A NATIONAL CONVERSATION ABOUT ABORIGINAL AND TORRES STRAIT ISLANDER CONSTITUTIONAL RECOGNITION

Discussion Paper. May 2011
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INTRODUCTION

Ten years ago Catherine Freeman carried the Aboriginal flag and the Australian flag together on her triumphant victory lap around the Olympic Stadium. Her simple gesture burnt an unforgettable image of pride and reconciliation into the national memory. As the *Daily Telegraph* said at the time, it ‘captured the essence of the nation’. That year more than 300,000 people came together to walk across the Sydney Harbour Bridge in support of reconciliation. In 2007 then Prime Minister John Howard announced he would work to achieve broad community support for some form of acknowledgement of the unique place of Indigenous Australians in our Constitution. In 2008 then Prime Minister Kevin Rudd made the Parliament’s historic National Apology to Australia’s Indigenous peoples, and in particular to the Stolen Generations. In recent years ‘closing the gap’ has become pressing business for Australians in government, companies, schools and communities right across the country.

Despite progress in the understanding and respect between Aboriginal and Torres Strait Islander peoples and other Australians, the unique contribution of Indigenous Australians to our national life is not reflected in the nation’s founding document, the Australian Constitution.

Today, a large number of Australians from all walks of life are seeking to change this situation. In December 2010 Prime Minister Julia Gillard appointed an Expert Panel on Constitutional Recognition of Indigenous Australians to lead a national conversation about making the recognition of Indigenous Australians in the Constitution a reality.

This paper has been written to encourage all Australians to express their views on how to acknowledge Aboriginal and Torres Strait Islander peoples in the Constitution. In the coming months the Australian people will be consulted on a range of ideas for recognising Indigenous peoples in the Constitution. People can participate by attending one of the public meetings, by writing a letter or email, or by lodging a written submission. The Panel will also conduct surveys to capture the views of people not directly participating in the consultation process. Drawing on the results of these consultations, surveys and expert advice, the Expert Panel will make recommendations to the Prime Minister in December 2011 on options to change the Constitution which could be put to the Australian people at a referendum.

This paper aims to provide a starting point for this national conversation. It discusses the importance of constitutional recognition of Aboriginal and Torres Strait Islander peoples, provides general information on Australia’s Constitution and the process of constitutional reform, and poses some questions designed to promote public discussion. All Australians are invited to take part in this discussion. At the end of this paper there is information about how you can participate in the national conversation, as well as links to further information and suggested reading.

A CONSTITUTION FOR THE PEOPLE

The Australian Constitution is the founding political and legal document of our nation. Changing it is difficult, and for good reason. Changes can have a far-reaching impact.
because the Constitution underpins our federal laws and institutions.

The power to amend our nation’s founding document lies with us, the people. Many Australians feel the need to address the gaps in our Constitution, to bring it up to date to reflect the reality of Australia in the 21st century and to create a shared vision of the kind of nation we aspire to become.

The values and attitudes of the times meant that Aboriginal and Torres Strait Islander peoples were not given an opportunity to participate in drafting the Constitution in the 1890s, nor were they able to vote for it. Indeed, the only mention of Aboriginal and Torres Strait Islander peoples in the Constitution was of exclusion. Ever since Federation, there have been calls for constitutional amendment to secure better treatment of Aboriginal and Torres Strait Islander peoples and stronger protection of their unique cultures, languages and spiritual connection to the land.

In 1967 this movement for change culminated in the most decisive referendum in Australian history. In that year, over 90 per cent of voters approved changes to the Australian Constitution. From then on, Aboriginal and Torres Strait Islander peoples were included in the counting of the Census, and the Commonwealth had the power to make laws for ‘the people of any race for whom it is deemed necessary to make special laws’. This power included making laws with respect to Aboriginal and Torres Strait Islander peoples from different parts of Australia who were previously subject to the differing laws of each State or Territory.

