention at Uluru. All delegates were invited to nominate. The selection process was determined by each region, but mostly was done by secret ballot.

On the final day, delegates were presented with a draft Record of Meeting which synthesised the discussion and debate from the plenary sessions and provided the opportunity to make changes. Nominees for the National Constitutional Convention delegation were then invited to address the full group on why they should be selected to attend and a vote was taken. From each Dialogue, ten delegates were selected to represent their region together with the convenors and working group leaders from the Dialogue (17 delegates in total). In addition to these delegates, the Council invited a number of other key individuals to attend the National Constitutional Convention, in order to ensure representation of an appropriate range of views.

Two short films, commissioned by the Council, were played at each Dialogue. These short films, researched and written by Council member Megan Davis and produced and narrated by Rachel Perkins, provided an inspirational historical overview of the Indigenous advocacy for reform and an educational overview of the structure of the Australian political system and the role of the constitution. They not only assisted in framing the several days of deliberation of each Dialogue, but also emphasised the importance of the Dialogues as further history-making events in the long line of Aboriginal and Torres Strait Islander political engagement.

## APPENDIX J: COX INALL RIDGEWAY REPORT ON DIGITAL CONSULTATIONS



# Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples

## Analysis of Digital Consultations



Final Report

Prepared on behalf of the Referendum Council

June 2017

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We stand in footsteps millennia old, may we acknowledge all traditional owners of this great brown land both past and present.

Prepared in partnership with  | Dentsu

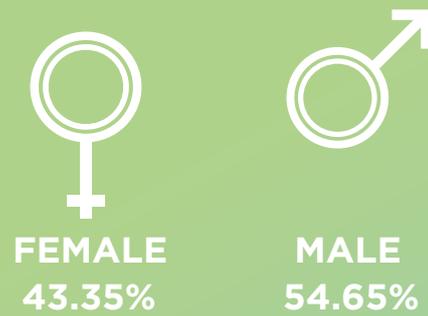
## WHO ENGAGED IN CONVERSATION?



### TOP 5 LOCATIONS



### GENDER



### AGE

24-35YR & 65+YR  
GREATEST PARTICIPATION  
ON SOCIAL



TELEVISION IDENTIFIED AS SOURCE OF MOST INFORMATION ON THE ISSUE FOR NON-ABORIGINAL & TORRES STRAIT ISLANDER POPULATION



WORD OF MOUTH, SOCIAL & COMMUNITY EVENTS WERE KEY INFORMATION SOURCES FOR THE ABORIGINAL & TORRES STRAIT ISLANDER POPULATION

## About this report

This report summarises the findings of a social and digital consultation project (the consultations) hosted by Cox Inall Ridgeway (in partnership with BWM Dentsu), to explore levels of support for constitutional reform and to determine the key reactions to the five options for reform that formed the basis of the Referendum Council's consultations.

The five options for reform included:

- Inserting an acknowledgement of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia,
- Amending or replacing the 'race power,'
- Inserting a guarantee against racial discrimination,
- Providing for an Indigenous voice to be heard by Parliament, and
- Deleting section 25.

The level of support for constitutional change was measured in two ways - a survey conducted online and via telephone, and through sentiment tracking across social and digital consultations held on the Council's website and social media platforms.

The two methods delivered starkly different results. The majority of those who participated in the online and telephone surveys were in favour of constitutional reform. This result was in direct contrast to social media sentiment, which was overwhelmingly neutral or negative.

## Social and digital consultations

Social and digital consultations were carried out across the Referendum Council website ([www.referendumcouncil.org.au](http://www.referendumcouncil.org.au)), Facebook page and Twitter feed.

Consultation began in February 2017 and finished on 15 May 2017. During this time, the platforms were updated weekly with news, content and weekly themes to engage the Australian population to share their ideas, opinions and thoughts on the options for reform. Approved questions relating to

the five reform options were also posed to facilitate discussion.

Total reach generated by digital consultation efforts was 2,824,702 impressions.

As well as hosting consultation and encouraging discussion, the Council's digital platforms provided a place for the public to access information about constitutional reform and the Referendum Council. The platforms were intended to exist only for the duration of the consultation and the Referendum Council's tenure.

The process for developing the platforms included research to determine current awareness of, and attitudes towards, constitutional reform. A review was undertaken of the cultural appropriateness for Aboriginal and Torres Strait Islander audiences of digital strategies and content.

## Measuring online sentiment

Council's digital platforms were constructed with integrated consultation tools via social media and an on-site submission form.

Data was collected throughout the digital consultation period using reporting software that included Google Analytics, Facebook Dashboard, Twitter Reports and Sysomos Social Monitoring.

Sentiment was measured and reviewed through a dual process of machine filtering and analysis by research experts to ensure humour, sarcasm and irony, as well as overall intonation, were evaluated. All posts were reviewed in relation to the specific options for reform. The following defines how sentiment has been identified in this report.

- Positive sentiment represents a positive opinion towards the option.
- Neutral sentiment represents an indecisive opinion or a question regarding the topic requesting further information.
- Negative sentiment represents a negative opinion on the options for reform.
- 'Not Applicable' sentiment represents comments not providing any indication of positive, negative or neutral support on the options for reform.

## Surveys

A total of 5,300 people participated in online and telephone surveys over a six month period between November 2016 and May 2017. Surveys were conducted in three phases during this period.

Two samples of 2,500 Australians completed a 5-minute online survey. The first survey was conducted in November 2016, the second survey in April 2017, both with different samples. The third survey re-contacted all participants from both surveys at the completion of the digital consultations (May 2017) to assess any significant changes in sentiment and preference for the reform options. Participants were representative of Australia's diverse geography and demography.

A boost sample of 100 participants identifying as Aboriginal and/or Torres Strait Islander were also surveyed via CATI (telephone interviews) at the same time that each online survey was conducted. Telephone surveys were conducted with Aboriginal and Torres Strait Islander peoples to understand their views compared to those of the wider community.

The aim of the surveys was to benchmark and determine levels of awareness and attitudes toward constitutional reform across a range of demographic groups, within both Aboriginal and Torres Strait Islander communities and the wider community. Importantly, the surveys were also used to determine any changes in awareness or attitudes across the consultation period. The survey included a mix of nominal and interval questions. The specific issues quantified related to levels of:

- awareness of constitutional reform,
- understanding of possible reforms,
- positive/negative views on the options, and
- understanding of information sources that influenced respondents' awareness of constitutional reform.

## Survey results

The majority of those who participated in the online and telephone surveys were in favour of the Council's five reform options. This includes a majority among the wider community and Aboriginal and Torres Strait Islander communities.

A very strong level of support was expressed for the guarantee against racial discrimination, with three in four members of the wider community and four in five Aboriginal and Torres Strait Islander peoples, in favour of the option.

While strong support was also expressed for an Indigenous voice to Parliament, this option was favoured by a larger proportion of Aboriginal and Torres Strait Islander peoples (80%) than the non-Aboriginal and Torres Strait Islander population (68%).

A majority of both groups supported removing or amending the 'race power' (65% and 62% respectively).

A similar majority supported the insertion of a statement acknowledging Aboriginal and Torres Strait Islander peoples as the First Australians, with 63% of online survey participants and 67% of Aboriginal and Torres Strait Islander peoples in favour of this option for reform.

The lowest levels of support were expressed for the deletion of section 25 (62% of the wider community and 56% of Aboriginal and Torres Strait Islander peoples).

Overall, support was highest amongst young and educated Australians. For example, 76% of higher educated Australians supported the option for a statement of acknowledgement compared with 63% of the broader population.

These survey results are indicative only and provide a point of comparison for the online sentiment results. They also assist in measuring changes in views over time, including as a result of the Referendum Council's public engagement process.

## SENTIMENT: SURVEY VS SOCIAL



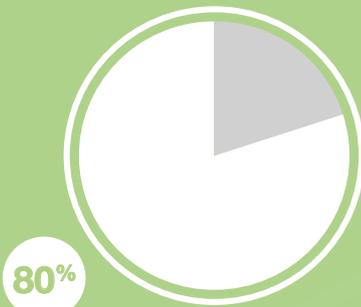
MAJORITY OF THOSE WHO PARTICIPATED IN THE ONLINE AND TELEPHONE SURVEYS WERE IN FAVOUR OF THE OPTIONS FOR REFORM



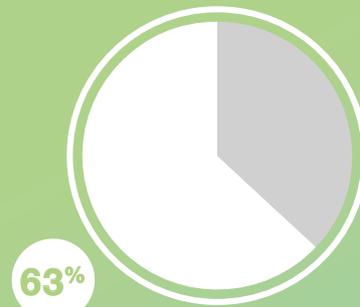
PUBLIC CONVERSATIONS ON SOCIAL MEDIA DURING THE CONSULTATION PERIOD WERE LARGELY NEUTRAL OR NEGATIVE

## WHO WAS MOST SUPPORTIVE?

OVERALL, SUPPORT WAS HIGHEST AMONGST YOUNG AND EDUCATED AUSTRALIANS



80% OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE SUPPORTED THE OPTION FOR AN INDIGENOUS VOICE TO PARLIAMENT

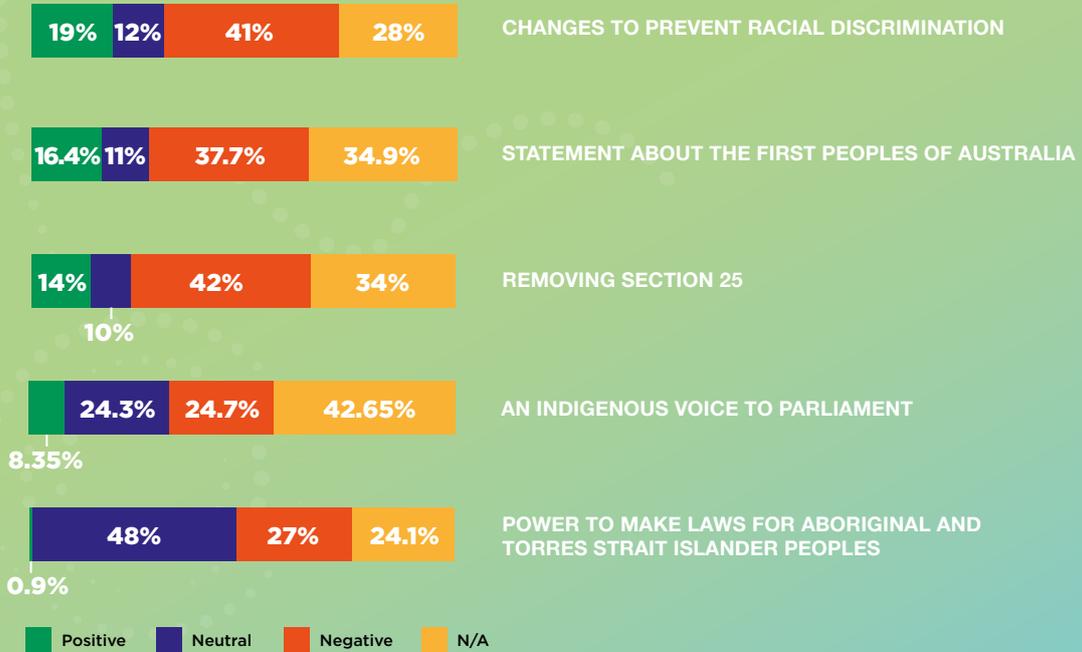


63% OF THE BROADER POPULATION SUPPORTED THE OPTION FOR A STATEMENT OF ACKNOWLEDGEMENT

## SENTIMENT ACROSS SURVEYS



## SENTIMENT ACROSS SOCIAL



### Access to information

The online and telephone surveys generated other insights into perceptions of the adequacy and availability of information about the reform options and preferred channels for receiving information.

Among online survey participants, just two in five people felt they had access to enough information to make an educated decision on constitutional reform. Television was identified as the biggest channel for information on the issue, followed by print media. Only 22% could recall the last place they saw reference to constitutional reform.

Levels of awareness were higher among Aboriginal and Torres Strait Islander peoples, with one in two reporting they felt adequately informed on the issues. Word of mouth, social media and community events were prioritised as key information sources by Aboriginal and Torres Strait Islander peoples.

### Social and digital consultation sentiment

In contrast to the popular support expressed in the online and telephone surveys, public conversations on social media during the consultation period were largely neutral or negative.

Negative sentiment was sitting around 40% for the proposed guarantee against racial discrimination (41.2%). The option to include a statement acknowledging Aboriginal and Torres Strait Islander peoples as the First Australians was at 37.7% negative and the option to delete section 25 was at 42.5% negative. In each case, negative sentiment was two to three times higher than positive sentiment.

Social media commentary in relation to the option to include an Indigenous voice to Parliament and the option to amend or remove the 'race power' was largely neutral, although one in four expressed negative sentiment (24.9% and 27% respectively). Positive sentiment was at its lowest level for options for an Indigenous voice to Parliament (8.35%

in favour) and for removing or amending the 'race power' (less than 1% in favour).

Insights into levels of negative sentiment are further explained in 'Interpreting the Findings.'

### Preferred options across all platforms

When the levels of positive sentiment from the surveys, website and social media sentiment are combined, an Indigenous voice to Parliament is the most popular reform (39.3%). This is followed by changes to prevent racial discrimination (35.6%), a statement about the First Peoples of Australia (34%) and removing section 25 (31.9%). There was significantly less overall positive support for the inclusion of a power to make laws for Aboriginal and Torres Strait Islander peoples (16.3%).

### Consistent themes

A number of themes emerged throughout the consultation period in relation to the options for reform and constitutional recognition more broadly.

