

# 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.