While the 1967 Referendum removed some constitutional discrimination against Aboriginal and Torres Strait Islander peoples, it did not afford them the dignity of recognition in the Constitution as the nation’s Indigenous peoples. Moreover, important questions about the way our Constitution treats Aboriginal and Torres Strait Islander peoples remain unresolved. Many Australians will not be aware that the possibility of racial discrimination (against people of any race) is still possible under our Constitution. For over 40 years since the 1967 referendum addressing these remaining issues has been a priority for Aboriginal and Torres Strait Islander peoples and all Australians who object to any form of racial discrimination. There have been a number of parliamentary committee reports into possible solutions. Many Aboriginal political statements, such as the 1988 Barunga Statement3 and the 1998 Kalkaringi Statement4 reflect the importance many Indigenous people place on achieving constitutional recognition of their continuing culture.

**THE BENEFITS OF CONSTITUTIONAL RECOGNITION**

The origins of the Australian nation in British colonial heritage and the legacy of the now-discredited legal doctrine of *terra nullius* have been at the centre of much that has made Australia the nation we are today. In recent years many Australians have come to understand the damage, injustice and suffering caused to Aboriginal and Torres Strait Islander peoples which, often inadequately, we have sought to rectify.

Australians have come from more than 230 countries to build a thriving, optimistic, multicultural democracy. Our nation occupies land that Aboriginal and Torres Strait Islander peoples have lived on, cared for and cherished for at least 40 000 years and perhaps much longer. Indigenous Australians are today the custodians of the oldest continuous cultures in human history.

All of us who live in Australia share pride in that unique cultural heritage. However,
Aboriginal and Torres Strait Islander peoples have no reassurance that their unique culture and heritage will continue to be valued by the nation. Constitutional recognition would be a significant step towards providing such reassurance.

Despite the hopes and goodwill expressed at the time of the 1967 Referendum, Aboriginal and Torres Strait Islander Australians as a group do not share equally in the nation’s wealth and opportunities. In terms of life expectancy, health, education and employment, many Aboriginal and Torres Strait Islander Australians are acutely disadvantaged.

Successive Commonwealth, State and Territory Governments have given priority to closing the gaps between Indigenous and non-Indigenous Australians in the areas of health, education, employment and economic development. However, many Aboriginal and Torres Strait Islander peoples have felt invisible in the life of the nation.

There have been many sunsets since Gough Whitlam trickled a handful of red soil into the hand of the old man...Have we seen consistent progress since that symbolic moment? Have we continued to advance? Have we ‘gone forward together as mates’ as the old man wished at the time. Or do we still have to learn to follow his road; to learn to stand up for rights; learn to struggle for the achievement of real recognition; learn to go forward and to do it together. Do we still have to learn the meaning of mateship? Are we still chained to the past?

PATRICK DODSON

By affirming the importance of Australia’s Aboriginal and Torres Strait Islander cultures to our nation through constitutional recognition, Australians could help sustain and value Indigenous cultures into the future. Positive recognition would also have a tangible effect on the lives of Aboriginal and Torres Strait Islander communities and individuals, as well as contribute to the national pride of all Australians. Formally recognising Aboriginal and Torres Strait Islander peoples in our Constitution is a chance to walk together, in the spirit of respect, friendship and hope, towards a truly reconciled nation.

**GATHERING MOMENTUM FOR CHANGE**

The current multi-party in-principle support for Indigenous constitutional recognition has created an unprecedented opportunity. Since 1999 there has been support by both the Australian Government and Opposition for constitutional recognition of Aboriginal and Torres Strait Islander Australians. Today all major parties, together with the Greens and the Independent Members of Parliament, support Indigenous constitutional recognition.

"Now is the right time to take the next step and to recognise in the Australian constitution the first peoples of our nation; now is the right time to take that next step to build trust and respect, and we certainly believe that constitutional recognition is an important step to building trust and respect, it’s an important step to building and acknowledging that the first peoples of our nation have a unique and special place in our nation."

PRIME MINISTER, JULIA GILLARD

The Prime Minister’s view is shared across the political spectrum. In 2007 the then Prime Minister John Howard announced an election policy to work towards recognition of Aboriginal and Torres Strait Islander peoples as first peoples in the preamble of the Constitution.

"My goal is to see a new Statement of Reconciliation incorporated into the preamble of the Australian Constitution ...I would seek to enlist wide community support for a ‘Yes’ vote. I would hope and aim to secure the sort of overwhelming vote achieved 40 years ago at the 1967 Referendum. If approached in the right spirit, I believe this is both realistic and achievable."