Mistrust of Government: There was a high level of mistrust expressed among both the wider community and Aboriginal and Torres Strait Islander peoples, as well as suspicion as to the 'true motivation' for some of the options for reform.

Interest in Aboriginal and Torres Strait Islander preferences: There was strong interest from the wider community as to which options Aboriginal and Torres Strait Islander peoples prefer, and why, as a way to inform their own decision-making.

Closing the Gap agenda: There was some concern that constitutional reform will 'replace' or 'draw attention away from' other pressing issues including social justice and the Closing the Gap agenda.

Lack of community input: There was concern that this was a 'government driven' rather than 'community driven' process and that community leadership had limited opportunities to participate in the discussion.

This was one of the most discussed topics throughout the digital consultations.

For example, many people expressed their frustration at the Referendum Council's dialogues. Some social media users criticised the Council for not running the dialogues with the broader community and raised concerns that key members were not allowed to participate in conversations. Others raised the issue that some Elders live in remote areas with no access to internet and may be unaware of the conversations taking place.

Substantive versus 'meaningless' change:

There was some concern that the options offered meaningless changes that would not positively impact the lives and experiences of Aboriginal and Torres Strait Islander peoples.

Recognition stops Treaty: Some discussed the move toward recognition being a ploy by the Government that sounded beneficial to Aboriginal and Torres Strait Islander peoples but that would prevent any chance of having a Treaty in Australia.

Special treatment: The singling out of Aboriginal and Torres Strait Islander peoples in the constitution was viewed by some as a backwards step in terms of achieving racial equality in Australia.

## Interpreting the findings: considerations and insights

### Online disinhibition

It is strongly suggested the Council give the online and phone survey results more weight (than the social results) in understanding levels of support for its options. Using online opinion as an indicator of what the wider population thinks about an issue is problematic for a number of reasons, most significantly because of the online disinhibition effect.

This is a tendency for online commentators to act out or be less civil than in 'real' life.

Social media tracking was helpful in providing a strong sense of the way people who are active online are talking about constitutional

reform. It is also useful in understanding the key misapprehensions and concerns of people who are unfamiliar with the issues.

### Low participation

There were a number of challenges in attracting a wide and diverse audience to the digital conversation. Although an advertising budget of \$50,000 was spread across the full eight week campaign to ensure maximum visibility of posts, this proved to be insufficient to engage a large number of commentators in the discussion.

Almost 200,000 people viewed content on the digital platform, but few chose to actively engage through comments, shares or reactions to the posts. This participation was mostly limited to people with extreme views, including those making racist comments, or expressing a singularly pro-sovereignty view.

Some commenters who supported the Council's reform options or asked questions were trolled, while others appeared to have a vendetta against the Council. Others asked for an anonymous method of providing their views.

Through the screening and moderation process profanity and discriminatory posts were discarded, as per the terms and conditions of participation.

### Sentiment change in online surveys

Across many of the options for reform, support from online survey participants dropped between sampling waves one to two, but returned to original levels by wave three.

Although no research was undertaken into why this may be the case, it should be noted that by wave three (post consultation period) the topic of constitutional reform was gaining strong mainstream media attention and was being mentioned more frequently across multiple media platforms. This could be attributed to a stronger level of support or a 'return' of support within both populations.

A number of other national debates were also taking place alongside the digital consultations, such as the option to change section 18c of the Racial Discrimination Act. During this time, numerous negative comments were made on the Council's social platforms about these issues. This demonstrates confusion by members of the population and the impact of related national debates on sentiment during the consultation period.

**Complex nature of issues**

It should also be noted that throughout the entire project, many respondents commented on the complex nature of the material being discussed and limited access to educational materials. This may have led to negative responses from people who may have misunderstood or not fully understood the options and their impacts.

Some participants reported the complexity of the information being a barrier to interest and engagement.

Through focus testing which occurred prior to the consultation period, many people reported having low levels of awareness of the Constitution, the process of Referendums and the political system in general.



## CHANGING THE CONSTITUTION TO HELP STOP RACIAL DISCRIMINATION

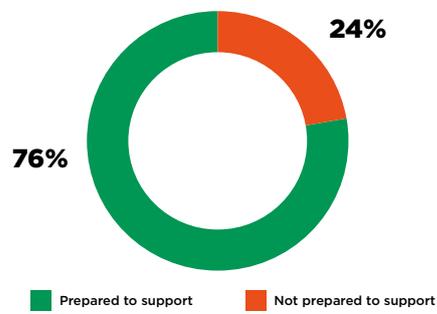
### Online survey results

Survey participants, both in the wider community and among Aboriginal and Torres Strait Islander peoples, were overwhelmingly in favour of changing the Constitution to help stop racial discrimination.

Approximately three quarters of people supported inclusion of a constitutional prohibition on racial discrimination.

Support was consistently around 75% throughout the process for the wider community. Support dropped off slightly (5%) among Aboriginal and Torres Strait Islander participants between waves one and two, however had returned to 80% by the third wave.

Support for a constitutional prohibition of racial discrimination among survey participants (at wave three)



### Social media sentiment

In contrast, overall sentiment across the social channels was negative in relation to changing the Constitution to help stop racial discrimination.

### Key issues raised

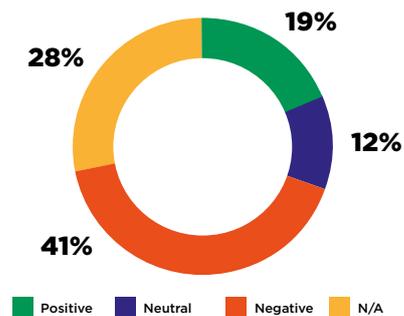
#### Social media discussion

The launch of the Council's website and educational videos on constitutional reform, generated some social media commentary on the option to include a constitutional prohibition of racial discrimination that was largely negative.

#### Addressing racism

A popular topic was whether a constitutional prohibition of racial discrimination would actually prevent racism. Some people expressed the view that the option would add words to the Constitution without resulting in substantive change. Others argued that simply adding words to the Constitution will not change the mentality of those that intimidate others, and that further education is needed to stop racism in Australia.

Constitutional prohibition of racial discrimination: Facebook and Twitter sentiment



'Singling out' particular communities

There was some commentary about the unfairness of certain groups being singled out for 'special treatment' and a preference expressed for options that provide benefits to all. Many comments accused Aboriginal and Torres Strait Islander peoples of also being the perpetrators of racism in Australia (so called 'reverse racism'). Other participants accused the Government of being racist for having certain programs that are exclusive to Aboriginal and Torres Strait Islander peoples.

Broadening the scope of discrimination

On the other hand, some expressed frustration that the option did not also include a prohibition on other forms of discrimination, including on the basis of gender, sexual orientation, religion and political views.

Bill of Rights

A bill of rights, or human rights clause for all Australians, was suggested by some people. These suggestions were seen as preferable to providing special treatment to certain groups. Some suggested the bill of rights should guarantee equal opportunity to work, to housing, to a living income and legal aid.

Interaction with racial discrimination laws

Among the other negative viewpoints, some argued the option is irrelevant and unnecessary as Australia already has racial discrimination laws, while some participants were concerned about the potential impact on sovereignty and treaty.



**REMOVING SECTION 25**

**Online survey results**

A majority of survey participants, in both the wider community and Aboriginal and Torres Strait Islander communities, expressed support for removing section 25.

Support for removing section 25 began at 63% for the wider community and 59% for Aboriginal and Torres Strait Islander peoples in November 2016, but decreased by 5% and 9% respectively for wave two in April 2017. After the consultations ended, support in wave three had returned to close to the original levels of support from wave one.

**Social media sentiment**

Overall, online sentiment was negative in relation to removing section 25 from the Constitution.

**Key Issues raised**

Social media discussion

Overall, there were some people who supported the option to delete section 25 on the basis that it refers to race rather than culture. Others supported the inclusion of an anti-racism clause provided race is properly defined.

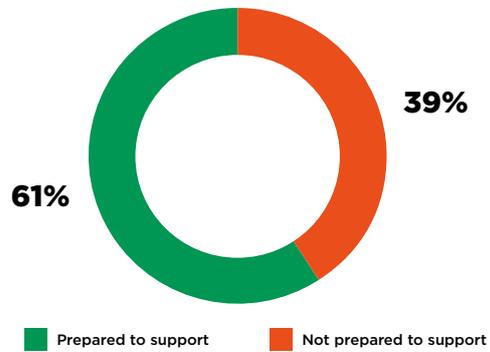
Section 25 as a ‘Dead Letter’

Section 25 was referred to as a ‘dead letter’ by some who argued there was no need to remove it because it is now a meaningless provision, based on the assumption that no states will ever disqualify certain races from voting in state elections.

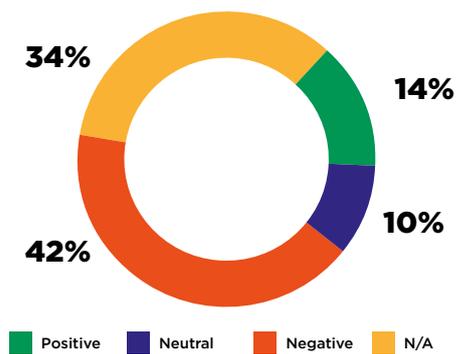
Prioritising ‘real’ change

Others expressed concern that the referendum will fail if it includes too many options and suggested prioritising changes that will result in real change, unlike the removal of section 25.

Support for removing section 25 among survey participants (at wave three)



Removing section 25: Facebook and Twitter sentiment





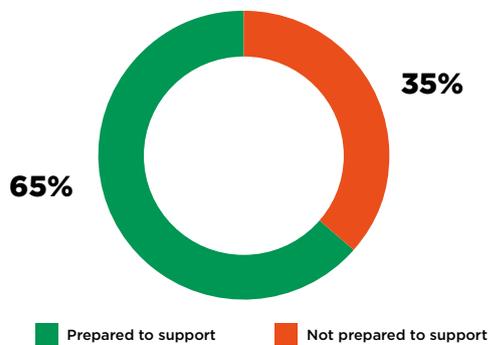
### REMOVING OR AMENDING THE 'RACE POWER'

#### Online survey results

Two thirds of survey participants expressed support for the option to remove or amend references to race, in both the wider community and among Aboriginal and Torres Strait Islander peoples.

Support for removing or amending references to race initially enjoyed support of over 60% across both waves one and two. While support remained relatively steady within the wider community, it dropped significantly among Aboriginal and Torres Strait Islander peoples between samples one and two (by 8%), but returned to original levels of support by wave 3.

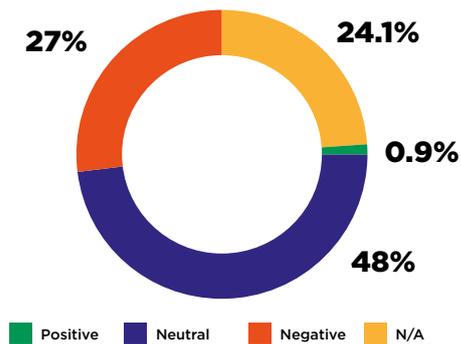
Support for removing or amending the 'race power' among survey participants (at wave three)



#### Social media sentiment

Online sentiment varied from neutral to negative across the social channels, with only 1% viewing the reform positively.

Removing or amending the 'race power': Facebook and Twitter sentiment



#### Key issues raised

##### Social media discussion

Concerns about the option to remove or amend the 'race power' in section 51 were widespread and opinions were divided into four main areas.

APPENDIX J: COX INALL RIDGEWAY REPORT ON DIGITAL CONSULTATIONS

Impact on laws for the benefit of Aboriginal and Torres Strait Islander peoples

Some objected to the attempt to amend the 'race power' because of fear that any meddling with the power would ultimately lead to it being removed from the Constitution. The concern is that without the 'race power' the Government cannot make special laws for certain races which might be necessary to protect or preserve those races. This would negatively impact laws that protect the rights of Aboriginal and Torres Strait Islander peoples (such as the Native Title Act) and prevent the Government legislating for programs that provide Aboriginal and Torres Strait Islander peoples with education, training and employment opportunities.

Overlap with an option for a constitutional prohibition of racial discrimination

There was some overlap between the suggestions on this option and the option to insert a constitutional prohibition of racial discrimination. For example, one respondent supported deletion of section 51 (XXVI), subject to both a provision that its deletion has no impact on Native Title laws or other funding provisions now in place for Aboriginal and Torres Strait Islander peoples, and the insertion of an anti-discrimination clause in the Constitution. This respondent also suggested "the word 'race' should not appear, as it is an outdated and erroneous concept".

Legalised discrimination and 'special treatment'

Others expressed concern that the 'race power' constitutes legalised discrimination and should be removed on principle and a clause inserted that applies to all people. Others were worried that singling Aboriginal and Torres Strait Islander peoples out in this way would be divisive and lead to further inequality between Aboriginal and Torres Strait Islander and other Australians.

Preference for Aboriginal and Torres Strait Islander autonomy

Others asserted that today's Government should no longer be making decisions on behalf of Aboriginal and Torres Strait Islander peoples – they should be able to make their own constitutional decisions about laws that impact them. Instead, Aboriginal and Torres Strait Islander peoples' autonomy should be reflected in the Constitution. The ability of the Government to make laws for Aboriginal and Torres Strait Islander peoples was viewed as a way of continuing assimilation via 'dependency' and 'overt control', which they argued will continue to fail and create division.



## AN INDIGENOUS VOICE TO PARLIAMENT

### Online survey results

Over two thirds of people support an Indigenous voice to Parliament, in both the wider community and Aboriginal and Torres Strait Islander communities.

Support for an Indigenous voice remained fairly steady for waves one and two, across both the wider community and Aboriginal and Torres Strait Islander communities. There is significantly more support for an Indigenous voice to Parliament among Aboriginal and Torres Strait Islander peoples (over 75%). While support among Aboriginal and Torres Strait Islander peoples dropped slightly between waves one and two, it had returned to original levels in wave three.

### Social media sentiment

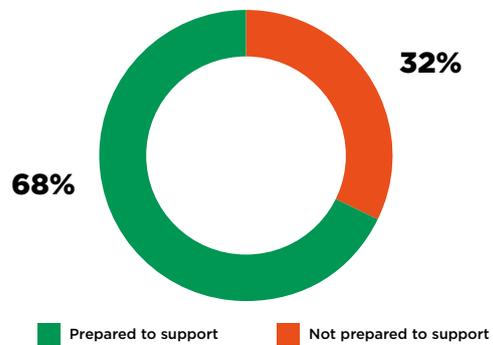
Online sentiment towards an Indigenous voice to Parliament varied across the social channels between negative, neutral and positive. Website sentiment was largely positive (66.7%), contrasted with the largely negative or neutral sentiment on Facebook and Twitter.

### Key issues raised

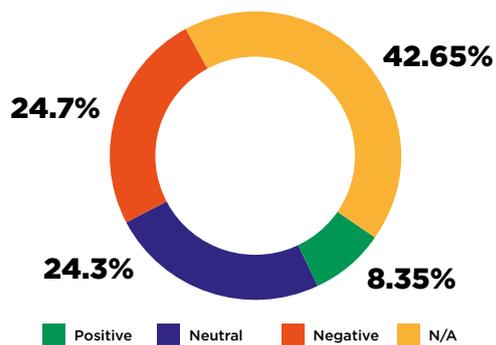
#### Social media discussion

This issue generated broader commentary about the need to listen to Aboriginal and Torres Strait Islander voices in general.

Support for an Indigenous voice to Parliament among survey participants (at wave three)



Indigenous voice to Parliament: Facebook and Twitter sentiment



Consultation with Aboriginal and Torres Strait Islander peoples

Some pro-treaty participants argued that it is now incumbent on the Australian Government to ask Aboriginal and Torres Strait Islander peoples if they would like to be specifically included, especially since they were excluded from the Constitution when it was established. For example, one participant observed, “We cannot force our Constitution onto them, especially after they were excluded by us from the beginning.”

Past Aboriginal and Torres Strait Islander representative bodies

Other people referred to past representative bodies that they believe failed due to difficulty implementing cohesive plans. There was also a view that implementation of Aboriginal and Torres Strait Islander peoples' aspirations for a voice to Parliament is not realistic and may be politically untenable.

Indigenous Productivity Commission

Some participants suggested a different approach, such as an Indigenous Productivity Commission, established in the Constitution to analyse and direct Government spending to the best programs and services to effectively ‘Close the Gap’.



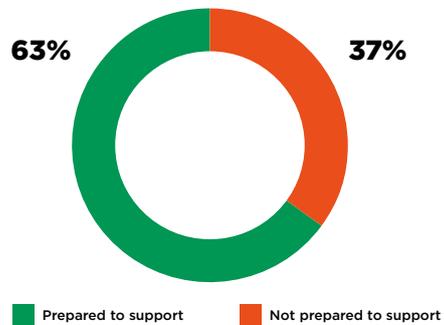
**A STATEMENT ABOUT THE FIRST PEOPLES OF AUSTRALIA**

**Online survey results**

Survey participants expressed a high level of support for inserting a statement about the First Peoples of Australia, including in the wider community and Aboriginal and Torres Strait Islander populations, with two in three people in favour.

Support for drafting a Statement of Acknowledgement has remained very steady among the wider community (at 63%), but it has seen a decrease in support among Aboriginal and Torres Strait Islander peoples (from 73% to 67%).

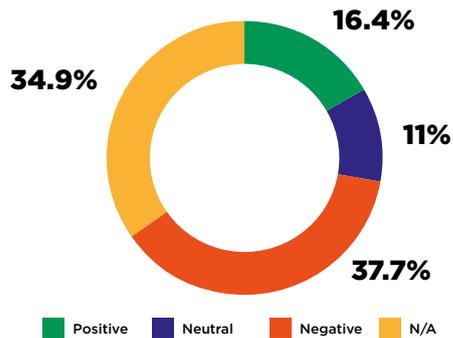
Support for a statement about the First Peoples of Australia among survey participants (at wave three)



**Social media sentiment**

Sentiment on social channels was again different between the website and social media. The website showed 38.5% positive sentiment and 30.8% negative sentiment, while the average sentiment on Facebook and Twitter was 37.7% negative, with a much smaller proportion of positive views (16.4%).

Support for a statement about the First Peoples of Australia: Facebook and Twitter sentiment



**Key issues raised**

Social media discussion

Commentary about the option to insert a statement about the First Peoples of Australia centred on four main themes.

Inherent 'whiteness'

Participants voiced concerns that the existing Constitution is inherently 'white' being formed, as it was, in an environment where Aboriginal and Torres Strait Islander peoples were treated as if they had never existed in the claimed territory of the Commonwealth of Australia.

#### Recognition and sovereignty

Some participants were of the view that (a) since Aboriginal and Torres Strait Islander peoples are excluded from the Constitution and (b) Aboriginal and Torres Strait Islander peoples never consented to being part of the Australian nation, there is an argument that Aboriginal and Torres Strait Islander peoples are not in fact 'Australians' but 'people living pursuant to their continuing pre-1770 laws and customs.' As such, there was concern that the option to now acknowledge them in the Constitution, is an attempt to formally bring them into the Australian nation, thereby undermining sovereignty and future treaty negotiations.

#### 'Special' rights

Some participants expressed the view that adding a statement about the First Peoples of Australia is elevating a specific ethnic group above others by giving them special rights. It is believed that adding such a statement will not advance the cause of 'Reconciliation', but calcify differences in the structure of the Constitution.

#### An entirely new Constitution

Many participants felt the underlying exclusionary intention of the Constitution cannot be changed by simply adding in clauses. It was described as a 'flawed legal document', that needs to be entirely rewritten so that it is inclusive of all people and includes reference to the rich Aboriginal and Torres Strait Islander heritage of Australia. In support of this argument, some participants referred to statements from current and previous Prime Ministers that there were 'mistakes' in the Constitution.

## APPENDIX 1: ONLINE SURVEY QUESTIONS

The online survey questions were designed to measure and identify whether the representative sample of Australians know or have heard about an option to amend the constitution to recognise Aboriginal and Torres Strait Islander peoples, how they feel about any proposed changes and if they have heard of the website / digital consultations. The questions were measured and aligned to activity specifically related to the development and implementation of the website and associated digital consultations.

### Survey Questions:

**1. Have you heard about an option to amend the constitution to recognise Aboriginal and Torres Strait Islander peoples?**

- a. Yes
- b. No

**2. What in your own words do you think constitutional recognition means?**

[OPEN TEXT BOX with a Don't know / No idea check box]

**3. Have you heard about the Referendum Council, which has been established to lead a national consultation process on constitutional recognition?**

- a. Yes
- b. No

**4. Do you support Aboriginal and Torres Strait Islander peoples being recognised in the constitution as the First Australians?**

- a. Strongly support
- b. Somewhat support
- c. Somewhat oppose
- d. Strongly oppose
- e. Not sure, will need more information

[OPEN TEXT BOX – please explain why]

**5. How prepared are you to support the following changes to the constitution (scaled response, including a 'don't know' option):**

- Drafting a statement acknowledging Aboriginal and Torres Strait Islander peoples as the First Australians and inserting it either inside the constitution or outside the constitution
- Removing or amending references to race
- Prohibiting racial discrimination
- Providing for an Indigenous voice to be heard in Parliament

Deleting section 25, which contemplates the possibility of a State government excluding some Australians from voting in State elections on the basis of their race.

- a. Strongly prepared
- b. Somewhat prepared
- c. Somewhat unprepared
- d. Very unprepared
- e. Don't know

**6. Do you feel you have had enough access to information in order to make an educated decision on constitutional recognition?**

- a. Sufficient access to information
- b. Somewhat sufficient access to information
- c. Somewhat insufficient access to information
- d. Insufficient access to information
- e. Not sure, have not searched for information

## APPENDIX 1: ONLINE SURVEY QUESTIONS

### **7. Where have you received most of the information about the recognition of Aboriginal and Torres Strait Islander peoples from?**

- a. Online news channels
- b. Print media - Newspapers, Magazines
- c. TV
- d. Word of mouth / conversations with friends/family/ colleagues
- e. Social media
- f. Community event
- g. Other
- h. (Referendum Council website - this option to be added in wave #2 and wave #3)

### **8. If you can remember, where was the last place you saw a reference to constitutional recognition?**

- a. yes
- b. no

OPEN TEXT BOX [please insert where you saw the reference last]

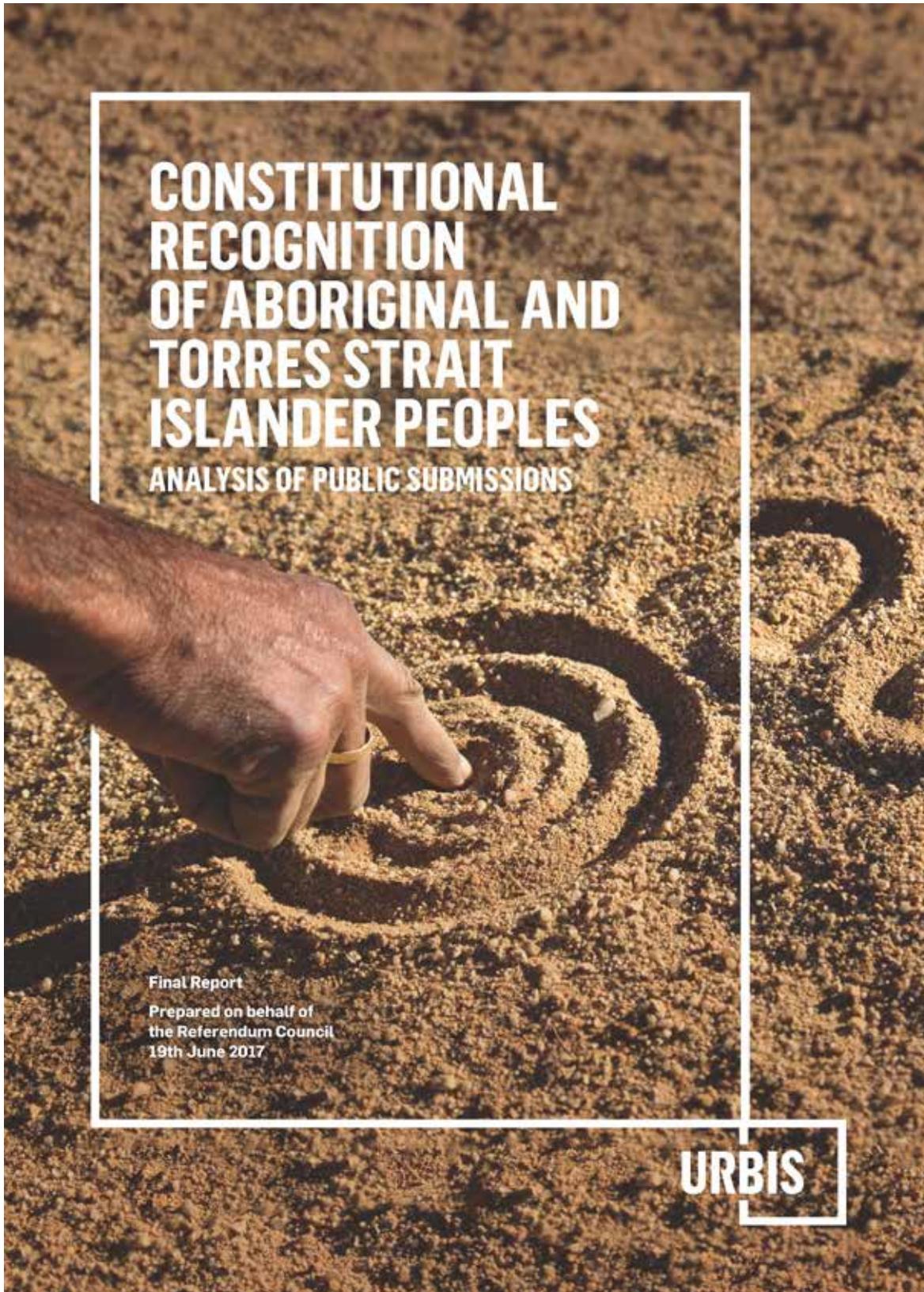
### **9. How much do you understand about the constitution?**

- a) I have strong understanding of the constitution
- b) I have some understanding of the constitution
- c) I don't know very much about the constitution
- d) I don't know anything about the constitution



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## APPENDIX K: URBIS ANALYSIS OF SUBMISSIONS RECEIVED



**Urbis acknowledges Aboriginal and Torres Strait Islander peoples as the Traditional Custodians of all lands on which we do business and we pay our respects to Elders, past and present.**

**We acknowledge the important contribution that Aboriginal and Torres Strait Islander peoples make in creating a strong and vibrant Australian society.**

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Project Code	SPP06217
Report Number	Final



Urbis' Public Policy team has received ISO 20252 Certification for the provision of Social Policy Research and Evaluation

Template version 2016.1.0

All information supplied to Urbis in order to conduct a research project will be treated in the strictest confidence. It shall only be used in this context and shall not be made available to third parties without client authorisation. Confidential information will be stored securely and data provided by respondents, as well as their identity, shall be treated in the strictest confidence and all assurance given to respondents shall be fulfilled.