JOHN HOWARD
In cities and regions across the country, a large majority of Australians support moves to acknowledge Aboriginal and Torres Strait Islander peoples in our Constitution. A Newspoll conducted in February 2011 found that 75 per cent of Australians already support some kind of constitutional reform to recognise Aboriginal and Torres Strait Islander Australians.  

Significantly, Aboriginal and Torres Strait Islander peoples from all over Australia have continued to stress the importance of constitutional recognition and the benefits such a step could have for us all. In April 2008, for instance, Aboriginal leaders in Eastern Arnhem Land presented to the Australian Government the *Yolngu and Bininj Leaders Statement of Intent*. This communiqué, which represented the hopes of some 8000 Aboriginal people, expressed the desire for constitutional protection for traditional land and cultural rights, and emphasised the importance of constitutional recognition of the clans’ basic desire to live on their land and practise their culture.
2. BACKGROUND TO THE AUSTRALIAN CONSTITUTION

The Constitution is the legal and political foundation stone of our nation. This is the document which establishes Australia as a federation and defines the Commonwealth’s national law-making powers. For Commonwealth laws to be valid, they have to be based on what is called a ‘head of power,’ set down in the Constitution. It also establishes the High Court of Australia as the court with the ultimate authority to determine questions of interpretation of the Constitution.

The Constitution cannot be amended without the express consent of the Australian people. Section 128, which sets out the precise manner and form in which the Constitution can be changed, requires that any proposed amendment must be approved by what is sometimes described as a ‘double majority’:

- a national majority of voters; and
- a majority of voters in a majority of States (that is, approval by voters in four out of six States).

In 1977 Section 128 was amended to allow the votes of residents of the Territories to be included in the national count.

HOW DOES A REFERENDUM WORK?

A referendum is an opportunity for the people to vote on proposals to change the Australian Constitution. Referenda questions are usually put as yes/no proposals. All Australians registered on the electoral roll cast their vote by writing either ‘yes’ or ‘no’ in the space provided on their ballot paper. As in the case of national elections, voting in referenda is compulsory.

As discussed below (in Section 7. Some ideas for change), there are a number of different and specific ways in which Aboriginal and Torres Strait Islander Australians could be recognised in the Constitution. The precise wording of the question asked in any proposed referendum on Indigenous recognition would be decided by the Australian Parliament. In framing its proposals, the Parliament will have before it the results of the Panel’s community consultations and its advice on those options that may have the broad, popular support needed to be successful.
3. **WHY IS RECOGNITION IMPORTANT?**

The Panel is seeking views from the Australian community about what ‘recognition’ should mean and what form recognition of Aboriginal and Torres Strait Islander peoples in the Constitution should take.

Constitutional recognition could mean different things to different people. For example, it could mean recognising the distinct and unique cultures of Aboriginal and Torres Strait Islander peoples and their prior ownership of the land. It could mean substantive action to protect Indigenous culture and heritage. It could mean the repeal of discriminatory provisions that have the potential to adversely affect Aboriginal and Torres Strait Islander peoples and other groups of Australians.

**REFLECTING WHO WE ARE AS A NATION**

The Constitution is Australia’s founding document. For over 100 years it has provided a durable framework for government for our free and democratic nation. The Australian Parliament must work within its provisions when making any laws. States, Territories, corporations, organisations or individuals can contest in court the constitutional validity of federal laws and regulations.

However, the Constitution is also a product of its time. It was drafted and adopted over a century ago by a narrow cross-section of Australian society, whose thinking understandably reflected the dominant historical, economic, social and political aspirations of the day.

**ELIMINATING RACIAL DISCRIMINATION IN OUR CONSTITUTION**

The original Constitution of 1901 established a negative citizenship of the country’s original peoples. The reforms undertaken in 1967, which resulted in the counting of Indigenous Australians in the national census and the extension of the races power to Indigenous Australians, can be viewed as providing a neutral citizenship for the original Australians. What is still needed is a positive recognition of our status as the country’s Indigenous peoples, and yet sharing a common citizenship with all other Australians.10

NOEL PEARSON

Most of us take for granted that, in Australia, we can live our lives without fear of official discrimination. However, there is nothing
in the present Constitution which ensures that protection. Arguably, Aboriginal and Torres Strait Islander Australians have been most exposed to discriminatory treatment by parliaments and governments—State and Commonwealth—throughout the past 200 years.