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## EXECUTIVE SUMMARY

In May 2017, Urbis was commissioned by the Referendum Council (the Council) to undertake an analysis of public submissions on constitutional recognition of Aboriginal and Torres Strait Islander peoples. A total of 1,111 submissions were received, including 1,057 submissions via a structured online survey (structured submissions) and 54 submissions taking the form of an email, letter or other document (free form submissions).

This report outlines Urbis' findings on the level of support for constitutional recognition, the level of support for key proposals for recognition as outlined in the Council's Discussion Paper, other key concerns and considerations for recognition, the profile of submission respondents and an exploration of alternative options for recognition suggested.

All submissions received were analysed according to an analytical frame, which ensured the levels of support, the various themes and other suggestions raised in the submissions were captured and categorised in a structured and methodically robust manner.

### LEVELS OF SUPPORT FOR CONSTITUTIONAL RECOGNITION

A very strong level of support for constitutional recognition of Aboriginal and Torres Strait Islander peoples was found, with nine out of ten submissions in favour. Only 8% indicated they did not support the move, while 2% of submissions were unsure of their position.

The strong support for recognition was based on a desire to see Aboriginal and Torres Strait Islander peoples acknowledged as Australia's First Peoples, with an ongoing set of rights based on that legacy. In addition to recognising Aboriginal and Torres Strait Islander peoples in the Constitution, there was also hope the recognition process would meet a broader need for modernising the Constitution – to remove outdated and prejudicial concepts, to stop racial discrimination and to remove redundant sections.

The highest level of support was for amendment of the existing Constitution, rather than a new constitution or recognition in normal law. Regarding the nature of the change, a wide range of responses were received, from the symbolic to the substantive. The strongest call was for substantive over symbolic change.

Two key reasons for opposition to recognition arose. Firstly, some argued constitutional recognition is a mistake in an environment where sovereignty remains unceded. This view was most common among those who demanded substantive change in the lives and rights of Aboriginal and Torres Strait Islander peoples, not just in relation to their treatment in the Constitution. Secondly, the singling out of Aboriginal and Torres Strait Islander peoples in the Constitution was seen by others as undermining efforts to achieve equality in Australia.

### SUPPORT FOR THE COUNCIL'S KEY PROPOSALS

The Council's Discussion Paper outlined five key proposals for constitutional reform, and all submissions were invited to express their support for or opposition to these measures.

The key proposals included:

- inserting a statement acknowledging Aboriginal and Torres Strait Islander peoples as the First Australians, either inside or outside the Constitution
- amending or deleting the 'race power', section 51 (xxvi), and replacing it with a new head of power
- inserting a constitutional prohibition against racial discrimination
- providing for an Indigenous voice to be heard by Parliament, and for the voice to be consulted on legislation and policy that affects Aboriginal and Torres Strait Islander peoples
- deleting section 25.

A large majority of submissions supported all five of these key proposals. With strongest support, more than nine in ten (93%) backed the inclusion of an Indigenous voice when Parliament and government make laws

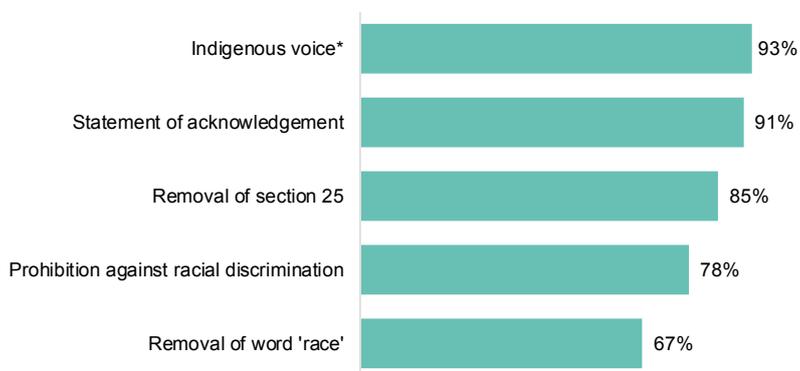
## APPENDIX K: URBIS ANALYSIS OF SUBMISSIONS RECEIVED

and policies about Indigenous affairs. A total of 77% supported the creation of a group providing this voice under the Constitution.

A statement of acknowledgement of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia also received significant backing, with 91% supporting this measure – 86% in favour of a statement within the Constitution and 5% in favour of a statement in normal Australian law.

Changes to the 'race provisions', section 25 and section 51 (xxvi), also received strong support with 85% of submissions supporting the removal of section 25 and more than two in three (67%) supporting removal of the word 'race' from the Constitution. A further 78% supported the insertion of a constitutional prohibition against racial discrimination.

Figure 1 – Preferred proposals for recognition



\*Indicative of support for an Indigenous voice in general, rather than creation of a group under the Constitution

## ALTERNATIVE OPTIONS FOR RECOGNITION

The proposal for a Treaty or an agreement-making power was not put forward as a specific reform proposal for comment. Nonetheless, calls for a Treaty, Treaties, or an agreement-making power frequently emerged as a preferred option for reform. There was strong support for a Treaty to provide certainty for Aboriginal and Torres Strait Islander peoples moving forward, and for a Treaty to acknowledge past injustices.

Few submissions provided specific comment on what a Treaty would look like or what form it would take. However, several referenced international jurisdictions with existing Treaty arrangements with their Indigenous populations, such as New Zealand, Canada and the United States of America as models for Australia to emulate.

There was also some support for constitutional change to reflect Australia's commitments under international law. The United Nations Declaration on the Rights of Indigenous Peoples (the UN Declaration) was the international instrument referenced most frequently. Some proposed the principles of the UN Declaration should underpin the process of constitutional recognition. Others called for the specific rights afforded to Indigenous persons within the UN Declaration to be incorporated into the Australian Constitution.

## PREREQUISITES FOR RECOGNITION

Finally, submissions also outlined some overall considerations regarding the process for achieving constitutional recognition. These included:

- the critical importance of consultation with Aboriginal and Torres Strait Islander peoples
- a strong desire to see substantive rather than symbolic change
- consideration of the chances of success at referendum
- accommodating the diversity of Aboriginal and Torres Strait Islander peoples

APPENDIX K: URBIS ANALYSIS OF SUBMISSIONS RECEIVED

- prioritising fairness and equality, including acknowledging Aboriginal and Torres Strait Islander peoples.
- We thank the Referendum Council for the opportunity of working on this important project, and look forward to the Council's full report.

# 1. INTRODUCTION

In May 2017, Urbis was commissioned by the Referendum Council (the Council) to undertake an analysis of public submissions on constitutional recognition of Aboriginal and Torres Strait Islander peoples. This section provides background information, an outline of the project and a description of the methodology used.

## 1.1. BACKGROUND

The Australian Government has made a commitment to holding a referendum on constitutional recognition of Aboriginal and Torres Strait Islander peoples. Significant work has been completed to understand what form constitutional recognition may take, including:

- in 2011 – appointment of the Expert Panel on Recognising Aboriginal and Torres Strait Islander peoples in the Constitution (the Expert Panel) to consult throughout Australia (with the submission of its final report and recommendations in 2012)
- in 2013 – appointment of the Parliamentary Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (the Joint Select Committee) to review work undertaken by the Expert Panel, to undertake consultation with key organisations and to review the Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012 (with the submissions of its final report and recommendations in 2015)
- in December 2015 – appointment of a 16-member Referendum Council by the Prime Minister and the Leader of the Opposition to consult widely throughout Australia and advise on next steps. Consultation has included 12 First Nations Regional Dialogues, culminating in a National Indigenous Constitutional Convention in May 2017; as well as an invitation for public submissions based on the Council's Discussion Paper.

## 1.2. THIS PROJECT

Urbis was commissioned to undertake an analysis of public submissions to the Referendum Council on Constitutional Recognition. Submissions were received during the period December 2016 to May 2017. A total of 1,111 submissions were received, including 1,057 submissions via a structured online survey (structured submissions) and 54 submissions taking the form of an email, letter or other document (free form submissions).

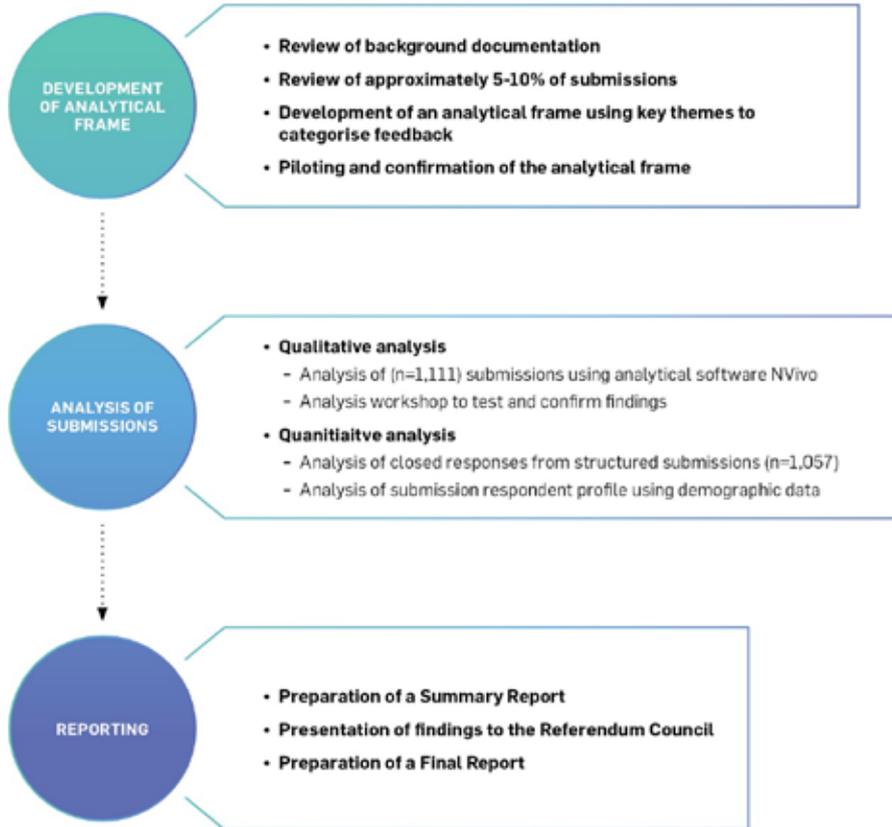
This report outlines Urbis' findings on:

- the level of support for constitutional recognition
- the level of support for key proposals for recognition
- key considerations for recognition
- the profile of submission respondents.

### 1.3. METHODOLOGY

Our methodological approach has involved a three step process as outlined below.

Figure 2 – Summary of methodology



#### 1.3.1. Development of analytical frame

An analytical frame creates a structure around which to group key concepts and themes across large volumes of qualitative data. In developing the analytical frame for this project, Urbis undertook a review of background documentation (including the Referendum Council’s Discussion Paper) and a high level review of a sample of submissions. The analytical frame took the form of a hierarchy of themes and sub-themes grouped under each question of the structured online survey. This was first built in Excel, then piloted and refined, and built in the software NVivo. A number of overarching themes were created (e.g. ‘other relevant content’) to allow analysis of concepts which did not fit within a specific theme.

#### 1.3.2. Analysis of submissions

##### Qualitative analysis

The qualitative analysis of submissions involved categorising phrases and concepts from the n=1,111 submissions against relevant themes in the analytical frame. This process was undertaken in NVivo and is referred to as ‘coding’. Consistency in the coding process across the Urbis research team was ensured via the development of a coding dictionary (defining a consistent interpretation of the theme labels).

## APPENDIX K: URBIS ANALYSIS OF SUBMISSIONS RECEIVED

Once the coding process was complete, reports for each theme and sub-theme were generated in NVivo to allow collated content to be reviewed in detail. Urbis research team members then met for a workshop to consider the findings – focusing the discussion around the overall level of support for constitutional recognition, the level of support for key proposals for recognition, as well as key considerations for recognition overall.

### Quantitative analysis

The quantitative analysis of submissions involved analysing descriptive statistics of on the demographic data from both the structured and free form submissions to develop an overall profile of respondents; as well as on the closed (yes/no) question data (from the structured submissions only) to understand support for key proposals for recognition. Cross-tabulations were also performed on the closed responses to understand differences in respondent profiles between those who were supportive and unsupportive of the different proposals. Table 1 below outlines which demographic characteristics were available for analysis by submission type.

**Please note – where quantitative data is used throughout the report this references data from the structured submissions only, with the exception of reporting on Aboriginal and Torres Strait Islander status and individual/organisation status (as shown below).**

Table 1 – Summary of available demographic data

Demographic characteristic	Submission type	
	Structured submissions	Free form submissions
Individual or organisation	X	X
Aboriginal and Torres Strait Islander status	X	X
Location – state/territory	X	
Location – remoteness	X	
Gender	X	
Age	X	

Finally, analysis was performed on the closed (yes/no) question data (from the structured submissions only) to understand whether there were common levels of support across different combinations of proposals for recognition. This was undertaken in an attempt to understand patterns of support across the spectrum of symbolic (e.g. a statement of acknowledgment) to substantive (e.g. an Indigenous voice in parliament) change.

### 1.3.3. Reporting

Following the analysis phase, a Summary Report was produced and presented to the Referendum Council. The Summary Report provided a snapshot of the respondent profile, and an outline of key themes from the submissions. This report (the Final Report) accompanies the Summary Report and provides greater detail.

#### A note on terminology

Both this Final Report and the Summary Report adopt the terminology 'strong voice', 'weak voice' etc. to indicate the level of support for each concept when discussing qualitative findings. In line with the methodological approach taken, these are qualitative terminologies used to provide an indication of the level of support across all n=1,111 submissions only. On the other hand, quantitative findings are expressed using numbers and proportions (%) throughout the reports, with charts and infographics applied to visualise results.

### 1.3.4. Limitations

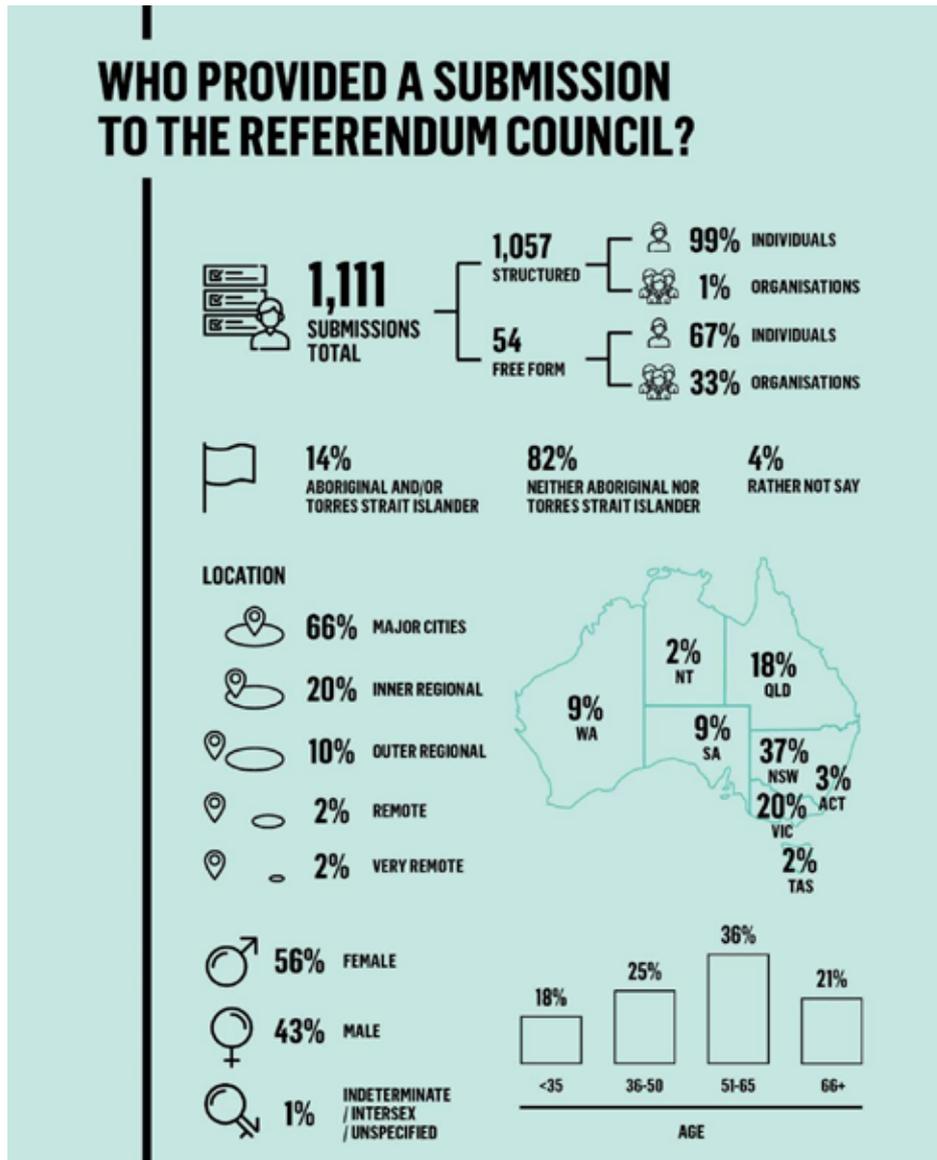
There are a number of limitations associated with this analysis of submissions. They include:

- Submissions processes generally attract those who are keenly following an issue and respondents are therefore likely to hold either a strongly supportive or a strongly opposed view. The views expressed in the submissions can therefore not be considered to be representative of the Australian public as a whole.
- The proposals for constitutional change required some knowledge of legal concepts to be fully grasped. It was evident in the quality of the content that many respondents did not have an adequate understanding of legal concepts to respond meaningfully to many of the questions. While the Referendum Council's Discussion Paper simplified the legal concepts well, there was no guarantee people had read the Paper, and there was no introductory text provided in the form itself to remind respondents of the legal concepts or issue behind each question.
- The structured online submission form asked respondents to indicate their support for each proposal for constitutional recognition separately, rather than asking people to consider combinations of reform options. This means there is a lack of insight into reasons for support or lack of support in the qualitative data.
- The structured online submission form didn't explicitly invite considerations of the potential risks associated with each proposal for recognition. This is likely to have led to a bias in favour of supportive views.
- The structured online submission form focussed questions around specific proposals for constitutional change, rather than inviting respondents to consider other options. For example, the Indigenous voice topic was largely framed around a specific proposal for an Indigenous group to be set up under the Constitution to advise Parliament or block laws. This narrow focus has limited the opportunity for respondents to comment on alternative mechanisms, such as, in the example of the Indigenous voice, dedicated seats in Parliament.

## 2. OVERVIEW OF RESPONDENTS

The following provides an overview of the demographic characteristics of respondents who provided a submission to the Referendum Council.<sup>1</sup> This profile of submissions represents an overrepresentation of Aboriginal and Torres Strait Islander peoples, females, people aged 36+ and people living in New South Wales compared to the total Australian population.

Figure 3 – Overview of respondents



<sup>1</sup> Please note demographic figures relate to structured submissions only, with the exception of Aboriginal and Torres Strait Islander status. Where free form submissions from organisations identified themselves as Aboriginal and Torres Strait Islander, they have been included in the quantitative analysis.

### 3. SUPPORT FOR CONSTITUTIONAL RECOGNITION

Before providing feedback on the five specific proposals for reform, all respondents were asked their general level of support for “some form” of constitutional recognition, and what form that recognition should take.

A very strong level of support for constitutional recognition of Aboriginal and Torres Strait Islander peoples was found, with nine out of ten submissions in favour. Only 8% indicated they did not support the move, while 2% of submissions were unsure of their position.

The strong support for recognition was based on a desire to see Aboriginal and Torres Strait Islander peoples acknowledged as Australia’s First Peoples, with an ongoing set of rights based on that legacy. In addition to recognising Aboriginal and Torres Strait Islander peoples in the Constitution, there was also hope the recognition process would meet a broader need for modernising the Constitution – to remove outdated and prejudicial concepts, to stop racial discrimination and to remove redundant sections.

*We have no acknowledgement of the first peoples of this land in our Constitution...it’s the symbolic thing that should happen. It’s a very important step on the long road to reconciliation. It’s a change that on one level is symbolic, in seeking to address historic elements of our Constitution which reflect racism. Symbols are important in politics. (Casse Australia)*

*The Constitution must be changed, deleting any section that is racist or prejudiced against any people, specifically the First Peoples. (Individual)*

There were no demographic differences of note when considering overall support for recognition.

The highest level of support was for amendment of the existing Constitution, rather than a new constitution or recognition in normal law. Regarding the nature of the change, a wide range of responses were received, from the symbolic to the substantive. The strongest call was for substantive over symbolic change.

*The powerful symbolism of recognising Aboriginal and Torres Strait Islander peoples in the Constitution must be accompanied by substantive changes to the legislative power of the Commonwealth to prohibit discrimination and make laws for the benefit of Aboriginal and Torres Strait Islander peoples... Without these factors constitutional recognition risks being perceived as an empty gesture and falling short of its potential to effect genuine and positive change. (Royal Australian and New Zealand College of Psychiatrists)*

*[Recognition] must be substantially significant that it shakes up the way law and policy making is made in this country, in other words a radical change need a radical solution. (Individual)*

Three key suggestions for substantive reform emerged when investigating overall preferences for change, before reviewing the specific proposals put forward by the Council. The most significant call was for a Treaty/Treaties or an agreement-making power, which may sit in and/or outside of the Constitution. In advocating for a Treaty or similar, both legal and moral dimensions were raised. Specifically, there was strong support for a Treaty to set the legal framework for Aboriginal and Torres Strait Islander peoples moving forward, and for a Treaty to acknowledge past injustices thereby creating an enabling environment for self-determination.

*Properly concluded Treaties reflecting the past, settling the past, securing the future, writing a new future, a roadmap forward is the only answer. (Individual)*

*A Treaty between the Commonwealth of Australia and the numerous Indigenous Nations is the only legally and morally recognisable way of containing the free, prior and informed consent required for a long-lasting agreement by all peoples on this great continent. (Individual)*

There was also a clear desire for Aboriginal and Torres Strait Islander peoples to have a stronger voice on Indigenous affairs. However, when exploring general preferences for change, little detail regarding the nature of this voice (including membership or powers) was provided.

*Such an amendment could ensure that the views of First Peoples are heard by lawmakers and could help Parliament to enact better and more effective laws. (Individual)*

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Reform via a Declaration of Recognition also received some support. This view noted a Declaration is an appropriate place for potentially emotive language, and argued this option carried a greater chance of successful implementation compared to a referendum to amend the Constitution.

*Recognition demands a powerful and poetic statement that captures the imagination. An Australian Declaration of Recognition would have the kind of cultural significance for Australians that the Declaration of Independence has for Americans – even though it is not part of the Constitution of the United States. (Australian Catholic University)*

Two key reasons for opposition to recognition arose. Firstly, some argued constitutional recognition is a mistake in an environment where sovereignty remains unceded. This view was most common among those who demanded substantive change in the lives and rights of Aboriginal and Torres Strait Islander peoples, not just in relation to their treatment in the Constitution. Secondly, the singling out of Aboriginal and Torres Strait Islander peoples in the Constitution was seen by others as undermining efforts to achieve equality in Australia.

*Whilst recognising that our Sovereignty has never been ceded, do we put this constitutional reform debate on pause until we deal with that question? (Individual)*

*My [opposition] is based on the clear principle of opposition to racism in all forms. That includes purported positive discrimination as well as negative discrimination. (Liberal Democratic Party)*

When considering the appropriate placement for recognition overall, the strongest support was for inclusion in a Preamble. A Preamble was considered to be the place of highest visibility and importance, and therefore appropriate for a reform of such significance as recognition.

## 4. PREFERRED PROPOSALS FOR RECOGNITION

The Council's Discussion Paper outlined five key proposals for constitutional reform, and all submissions were invited to express their support for or opposition to these measures.

The key proposals included:

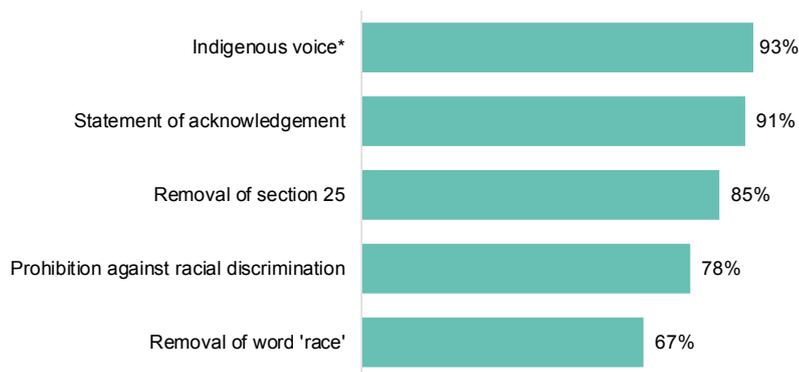
- inserting a statement acknowledging Aboriginal and Torres Strait Islander peoples as the First Australians, either inside or outside the Constitution
- amending or deleting the 'race power', section 51 (xxvi), and replacing it with a new head of power
- inserting a constitutional prohibition against racial discrimination
- providing for an Indigenous voice to be heard by Parliament, and for the voice to be consulted on legislation and policy that affects Aboriginal and Torres Strait Islander peoples
- deleting section 25.

A large majority of submissions supported all five of these key proposals. With strongest support, more than nine in ten (93%) backed the inclusion of an Indigenous voice when Parliament and government make laws and policies about Indigenous affairs. A total of 77% supported the creation of a group providing this voice under the Constitution.

A statement of acknowledgement of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia also received significant backing, with 91% supporting this measure – 86% in favour of a statement within the Constitution and 5% in favour of a statement in normal Australian law.

Changes to the 'race provisions', section 25 and section 51 (xxvi), also received strong support with 85% of submissions supporting the removal of section 25 and more than two in three (67%) supporting removal of the word 'race' from the Constitution. A further 78% supported the insertion of a constitutional prohibition against racial discrimination.

Figure 4 – Preferred proposals for recognition



\*Indicative of support for an Indigenous voice in general, rather than creation of a group under the Constitution

Quantitative analysis revealed that no respondents supported only a statement of acknowledgement, only an Indigenous voice in parliament, only the deletion of section 25 or only the insertion of a prohibition against racial discrimination. This reveals the extent of support for a broader package of reforms to achieve recognition for Aboriginal and Torres Strait Islander peoples.

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It should be noted that respondents were asked to consider each proposal individually, rather than in bundles, and without consideration of the potential risks associated with each proposal. This may have created a bias towards support for the proposed measures.

## 5. PREREQUISITES FOR RECOGNITION

The submissions raised a number of key considerations for the Referendum Council on the journey towards constitutional recognition.

### Consultation with Aboriginal and Torres Strait Islander peoples

The critical importance of consultation with Aboriginal and Torres Strait Islander peoples was strongly stated. There was significant deference to the opinion of Aboriginal and Torres Strait Islander peoples throughout the submissions. Many of the submissions, while supportive of one or more of the key proposals, declined to provide more detail, noting the model and its specifics should be the preserve of Aboriginal and Torres Strait Islander peoples themselves.