Before 1967 Aboriginal and Torres Strait Islander peoples were not counted in the national census. The historic referendum of 1967 changed that situation. It also amended Section 51(xxvi) (known as the ‘race power’) so that the Commonwealth Parliament could make laws specifically in respect to Aboriginal and Torres Strait Islander peoples.

However, the possibility of racial discrimination in Australian laws still exists under the Constitution. Many constitutional law experts believe that two sections of our existing Constitution—Section 51(xxvi) and Section 25—would need to be amended to eliminate the possibility of discrimination on the basis of race (not only in relation to Aboriginal and Torres Strait Islander peoples, but for any cultural group of Australians). These sections are discussed in detail below (in Section 7. Some ideas for change).

Section 51(xxvi) and Section 25 of the Australian Constitution are reproduced below:

PART III—THE HOUSE OF REPRESENTATIVES

Section 25. For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

PART V—POWERS OF THE PARLIAMENT

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:
WHY CHANGE THE CONSTITUTION?

Although there are a number of potential benefits to the nation flowing from constitutional recognition of Aboriginal and Torres Strait Islander peoples, the specific benefits will depend ultimately on what options are put to the Australian people.

ACKNOWLEDGING ABORIGINAL AND TORRES STRAIT ISLANDER CULTURES

The Reconciliation Barometer 2010, conducted for Reconciliation Australia by Auspoll, found that more than two-thirds of the non-Indigenous Australian community believe that Indigenous culture is important to Australia’s identity as a nation. However, many Aboriginal and Torres Strait Islander communities are concerned that their unique identities and cultures are under threat. Affirming the importance of Australia’s Aboriginal and Torres Strait Islander cultures in our Constitution is a way for all of us to express the importance of protecting our nation’s extraordinary cultural heritage for the benefit of all Australians. It would also let the rest of the world know that we take pride in the unique cultures of Aboriginal and Torres Strait Islander peoples.

IMPROVING HEALTH AND WELL BEING

Recognition can have a practical and beneficial impact on the way people see themselves. For all of us, the way we are treated and perceived by our communities has a real impact on how we feel about ourselves, our sense of belonging, our behaviour and our self-respect.

The Royal Australian and New Zealand College of Psychiatrists considers that constitutional change would improve Indigenous mental health because symbols can inspire action and lead to practical, beneficial effects. According to the College President, Dr Maria Tomasic:

“The lack of acknowledgement of a people’s existence in a country’s constitution has a major impact on their sense of identity, value within the community and perpetuates discrimination and prejudice which further erodes the hope of Indigenous people. There is an association with socioeconomic disadvantage and subsequent higher rates of mental illness, physical illness, and incarceration. Recognition in the Constitution would have a positive effect on the self esteem of Indigenous Australians and reinforce their pride in the value of their culture and history. It would make a real difference to the lives of Indigenous Australians.”

NATIONAL IDENTITY

Australians have forged an identity based on fairness. This has shaped how we prefer to relate to each other, how we view the world and how we would like to move forward together.

In 2008 the National Apology to Australia’s Indigenous Peoples demonstrated the practical power of symbolic actions to improve the bonds between Australians and to progress reconciliation. Many Aboriginal and Torres Strait Islander peoples declared on the day that, for the first time in their lives, they felt truly Australian. Australians from all cultural backgrounds found themselves...
deeply affected by the Apology. Many expressed their pride in the Parliament’s formal acknowledgement and recognition of an important truth in Australian history.

A constitutional amendment supported by an overwhelming majority of Australians would, similarly, be a lasting symbol of Australians’ respect for the unique cultures of the nation’s Aboriginal and Torres Strait Islander peoples, improve the relationships between Indigenous and non-Indigenous Australians, and help build a more united and reconciled Australia. It would also be a way of reconciling with our past and collectively moving on.