*The model must come from the people, it must not be imposed by politicians. The model must arise out of a genuine negotiated agreement between Indigenous peoples and the Australian government.* (Individual)

*Indigenous views must be paramount in determining what forms of constitutional recognition to adopt.* (The University of Western Australia)

*I would prefer Aboriginal and Torres Strait Islander people to say what the change should look like.* (Individual)

### Substantive rather than symbolic change

The desire to see this process lead to substantive rather than symbolic only change was also clear. While many were supportive of one or several mechanisms for constitutional recognition, much of the detailed feedback noted these changes must be placed within a wider agenda of substantive change to be acceptable.

*NSWALC's position on reform to the Australian Constitution [is that it] should be meaningful and not result merely in symbolic recognition.* (NSW Aboriginal Land Council)

*It must involve substantive change which will prevent First Nations' rights being eroded without their prior, free and informed consent.* (Individual)

*A move beyond mere symbolism and tokenism.* (Individual)

### Consideration of the chances of success

The conservative track record of Australia in relation to constitutional change was a key concern, particularly throughout organisational submissions. Many emphasised the need to develop a pathway for change with a strong likelihood of success, bi-partisan support and an accompanying plan for engaging the Australian population to support a successful outcome. Concern was expressed regarding the potential damage wrought by an unsuccessful attempt at constitutional recognition – for Aboriginal and Torres Strait Islander peoples specifically, and equality generally.

*Given the political difficulties involved in amending the Australian Constitution, it is vital to consider possibilities for recognising Aboriginal and Torres Strait Islander peoples by way of small-c constitutional change.* (Individual)

### The diversity of Aboriginal and Torres Strait Islander peoples

The submission questions were phrased in relation to Aboriginal and Torres Strait Islander peoples as a collective group. However, the diversity of Aboriginal and Torres Strait Islander peoples was considered by many as both fundamental to success (to reach agreement on the model across the many and varied nations), as well as in achieving a right and just outcome.

*Acknowledge them as First Nation peoples, represented by many nations.* (Individual)

*Do Aboriginal people want to be classified as one entity or recognition for each different nation? This should be decided by their selected representatives.* (Individual)

### **Fairness and equality, including acknowledging Aboriginal and Torres Strait Islander peoples**

The importance of the Constitution reflecting the values of fairness and equality was broadly emphasised. Singling out the specific experience and value of Aboriginal and Torres Strait Islander peoples was considered key by most to achieving an acceptable level of equality in Australia.

*Changes should include reference to Aboriginal and Torres Strait Islander peoples as traditional owners of the land, having equal rights and access to same opportunities as other races. (Individual)*

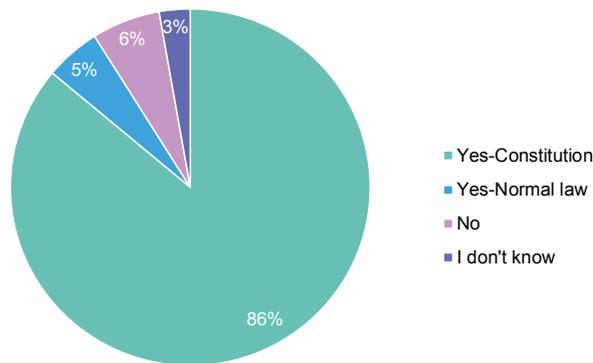
## 6. A STATEMENT ACKNOWLEDGING THE FIRST PEOPLES OF AUSTRALIA



According to the Council’s Discussion Paper, a statement of acknowledgement is a statement of facts, and several suggestions for the statement’s content were provided. The Discussion Paper also referred to the Expert Panel’s recommendation that a statement of acknowledgement be included as an introduction (preamble) to a proposed new law-making power. Another suggestion was that a statement of acknowledgement could be enshrined in a Declaration outside the Constitution, perhaps in legislation enacted by all parliaments – federal, State and Territory – at the same time to create a national defining moment of reconciliation. This path would not require a referendum.

The great majority of submissions (86%) supported a statement of recognition within the Constitution, with 5% preferring a statement in normal Australian law. Only 3% were in opposition to a statement at all, with 6% unsure. Those aged 35 or under were slightly more likely to support a statement of acknowledgement in the Constitution.

Figure 5 – Should we have a statement that acknowledges the First Peoples of Australia?



n=1,042

Those in favour of a statement cautioned that a statement on its own falls short of the recognition required. This prominent voice wanted any statement of acknowledgement to be framed as one step on the recognition pathway, that must be accompanied by more substantive changes.

*The acknowledgement in no way should undermine future Treaty negotiations.* (Caritas Australia)

*We believe a statement of acknowledgement in the Constitution falls short of what is required for meaningful and purposeful change.* (Individual)

A small number of key legal organisational submissions raised concerns related to introducing symbolic, potentially legally ambiguous language into the Constitution. They argued a Declaration of Recognition in normal law is a more appropriate approach to achieving the outcomes a statement of acknowledgement in the Constitution may deliver.

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*Any statement that is rich enough to capture the deep and profound significance of these issues will invariably contain the kind of language that is susceptible to legal uncertainty. (Australian Catholic University)*

A small minority were opposed to any form of statement, believing singling out Aboriginal and Torres Strait Islander peoples undermines the goal of equality for all Australians, regardless of their race or ethnicity.

The views related to the statement's content were consistent regardless of the preferred placement – in the Constitution or in normal law. The majority emphasised the urgent need to correct the facts – clearly acknowledging Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia. There was also some support for recognising the complexity and highly successful nature of Aboriginal and Torres Strait Islander societies at the point of occupation (as evidenced by the 60,000-year history of the various nations).

*This change should acknowledge [Aboriginal and Torres Strait Islander peoples] as First Peoples and it should convey the continuity of Aboriginal and Torres Strait Islander cultures as a significant part of our nation's identity. (Individual)*

*We should acknowledge the long and rich history of our First Nations people. (Individual)*

*We must eradicate the idea that Aboriginal society was unsophisticated and primitive. (Individual)*

There was also a clear desire to acknowledge the importance of enduring languages, cultures, and connection to land and country among Aboriginal and Torres Strait Islander peoples today – and the contribution of these to contemporary Australian society. For example, many noted the significant cultural contribution of the First Peoples of Australia to our current national identity, and the important role Aboriginal and Torres Strait Islander peoples have played and continue to play in caring for country.

*Acknowledge the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters. Respect the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples. (Individual)*

*Acknowledge that Aboriginal and Torres Strait Islander people occupied and looked after this land for millennia before white Australians arrived. (Individual)*

*They lived in harmony with the land for over sixty thousand years, and never dramatically altered its natural state. (Individual)*

Correcting the record regarding occupation had strong support and implies an acknowledgement of past wrongs. However, there was broad support for more explicitly outlining these past, and contemporary, harms experienced by Aboriginal and Torres Strait Islander peoples. This view primarily emphasised past wrongs, namely the process of occupation as invasion or dispossession, although there was also a strong focus on acknowledging the more recent history of injustice, including the Stolen Generations, rates of incarceration of Aboriginal and Torres Strait Islander peoples and ongoing systemic discrimination. This commonly held view was also tempered by some caution regarding the use of highly emotive and potentially 'deal-breaking' language regardless of being factually correct.

*We have to acknowledge this country was taken over by invasion and the treatment of the legitimate inhabitants was, and to some extent still is, disgraceful. (Individual)*

*Acknowledge the First Nations people were subjected to colonisation, resulted in genocide and racist government policies, experience intergenerational trauma, which affects their physical psychological and spiritual wellbeing... (Individual)*

*The statement should be a statement of redress, avoiding what are seen as deal breaking and emotive terms, like massacre and invasion (which are factually correct but not particularly strategically useful) by acknowledging the loss incurred by First Australians as a consequence of colonisation. (Individual)*

Finally, a theme emerged regarding Aboriginal and Torres Strait Islander land rights. Most suggestions for the statement used legally ambiguous concepts such as custodianship, guardianship and Traditional Ownership. A small number contained specific suggestions with legal effect for formalising ownership arrangements, for example based on unceded sovereignty or native title law.

*It should say that First Peoples are the rightful guardians of this land. (Individual)*

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*That they are the custodians of land and water in Australia.* (Individual)

There was overwhelming support for placing any constitutional statement of acknowledgement within a Preamble. This was based on the view a Preamble sets the spirit and aspiration for the document, and/or that placement in a Preamble implies very high significance of the content.

*At the very beginning so it is loudly proclaimed.* (Individual)

*At the very start, as it is the most important thing.* (Individual)

Those in opposition to the placement in a Preamble argued a statement should be inserted into a revised head of power, providing a guide to the purpose of the provision. Others feared placement in a Preamble rather than the body of the Constitution could be construed as tokenistic.

*The Law Council supports the insertion of new preambular paragraphs as part of a new head of power to make laws with respect to Aboriginal and Torres Strait Islander peoples. The Law Council is of the view that this has the advantage of avoiding the political difficulties of seeking to insert a new preamble to the Constitution which addressed only the historical experiences and aspirations of Aboriginal and Torres Strait Islander peoples. Additionally, it avoids the challenges of developing a values statement in the preamble which may give rise to divisive debate.* (The Law Council of Australia)

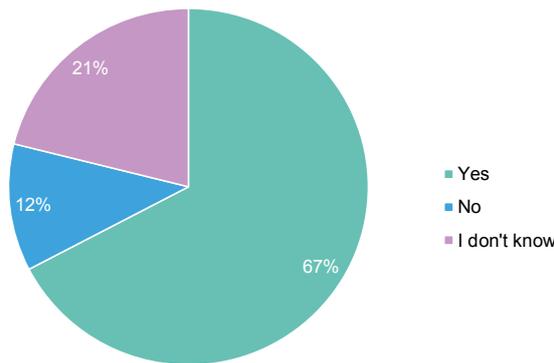
## 7. THE ‘RACE POWER’



Known as the ‘race power’, section 51 (xxvi) is the head of power that allows the Commonwealth government to make laws regarding Aboriginal and Torres Strait Islander peoples on issues such as native title and heritage protection. The Expert Panel and Joint Select Committee both made the recommendation to repeal section 51(xxvi), yet retain a power to enable the Commonwealth government to legislate for Aboriginal and Torres Strait Islander peoples.

Two in three submissions (67%) supported removing the word ‘race’ from the Constitution. Around one in five (21%) were unsure, and only 12% were in opposition to the proposed changes to section 51 (xxvi). Older respondents (those aged 66 and over) were more likely to support the removal of the word ‘race’.

Figure 6 – Should the word ‘race’ be taken out of the Constitution?



n=1,032

When asked to provide further comment, the majority described the ‘race power’ as outdated, discriminatory and having no place in modern Australian society.

*Section 25 and 51 should be completely removed as they allude to race, a non-existent ideology which stands against the inclusiveness of all peoples. (Individual)*

*Race should be removed where it has powers that discriminate in a negative way. (Individual)*

Rationale for retaining ‘race power’ provisions (12% of submissions) included concern about the potential legal ramifications of amending this section.

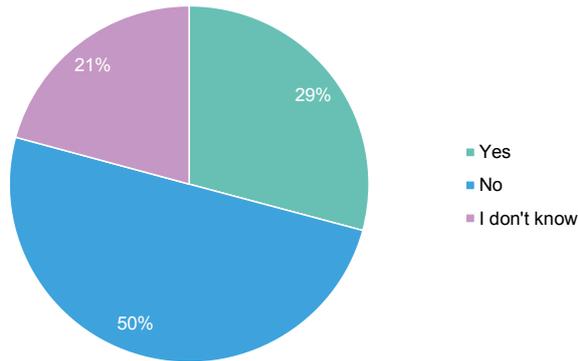
*My suggestion is that the text of the Constitution be left as is and no changes made to section 51... These broad powers allow Parliament to respond flexibly to changing circumstances, for all minorities and all citizens, and should be left as is. (Individual)*

Opinion was divided regarding whether government should retain the power to make special laws for Aboriginal and Torres Strait Islander peoples, with half indicating they were not supportive.

Only 29% indicated support for an amended power and 21% were unsure. However, this division may reflect the question construction, sequencing and the complex nature of legal implications associated with removing or amending the ‘race power’.

*I am not sure how to answer this one. While there should be no place for laws based on race in the Constitution, powers for special laws to ensure fair and just treatment of our first peoples should be retained (e.g. regarding native title and Indigenous heritage). (Individual)*

Figure 7 – Should the Australian Parliament keep the power to make special laws for Aboriginal and Torres Strait Islander peoples?



n=1,021

## 7.1. SUGGESTIONS FOR AMENDMENTS TO THE ‘RACE POWER’

Three primary suggestions for amendment or removal of the ‘race power’ were made:

- remove the word ‘race’ but retain power
- include a prohibition to stop racial discrimination
- remove the ‘race power’ entirely.

Each of these is explored in further detail below.

### 7.1.1. Remove ‘race’ but retain power

The most significant support was for replacing the word ‘race’ with ‘Aboriginal and Torres Strait Islander peoples’. This was most commonly contingent upon adding a limit to the power to legislate only for the benefit or advancement of the Aboriginal and Torres Strait Islander peoples. Many referenced the recommendations of the Expert Panel and the Joint Select Committee in support of this position.

*There should be a provision to make laws for Aboriginal and Torres Strait Islander peoples – the discussion paper makes the case well. However, any such laws need to be accompanied with safeguards to stop racial discrimination. (Individual)*

Consultation with Aboriginal and Torres Strait Islander peoples underpinned support for this view, given Parliament’s definition of what is beneficial may differ from that of Aboriginal and Torres Strait Islander communities.