Importantly, changing the Constitution to make it more inclusive would be a clear and enduring declaration that Australians will not accept racial discrimination in our Constitution any more than we do in our communities, workplaces and daily lives. Revising the Constitution could also benefit all Australians by strengthening the sense of belonging by people from diverse backgrounds living in Australia today, and affirming the values of equality, democracy and fairness that unite us all.
5. THE CHALLENGES OF CONSTITUTIONAL REFORM

Australia’s Constitution is one of the most difficult to change in the world. Its drafters did not intend our Constitution to be easily amended. Australian voters have approved only eight of the 44 referenda put to them since Federation, most recently in 1977.

Most historians and constitutional scholars believe that each of the eight adopted referenda had three essential features in common—bipartisan or multi-party political support, community education on the need for change, and ‘ownership’ by the people.

MULTI-PARTY SUPPORT

No referendum in Australia’s history has succeeded without the support of the nation’s main political parties. Bipartisan agreement was crucial to the success of the 1967 Referendum. In contrast, the lack of bipartisan consensus contributed to the rejection of the 1999 Referendum on the republic.

As noted, the current Australian Government and Opposition, as well as the Australian Greens and Independent Members of Parliament, have declared their support in principle for constitutional recognition. Given the double majority required to amend the Constitution, referendum proposals for constitutional amendment need the support of not just the majority of Australians, but of parties and groups across the political spectrum and in a majority of States.

COMMUNITY EDUCATION ON THE NEED FOR CHANGE

Experience shows that broad community support is critical to the success of a referendum proposition. The Constitution is a technical legal document, and discussions about amending it will sometimes involve complex details. For that reason, the Panel aims to provide comprehensive and easy-to-understand information about proposed changes and how they might affect the legal and political systems. This information will be available on the Panel’s website at www.youmeunity.org.au. Information about any referendum proposal must also be accessible to all groups in the community including cultural groups, young and elderly people, as well as people unable to readily access information from the internet and social media.

The task of the Panel is to consult widely with the Australian people and advise the Government, based on that feedback and expert advice, on what form any constitutional recognition of Aboriginal and Torres Strait Islander peoples might take. To make its consultations as inclusive, open and meaningful as possible, the Panel will work throughout 2011 to raise awareness about the benefits and challenges of constitutional recognition of Aboriginal and Torres Strait Islander peoples. The Panel’s discussions with the community will provide opportunities for all Australians to familiarise themselves with the Australian Constitution, to understand the
arguments for and against particular ideas for change, and to express their views on the merits of change.

**OWNERSHIP BY THE PEOPLE**

As the Australian people have ultimate control over the process, constitutional reform depends on them having confidence that any proposed change is of real benefit to Australia. Broad and active community participation is vital to popular ownership. In this case, the Australian people must feel they have been adequately consulted, and that their opinions and ideas have been understood and are reflected in the proposals put forward to the Australian Government. A genuine sense of ownership of any proposed change can be nurtured by an appropriate consultation period that gives the entire community time to inform itself about the issues.

Since one of the central aims of constitutional recognition of Aboriginal and Torres Strait Islander peoples is to make Australia a more unified and reconciled nation, it is essential that any proposed amendment reflects the hopes and views of an overwhelming majority of Australians.

Specifically, the members of the Panel consider that any amendment concerning the recognition of Aboriginal and Torres Strait Islander peoples must also have their widespread support before being put to a referendum. The members of the Panel will ensure a diversity of views among Aboriginal and Torres Strait Islander peoples are heard and considered in developing the Panel’s recommendations to government.
6. **PRINCIPLES GUIDING THE PANEL**

Recognising that changing the Constitution is a complicated procedure, and that different sections of the Australian community will have different priorities in achieving change, the Panel has set down four principles that will guide its assessment of any proposal for constitutional recognition of Aboriginal and Torres Strait Islander peoples:

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

The options for amending the Constitution will draw on the outcome of the consultations that are held with the Australian community in the coming months, and also on expert advice.

Over the past 30 years, many different groups and institutions have already debated specific possibilities for recognition of Aboriginal and Torres Strait Islander Australians in the Constitution. Several Indigenous political statements, such as the Barunga and Kalkaringi statements, and a number of parliamentary committees and reports have canvassed various possibilities for amendment. The work done over the past 30 years will also inform the Panel’s recommendations.