*I can see that special laws may need to be made for issues such as native title, but I only support keeping this power if there are very strong protections to prevent this from being used against the interest of Indigenous people and this needs to be assessed by Indigenous people themselves, not imposed from outside. (Individual)*

Key legal and Aboriginal and Torres Strait Islander organisations also cautioned amendments to the ‘race power’ would need to be carefully considered – to minimise risk of invalidating current, or future, Commonwealth laws with respect to Aboriginal and Torres Strait Islander peoples, including advancements made under the Native Title Act 1993 (Cth).

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*Whilst it does not appear that there are any serious suggestions that the race power should be removed altogether (as this would affect laws around Native Title and may hamper Commonwealth's ability to work for the advancement of indigenous peoples). ACL recommends caution with respect to proposing any change whatsoever to section 51(xxvi). (Australian Christian Lobby)*

*The Native Title Act and the Racial Discrimination Act were enacted by the Commonwealth pursuant to that power... if the constitutional power to make laws for any race was removed, thought would need to be given to how to retain the rights afforded in the Native Title Act without further derogation... (Individual)*

There was strong backing for amending section 51 (xxvi) to include a non-discrimination clause. For many, support for amending the 'race power' was again contingent on limiting Parliament's power to ensure new laws do not adversely affect Aboriginal and Torres Strait Islander peoples, by including a constitutional prohibition against racial discrimination. The insertion of a new 'section 116A', as proposed by the Joint Select Committee, was often referenced.

*The Australian Constitution in its current form retains discriminatory clauses which are sources of concern to Australian people and inconsistent with international human rights principles. The Australian Constitution must enshrine the rights of all Australian citizens... The repeal of problematic "race" provisions from the Constitution and the inclusion of a new section expressly prohibiting discrimination on the basis of race would ensure the universal human right. (Amnesty International)*

### 7.1.2. Remove the 'race power'

Some submissions called for the 'race power' to be removed from the Constitution altogether, to avoid further discrimination or racial segregation. The 2007 Northern Territory National Emergency Response was cited by some as an example of why this power should be removed.

*While there is some scope for community laws within Aboriginal and Torres Strait Islander communities (or other communities) these laws should not contravene overall governing laws of Australia. There shouldn't be discriminating laws that apply only to Aboriginal or Torres Strait Islander people such as in the [Northern Territory] Intervention. (Individual)*

As discussed, while some urged for removal to be accompanied by the inclusion of a prohibition against discrimination, many provided no suggestion as to appropriate replacement powers.

A minority called for the removal of section 51(xxvi) on the grounds that Australian law is based on the principle of fairness and equity. They argued all Australian citizens should be equal under the law, with no individual race or group receiving special consideration in the Constitution.

*All Australians should be governed equally, subject to the same laws regardless of race. (Individual)*

## 8. A GUARANTEE AGAINST RACIAL DISCRIMINATION



In 2012, the Expert Panel recommended the following 'Prohibition of racial discrimination' clause be inserted into the Constitution as 'section 116A':

*"(1) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.*

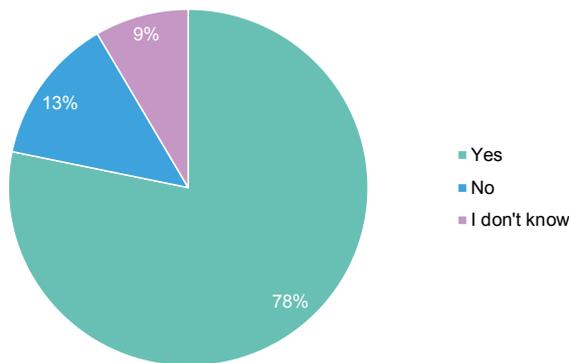
*"(2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group."*

The Referendum Council asked Australians to consider the proposal to insert a guarantee into the Constitution, to prevent the Federal Parliament from discriminating against people of any race or cultural background.

The inclusion of a constitutional guarantee against racial discrimination was supported by nearly four in five (78%). Only 13% were opposed to the proposal and a further 9% were unsure. Women, and those aged 35 or under were more likely to be supportive of the insertion of a guarantee.

Among those supportive of a guarantee, 96% supported extending the guaranteed protection to all Australians. Only 3% favoured the introduction of a guarantee against racial discrimination for Aboriginal and Torres Strait Islander people only. Support for the guarantee was always coupled with support for at least one other proposed reform, indicating the guarantee is seen as part of a package of reforms for recognition.

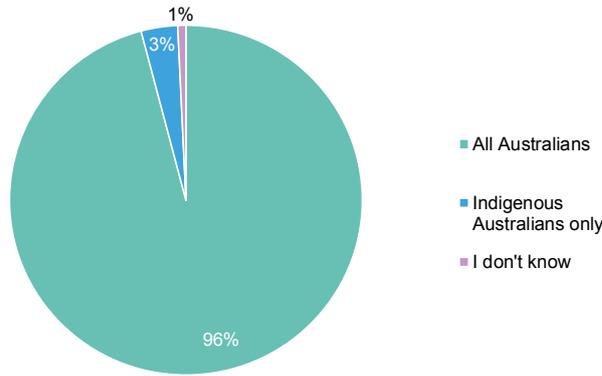
Figure 8 – Do you think that a guarantee against racial discrimination should go in the Constitution?



n=1,043

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Figure 9 – Should the guarantee protect all Australians against racial discrimination, or only Indigenous Australians?



n=806

The complexity of issues related to the ‘race power’ extended into ideas about a guarantee, including its wording and placement. The potentially contradictory relationship between changes to the ‘race power’ and a guarantee against racial discrimination, depending on how ‘race’ is interpreted, were most clearly addressed by key organisations including the Law Society of New South Wales, the Law Council of Australia, the Royal Australian and New Zealand College of Psychiatrists (RANZCP), and Amnesty International.

*The RANZCP support the removal of section 51(xxvi) ... and the insertion of a new clause allowing the Parliament to make laws for the benefit of Aboriginal and Torres Strait Islander peoples. This is conditional on the inclusion of a constitutional prohibition against racial discrimination. (Royal Australian and New Zealand College of Psychiatrists)*

These groups supported the introduction of ‘section 116A’ as proposed by both the Expert Panel and Joint Select Committee – to not only protect the rights of Aboriginal and Torres Strait Islander peoples, but also increase broader human rights protections for all Australians. They emphasised any changes to the ‘race power’ must be accompanied by such a clause. Some submissions reflected on the complexity inherent in supporting the removal of ‘race’, while simultaneously being in favour of protection against racial discrimination.

*... Amnesty International supports a new section 116A as recommended by the Expert Panel and the progress report of the Joint Select Committee... The inclusion of a section which prohibits discrimination would further strengthen Australia’s commitment to realising the principles of the UDHR [United Nations Declaration on Human Rights], international human rights treaties and the Declaration on the Rights of Indigenous Peoples. The inclusion of new section 116A would not only represent a demonstrated commitment to Indigenous Peoples’ rights in Australia, but would increase broader human rights protections for all Australian citizens in line with Australia’s international human rights commitments. (Amnesty International)*

Individuals also strongly supported a racial non-discrimination provision, with most in favour of the principle of racial equality for all Australians. A minority of supporters proposed the new constitutional guarantee should focus only on Aboriginal and Torres Strait Islander peoples. Others proposed that further measures, such as a Bill of Rights, were required to move forward from past wrongs and ensure all citizens are treated fairly by the Australian Government.

*I believe that Australia requires a constitutional Bill of Rights. The intervention into Aboriginal communities in the Northern Territory was effected only by legislating an exception to the Racial Discrimination Act. Clearly legislative measures are insufficient protection against a Commonwealth inclined to intervene in such a way. (Individual)*

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*A high level declaration, similar to that used in the Universal Declaration of Human Rights would be a holistic way to introduce the topic, and then drill down to indigenous rights. (Individual)*

Organisations, including the Law Council of Australia, proposed a national charter or Bill of Rights would provide an appropriate legal framework to ensure laws for Australian citizens are consistent with human rights.

*The Law Council supports the development of a charter or bill of rights at the federal level... In particular...a 'dialogue' model of a Charter of Rights or a Human Rights Act. This Charter would facilitate a constructive dialogue between the courts and the parliament about whether Australian laws are consistent with human rights, and if not, whether they remain appropriate for the Australian community. (The Law Council of Australia)*

*A guarantee against racial discrimination should form part of a Bill of Rights for Australia. CLA believes the question of 'not enough support' does not arise - all consultations at state and federal levels have shown overwhelming support for such an instrument ... such a Bill of Rights need not form part of the Constitution. CLA remains open to other models for enshrining a Bill of Rights in Australia. (Civil Liberties Australia)*

Among those opposed to a guarantee, some argued existing laws are sufficient, or suggested strengthening existing laws, while others expressed concern that a legal guarantee is not enforceable.

*No law will stop racial discrimination. (Individual)*

*A government cannot guarantee a stop to racial discrimination. (Individual)*

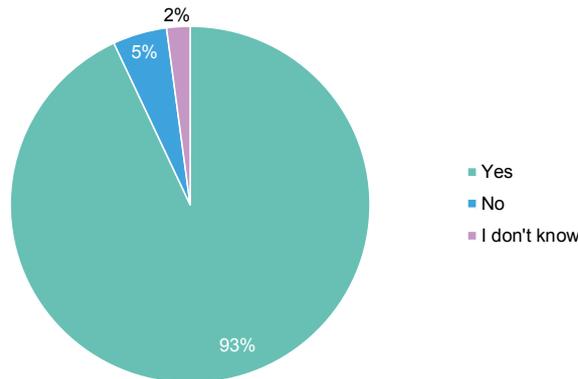
## 9. AN INDIGENOUS VOICE



The Discussion Paper notes establishing an Indigenous voice is about ensuring better political representation for, and consultation with Aboriginal and Torres Strait Islander peoples, especially when government and Parliament make decisions about Indigenous affairs. Although Australia has acceded to the UN Declaration on the Rights of Indigenous Peoples, which “emphasises the importance of genuine participation...in political decisions”<sup>2</sup>, no formal processes have yet been implemented to facilitate this voice. Aboriginal and Torres Strait Islander peoples have long advocated for a stronger voice, especially in the Australian system of representative democracy, where the voice of minority populations cannot always be heard.

A large majority of structured submissions (93%) supported Aboriginal and Torres Strait Islander peoples having a say when Parliament and government make laws and policies about Indigenous affairs.

Figure 10 – Do you think Indigenous people should have a say when Parliament and government make laws and policies about Indigenous affairs?



n=1,048

One submission reflected on a number of reasons for supporting this change:

*Parliament does not listen to our concerns and aspirations. This is true at all levels of government. This is why Indigenous people should be guaranteed a say in Parliament's laws and policies that affect us...It's not just about what's fair, it is also about making good policy and achieving good outcomes. Ensuring First Nations voices are heard would help ensure that laws and policies for Indigenous affairs are more effective and better accepted by communities. (Individual)*

No respondents supported the establishment of an Indigenous voice only (to the exclusion of all other proposals for change). This again reinforces the overall preference for a package of reforms to be made to the Constitution.

Of the submissions not in support of an Indigenous voice to be set up under the Constitution, a primary reason included concern the establishment of special provisions for Aboriginal and Torres Strait Islander peoples may contribute to racial segregation (as reflected throughout the submissions). There was also a

<sup>2</sup> p. 11, Referendum Council, *Discussion Paper on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples*, October 2016

concern that if a mechanism established under the Constitution to achieve an Indigenous voice were to be unsuccessful – with some submissions reflecting on issues associated with the Aboriginal and Torres Strait Islander Commission (ATSIC) – there would be no flexibility to make changes to the mechanism or to adopt an alternative mechanism.

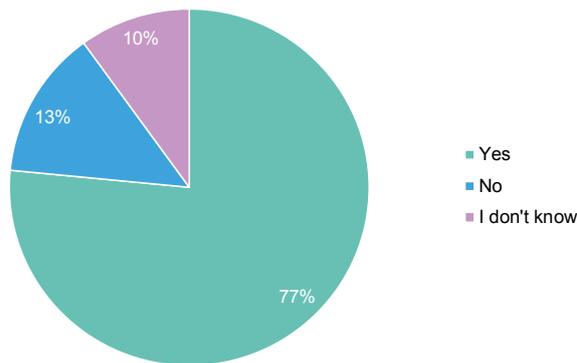
## 9.1. SUGGESTIONS FOR THE INDIGENOUS VOICE

There are a number of ways a stronger Indigenous voice could be achieved via constitutional change. The structured survey asked respondents to comment on a specific proposal for a new Indigenous group to be set up under the Constitution, and there were also other mechanisms suggested.

### 9.1.1. An Indigenous group

The specific proposal for a new Indigenous group to be set up under the Constitution was supported by a majority (77%) of structured submissions. Those aged 35 or under were more likely to support the creation of a group under the Constitution.

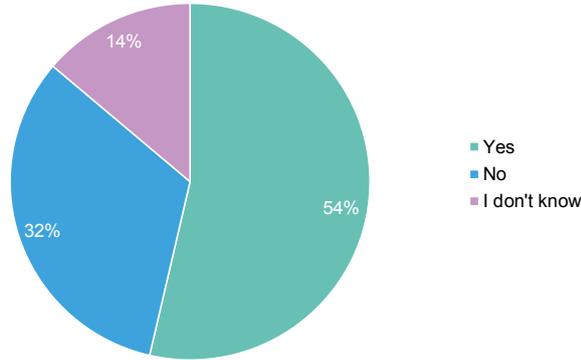
Figure 11 – Should a new Indigenous group be set up under the Constitution to give advice and make sure Indigenous people have a voice in political decisions that affect them?



n=1,031

Those respondents in support of the specific proposal (n=789) were asked if it was worth creating a group that could give advice only, and not have the power to block new laws. Over half of all submissions (54%) agreed that it was worth it, while nearly a third (32%) disagreed. While those aged 35 and under were more likely to be supportive of a constitutionally created group, they were also more likely to be in favour of a group even with advisory only powers.