The following ideas for the constitutional recognition of Aboriginal and Torres Strait Islander peoples have already been raised by a number of constitutional experts. Without limiting what other suggestions may come forward, opinions on the ideas outlined below are invited.

STATMENTS OF RECOGNITION/VALUES

Idea 1. Statement of Recognition in a preamble

This idea would require adding a preamble to the Constitution that recognises Aboriginal and Torres Strait Islander peoples’ distinct cultural identities, prior ownership and custodianship of their lands and waters. At present, there is no preamble to the Australian Constitution itself. Contrary to popular belief, the Australian Constitution does not have a preamble into which a Statement of Recognition could simply be inserted.

Idea 2. Statement of Recognition in the body of the Constitution

Rather than place a Statement of Recognition acknowledging Australia’s Aboriginal and Torres Strait Islander peoples’ distinct cultural identities, prior ownership and custodianship of their lands and waters in a preamble, it could be inserted as a section in the body of the Constitution.

Idea 3. Statement of Values in a preamble

This idea would include a Statement of Values in a preamble to the Constitution which incorporates recognition of Aboriginal and Torres Strait Islander peoples alongside a description of the Australian people’s fundamental values, such as a commitment to democratic beliefs, the rule of law, gender equality, and acknowledgement of freedoms, rights and responsibilities. The content could be similar to the pledge that new citizens are required to make when they become naturalised Australians.

This approach has been adopted by Queensland (2010) in its State Constitution.

Idea 4. Statement of Recognition and Statement of Values in the body of the Constitution

A Statement of Recognition and a Statement of Values could be placed in the body of the Constitution as a specific section rather than as a preamble to the Constitution.

These four ideas are quite similar. All involve adding a Statement of Recognition or Values to the existing text of the Constitution. This will have symbolic value. A statement may also have legal consequences, depending in part on form and content. This is a complex area on
which the Panel will be seeking legal advice. At this stage the Panel is most interested in views on the content and form of any Statement.

**EQUALITY AND NON-DISCRIMINATION**

Ideas 5, 6 and 7 (below) contemplate different kinds of recognition. Many people, including Aboriginal and Torres Strait Islander representatives, believe that the amendment to the Constitution could and should go beyond a Statement of Recognition or Statement of Values and seek to address the potential for racial discrimination and lack of equality that they believe still exists in the Constitution. A final idea (Idea 7) contemplates inserting agreement-making powers between the Commonwealth and Aboriginal or Torres Strait Islander Australian communities in the Constitution.

Any of ideas 5, 6 and 7 could be pursued in addition to recognition in a preamble or the body of the Constitution (with or without a Statement of Values).

**Idea 5. Repeal or amend the ‘race power’**

One of the unforeseen consequences of the 1967 amendment to Section 51(xxvi) of the Constitution is that it created an ambiguity in the so-called ‘race power’. Originally, the ‘race power’ permitted the Commonwealth Parliament to make laws with respect to ‘[t]he people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws’. The 1967 Referendum amended this section so that the words ‘other than the aboriginal race in any State’ were deleted. This meant that the Commonwealth Parliament was given a new head of power (Section 51(xxvi)) and under that power was able to make laws of national application with respect to Aboriginal and Torres Strait Islander peoples. This included scope to pass legislation protecting Indigenous interests and to provide for Indigenous people’s welfare.

However, judicial interpretation indicates that the ‘race power’ (Section 51(xxvi)) does not empower the Commonwealth to make laws only for the benefit of Aboriginal and Torres Strait Islander peoples (or other racial groups). The laws can also be detrimental to or discriminate against Aboriginal and Torres Strait Islander Australians, (or indeed any other group of people), based on race. The Commonwealth has passed a law—the *Racial Discrimination Act 1975*—which prohibits racial discrimination, but this does not have the strength of a constitutional amendment as Parliament can repeal or amend it at any time.

Recognised approaches for addressing the problem of the ‘race power’ are:

- repeal the ‘race power’ as a Commonwealth head of power; or
- amend the ‘race power’ so that it can only be used to make laws for the benefit or advancement of Aboriginal and Torres Strait Islander peoples and other racial groups; or
- insert a new guarantee of non-discrimination and racial equality for all Australians in the Constitution; and
- create a new head of power authorising laws with respect to the culture, historical disadvantage and unique place of Aboriginal and Torres Strait Islander peoples.

One of the most common suggestions for reform of the ‘race power’ is to amend it so that it can only be used for the benefit of Aboriginal and Torres Strait Islander peoples, although the word ‘benefit’ would be subject to judicial interpretation. Repealing the ‘race power’—that is, simply removing it altogether from the Constitution is another idea. This would remove the power of the Parliament to...
make racially discriminatory laws. This could, however, be seen as detrimental to Aboriginal and Torres Strait Islander peoples if the Commonwealth lost its ability to make laws for the benefit of Aboriginal and Torres Strait Islander peoples under other constitutional heads of power.

Another frequent suggestion has been to insert a new non-discrimination or racial equality clause in the Constitution which would eliminate the potential for racially discriminatory laws. This idea would strengthen protection against discrimination for Australians of all cultures and backgrounds.

Finally, some experts have suggested that another way to deal with the discriminatory potential of the ‘race power’ would be to repeal it and create a new head of power, allowing Commonwealth laws to be based on culture, historical disadvantage and/or the unique place of Aboriginal and Torres Strait Islander peoples as the descendants of the original owners and occupiers of Australia, rather than one based on race. This would be a narrower power than the first two ideas in relation to the ‘race power’, focussing on matters of importance to Aboriginal and Torres Strait Islander peoples, rather than a general power to make laws beneficial to them.

Idea 6. Repeal of Section 25

Section 25 is a provision that contemplates the possibility that State Governments might exclude some Australians from voting in State elections on the basis of their race. This section reflects the legal and political situation at the time of Federation, when some States, did in fact, enact discriminatory laws preventing some groups of people from voting in elections. Under Section 25, if a racial group is denied the right to vote in State elections, the people of that race are not counted in determining the number of seats that State is entitled to in the Commonwealth House of Representatives. While the operation of Section 25 would disadvantage a State that enacts racially discriminatory voting laws—by reducing the State’s entitlement to seats in the House of Representatives—many people regard Section 25 as an outdated provision that sits uncomfortably with Australian values of non-discrimination and equality. Section 25 was, in fact, described by the 1988 Constitutional Convention as ‘odious’ and having no place in a modern democracy. It should be noted that the potential for people to be disqualified from voting extends to all racial groups, and not only Aboriginal and Torres Strait Islander Australians. It has been suggested that removing this undemocratic section would thus benefit all Australians, now and in the future.

CONSTITUTIONAL AGREEMENTS

Idea 7. Agreement-making power

The Constitution could also be amended to enable the Australian Government to enter into specific agreements with Aboriginal and Torres Strait Islander communities which would have the force and effect of Commonwealth law. As long ago as 1983, the Senate Standing Committee on Constitutional and Legal Affairs recommended that a provision be inserted into the Constitution enabling the making of such agreements between the Commonwealth and Indigenous bodies or groups. Agreements could apply to a range of issues, such as education agreements, agreements for the protection of cultural heritage, and agreements on rights to land. The Senate Committee suggested that a new provision along these lines could be similar in form to Section 105A of the Constitution which currently provides constitutional backing for financial agreements reached between the Commonwealth and the States, and guarantees that the agreements can only
be modified by further agreement between the parties involved, not by legislation. Many Aboriginal and Torres Strait Islander people believe that they have never had an equal relationship with governments or parliaments when decisions about them, their culture, land or rights have been determined. They consider it is now time for a new way forward through agreements being entered into on a range of matters, including land, culture, languages and communal strengths.