Figure 12 – Is it worth creating the new group if it can only give advice and does not have the power to block new laws?



n=761

When asked what the new group should look like, respondents commented on a number of aspects including membership composition, governance arrangements, and the purpose and powers of the group.

### Purpose

Supporters called for the group to elevate the voice of Aboriginal and Torres Strait Islander peoples in Parliament, in particular around Indigenous affairs. There was strong support for the principle of self-determination. This was consistent regardless of views on the group’s powers (i.e. having an advisory role versus the ability to block laws).

*We need to elevate Indigenous Australians to the rightful place.* (Individual)

*Regardless of whether or not Aboriginal and Torres Strait Islanders [sic] are given the power to block new laws, it’s a starting point for their voice to be heard and to represent the needs of their communities.* (Individual)

### Membership

There was strong support for the group to comprise Aboriginal and Torres Strait Islander peoples only (again, in line with the principle of self-determination). The Importance of demographic diversity – including by gender, age, state/territory, metropolitan/rural/remote location, and the various Aboriginal and Torres Strait Islander Nations – was clearly emphasised. Many respondents wanted to see a mix of Elders, leaders, prominent people and influencers in Indigenous affairs; while at the same time maintaining genuine community representation, with members acting as a conduit between their local communities and government.

*The risk with any advisory group is that one voice can dominate and not be representative of broader and divergent views.* (Individual)

*[The group should be made up of] people from all walks of life.* (Individual)

*It should in some way represent the many countries that make up Indigenous Australia.* (Individual)

### Powers

Over half (54%) of all supporters thought it was worth creating a group with an advisory role only. Some argued this facilitated a greater Indigenous voice, while also balancing the need to maintain the sovereignty of the Australian Parliament.

*“The constitutional establishment of an Indigenous advisory body would require Parliament to consider whether Indigenous people themselves believe that a proposed law discriminates against*

*them. In this way, Indigenous people become incorporated into the process...without undermining the sovereignty of Parliament. (Australian Catholic University)*

Among supporters who only backed the creation of a group with the power to block laws, there was a view that an advice only role risked being tokenistic. There was also support for the group to exist independently of political motivations.

*Not advice [only]. We need to get serious about this and work with Aboriginal people. They must be a very real part of any decisions made about them. (Individual)*

Some argued the group should have an even greater role in facilitating change and embedding self-determination, including the power to create (not just block) new laws.

*The group must have the power to make change. (Individual)*

## Governance

There was a strong preference for members to be elected at the local level by Aboriginal and Torres Strait Islander communities, rather than being appointed by communities or government. This was, again, about ensuring genuine community representation.

*Representatives...who...tap into local Aboriginal networks. (Individual)*

*Having the body be democratically elected would present significant benefits to ensuring the broader Aboriginal and Torres Strait Islander population have input. (Royal Australian and New Zealand College of Psychiatrists)*

### 9.1.2. Other mechanisms

Feedback on other mechanisms for achieving an Indigenous voice was not explicitly invited in the structured online survey. Alternative mechanisms were therefore primarily suggested by those in opposition to the specific proposal for a new Indigenous group to be set up under the Constitution, or as part of free form submissions.

Suggestions for alternative mechanisms included a third (Indigenous) House of Parliament or a dedicated number of seats in existing Houses of Parliament. Those in favour of an Indigenous House of Parliament occasionally referenced the Sami Parliaments in Sweden and Norway which are publicly elected and have responsibility for decisions made in relation to Sami (Indigenous) affairs. Those in favour of a dedicated number of seats in existing Houses of Parliament occasionally referenced the approach taken in New Zealand where Maori people can choose to enrol in either Maori or main electorates, and the number of people enrolling in Maori electorates determines the number of dedicated Maori seats in Parliament (currently 7 seats).

*Our nations are all different and limited representation will be tokenistic...the only real way to solve this would be a third house of Parliament. (Individual)*

*Allocated seats for Aboriginal and Torres Strait Islander people in the Federal Parliament would provide, as per the New Zealand model, a legitimate Indigenous voice. (Individual)*

Ultimately, there was strong support for Aboriginal and Torres Strait Islander peoples to be consulted in the establishment of an Indigenous voice in parliament – to ensure the mechanism was appropriate and achieved its intended objectives.

*Ask the Indigenous community what they want. (Individual)*

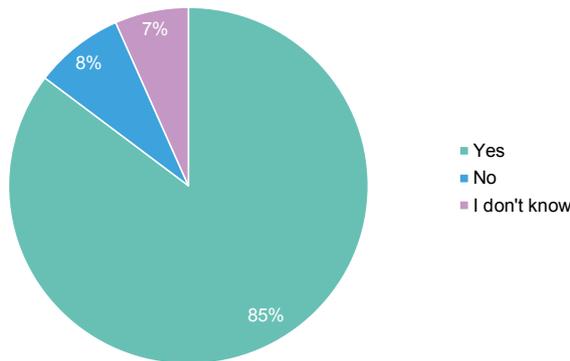
## 10. SECTION 25



Section 25 of the Constitution “contemplates that States might pass a law banning people from voting at a State election, on the basis of their race”.<sup>3</sup> Practically speaking, section 25 is considered a ‘dead letter’, as the Racial Discrimination Act takes care of State voting laws and the section itself provides a disincentive to race-based voting legislation by ensuring a reduction in representation at the Federal level if this legislation were to be enacted. However, calls for the removal of section 25 have consistently been made as its existence means the Constitution contemplates race-based voting, which is broadly considered an outdated concept.

The broad support for the removal of section 25 was confirmed in the structured submissions, with a large majority (85%) supporting its removal. Only 8% did not support its removal and 7% indicated they were unsure. Women, respondents aged 35 or under and those who did not identify as Aboriginal and Torres Strait Islander were more likely to support this proposal.

Figure 13 – Should we delete section 25?



n=1,042

Reasons for support strongly reflected a desire to modernise the Constitution – to create a document in line with the values of contemporary Australian society. Removing a discriminatory power was also seen as a symbolic gesture to address the wrongs of the past, and as a protection against the discriminatory power being used in the future. Overall, there was a good understanding that the provision had no current legal effect, but nonetheless there was a desire to ‘tidy up’ the Constitution.

*This section is a legacy from the era of the White Australia Policy and it should be removed as part of the package of changes necessary to finally eliminate racially discriminatory provisions from the Constitution. (Caritas Australia)*

*This section is outdated. In the words of one witness at the Committee hearings in September 2015: section 25 is a “vestige of racial concepts and practices that have no place in contemporary Australia”. (Australian Christian Lobby)*

<sup>3</sup> p. 11, Referendum Council, *Discussion Paper on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples*, October 2016

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*Removing [section 25] sends a clear message that Australia is moving forward.* (Individual)

When asked whether there was any point keeping section 25, no clear arguments were presented for maintaining the section.

No respondents supported the deletion of section 25 only (to the exclusion of all other proposals for change). Once more, this reinforced the overall preference for a package of reforms to be made to the Constitution.

## 11. ALTERNATIVE OPTIONS FOR RECOGNITION

Several other options for substantive reform emerged when investigating overall preferences for change, beyond the specific proposals put forward by the Referendum Council. The strongest level of support was for a Treaty/Treaties, or to strengthen the Constitution to better reflect Australia's commitments under international law.

### 11.1. SUPPORT FOR A TREATY



In the context of constitutional reform, reference to a Treaty, or Treaties, generally relates to an agreement between Indigenous people and government that has legal effect. In the United States, New Zealand and Canada, Treaties form the basis for relationships between governments and First Peoples. Both the Expert Panel and Joint Select Committee acknowledged strong support for a treaty, while noting that such substantial reform may require a longer timeline and more national discussion.<sup>4</sup>

The proposal for a Treaty or an agreement-making power was not put forward as a specific reform proposal for comment. Nonetheless, calls for a Treaty, Treaties, or an agreement-making power frequently emerged as a preferred option for reform. There was strong support for a Treaty to provide legal certainty for Aboriginal and Torres Strait Islander peoples moving forward, and for a Treaty to acknowledge past injustices.

*It should state that it is now the intention to invite the members of the pre-1770 Indigenous societies to unite with Australians under the Australian Constitution, that is part of the treaty process. They were excluded from the start and that intention cannot be changed just by adding some little clause into an exclusionary legal foundation. (Individual)*

Many were also of the view that a Treaty process should be the precursor to any constitutional reform, or at the very least occur simultaneously to constitutional recognition.

*A Treaty recognising Aboriginal and Torres Strait Islander peoples and then constitutional reform. (Individual)*

*Recognition in the Constitution is important but should not be presented as the only legal change needed. It would be good if the Recognise team could place constitutional change in relation to Treaty. Both are necessary... (Individual)*

A minority called for a Treaty as the only legitimate option for constitutional reform. Those of this view were unsupportive of all other proposals put forward.

*Treaty. There is nothing other than a Treaty with First Nations People that will right the wrongs of the past and prove to everyone that respect is returned to the original inhabitants and caretakers of this wonderful country. (Individual)*

Some who favoured a Treaty also acknowledged such reform is inherently complex and proposed an agreement-making power as an interim step. Treaty between the Commonwealth and Aboriginal and Torres Strait Islander peoples remained the goal of constitutional reform for this group.

Few submissions provided specific comment on what a Treaty would like or what form it would take. However, several referenced international jurisdictions with existing Treaty arrangements with their

<sup>4</sup> Referendum Council, *Discussion Paper on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples*, October 2016

Indigenous populations, such as New Zealand, Canada and the United States of America as models for Australia to emulate.

*Our First Nations peoples should have powers to make certain laws pertaining to them alone, like the Maori and the people of the Canadian First Nations.* (Individual)

*Treaties ... are accepted around the world as the means of reaching a settlement between indigenous peoples and those who have settled their lands. Treaties can be found in countries such as the US, Canada and New Zealand... Australia is the exception. We are now the only Commonwealth nation that does not have a treaty with its indigenous peoples.* (Individual)

## 11.2. DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

There was also some support for constitutional change to reflect Australia's commitments under international law. The United Nations Declaration on the Rights of Indigenous Peoples (the UN Declaration) was the international instrument referenced most frequently.



In their 2012 report, the Expert Panel note that Articles 18 and 19 of the Declaration provide important procedural guarantees: "Article 18 of the Declaration recognises the right of indigenous peoples to participate in decision-making in matters affecting their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions. Article 19 requires states to consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions before adopting and implementing legislative or administrative measures that may affect them."<sup>5</sup>

The UN Declaration was mentioned in several different contexts. Some proposed the principles of the UN Declaration should underpin the process of constitutional recognition. Others called for the specific rights afforded to Indigenous persons within the UN Declaration to be incorporated into the Australian Constitution.

*If framed correctly... prohibiting discrimination in the Constitution is entirely in keeping with Australia's national identity, with its emphasis on egalitarianism and fairness, and is also a natural progression from Australia's ratification of international legal conventions like the United Nations Declaration on the Rights of Indigenous Peoples.* (Royal Australian and New Zealand College of Psychiatrists)

While few individuals referred to specific articles of the UN Declaration, many drew on the 'general principles' of the instrument to provide further support the view that Aboriginal and Torres Strait Islander peoples should be properly consulted on any form of constitutional recognition.

The most comprehensive proposals relating to the incorporation of international commitments into constitutional reform were again put forward by organisations, including the Law Council of Australia and Amnesty International.

*... Amnesty International calls on the Australian government to draw upon the principles encoded in these international instruments to ensure the Australian Constitution reflects a language of rights... With specific reference to Indigenous rights, Amnesty International calls on the Australian Government to ensure that Article 2 of the Declaration on the Rights of Indigenous Peoples is fully realised in any amendments made to the Australian Constitution: "Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from*

<sup>5</sup> p. 60, Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, 2012

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*any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity. (Amnesty International)*



## 12. SUMMARY

A large majority (90%) of submissions supported the constitutional recognition of Aboriginal and Torres Strait Islander peoples, although there were differing views on what proposals would constitute the most appropriate mechanisms for recognition. This report has outlined the levels of support for the various reform proposals and relevant details regarding reasons for and against these options.

This report has also outlined the reasons provided for supporting overall constitutional recognition of Aboriginal and Torres Strait Islander peoples. The majority of submissions supported a package of constitutional reforms, and support substantive rather than symbolic only change. In addition to arguing the importance of recognising Aboriginal and Torres Strait Islander peoples as the First Australians, and for recognising and protecting their unique heritage, cultures and languages, there was also broad support for modernising the Constitution, to enshrine the principles of equality and non-discrimination within the document.

Submissions also outlined some overall considerations regarding the process for achieving constitutional recognition. This report has summarised what submissions suggest are the prerequisites for referendum success. These include:

- consultation with Aboriginal and Torres Strait Islander peoples
- substantive rather than symbolic change
- consideration of the chances of success at referendum
- accommodating the diversity of Aboriginal and Torres Strait Islander peoples
- prioritising fairness and equality, including acknowledging Aboriginal and Torres Strait Islander peoples.

We thank the Referendum Council for the opportunity of working on this important project, and look forward to the Council's full report.

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