**QUESTIONS FOR YOU TO THINK ABOUT:**

- Would recognition of Aboriginal and Torres Strait Islander peoples in Australia’s Constitution more accurately reflect our national identity?
- Does the Constitution adequately reflect who we are as a nation today?
- How should Aboriginal and Torres Strait Islander peoples be recognised in the Australian Constitution?
- How important are each of these forms of recognition?
- Should recognition be included in a preamble to the Constitution or should it be in the body of the Constitution?
- What should be included in a statement recognising Aboriginal and Torres Strait Islander peoples’ place in our nation?
- Should recognition of Aboriginal and Torres Strait Islander peoples be accompanied by a Statement of Values? If so, which values underlying our society and democracy would be important to include in a Statement of Values?
- Should Section 51(xxvi) (the ‘race power’) of the Constitution be repealed or amended to ensure that laws cannot discriminate against Aboriginal and Torres Strait Islander Australians?
- Should the Constitution be amended to ensure that no laws can be made which discriminate against any Australian on the basis of race?
- If a new head of power is created to replace the ‘race power’, should this be based on culture, historical disadvantage, the unique place of Aboriginal and Torres Strait Islander peoples as the descendants of the original owners and occupiers of Australia, or some other category?
- Should Section 25 be deleted from the Australian Constitution to remove the suggestion that an Australian voter could be excluded from voting on the basis of race?
- Should an agreement-making power be created in the Constitution?
- Are there other ideas for constitutional recognition of Indigenous Australians not contained in this paper that the Panel should consider?
The Expert Panel on Constitutional Recognition of Indigenous Australians is leading the national conversation about changing the Constitution to recognise Aboriginal and Torres Strait Islander Australians.

The Panel is made up of Australians from Indigenous and non-Indigenous communities, people from small and large business, community leaders, academics and members of Parliament from across the political spectrum—from all States, and representing city and country areas. The Panel Co-Chairs are Professor Patrick Dodson and Mr Mark Leibler AC. A list of the Expert Panel members and their biographical details can be found at www.youmeunity.org.au

The Expert Panel will gather input from around the nation and report to the Government in December 2011. In 2012, the Government will consider the Panel’s recommendations.
Further information on Constitutional Recognition of Indigenous Australians is available at www.youmeunity.org.au. From the website you can download a copy of this discussion paper which is the starting point for a national conversation on the most appropriate ways to recognise Aboriginal and Torres Strait Islander Australians in our Constitution.

Have your say by attending one of the consultations that the Panel will be holding around Australia. Details of the locations and dates of these consultations are available on the website.

If you are not able to come to one of the scheduled consultations in person, you may wish to have your say by lodging a formal submission. The submission template and other information is also on the website. Formal submissions close at 5.00pm on 30 September 2011.

Also, you or your organisation may choose to run your own information sessions with your community or interest groups using the DIY material that will be made available on the website.

Finally, you may also be interested in following the progress of the Panel on Facebook, YouTube and Twitter.
10.

FURTHER READING AND RELEVANT LINKS

BOOKS


BOOK CHAPTERS


ARTICLES


**LECTURES AND SPEECHES**


**REPORTS**


**OTHER READING**


Agreements, Treaties and Negotiated Settlements Project. Publications available at <http://www.atns.net.au>


11.

ENDNOTES


4. The *Kalkaringi Statement* was developed by the Combined Aboriginal Nations of Central Australia at the Kalkaringi Constitutional Convention in August 1998. Available at www.clc.org.au/media/issues/governance/kalkaringi_statement.html


Results of the Newspoll survey conducted in February 2011

<table>
<thead>
<tr>
<th>Response</th>
<th>Per cent</th>
</tr>
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<tbody>
<tr>
<td>In favour</td>
<td>75</td>
</tr>
<tr>
<td>Against</td>
<td>16</td>
</tr>
<tr>
<td>Don’t know</td>
<td>9</td>
</tr>
</tbody>
</table>

Notes on the survey

The survey was conducted using the Newspoll Omnibus over the telephone over the 4th to the 6th of February 2011. Surveys were administered by trained interviewers in all states of Australia and in both city and country areas. Telephone numbers and the person within the household were selected at random. The data has been weighted to reflect the population distribution. The sample is 1,202 interviews among adults aged 18 years plus. The maximum margin of sampling error is plus or minus 3 percentage points.


14. Recommendations for recognition have originated from many different bodies including:
   - Senate Standing Committee on Constitutional and Legal Affairs, 1983
   - Constitutional Commission, 1988
   - Constitutional Convention, 1998
   - Council for Aboriginal Reconciliation, 2000
   - Senate Legal and Constitutional Affairs Committee, 2003
   - Australia 2020 Summit, 2008
   - House of Representatives Standing Committee on Legal and Constitutional Affairs, 2008

